

WEERASINGHE
v.
DE SILVA

SUPREME COURT.
BANDARANAYAKE, J.
FERNANDO, J. AND
KULATUNGA, J.
S.C. APPEAL NO. 48/88.
JUNE 3, 1991.

Notice of action – Civil Procedure Code, s. 461 and Form No. 71.

Held:

The object of section 461 of the Civil Procedure Code is to afford an opportunity to the person concerned to consider his position in regard to a claim and come to terms of settlement or settle the claim in full without taking the risk and trouble of litigation. Form No. 71 containing the form of notice is directory only. If it enumerates in sufficient detail the cause of action and the relief claimed it would be an adequate compliance. It is not necessary to state the notice is under s. 461.

Cases referred to:

1. *De Silva v. Ilangakoone* 57 NLR 457.
2. *Saiboo and Others v. Attorney-General* 48 NLR 574.
3. *Munnich v. Godstone Rural District Hospital* [1966] 1 All ER 930.
4. *Howard v. Secretary of State for the Environment* [1974] 1 ALL ER 644.

APPEAL from judgment of Court of Appeal.

E. D. Wickramanayake for defendant-appellant.
H. L. de Silva, P.C. with *B. Rajapakse* for plaintiff-respondent.

Cur. adv. vult.

July 16, 1991.

BANDARANAYAKE, J.

This appeal involves the determination of a question of law. It relates to the notice that ought to go out under s.461 of the Civil Procedure Code before the institution of an action against a public officer in respect of an act purporting to be done by such person in his official capacity.

The plaintiff-respondent complained that the defendant-appellant Inspector of Police maliciously charged him before the Magistrate's Court for being in possession of an unlicensed revolver, in breach of the provisions of s. 22(1) of the Firearms Ordinance. The plaintiff also complained that he was wrongfully confined for a period of four months. The plaintiff had been acquitted by the trial Court on 11.10.72. Consequently no action for damages would have been maintainable unless it was commenced before 11.10.74.

The facts bearing upon the plaintiff's acquittal are not contested. On 16 August 1974 the plaintiff's Attorney-at-Law sent out the following letter to the defendant-appellant. It has been marked in evidence at the trial in the District Court as P6. It reads as follows:

"P6

No. 120, Trincomalee Street, Matale,
16th August 1974.
Gamini D. Weerainghe, Esqr.,
Inspector of Police, Gampaha.

Dear Sir,

I am instructed by G. P. Chularatne de Silva of Mahawela in Matale District, to demand of you the immediate payment of the sum of Rs. 50,000/- being damages suffered by my client causing great pain of body and mind and damage to reputation to him consequent to your maliciously prosecuting him in M.C. Matale Case No. 37305 charging my client with possessing an unlicensed firearm to wit: "a revolver" without a licence or permit from the Government Agent, Matale, and thereby committing an offence under the Firearms Ordinance of which charge he was acquitted and for wrongful arrest and confinement of my client for a period of four months.

Should you fail to comply with the requirement of this demand within seven (7) days time my further instructions are to sue you at law for the recovery of the said sum of Rs. 50,000/- and costs of action.

Allow me however to recommend an amicable settlement.

Yours faithfully,

(Sgd)

Proctor, S.C. (Now Attorney-at-Law)"

Thereafter one finds that the Attorney-at-Law for the plaintiff-respondent wrote another letter to the defendant-appellant dated 9.9.74 which has been marked in evidence as P7.

It reads:

"P7.

No. 120, Trincomalee Street, Matale.
9 September.

Registered.

Gamini D. Weerasinghe, Esq.,
Inspector of Police,
Police Station, Gampaha.

Dear Sir,

Notice under S.461 Civil Procedure Code.

On instructions from Mr. G. P. H. Chularatne de Silva of Mahawela in Matale District, I hereby give you notice **under Section 461 of Civil Procedure Code that an action at law will be instituted against you after 30 days** from date hereof in the District Court of Matale consequent to your having instituted criminal proceedings against my client in M.C. Matale Case No. 37305.

Cause of Action: 1. Maliciously prosecuting my client in M.C. Matale Case No. 37305 on a charge of possessing an unlicensed firearm to wit: a revolver, on 19 June 1971 without a licence from the Government Agent, Matale.

2. Maliciously arresting my client on the above charge on 19 June 1971 and keeping him in custody for a period of 4 months and 11 days. Name and Place of abode of my client who intends to institute action against you: Gardiye Punchi Hewage Chularatne de Silva of Mahawela, Matale District.

Relief Claimed: Rs. 50,000/- being damages suffered by my client consequent to your wrongful acts.

Yours faithfully,

(Sgd)

Attorney for Mr. G. P. H. Chularatne de Silva.”

Received on 11.9.74.”

The date of receipt was a handwritten endorsement made by the defendant. The plaint filed on 10 October 1974 the cause of action being for causing pain of mind and injury to reputation by reason of malicious prosecution – M.C. Matale Case No. 37305. Damages were claimed in a sum of Rs. 50,000/-. The point to be observed here is the date of the filing of the plaint which as I have said was on the 10th October 1974. Having regard to the fact that the plaintiff-respondent had been acquitted in the criminal case 11.10.72, the action would have been prescribed if it had been filed on 11.10.74 or thereafter. Section 461 of the Civil Procedure Code stipulates that one month's written notice should be given and that that notice should be delivered to the party being used before action is instituted. If P6 is considered to be a proper notice coming within the requirements of s.461, time is not relevant because P6 was sent out on the 16th of August 1974 which gives substantially more than one month written notice. If, however, P6 is not regarded as a notice the plaintiff falls back on P7 which is dated 9 September 1974. P7 has been delivered only on 11 September. Thus the plaint which was filed on the 10th October has been filed one day before the expiry of one month since P7 was delivered to the defendant in which event there is no compliance with the provisions of s.461.

It was submitted by Counsel for the defendant-appellant that gross prejudice had been caused to his client by the lower Court's holding that due notice in terms of s. 461 had been given for otherwise the action was prescribed. It was argued on behalf of the defendant-appellant that P6 does not constitute a notice to which the defendant, a public officer, was entitled to under S. 461. Counsel for the appellant argued that P6 was nothing more than a letter of demand requiring the immediate payment of a sum of Rs. 50,000/- being damages suffered by the plaintiff consequent to the alleged malicious prosecution and informing him that if he fails to satisfy the demand within seven days the defendant would be sued at law for the recovery of the said sum of Rs. 50,000/- and costs. Counsel submitted that P6 should be taken to mean what it says and not to stretch its meaning to say that it amounted to a notice of action as required by the Code. Counsel relied on the judgment of Basnayake, C.J., in *De Silva v. Illangakoone*⁽¹⁾ where it was held that the notice under s. 461 of the Civil Procedure Code was a condition precedent to the institution of an action against a public officer and that the requirements of this section should be strictly observed and the notice should be in the form prescribed in the Schedule to the Code. The notice should indicate to the recipient that the communication is meant to be a notice under that Section and inform him of all particulars. It was held that procedural provisions are imperative and failure to observe them is fatal to an action. Counsel also argued that although P7 was in that proper form and was in fact the only notice sent in terms of s.461, action had been instituted before the expiry of one month after delivery of P7 and that therefore the action was bad in law.

Learned Counsel for the plaintiff-respondent submitted that the view expressed in the case of *de Silva v. Illangakoone* (*supra*) was too strict and that a less stringent attitude should be adopted by the Courts in regard to satisfaction of the provisions of s.461. It was submitted that the object of the legislature requiring notice was to afford an opportunity to the public officers mentioned in the Section and consider their position in regard to the claim made and either to make amends in some form for the injury caused or settle the claim without recourse to the trouble, delay and costs of litigation. Counsel submitted that the object of the legislature had been satisfied by the

plaintiff-respondent in this case when he delivered the letter P6 to the defendant-appellant. When one reads the whole of P6 it is clear that the defendant is being informed and given notice of the plaintiff's complaint that an action at law will be instituted for the cause of action, which has been the malicious prosecution of the plaintiff before Magistrate's Court which action by the defendant caused injury to mind and body and reputation and that the defendant would have to atone for his malicious conduct by the payment of damages in a sum of Rs. 50,000/- and that failure to comply would result in the recovery of the said sum by the institution of an action it was the argument of Counsel for the respondent that the principal matters contained within the provisions of the Section had been fully met by P6 and that therefore it was unnecessary for the plaintiff to have sent out letter P7 as well but that the plaintiff did so merely out of an abundance of caution and not in recognition of non-compliance with the requirements of s.461. Counsel relied on the decision of Jayatilake, J. in *Saiboo & Others v. Attorney-General* ⁽²⁾ which is an appeal from the Court of Requests that has been decided by a single Judge. In that judgment Jayatilake, J. has referred to the object of the legislature in enacting s.416 and also relied on an Indian authority for his decision.

Counsel for the plaintiff-respondent also relied on two English cases. The case of *Munnich v. Godstone Rural District Hospital* ⁽³⁾ which case dealt with the validity of an enforcement notice issued by the District Council requiring the persons named in the notice to do something. Lord Denning held that he no longer favoured formalities being used to defeat the public good. His Lordship rejected technicalities and applied the simple test "Does the notice tell him fairly what he has done wrong and what he must do to remedy it." In *Howard v. Secretary of State for the Environment* ⁽⁴⁾, Lord Denning, M. R. dealt with the enforcement notice under the Town and Country Planning Act. It was held that the written notice required by s.16(1) of the Act to be given within a certain period specified in the notice was imperative and went to jurisdiction; but the requirement under s.16(2) that the notice of appeal should specify the grounds and the facts was directory only and failure to comply with them did not bar the appeal.

Respondent's Counsel in the instant case argued that the existence of form No. 71 giving a form of notice under this Section is merely directory in nature and that simply because P6 was not in that

form it did not mean that it could not be considered as a notice under s.416 as all the matters referred to in that section had been included in P6 and that therefore the plaintiff has validly instituted this action before the District Court.

Part IV, Chapter XXXI of the Code relates to actions in particular cases. The provisions of s.461 of the Code casts a specific duty to serve notice on those entitled to notice under the provision. It stipulates –

- (i) *a time period within which the notice must be given – one (1) month*
- (ii) *a particular manner (ie) it must be written notice;*
- (iii) *that the cause of action must be stated;*
- (iv) *the name and address of the person intending to institute the action must be stated; and*
- (v) *the relief claimed.*

I am inclined to respectfully agree with the view expressed by Jayatilake, J. in *Saiboo and Others v. Attorney-General (supra)* that the objects of this provision are to afford an opportunity to the person concerned to consider his position in regard to a claim and come to terms of settlement or settle the claim in full without taking the risk and trouble of litigation. In fact the parties in this case had failed to arrive at a settlement before the Conciliation Board according to the Certificate of the Chairman dated 29 September, 1974. It would appear therefore that the defendant-appellant was in any case fully aware of the cause of action and the relief claimed by the plaintiff at the time plaint was filed. Again s.416 does not require that the notice contemplated should inform the recipient that it was a notice under s.461. I am of the view that Form No. 71 containing the form of notice is directory only. P7 may be conveniently disregarded as it fails to satisfy the time frame contemplated by the Section which must be regarded as imperative. We have letter P6 which has been delivered to the defendant well within the time frame aforesaid. It gives all required particulars of the claimant; it enumerates in quite sufficient detail the cause of action and relief claimed. Indeed the plaint filed

did in paragraph 8 claim that due notice had been given. This has been repeated in the amended plaint filed. Thus it appears to me that all the conditions set out in the section have been satisfied. The fact that P6 uses the language of a letter of demand and stipulates a time frame of 7 days within which the demand should be met failing which action would be instituted cannot be said to have misled the defendant or caused prejudice to him in any way as the section does not require attention being drawn to the fact that it is a notice under s.461. The particulars mentioned in P6 provided the defendant an opportunity to consider the claim and offer a settlement. In the circumstances P6 in my view satisfies the requirements of s. 461 and could be considered a valid notice within terms. The judgment of the Court of Appeal is affirmed and this appeal is dismissed with costs.

FERNANDO, J. – I agree.

KULATUNGA, J. – I agree.

Appeal dismissed.
