MASEENA
v
SAHUD AND ANOTHER

COURT OF APPEAL
AMARATUNGA, J.
BALAPATABENDI, J.
CALA 184/2002
D.C. GAMPOLA L/2765
NOVEMBER 26, 2002

Civil Procedure Code – S. 11, S.35(1), S. 40, Amendment 9 of 1991 – S. 4, S. 42, S. 43, S. 46(2), S. 80, S. 93(2) – Misjoinder of Parties – Court returning plaint for amendment – ex mero motu – Is it legal ?– Position after the amendment 9 of 1991 – First date of trial.

The 1st plaintiff-respondent divorced his wife the defendant-petitioner and thereafter he and the 2nd plaintiff-respondent – Lessee – instituted action against the defendant-petitioner. The 1st plaintiff-respondent sought a declaration to the property in question and the eviction of the defendant-petitioner, his former wife, and also sought a declaration that the 2nd plaintiff - respondent is the Lessee.

Of the issues raised by the defendant four issues were tried as preliminary issues.

The trial court in answering the preliminary issue 12 - held that the action is not properly constituted and it is contrary to section 35(1) and that there is misjoinder of parties and returned the plaint for amendment under section 46(2).

The defendant-petitioner sought leave to appeal against the order.

Held :

(i) The trial Judge has failed to take into account section 93(2) of Act 9 of 1991.

(ii) The amendment has taken away the power of court to amend pleadings *ex mero motu*. An amendment could be allowed only upon the application of a party when that party satisfies two conditions in section 93(2). In this case there was no such application.

Per Gamini Amaratunga, J.

> "The Judge has held that the action is not properly constituted and that there is a misjoinder of parties then no further amendments of the plaint should have been allowed."

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

Cases referred to :

1. *Divisional Forest Officer* v *Sirisena* 1990 1 SRI LR 44 at 49 and 50
2. *Gunasekera and another* v *Abdul Latiff* 1995 1 SRI LR 225
3. *Ceylon Insurance Company Ltd.* v *Nanayakkara and another* 1999 3 SRI LR 50

J.C. Weliamuna for defendant-petitioner

Manohara de Silva for plaintiff-respondent.

Cur.adv.vult

April 28, 2003

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the order made by the learned Additional District Judge of Gampola dated 6.5.2002 returning the plaint to the plaintiffs' for amendment. The facts leading to the said order are as follows: The 1st plaintiff who was the husband of the petitioner has obtained a divorce against the petitioner. By his plaint dated 26.10.1998 (filed on 02.11.1998) he has averred that he is the owner of the property described in the first schedule to the plaint and the second plaintiff is the lessee of the said property. According to the plaint even after the 1st plaintiff divorced the petitioner the latter has continued to occupy the house situated in that property. The plaintiff has averred that after the divorce the petitioner has no right to the property. He accordingly has prayed for a declaration that he is the owner of the property and the 2nd plaintiff is the lessee of that property and for an order ejecting the petitioner from that property.

Further the plaintiffs have averred that there were items of movable property worth more than Rs. 10,00000/- belonging to the 1st plaintiff stored in the rooms of the house occupied by the petitioner. A list of the said movable items is given in the second sched-

ule to the plaint. The plaintiffs have prayed for a declaration that those items of movable property belong to the 1st plaintiff and that he is entitled to take possession of those items and for an order declaring that the 1st plaintiff is entitled to get possession of those items from the petitioner. The plaintiffs have also sought an enjoining order and an interim injunction preventing the petitioner from disposing such property or causing damage to the house or the items movable property. The Court has issued the enjoining order and notice of injunction as prayed for.

When the petitioner appeared in Court and filed her objections the Court has made order on 15.6.1999 dissolving the enjoining order. On 07.10.1999 the plaintiffs have filed an amended plaint dropping the relief claimed in respect of the items of movable property and claiming the same relief claimed in the original plaint in respect of the immovable property. Thereafter an application has been made to amend the schedule to the amended plaint by substituting the words 'assessment No. 18' for the words '18 perches'. Despite the objections raised on behalf of the defendant-petitioner, the trial Judge has allowed the amendment on the basis that the error sought to be rectified was a typing error.

On 14.9.2001 the case was taken up for trial and both parties have raised their issues and the defendant-petitioner has moved that issues 10 to 13 raised on her behalf be tried first as preliminary issues of law. The learned Judge without making an order on the application of the defendant has merely noted the application and has directed the parties to file written submissions. The next date fixed for trial was 30.4.2002. The journal entry of that date is so illegible and it is not possible to ascertain what happened on that date. However since the learned Judge has later pronounced his order on the defendant's application to try issues Nos. 10, 11, 12 and 13 as preliminary issues one may presume that on 30.4.2002 the court decided to make an order on the defendants application.

Issues Nos. 10, 11, 12 and 13 raised by the defendant are as follows:

No.10 According to law, can the plaintiff maintain this action?

No.11 Is the action misconceived in law?

No.12 Is there a misjoinder of parties?

No.13 Has the action been filed in contravention of sections 35(1) and /or 40 and /or 42 and /or 43 of the Civil Procedure Code?

The learned Judge in his order has proceeded to consider those issues. He has considered issue No. 10 and 12 together. By the plaint the plaintiffs have sought declarations that the 1st plaintiff is the owner of the property and the 2nd plaintiff is the lessee of the property. It is clear that this case is an action for declaration of title to immovable property and for the recovery of immovable property. According to section 35 of the Civil Procedure Code in such an action "no other claim or any cause of action shall be made unless with the leave of Court, except -

(a) claims in respect of mesne profits or arrears of rent in respect of the property claimed;

(b) damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and

(c) claims by a mortgagee to enforce any of his remedies under the mortgage.

It is clear from this section that in an action for declaration of title to immovable property it is not possible to seek, without the leave of Court, a declaration that a party, other than the party claiming declaration of title is a lessee. The plaintiffs have not obtained leave of the court to join those two different claims in the same action. According to section 11 of the Civil Procedure Code "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly severally or in the alternative in respect of the same cause of action. It is clear that the two plaintiffs are not persons in whom the right to any relief in respect of the same cause of action jointly existed. In these circumstances the learned Judge has quite rightly held that the plaintiff's action is not properly constituted as it is contrary to section 35(1) of the Civil Procedure Code and that there is misjoinder of parties.

In respect of issue No. 11 the learned Judge has held that the plaint discloses a cause of action and in respect of issue No.13 he has held that in view of his decision that the plaint is bad in law as it has contravened section 35 of the Civil Procedure Code, it was not necessary to consider matters raised in issue No. 13.

Thereafter the learned Judge has decided to return the plaint for amendment. For this decision he has relied on the provisions of section 46(2) of the Civil Procedure Code which reads as follows:

> "Before the plaint ..... Is allowed to be filed, the Court may, if in its discretion it shall think fit, refuse, to entertain the same for any of the following reasons."

The reason applicable to the present case is paragraph (f) of section 46(2). Paragraph (f) is as follows:

> "if it is wrongly framed by reason of non joinder or misjoinder of parties or because the plaintiff has joined causes of action which ought not to be joined in the same action, and may return the same for amendment then and there or within such time as may be fixed by Court upon such terms as to costs..."

According to section 46(2) a Court may return the plaint for amendment "before the plaint is allowed to be filed." The learned Judge having noted that the point of time envisaged by section 46(2) has passed, has proceeded to consider whether the Court has the power to return the plaint for amendment at any subsequent stage. The learned Judge having considered the observations of Wijetunga, J. in *Divisional Forest Officer* v *Sirisena* [1] has decided that it is open to the Court to return a plaint for amendment even after the stage envisaged in section 46(2). However the learned Judge has failed to take into account the difference in the legal position that existed on the date of that judgment i.e, 25/8/1989 and the present legal position. After section 93 of the Civil Procedure Code was amended by section 2 of Act, No. 9 of 1991 the position is different. Section 93(2) of the Civil Procedure Code as it presently stands after the said amendment reads as follows:

> "On or after the day first fixed for trial of the action and

before the final judgment no application for the amendment of any pleadings shall be allowed unless the court is satisfied, for the 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."

The effect of this section was explained by Ranaraja, J. in *Gunasekera and another* v *Abdul Latiff* (2). According to that judgment the amendment introduced by Act, No. 9 of 1991 has taken away the power of court to amend the pleadings *ex mere motu*. An amendment could be allowed only upon the application of a party. In this case there was no application by the plaintiff to amend the plaint. The court *ex mere motu* decided that the answer should be amended. Under the present law the court has no power to do this.

In this case the day first fixed for trial was 4/9/2001. The meaning of the phrase 'the day first fixed for trial' was explained in *Ceylon Insurance Company Limited* v *Nanayakkara and another* (3). It was stated in that case that "section 80 of the Civil Procedure Code provided for fixing the date of trial and such date constitutes, the day first fixed for trial." Therefore any amendment to pleadings in this case after 4/9/2001 will have to be done on the application of a party and only when the court is satisfied that the two conditions set out in section 93(2) are present.

In this case having decided that the plaintiff's action is not properly constituted as it is not in conformity with section 35(2) and that there is misjoinder of parties, the learned Judge has stated that he refuse the application of the defendant to take up issues No. 10, 11, 12 and 13 first. Since the learned Judge has already decided issues No. 10 and 12 against the plaintiff and issue No. 11 in favour of the plaintiff's I cannot understand the logic of the Judge's refusal to try issues No. 10-13 before other issues are tried. The Judge has already recorded his conclusions regarding those issues. His decision to return the plaint for amendment is wrong in law and accordingly I allow the appeal and set aside that part of the order dated 6/5/2002 directing the return of the plaint for amendment. The plaintiff has already filed his amended plaint as directed by the learned Judge. Since the order permitting the plaintiff to file amend-

ed answer has been set aside, the amended plaint dated 3/6/2002 is also hereby rejected.

The plaintiff has amended the original plaint by filing an amended plaint. Thereafter he has amended the amended plaint by amending the schedule to the plaint. After the trial process commenced and the issues have been framed, the learned Judge has come to the conclusion that the plaintiff's action is not properly con- 170
stituted and that there is misjoinder of parties. After the Judge has come to this conclusion for reasons stated, no further amendments of the plaint should have been allowed. I therefore direct the learned Judge to formally record his answers to issues No. 10, 11, 12 and 13 in accordance with the conclusions set out in his order dated 6/5/2002 and thereafter make an appropriate order regarding this case in accordance with the recorded answers to issues No. 10, 11, 12 and 13. The defendant-appellant is entitled to costs of this appeal in a sum of Rs. 15,000/-

BALAPATADENDI, J. I agree

Trial Judge is directed to formally record his answers to the preliminary issues in accordance with the conclusions set out in the impugned order and thereafter make an appropriate order.

Application allowed.