

COURT OF APPEAL**Senaratne****Vs.****Cabraal****CA (LA) 155/81 — DC. Colombo No.3920/RE**

*Section 21 of Rent Amendment Act No 55 of 1980 — Rent Act Section 22(2)6 —
Amendment of Plaint — Exclusion of old ground in amended Plaint*

Plaintiff Respondent instituted this action for ejection of the tenant on the grounds that the premises were reasonably required by him as a residence for himself and members of his family in terms of Section 22(2) b of the Rent Act.

However, before the trial stage was reached Amending Act No. 55 of 1980 became effective amending in many ways the provisions of the Rent Act.

Section 21 of the Amending Act empowered the Plaintiff Appellant to amend his plaint so as to rely on a new ground of action specified in the new section 22(2)(bb)(i)(ii).

Plaintiff sought to amend his plaint as provided for in the new Amending Act by introducing the new ground and deleting the original ground.

Defendant Appellant while accepting the new ground contended that the original ground should stand side by side.

The District Judge allowed the addition of the new ground and the deletion of the original ground.

Defendant appealed to the Court of Appeal.

Held that since Court cannot under Section 2 of the Amending Act determine the action on anything but the new ground it becomes necessary that the original plaint should be replaced in paragraphs in so far as they are a hindrance to the determination of the action on the new ground.

APPEAL with leave obtained from order of the District Judge of Colombo

Before:- Rodrigo, J. and L.H. de Alwis, J.
Counsel: H.W. Jayewardene Q.C. with W. Siriwardena & R. de Silva
for Defendant-Petitioner.
H.L. de Silva S.A. with T.B. Dillimuni for
Plaintiff-Respondent.
Argued on: 2.4.1982.
Cur. adv. vult.
Decided on: 17.5.1982

RODRIGO, J.

This is an appeal with leave obtained from an order of the District Judge dated 25.11.81 permitting an amendment sought by the plaintiff to his plaint. The plaint has been filed to institute action for the

ejection of his tenant (defendant) from the premises described therein on the ground of the premises being reasonably required by him for occupation as a residence for himself and members of his family. This ground is founded on s.22(2)(b) of the Rent Restriction Act No. 7 of 1972 (Act). It is dated 20th February 1980. Before the action was ripe for trial the Act was amended in many of its provisions by the Rent (Amendment) Act No. 55 of 1980 (Amending Act) which became operative on 12th December 1980. The provision in the Amending Act directly related to this appeal is s.21(1). This provision empowers a plaintiff who has filed an action for ejection of his tenant from any premises under s.22(2)(b), as the plaintiff in this appeal has done, if the action is pending, as this action is, to apply to amend the plaint if he seeks to rely on a new ground of ejection specified in the new sub-section 22(2)(bb)(i)(ii) enacted in the Amending Act. For completeness I will quote the new sub-section 22(2)(bb)(ii):-

“(bb):- In case of premises let to a tenant whether before or after the date of commencement of this Act and where the landlord is the owner of not more than one residential premises,

(ii) the landlord of such premises has deposited prior to the institution of such action or proceedings a sum equivalent to 5 years' rent with the Commissioner of National Housing for payment to the tenant: or;”

The plaintiff then sought to rely on s.22(2)(bb) (ii) for the ejection of the tenant. Accordingly he applied to amend his plaint by inserting three paragraphs with the averments necessary to entitle him to seek ejection on that new ground. He, however, sought by his motion for amendment also to delete the existing paragraphs particularly paragraph (3) of the plaint which specified the ground of ejection under s.(22) (2)(b) of the principal Act on which he relied when he instituted the action. Notice was given of the application for amendment to the defendant and an inquiry followed. Counsel for the defendant objected to the deletion of the existing paragraphs, particularly paragraph (3) while not objecting to the insertion of the new paragraph if it was adduced as an addition but not otherwise. His contention *inter alia* was that the deletion of the existing paragraph (3) based on s.22(2)(b) and the substitution of the paragraphs now sought to be introduced would have the effect of introducing an altogether new plaint under cover of an amended plaint. He added that the

amendment introduced a new cause of action comprising a new ground and if the existing cause of action based as it may have been on s.22(2)(b) is deleted, the trial will be on the new cause of action only whereas he has already by his answer pleaded that the plaintiff cannot maintain his action as it stood and that it should be dismissed. After hearing Counsel, the trial Judge permitted the amendment by a brief order which stated that the objections to the amendment are not adequate enough to refuse the amendment sought. That was for introducing the new ground and deleting the existing ground. He permitted the amendment. It is from this order that this appeal has been taken with leave obtained.

The submission is urged for the appellant that the tenants being protected as they are by the Rent Act against eviction a plaintiff can seek ejectment of the tenant only under a limited jurisdiction vested in a Court and that jurisdiction is spelt out in s.22(2) (b) of the Rent Act as far as this plaint is concerned. The plaintiff having invoked that limited jurisdiction when this action was instituted, with the paragraph (3) in the plaint as the ground on which it is founded cannot, by deleting that paragraph and substituting another retain the jurisdiction which this plaint attracted initially. If the paragraph is deleted it is argued, the ground on which the plaintiff was entitled to institute action is eliminated. The plaintiff may be entitled to institute a fresh action on the facts envisaged in the amended provisions of the amending Act but the original action cannot be said to have been instituted on this new ground. So the argument goes. It is also contended that though s.93 of the Civil Procedure Code which regulates amendments to pleadings and processes in an action vests the Court with a discretion to permit or disallow a proposed amendment, this discretion can never be exercised in favour of permitting an amendment which does not relate to allegations of fact necessary to prove the plaintiff's original claim, but introduces a new ground of jurisdiction. In short, what is said is that one can amend the super structure but cannot replace the foundation.

Provisions of the Code relating to amendments are contained particularly in s.93 and s.46. The provision in s.93 merely grants the Court a wide discretion and the limitation to this discretion are to be gathered from judgments. To quote Tambiah, J in *Senanayake v. Anthonisz* 69 - N.L.R. 227,

“ The principles governing the amendment of a plaint have been clearly set out by my Lord the Chief Justice who, after an exhaustive review of all the authorities laid down the following propositions (vide *Daryanani v. Eastern Silk Emporium Ltd* - 64 N.L.R. 529 at 531).

“Two main rules which have emerged from the decided cases are:-

1. the amendment should be allowed, if it is “necessary” for the purpose of raising the real question between the parties; and,
2. an amendment which works an injustice to the other side should not be allowed.”

The first rule is based on the principle that a multiplicity of actions should be avoided. The second rule is based on the ground that where injustice could be caused to the other side by allowing an amendment it should be refused. It is also a cardinal rule that an amendment should not be allowed if the effect of it would be to convert an action of one character into an action of inconsistent character. This principle is deducible not only from the proviso to s.46 of the Civil Procedure Code but is also axiomatic in view of the fact that the function of the pleadings is to clarify the issues so that the real issues between the parties may be tried and not allow parties to sidetrack the real issues by bringing a new action which is inconsistent with the one that is already being brought. This principle is being recognised in a number of cases in Ceylon (vide *Thirumala v. Kulandavelu*-66 N.L.R. 285, *Daryanani v. Eastern Silk Emporium* (Supra), *Wijewardena v. Lenora* 60 N.L.R. 457.)

Assuming then, but without deciding, that the new ground sought to be introduced is so inconsistent with the existing ground of ejection as to amount to a new action, the Court would disallow the new ground sought to be introduced on the principles enunciated in the judgments above cited. But as I have said, the defendant is not objecting to the new paragraphs going in. His objection is to the deletion of the original paragraphs. He wants all paragraphs, that is the existing and the new to stand together. He cannot object to the new paragraphs going in because of the amending Act - s.21. To him it is a virtue of necessity. He would rather have the new

paragraphs out. But he cannot do it because of s.21 of the amending Act. So he strives to retain the existing paragraphs to stymie the plaintiff. The plaintiff argues that he is entitled to have the original paragraph (3) omitted and that the surgery required for this transplanting operation is provided by s.21 of the amending Act. He says he does not seek his amendment under s.93 of the Code. Let me therefore get it out and analyse and examine it:-

“21. (1) — Where any action or proceedings instituted in any court for the ejection of a tenant from any premises under subsection (2)(b) of section 22 of the principal enactment, is or are pending on the day immediately preceding the date of commencement of this Act, the landlord of such premises may, where he seeks to rely on any new ground specified in subsection (2) (bb) of section 22 of the principal enactment, make application to the court to amend the plaint and the court shall, notwithstanding the provisions of any other law, permit the landlord to amend the plaint in such action or proceedings and make such other orders as may be necessary, where the court is satisfied that the landlord has deposited with the Commissioner of National Housing a sum equivalent to five years' rent of such premises to be payable to the tenant thereof, and proceed to hear and determine the action or proceedings on the new ground adduced, and make order in accordance with section 22 of the principal enactment.”

Applying the provisions of this section to the facts of this case:-

- (a) the action has been instituted for the ejection of the defendant-tenant under s. 22 (2)(b) of the Rent Act - Para 3 of the original plaint.
- (b) the action is pending.
- (c) the plaintiff is seeking to rely on s. 22 (2)(bb) (ii) of the Act as amended - para 3 of the motion for amendment dates 26th June 1981.

Section 21 then goes on to enact that (a) where the plaintiff relying on s. 22(2)(bb) makes application for amendment of the plaint (the plaintiff is doing that) the Court *shall* permit such amendment *notwithstanding the provisions of any other law*, (b) and the Court shall make such *other orders* as may be *necessary*. To pause here, beyond permitting the amendment, what other orders are necessary to be made? The meaning of 'necessary' is 'unavoidable'. - See

Shorter Oxford Dictionary. What are the unavoidable *other* orders that the Court has to make after permitting the amendment? In my view it is an order or orders to eliminate the ground under s. 22 (2) (b) which cannot coexist with the new ground as it brings in a totally different and inconsistent set of facts. It is in fact a new action which the Amending Act permits. This is made still more clear when one continues to read the section, for, further down in the section, is the requirement "that where the Court is satisfied proceed to hear and *determine the action on the new ground adduced.*" So that even if nothing is deleted as a result of the amendment, the Court cannot hark back to the original averments in the plaint for what the Court can hear to determine the action is only matters relating to the new ground adduced. The action then is transformed into one resting on the new ground. Since the Court cannot determine the action on anything but the new ground it becomes unavoidable that the original plaint must be replaced in paragraphs insofar as they are a hindrance to the determination of the action on the new ground.

For these reasons we are of the view that this appeal should be dismissed. The appeal is accordingly dismissed with costs.

L.H. DE ALWIS J. – I agree.

Appeal dismissed