

SENEVIRATNE
v.
FERNANDO AND OTHERS

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKREMA, J.
CA 253/98(LG)
D.C. NEGOMBO 4824/L
JANUARY 20TH, 2000.

*Addition of a Party - S. 18(2), S. 21, S. 404 Civil Procedure Code -
Substitution - Party added or substituted - right to file amended Plaintiff ?*

The Plaintiff instituted action seeking Declaration of title and ejection. The position of the Defendant Respondents was that the Deed was a conditional transfer and prayed for re-transfer of the property.

While the action was pending the Plaintiff transferred the property to his son and thereafter made an application to add the son as an added Party, which was allowed.

Thereafter the Added Party made an application to amend the Plaintiff. The Defendant Respondents objected, and the District Court refused the application.

Held :

- (i) On a perusal of the proceedings it is seen that the Plaintiff's son has been added as a party in terms of S. 18(2) and therefore not entitled to call himself a substituted Plaintiff and proceed to file Plaintiff.

If the Plaintiff desired to amend the Plaintiff after the son was brought in as an added party there will be no objection for the Plaintiff to amend the Plaintiff with leave of Court.

- (ii) There is no provision for the party added to assume the status of a substituted Plaintiff and thereafter file Plaintiff because there is already before Court a Plaintiff on which the proceedings have commenced.
- (iii) The words..... "as the case may require" in S. 404 cannot be used indiscriminately.

APPLICATION for Leave to Appeal, leave being granted.

Case referred to :

1. *Eugine Fernando v. Charles Perera* - 1988 2 CALR 37.

Sunil F. A. Cooray with Chitrananda Liyanage for Substituted Plaintiff
Petitioner - Petitioner.

Rohan Sahabandu with Athula Perera for Defendant - Respondent -
Respondent.

Cur. adv. vult.

March 22, 2001.

JAYASINGHE, J.

The Plaintiff instituted action in the District Court of Negombo against the Defendants abovenamed on 10.01.1994 and thereafter filed amended plaint on 18.04.1994. She alleged that the 1st and 2nd Defendants above named were the owners of the land described in the schedule to the said amended plaint; that the said 1st and 2nd Defendants abovenamed on 14. 02. 1991 conveyed the said property to her for a consideration of Rs. 200,000/- by deed No. 6666; that on the same day by deed No.6667 executed a lease in favour of the said Defendants for a period of one year at a lease rent of Rs. 1000/- a month; that the 1st and 2nd Defendants without her prior consent sub leased the said land to the 3rd and 4th Defendant; that the said lease expired on 13. 02. 1993; that the Defendants failed to vacate and hand over possession of the said land upon the expiry of the lease. The Plaintiff accordingly sought a declaration of title thereto, ejectment of the Defendants and for damages and costs.

Defendants filed answer; averred that the Defendants never intended to transfer the land to the Plaintiff and that it was only a money transaction in that the money was borrowed to send their son abroad; that a sum of Rs. 75,000/- has already been returned and prayed for re transfer of the said land to the 2nd Defendant on payment of Rs. 125,000/- and for dismissal of the Plaintiff's action.

While the action was pending the plaintiff gifted the said land to her son one Ariyaratne Seneviratne on 04.02.1996 and thereafter made an application to add the said Seneviratne as an added party. Court made order allowing the application. Thereafter the **added party** - the said Seneviratne made an application for amendment of the plaint. The Defendants filed objection to the said amendment and the parties filed written submissions. The learned District Judge by his order dated 07. 10. 1998 refused the application for amended plaint. Aggrieved by the order of the learned District Judge the said Seneviratne appealed to this Court.

Mr. Cooray submitted that the Plaintiff made an application on 19.03.1996 to add the Plaintiff's son as the "Substituted Plaintiff" and the Court allowed the said application on 12.09.1997 and that there is no appeal against that order. The "Substituted Plaintiff" thereafter sought to amend the plaint. He submitted that an amendment of the plaint was essential in order to put in issue the title acquired by the "Substituted Plaintiff" and to claim relief accordingly.

Mr. Sahabandu referred Court to the application of the Plaintiff dated 19. 03. 1996. He submitted that the said application was for the son of the Plaintiff to be added as a party, which application was allowed by the learned District Judge. He submitted that there was no order made by the learned District Judge to substitute the Plaintiff's son as Substituted Plaintiff.

Two questions come up for determination by this Court.

1. was the Plaintiff's son added as a party in terms of Section 18(2) or whether he was substituted as Substituted Plaintiff by the order of the learned District Judge?
2. is the party so added or substituted entitled to file "plaint"?

The Plaintiff by her petition dated 19. 03. 1996 averred, that, pending her action 4824/L in the District Court of Negombo

for declaration of title and ejectment of the Defendants, she had transferred the property in question to her son and prayed that he be added as a party. Thereafter the Plaintiff's son Ariyaratne Seneviratne filed a petition and affidavit on 17. 12. 1996 seeking an order of Court that he be added as the 2nd Plaintiff or in the alternative as Substituted-Plaintiff in terms of Section 404 of the Civil Procedure Code. The learned District Judge by her order dated 12. 09. 1997 allowed the application of the Plaintiff to add her son the said Seneviratne as an added party. The written submissions tendered to Court by the Plaintiff-Petitioner on 16.06.1997 was on the basis that the said Seneviratne to be added as a party in terms of Section 404 and learned District Judge only made a reference to the said application but did not state the basis why she was allowing the application. However it is clear that the said Seneviratne was only added as a party. Thereafter the said Seneviratne filed a plaint as "Substituted Plaintiff" on 13. 03. 1998. The resulting position is that there came to be a Plaintiff and Substituted Plaintiff. The Defendants filed objections on 19. 05. 1998 and moved that the plaint be rejected as the said plaint has been filed in violation of Section 39 and 40 of the Civil Procedure Code.

The learned District Judge in refusing the application for amended plaint gave a number of reasons. He observed that the purpose of the "amended plaint" was to cure certain defects in the original plaint of the Plaintiff and that Section 21 permitted an amendment of the plaint only where a Defendant is added. In this instance the party added was a Plaintiff. He also referred to Section 404 but did not give reasons why it is inapplicable. The learned District Judge has held that the said Seneviratne was added as a Plaintiff and therefore did not have the right to amend the plaint. However I find that Seneviratne has come to Court on a plaint as Plaintiff after he was added as a party by the order of the learned District Judge by her order of 12. 09. 1997, even though in the caption Seneviratne is referred to as Substituted Plaintiff.

Section 18(2) provides that - "..... And in the case of a party being added, the added party or parties shall be named,

with the designation "added party", in all pleadings or processes or papers entitled in the action and made after the date of the order."

It is clear on the order of the learned District Judge dated 12. 09. 1997 the said Seneviratne has been added as a party. The application of the Plaintiff was also to add Seneviratne as a party to whom she had gifted the property by Deed No. 5782. However the application of Seneviratne was for him to be added as the 2nd Plaintiff or in the alternative as Substituted Plaintiff. However Court has made no order regarding the application of Seneviratne.

Section 404 provides that: "In other cases of assignment, creation or devolution of any interests pending the action, the action may, with leave of the court, given either with the consent of all parties or after service of notice in writing upon them, and hearing the objections, if any, be continued by or against the person to whom such interests has come, either in addition to or in substitution for the person from whom it has passed, as the case may require." The words **as the case may be cannot be used indiscriminately.**

What then was the status assumed by the said Seneviratne upon the order of the learned District Judge of 12. 09. 1997. The Plaintiff Wimalawathie in her plaint prayed for declaration of title; ejection of the Defendants and for damages. Could it be said that she cannot maintain an action for declaration of title upon her transferring the property to Seneviratne? Rights of parties are to be determined as at the time of the institution of the proceedings. If the Court is to hold with the Plaintiff her title is vindicated and the right that accrues to her will stand transferred to Seneviratne on the Deed No. 5782. Similarly if she fails no rights pass on to Seneviratne and Deed No. 5782 is of no avail. I cannot agree with Mr. Sahabandu's submissions that the Plaintiff cannot ask for declaration of title as she has now lost title. It will not be possible for Court to give judgment for Seneviratne without first having considered the title of his predecessor.

In ***Eugine Fernando v. Charles Perera***⁽¹⁾ the Plaintiff who claimed to be the owner of a land which was occupied by the Defendant instituted an action for declaration of title, ejection of the Defendant and damages. Pending the action the Plaintiff transferred the premises and the transferee made an application to be added as a Plaintiff and the plaint was amended to the effect that the original owner was the first Plaintiff and the transferee the 2nd Plaintiff. The District Court granted relief to the Plaintiffs except granting them damages. On appeal it was held that on a true reading of Section 404 of the Civil Procedure Code there was no impediment to bring in a purchaser of the Plaintiff's interests, in addition to the Plaintiff and the action continuing to enable the purchaser to get the relief that the Plaintiff could have got but for the transfer. 2nd Plaintiff was not entitled to the relief granted by the District Court.

Here the transferee was added as 2nd Plaintiff.

On a perusal of the proceedings I find that the Plaintiff's son has been added as a party in terms of Section 18(2) and therefore not entitled to call himself a Substituted Plaintiff and proceed to file plaint. If the Plaintiff desired to amend plaint after the son was brought in as an added party there was no objection for the Plaintiff to amend the plaint with leave of court. There is no provision for the party added to assume the status of a Substituted Plaintiff and thereafter file plaint because there is already before Court a plaint on which the proceedings have commenced.

In any event the said Seneviratne cannot come before Court as Substituted Plaintiff or as 2nd Plaintiff for no order has been made by the learned District Judge to that effect. The learned District Judge therefore cannot be faulted for refusing the application of the said Seneviratne to file amended plaint as Substituted Plaintiff. Appeal is dismissed with costs fixed at Rs.5,250/-.

JAYAWICKRAMA, J. - I agree.

Appeal dismissed.