

SUSIL PERERA
v.
KELLY AND ANOTHER

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 140/2002
DC COLOMBO NO. 18626/L
MAY 06, 2002

Civil Procedure Code, sections 12 and 22 – Addition of a party – Objective – Is it necessary to claim relief against added party?

The plaintiff-respondent instituted action seeking to cancel a deed of gift and for ejection of the 1st defendant-respondent. The cancellation was sought on an alleged ingratitude by the respondent towards the plaintiff-respondent the donor. The 1st defendant-respondent in her answer averred that the property was gifted subsequently to the petitioner. The petitioner was added as a party. When the matter was taken up for trial, the petitioner made an application to have him released on the basis that no relief has been claimed against him, and the plaintiff has failed to amend the original plaint in terms of section 21. It was contended that as no cause of action or any allegation has been disclosed against the petitioner, there is no necessity, for the petitioner to participate in the proceedings.

The District Court refused the application.

Held:

- (1) The petitioner has raised the objection on the 3rd date of trial, although he had several opportunities before this date to raise, this particular objection. The petitioner who had participated in the proceedings till the 3rd date of hearing, after having formulated the contested issues, cannot be permitted to withdraw from the case as and when he wished to do so.
- (2) Any objection to misjoinder of causes of action has to be taken before the hearing.
- (3) Once a party is added as a party to an action, court has no power to strike him off afterwards.

Per Nanayakkara, J.

"The objective in adding a party to an action is to enable the Court to effectually and completely adjudicate upon and settle all the questions involved and not necessarily to claim relief against him; the fact that no relief has been claimed does not entitle the petitioner to a discharge from proceedings, if his presence is necessary for the effectual determination of all the issues involved."

APPLICATION to leave to appeal from the Order of the District Court of Colombo.

Cases referred to :

1. *Rauther v. Kandasamy* – (1920) CWR 16.
2. *Adlin Fernando and Another v. Lionel Fernando and Others* (1995) 2 SLR 25.
3. *Bandiya v. Kiriya* – (1916) 2 CWR 115.

Ranjan Suwandarathne with *Ranjit Perera* for defendant-petitioner.

Harsha Soza for plaintiff-respondent.

Cur. adv. vult.

June 25, 2002

NANAYAKKARA, J.

The plaintiff-respondent (respondent) instituted action in the District ⁰¹ Court of Colombo against the 1st defendant-respondent seeking, *inter alia*, the cancellation of deed No. 04. dated 13th August, 1997, attested by D. D. Wickremasinghe, Notary Public, and also for ejectment of the 1st defendant-respondent and all those who are holding under her from the property described in the Schedule to the plaint.

The cancellation of the deed was sought on an alleged ingratitude by the respondent towards the plaintiff-respondent who gifted the property which is the subject-matter of the action.

The 1st defendant-respondent who filed her answer in response to ¹⁰ the averments set out in the plaint among other things had averred

that the property which was gifted to her was subsequently gifted to the petitioner by virtue of deed No. 2123 dated 30. 07. 99, attested by S. B. F. Wijeratne and he has become the absolute and sole owner of the property and prayed for the dismissal of the action.

Thereafter, on an application made under section 18 of the Civil Procedure Code, by the plaintiff-respondent the petitioner was added as a party defendant to the action. Thereafter, the petitioner who filed his answer denying averments contained in the plaint, claimed that he was the absolute owner of the property in respect of which action ²⁰ was instituted by the plat.

At the trial which was taken up on 29. 09. 2000, after recording 2 admissions the parties had proceeded to formulate issues in the case. The plaintiff had raised 8 issues while the 1st defendant had raised 5 issues.

Thereafter, another additional issue which was suggested by the learned counsel for the plaintiff-respondent had been refused by the learned District Judge after considering the submissions made by the respective parties.

When the case was taken up for trial counsel for the 1st defendant- ³⁰ respondent had suggested 3 more fresh issues (15, 16 and 17) on the basis of *ex facie* non-disclosure of a cause of action and non-maintainability which issues counsel wanted the court to try as preliminary issues.

The learned District Judge who made an order on the matter on the basis of written submissions of the parties deferred answering those issues along with other issues at the conclusion of the trial.

Thereafter, when the case was taken up for further trial on 19. 10. 2001, the counsel for the petitioner made an application to have the petitioner released from the proceedings on the basis that ⁴⁰

no relief has been claimed against him by the plaintiff-respondent. It is against the refusal of the learned District Judge by his order dated 03. 04. 2002 to release the petitioner has preferred this leave to appeal application praying for the relief claimed therein.

The petitioner's main complaint is that although the petitioner was added as a party to the action, on an application made by the plaintiff-respondent, he had failed to amend the original plaint in terms of the provisions of section 21 of the Civil Procedure Code nor has he sought any direction from counsel in terms of the said section in regard to the amendment of the plaint. 50

The petitioner has also contended that as no cause of action or any allegation has been disclosed against the petitioner, there is no necessity for the petitioner to participate in the proceedings.

It would be necessary at this stage to examine the validity of the argument advanced by the petitioner on the question whether he should be released from the participation of the proceedings. In making a determination in regard to the validity of the argument advanced by the petitioner, attention should be focused on section 22 of the Civil Procedure Code.

Section 22 of the Civil Procedure Code provides thus :

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“All objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant.”

A close examination of this section makes it evident that all objections for want of parties for joinder of parties who have no interest in the action or misjoinder as co-plaintiffs or co-defendants should be taken at the earliest possible opportunity and the failure to lodge such

objection at the earliest possible opportunity will deprive him of the ⁷⁰ opportunity of raising the objection, as such objection is deemed to have been waived.

As far as the facts of the present case are concerned, it is evident that the petitioner has neither taken up this objection in answer nor at the first hearing. The petitioner has thought it fit to raise the objection on the 3rd date of trial, although he had several opportunities before this date to raise this particular objection. The petitioner who had participated in the proceedings till the 3rd date of hearing after having formulated the contested issues in the case, cannot be permitted to withdraw from the case as and when he wished to do so. ⁸⁰

In this connection reference to the following authorities would be helpful in the resolution of the issue involved. In *Rauther v. Kandasamy*,⁽¹⁾ when objection was taken to the joinder of certain parties and causes of action 3 days before the date fixed for hearing, the Supreme Court commenting on the belatedness of the objection observed in the following terms:

“The objection should have been taken immediately after the plaint in the action and it was far too late to come three days before trial when, if the objection was allowed, the trial would have had to be postponed. There appear to be no merits in the objection ⁹⁰ that was taken as it would appear to be more convenient that the entire dispute between all the parties should be settled on the same occasion.”

In the case of *Adlin Fernando and Another v. Lionel Fernando and Others*². Justice Ranaraja had made the following observation in regard to the objection to misjoinder of parties and causes of action:

“Thus, it is clear that if any objection to misjoinder of causes of action is raised by the defendants, it has to be done before the hearing. It is not open to a defendant to await the framing of

issues by the plaintiff, and then without prior notice to the plaintiff, 100
frame issue on misjoinder of parties or causes of action.”

It should also be observed that once a party is added as a party to an action, court has no power to strike him off afterwards. This is clearly evident from reasoning adopted in the case of *Bandiya v. Kiriya*.⁽³⁾ Justice Shaw has made the following observation:

“I do not think the Commissioner was right in doing this. Having joined him as a party it seems to me that he had no right to afterward strike him out. That he was a person who had an interest in the proceedings seems to be clear, and he had a serious interest in the result of the case and also his presence before the court was 110
certainly proper for the purpose of enabling the whole of the matter in controversy to be settled in the present action.”

The objective in adding a party to an action is to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the action and not necessarily to claim relief against him. The fact that no relief has been claimed against the petitioner does not entitle the petitioner to a discharge from the proceedings if his presence is necessary for the effectual determination of all the issues involved in the case.

Therefore, when all these matters are taken into consideration, I 120
am inclined to the view that the petitioner is not entitled to leave in this matter.

UDALAGAMA, J. – I agree.

Application dismissed.