

PERERA
v
GEEKIYANA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 829/94(F)
D.C. COLOMBO 15554/L
MARCH 14, 2007

Civil Procedure Code – Section 46, 48, 38, 93 – Caption read District Court of Mt. Lavinia and the word Mt. Lavinia was struck off – and the word Colombo inserted in handwriting – Application to initial alteration – refused – Dismissal of action – Validity – should the plaint be amended?

A preliminary objection was raised stating that the caption of the plaint reads as District Court of "Mt. Lavinia" and the word "Mt. Lavinia" had been struck off and the word "Colombo" has been inserted in handwriting.

The trial Judge inquired from Counsel whether he wishes to amend the plaint, the Counsel indicated that the plaint need not be amended but sought permission from Court to initial/endorse the caption showing the alteration.

This was refused by the trial Judge and the action was dismissed.

Held:

- (1) There was no necessity to apply to Court to amend the plaint. Amendment of pleadings will become necessary only to ascertain the points in issue in case of doubt, function of the pleadings is to clarify the issues so that the real issues between the parties may be tried.
- (ii) It is settled law that cause of justice cannot be thwarted by procedural technicalities. A party cannot be refused just relief mainly because of some mistake, negligence or inadvertence;
- (iii) Court should always be mindful of the fact that merits of the case should be considered unless the objection raised by Counsel indicates a material defect in the pleadings which needs amendments in compliance with section 93;

- (iv) Attitude of Courts should be to avail frivolous technicalities "Supreme Court is a Court of Law which should not be tramelled by technical objections and that it is not an academy of law" – Chief Justice Abrahams in *Velupillai v Chairman, U.C. Jaffna*.⁽⁷⁾

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to:

- (1) *J.E. Senanayake v V.H.L. Anthonisz and another* – 69 NLR 225 at 227.
- (2) *Fernando v Soysa* – 2 NLR 40.
- (3) *Mohideen v Gnanaprakasam* – 14 NLR 33.
- (4) *Soysa v Soysa* – 17 NLR 118.
- (5) *Avva Ummah v Casinader* – 24 NLR 199.
- (6) *W.M. Mendis v Excise Commissioner* – 1999 (1) SLR 351.
- (7) *Velupillai v Chairman U.C., Jaffna* – 39 NLR 464.

N.R.M. Daluwatte, P.C., with Rohan Gunapala for the appellant.
Romesh de Silva P.C., for respondent.

Cur.adv.vult.

May 21, 2007

ANIL GOONERATNE, J.

This appeal arises from the order of dismissal of the plaintiff's action on 31.5.1994 by the learned Additional District Judge, Colombo where a preliminary objection was raised at the trial by the defendant-respondent to the plaint filed of record stating that the caption of the plaint reads as District Court of Mt. Lavinia and the word Mt. Lavinia had been struck-off and the word Colombo inserted in hand writing. The original Court Judge after hearing both the learned President's Counsel for the defendant on the above objection and the Counsel for the plaintiff, had inquired from the Counsel for the plaintiff as to whether he wishes to amend the plaint but Counsel for the plaintiff indicated to Court that the plaint need not be amended but sought permission from Court to allow the registered Attorney of the plaintiff to initial or endorse the caption showing the alteration with the word Colombo which was handwritten on the plaint. 01 10

Court had not permitted the registered Attorney to initial or endorse the plaint as aforesaid but in the order, Additional District

Judge has made reference to the fact that in these circumstances what should be done was for the plaintiff to have applied to Court to amend the plaint but when the answer to court by Counsel for plaintiff was in the negative, Original Court dismissed the plaint with costs as the plaint filed of record is not a valid plaint. 20

It was contended on behalf of the defendant-respondent that

- (a) Failure to initial the caption is indicative of the fact that the caption would have been altered at any time on any date.
- (b) Service copy of the plaint too has the same alteration which is also unsigned / not initialed.
- (c) No application has been made to rectify the error and as such plaint has to be dismissed.

The plaintiff-appellant contends that the objection taken by the defendant is highly technical/frivolous and that it is a curable defect which would not cause any prejudice to the defendant. The appellant also submitted to this Court that 30

(a) any objection of this nature should be taken at the earliest opportunity by motion prior to the trial date.

(b) Plaint had been tendered to the registry on 29.9.91 and accepted on 30.9.91. (date stamp placed)

(c) Plaint accepted after the caption was altered correctly.

(d) Service copy has been subscribed by the registered Attorney for plaintiff. 40

On a perusal of the record I find that although an objection to the plaint was raised on 31.5.1994, there had been several dates prior to 31.5.94, where this case had been called in the District Court of Colombo, and prior to 31.5.94 the case had been fixed for trial on 6.1.94. On that date the journal entry indicates that the case had been re-fixed for trial/settlement on 31.5.1994. As such this objection should have been taken on a motion prior to filing the answer of the defendant.

The learned Additional District Judge's order of 31.5.94 dismissing the action needs to be examined. The trial Court Judge *inter alia* refer to the following matters in her order. 50

- (a) mistakes do occur and its not unusual.
- (b) request by plaintiff to endorse the pleadings or initial the alterations cannot be permitted after same has been filed of record.
- (c) the place of alteration in the pleadings should be initialed by the registered Attorney. It is his responsibility.
- (d) in this instance Court is unable to state as to when the alteration of the caption was done. It might have been after acceptance of the plaint. 60
- (e) although the District Court seal has been affixed by the Registrar on the plaint, it would not mean that Court has accepted same.
- (f) if the name of Court is incorrectly inserted plaint should be initially rejected. However if a correction is done without the endorsement/initial of the Attorney-at-law it is an invalid plaint.
- (g) as observed above, when Court inquired from the plaintiff's Counsel as to whether plaint needs to be amended the answer to same was in the negative. At this point when Court inquired from the plaintiff he should have moved to amend the plaint/caption. 70
- (h) since the plaint is not valid Court dismissed the plaint with costs.

The trial Court Judge's findings as stated above may in a way be of some relevance to the day to day functioning of the original Court but the ultimate decisions to dismiss the plaint is an erroneous decision of the original Court since the error suggested by Court and the Defence Counsel is of a trivial nature and a curable defect. (If it is the view of the original Court that there is an alteration done in the caption to the plaint). 80

A plaint could be returned for amendment or rejected according to the provisions referred to in section 46 of the Civil Procedure Code.

Section 48 of the Civil Procedure Code requires the order for return or rejection to specify the fault or defect and the date of filing

plaint and by whom it was filed and such order to be filed of record and signed by the Judge. Section 48 reads thus:

Every order returning or rejecting a plaint shall specify the date when the plaint was presented and so returned or rejected, the name of the person by whom it was presented and whether such person was plaintiff or registered Attorney, and the fault or defect constituting the ground of return or rejection; and every such order shall be in writing signed by the Judge, and filed of record. 90

In this instance the original Court had not made an order in compliance with section 48 of the Code.

Plaintiff's position was that an amendment was not necessary or that there is nothing to be done to amend the plaint other than to place the initial of the Attorney in the place where the word 'Colombo' (hand written) appears, since the plaint has been presented and accepted by Court by that time the objection was raised by the defence. If that position of the plaintiff is accepted the only lapse if at all on his part would be his failure to endorse or initial the place where the word 'Colombo' appears on the plaint. To this extent the learned District Judge is correct as any slight alteration needs to be initiated by the registered Attorney-at-Law. However, I am inclined to accept the position of the plaintiff's Counsel that there was no necessity to apply to Court to amend the plaint, other than to place one's initials with permission of Court at the point where hand written word appears on the plaint. Amendment of pleadings will become necessary only as ascertain the points in issue in case of doubt and it has been considered by our courts that the function of the pleadings is to clarify the issues so that the real issues between the parties may be tried. *J. E. Senanayake v V. H. L. Anthonisz and another*⁽¹⁾ at 227. 100 110

In fact the earlier view was that a Judge cannot reject or return a plaint after having accepted it and ordered summons. *Fernando v Soysa*⁽²⁾ and *Mohideen v Gnanaprakasam*⁽³⁾. However the cases reported in *Soysa v Soysa*⁽⁴⁾ and *Avva Umma v Casinader*⁽⁵⁾ changed the position to enable Court to take steps to return or reject the plaint if the material defect has been pointed out by the 120

defendant at a subsequent stage. This principle is being followed even in recent times.

The original Court Judge should have given her mind to the question whether the objection raised by the defence is valid (prior to dismissal of the plaint) for the following reasons:

- (a) Is there any prejudice or injustice caused to the defence?
- (b) Is the objection of a trivial nature, which can be cured? 130
- (c) Is an amendment of the caption really necessary?
- (d) Should the merits of the case be considered and permit the parties to proceed to trial rather than dismissing the case without considering the merits, merely because plaintiff took the view that there is no need to amend the plaint.
- (e) Is it not apparent on a perusal of the plaint that with or without an amendment to the caption scope of the action or its character would not change.

It is settled law that cause of justice cannot be thwarted by Procedural technicalities. In *W.M. Mendis & Co. v Excise Commissioner*.⁽⁶⁾ The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence. 140

A Judge hearing civil cases in the original court should always peruse the pleadings and decide as to whether there is a real necessity to amend the pleadings according to accepted procedure. Court should always be mindful of the fact that merits of the case should be considered unless the objection raised by Counsel indicates a material defect in the pleadings which needs amendment in compliance with section 93 of the Code. Attitude of courts should be to avoid frivolous technicalities. 150

"Supreme Court – is a court of law which should not be trammelled by technical objections and that it is not an academy of law" *per* Chief Justice Abrahams (*Velupillai v Chairman U.C. Jaffna*).⁽⁷⁾

It is unfortunate that this case had been dismissed some years ago on a highly technical issue, without considering the merits of the case. In the circumstances I set-aside the order of the learned Additional District Judge of Colombo dated 31.5.1994, with costs, fixed at Rs. 10,000/- and I direct that the case proceed to trial on the pleadings filed of record. 160

EKANAYAKE, J. – I agree.

Appeal allowed.