KANAGARAJ VS. ALANKARA

COURT OF APPEAL
ERIC BASNAYAKE J.
CHITRASIRI J.
CALA 33/2007
DC COLOMBO 20660/L
SEPTEMBER 14, 2007
APRIL 23, 2007

Civil Procedure Code amended by Acts Nos 79 of 1988, 9 of 1991 – Section 93 of Pleadings – Law after the 1991 amendment to Section 93 – Rei vindicatio – action – Burden of proof? - Date first fixed for trial?

The trial Judge refused to accept the amended answer of the 1st defendant.

In the rei vindicatio action filed against the 1st, 2nd and 3rd defendants, the plaintiff pleaded that his predecessors in title became the owner of the larger land and he purchased a portion of the property. The plaintiff contended that, the 2nd defendant had begun to use a portion of the property.

The 1st and 2nd defendants filed separate answers – the 1st defendant states that he purchased the land from a third party and that he had leased the land to the 2nd defendant. After the trial was postponed, and before the case was taken up for trial, the defendant sought to amend the answer. By the amendment, the 1st defendant sought to dispute the corpus admitted previously and describe the title of the 1st defendant. This was rejected by the trial Judge on the ground that the 1st defendant has admitted the corpus, and that it is not necessary for the 1st defendant to describe in detail his title.

On leave being sought,

Held:

(1) The Law had undergone tremendous changes Section 93 of the Code was amended by Act 79 of 1988 and later by Act 9 of 1991 –

the wide discretion enjoyed by Court has been restricted. The discretion is allowed to be exercised only to applications made before the day fixed for trial.

(2) Amendments on or after the first date of trial can now be allowed only in very limited circumstances – namely when the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party is not guilty of laches.

Held further:

(3) In a Rei Vindicatio action it is the duty of the plaintiff to prove his title. If the plaintiff fails to prove his title, action will be dismissed. If the defendant has a title he could plead it and pray for a declaration. The 1st defendant only seeks a dismissal of the action in the answer and in the proposed amended answer - thus by disallowing the amendment the defendant would lose nothing. At the time of filing the answer, the 1st defendant was well aware of what the 1st defendant now wants in the amendment. No explanation is offered for his failure not to mention them in the answer. What is contemplated by Section 93 (2) are those necessitated due to unforeseen circumstances.

Per Eric Basnayake, J.

"The fact that the trial did not commence has no bearing. What is important is the date first fixed for trial".

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to:-

1. *Abeywardane vs. Euginhamy 1984* – 2 Sri LR 231 (distinguished)
2. *Seneviratne vs. Chadappa* – 20 NLR 60 (distinguished)
3. *Colombo Shipping Co. Ltd vs. Chiraya Clothing (pvt.) Ltd.* – 1995 – 2 Sri LR 97
4. *Silva vs. Goonetilake* – 32 NLR 217
5. *Hamine vs. Appuhamy* – 52 NLR at 49-50
6. *Muthusamy vs. Senaviratne* – 31 CLW 91
7. *Myaka vs. Haveman* – 1948 – 3 SA 457

8. *Jeena vs. Minister of Lands* – 1955 – 2 SA 380
9. *Avdiappa vs. Indian Oversees Bank* – 1995 – 2 Sri LR 13
10. *Kuruppu Arachchi vs. Andreas* – 1996 – 2 Sri LR 11
11. *Ceylon Insurance Co. Ltd vs. Nanayakkara* – 1999 – 3 Sri LR 50

Ikram Mohamed PC with *M. S. A Wadood* for 1st defendant – petitioner.
J. P. Gamage with *K. H. D. Priyadharshani* for plaintiff-respondent.

Cur.adv.vult.

May 05th 2010

ERIC BASNAYAKE J.

The 1st defendant-petitioner (1st defendant) is seeking to have the order dated 23.1.2007 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had refused to accept the amended answer of the 1st defendant.

This is a *rei vindicatio* action filed on 10.3. 2005 against the 1st, 2nd and 3rd defendants praying inter alia to have the plaintiff-respondent (plaintiff) declared the owner of the property described in the schedule to the plaint and to eject the 1st and 2nd defendants. The plaintiff claimed that his predecessor in title was one H. P. G. S. Abeysiriwardene who become the owner of a larger land by deed No. 2166 of 20.8.1982. The plaintiff purchased, by deed No. 2208 of 2.11.1982, a portion of this property which is described in the schedule to the plaint. The plaintiff states that the 2nd defendant began to use a portion of the property owned by the plaintiff about two months prior to 16.1.2005 and on 16.1.2005 the 2nd defendant commenced constructing a wall.

The 1st defendant filed answer on 16.6.2005. In the answer the 1st defendant admits the corpus stating that he

purchased the land referred to in the plaint on 15.10.2003 from the Central Finance Company Ltd. The 1st defendant also stated that this land was given on a lease by him to the 2nd defendant. The 2nd defendant filed a separate answer. In that the 2nd defendant too referred to the land mentioned in the plaint as the subject matter. He said that this property had been leased to the 2nd defendant by the 1st defendant on 1.1.2005. After filing the answers the case was fixed for trial for 21.10.2005. However the trial was postponed for another date. Before the case was taken up for trial the 1st defendant made an application on 8.3.2006 to amend the answer.

By this amendment the 1st defendant wished to dispute the corpus admitted previously. The 1st defendant had filed three new schedules to the proposed amended answer. He claimed that he is in possession of the land described in the 3rd schedule. The 1st defendant also replaced paragraph 8 of the answer with 13 sub paragraphs to describe the title of the 1st defendant. The 2nd defendant did not move to amend his answer.

The learned Judge had observed that the 1st defendant had admitted the land in question in the answer. The 1st defendant while denying the plaintiff's title to this land, had claimed title to it in the body of the answer. However in the prayer the 1st defendant had prayed for a dismissal of the plaintiff's action and not sought a declaration of title. For this reason the learned Judge found that it is not necessary for the 1st defendant to describe in detail his title and found that in the event the amended answer is refused the 1st defendant would suffer no loss.

The learned counsel for the 1st defendant submitted in the written submissions tendered to court that the amendment was only to describe the devolution of title. It was submitted

that the defendant had challenged the plaintiff's title and pleaded the title of the 1st defendant in the answer. The learned counsel submitted that the trial has not commenced yet. The learned counsel relied on the judgment of *Abeywardene vs. Euginahamy*[1] in support of his submission.

In *Euginahamy's case (supra)* the plaintiff moved to amend the plaint when it was taken up for trial. This move was due to the submission of the counsel for the defendants that the particulars of the plaintiff's title to the land had not been specified. The amendment was refused by the trial Judge. The Court of Appeal however had allowed the amendment for the reason that the amendment was to give full particulars of their title. L. H. De Alwis J Held that (at 233) "all that they sought to do by the amendment was to give full particulars of their title to the land in dispute. . . the lateness of the application for amendment is not a ground for refusing the application. The learned Judge relied on the judgment of *Seneviratne vs. Candappa*[2] where Shaw J said "however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side".

Since the date of pronouncing these judgments the law has undergone tremendous changes due to which the principle on which the amendments were allowed by these decisions cannot be considered as good law. The section relating to amendments of pleadings is found in section 93 of the CPC. At the time of pronouncing Euginahamy's case in 1984, the section stood as follows:-

> **At any hearing of the action or any time** in the presence of or after reasonable notice to the parties to

the action before final judgment, the court shall have full power of amending in its discretion . . . all proceedings. . .

This section was amended by Act No. 79 of 1988 by restricting amendments to cases where there are exceptional circumstances. The section is as follows:-

"The court may, **in exceptional circumstances. . . at any hearing . . . or at any time. . . before final judgment,** amend all pleadings"

The application of the above section was drastically reduced by a further amendment by Act No. 9 of 1991 which stands without an amendment up to now. The relevant portion is as follows:-

93 (1) Upon application made to it before the day first fixed for trial of the action. . . the court shall have full power of amending in its discretion, all pleadings. . .

Thus the wide discretion enjoyed by court all this time has been restricted. This discretion is allowed to be exercised only to applications made before the day first fixed for trial. Section 93 (2) is as follows:-

93 (2) On or after the day first fixed for the trial and before the final judgment, ***no application for the amendment of pleadings shall be alowed*** *unless the court is satisfied for reasons to be recorded by the court that* ***grave and irremediable injustice*** *will be caused if such amendment is not permitted* ***and on no other ground*** *and that the party so applying has* ***not been guilty of laches*** *(emphasis added). (3) & (4) are not reproduced.*

Amendments on and after the first date of trial can now be allowed only in very limited circumstances, namely, when the court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party is not guilty of laches (*Colombo Shipping Co. Ltd. vs. Chiraya Clothing (pvt.) Ltd* [3]

The learned counsel for the 1st defendant failed to address court with regard to the above requirements in the written submission tendered. This being a *rei vindicatio* action it is the duty of the plaintiff to prove his title. The significance of this requirement is that, where the plaintiff fails to prove title in himself, judgment in the vindicatory action will be given in favour of the defendant, even though the letter has not been able to establish title. "There is abundant authority that a party claiming a declaration of title must have title himself. The authorities unite in holding that the plaintiff must show title to the corpus in dispute and that, if he cannot, the action will not lie" (*Macdonell C. J. in De Silva vs. Goonetilleke*[4] Dias S. P. J. in *Abeykoon Hamine vs. Appuhamy*[5] stated that "this being an action rei vindicatio, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute". "It is an elementary rule that in an action for declaration of title, it is for the plaintiff to establish title to the land he claims and not for the defendant to show that the plaintiff has no title to it" (Soertsz S. P. J. in *Muthusamy vs. Seneviratne*[6]

"Prima facie, proof that the appellant is owner and that the respondent is in possession entitles the appellant to an order giving him possession, i.e. to an order for ejectment. This prima facie right of the owner could be met by the respondent by proof that he had been given the right of possession either by the appellant or by some other person

who was entitled to grant such right and that the right was still current. In such a case the onus would be on the plaintiff to prove his ownership and the defendant's possession; once he discharged this onus, the onus would be on the defendant to prove the grant of the right of possession to him" (*Myaka vs. Havemann*[7] (*Jeena vs. Minister of Lands*[8] (The law and the cases cited by G. L. Peiris, The Law of Property in Sri Lanka Vol. 1 pg 348, 9)

If the plaintiff fails to prove title, the action will be dismissed. If the defendant has a better title he could plead it and pray for a declaration. The 1st defendant only seeks a dismissal of the plaintiff's action in the answer and the proposed amended answer. Thus by disallowing the amendment the defendant would lose nothing.

At the time of filing the answer the 1st defendant was well aware of what the 1st defendant now wants in the amendment. The 1st defendant does not offer any explanation for his failure not to mention them in the answer. The amendments contemplated by section 93 (2) are those that are necessitated due to unforeseen circumstances. (*Avdiappa vs. Indian Overseas Bank*[9], *Kuruppuarachchi vs. Andreas*[10] *Ceylon Insurance Co. Ltd. vs. Nanayakkara*[11].

The fact that the trial did not commence has no bearing. What is important is the date first fixed for trial. Therefore the submission with regard to that fails.

For the foregoing reason I am not inclined to interfere with the order of the learned Judge. Therefore leave is refused with costs.

CHITRASIRI J. – I agree.

Application dismissed.