PANADURA FINANCE & ENTERPRISES LTD.
v.
PERERA AND ANOTHER

COURT OF APPEAL
WIGNESWARAN, J.,
JAYAWICKREMA, J.
C.A. NO. 821/97 CALA NO. 197/97
D.C. PANADURA NO. 1041/L
APRIL 30, 1998
JULY 2, 1998
SEPTEMBER 1, 1998

Civil Procedure Code – S. 18 – addition of a Party – Res judicata.

Case No. 416/L was instituted by the defendant-respondent against the added defendant-petitioner and the plaintiff-respondent for the cancellation of Agreement No. 420 on the ground of fraud. The case was decided *Ex parte* wherein the Court dismissed the action, on the basis that repayment in terms of the Agreement was not made.

Thereafter, the plantiff-respondent filed the present case against the defendant-respondent and the defendant-respondent moved to add the petitioner as a party which was allowed. It was contended that the decision in 416/L is *res judicata* between the defendant-respondent on the one hand and the plaintiff-respondent and the added defendant-petitioner on the other.

Held:

1. The issue in question is different from the earlier case. The question of constructive trust and laesio enormis were not distinctly raised in issue between the same parties and determined in the earlier case 416/L. Thus, on account of the causes of action being different between the two cases, as well as due to the added defendant petitioner not filing an answer and not participating in the earlier suit 416/L and for the reason that the ground of dismissal of the earlier action 416/L in any event cannot operate as a bar to a second action claiming the same relief.

2. The claim of constructive trust and claim of laesio enormis raised by the defendant-respondent are not against the plaintiff-respondent but against the

added defendant-petitioner, thus an opportunity must be given to the added defendant-petitioner to answer such claims.

3. The 1st defendant in that action who is the added defendant-petitioner in this case, did not file an answer, the matter in issue between the defendant-respondent and the added defendant-petitioner remains unresolved upto date.

4. In the context of the alleged fraud remaining unresolved against the added defendant-petitioner it is in its best interest to be made a party to this case, to have all matters adjudicated effectually completely and finally.

APPLICATION in Revision from the Order of the District Court of Panadura.

Cases referred to:

1. *Kumarihamy v. Dissanayake* – 37 NLR 345.
2. *The Chartered Bank v. L. N. de Silva* – 67 NLR 135.
3. *Mohamed Cassim v. Sinne Lebbe Marikar et al* – 12 NLR 184.
4. *Perera v. Appuhamy* – 17 NLR 112 at 113.

I. S. de Silva with *Naveen Dissanayake* for the added defendant-petitioner.

Raja Pieris for defendant-respondent.

Ikram Mohamed, PC with *Ms. Shyama* Fernando for plaintiff-respondent.

Cur. adv. vult.

April 01, 1999.

WIGNESWARAN, J.

An order was made by the District Judge of Panadura dated 7. 10. 1997 allowing the application of the defendant-respondent to add Panadura Finance and Enterprises Limited of No. 60, Park Street, Colombo 2, the added-defendant-petitioner abovenamed, as a party to these proceedings under section 18 of the Civil Procedure Code.

The added-defendant-petitioner filed Leave to appeal Application No. 197/97 and Revision Application No. 821/97 against the said order.

It was agreed that this order should apply to both applications.

The grounds enumerated by the added defendant-petitioner which were more or less acquiesced upon by the plaintiff-respondent are as follows:

(i) The issues in the present Case No. 104/L were already decided in DC Panadura case No. 416/L and between the same parties. The two cases being identical in person, thing and cause, they fell within the scope and ambit of the doctrine of *res judicata.*

(ii) Under section 18 (1) of the Civil Procedure Code a person should be added as a party only for the purpose of completely and effectually settling all matters in issue in an action. There is in this instance no need for the added defendant-petitioner to be added as a party since the matters in issue could be completely and effectually settled without adding the said Finance Company.

The plaintiff-respondent in addition made the following submissions:

(iii) Deed No. 420 was executed 10 years prior to the institution of this action and therefore any claim based on deed No. 420 was prescribed.

(iv) The defendant-respondent's plea of *laesio enormis* cannot be maintained since the defendant-respondent was not a party to the said deed.

(v) At most the added-defendant-petitioner could only be an independent witness and not a party to this case. Decisions in *Kumarihamy v. Dissanayake*[1], *The Chartered Bank v. L. N. de Silva*[2] referred to.

All these submissions would now be examined.

Res Judicata

Case No. 416/L was instituted on 17. 7. 1989 by the defendant-respondent against the Added defendant-petitioner and the plaintiff-respondent for the cancellation of Agreement No. 420 dated 18. 02. 1985 on the ground of fraud. It was the contention of the defendant-respondant in that case that her signature was obtained on unfilled

printed forms by the officials of the Panadura Finance and Enterprises Ltd. making her believe that she was placing her signature to a set of guarantee forms for a loan of Rs. 36,000 that was to be granted in the name of her nephew Lalith Chandrasiri Lokuge. Later, she came to know that her signature was obtained to a deed of transfer of her sole ancestral property in favour of the Finance Company and that the latter on the same day entered into an agreement to sell with her nephew in respect of the said property.

She made a complaint to the Police when she came to know of the fraud.

On 20. 3. 1989 the agreement to sell was unilaterally cancelled by deed No. 1116, and by deed No. 1117 on the same day a deed of transfer was written in favour of the plaintiff-respondent. The plaintiff-respondent fully aware of the fraud perpetrated on the defendant-respondent, yet, moved to obtain possession of the said property by extra judicial means since the plaintiff-respondent's husband was a retired senior police officer.

Thereafter, the parties were before the Primary Court of Kesbewa in case No. 40928 and possession was granted to the defendant-respondent pending action in the District Court.

Thereafter, DC Panadura case No. 416/L was filed.

That case was decided *ex parte* wherein the Court dismissed the said action on the basis that repayment in terms of the agreement was not made. Though Notice of Appeal against the said *ex parte* judgment was lodged, Petition of Appeal having not been filed the defendant-respondent forfeited her right of appeal. It appears that the learned District Judge in that case No. 416/L had failed to consider the uncontradicted evidence of the plaintiff in that case and taken a decision presuming the validity of the impugned deed. When fraud was pleaded the Court could not have presumed the validity and applicability of the terms and provisions of the Agreement to sell.

Thereafter, taking advantage of the dismissal of case No. 416/L the plaintiff-respondent filed the present case No. 1041/L against the defendant-respondent. The defendant-respondent moved to add the Panadura Finance and Enterprises Ltd. as a party under section 18

of the Civil Procedure Code. This application was allowed by the learned District Judge by his order dated 7.10.97.

The contention is that the decision in case No. 416/L is *res judicata* between defendant-respondent on the one hand and the plaintiff-respondent and the added defendant-petitioner on the other.

On an examination of the documents and submissions before this Court it is found that the added defendant-petitioner who was the 1st defendant in case No. 416/L abovesaid did not file answer in the said case. In any event the Court had fixed the case for *ex parte* trial against the 1st and 2nd defendants in that case No. 416/L who are the added defendant-petitioner and the plaintiff-respondent respectively, in this case No. 1041/L. Having not participated in the proceedings in the previous case No. 416/L, the added defendant-petitioner and the plaintiff-respondent are taking up the plea of *res judicata* in this case.

In *Mohamed Cassim v. Sinne Lebbe Marickar et al*[3] was held that a judgment dismissing an action for declaration of title to land on the ground that the plaint disclosed no valid cause of action *does not* operate as a bar to a second action for the same relief.

In *Perera v. Appuhamy*[4] at 113 it has held that an *ex parte* decree when final is *res judicata* only so far as the decision necessarily decided an issue.

In the instant case the issue in question is different from the earlier case in any event. The questions of constructive trust and *laesio enormis* were not distinctly raised in issue between the same parties and determined in the earlier case No. 416/L (cf. prayers set out in the answer dated 11.10.1995 filed in this case).

Thus, on account of the causes of action being different between the two cases, as well as due to the added defendant-petitioner not filing an answer and not participating in the earlier action No. 416/L and for the reason that the ground of dismissal of the earlier action No. 416/L in any event cannot operate as a bar to a second action claiming the same relief, we are unable to accept the submission made on *res judicata.*

(ii) *Addition under section 18 (1) of the Civil Procedure Code :*

There is no doubt as stated by the learned District Judge in his order dated 7. 10. 1997, the added defendant-petitioner should be a necessary party to these proceedings for more than one reason.

Firstly, the claim of constructive trust and the claim of *laesio enormis* raised by the defendant-respondent are not against the plaintiff-respondent but against the added defendant-petitioner. Thus, an opportunity must be given to the added defendant-petitioner to answer such claims.

Secondly, the plaintiff-respondent bases her title on a deed executed by the added defendant-petitioner which was subject to an action previously. The 1st defendant in that action who is the added-defendant-petitioner in this case failed to file answer. The matter in issue between the defendant-respondent and the added defendant-petitioners thus remains unresolved upto date. Without that being resolved the plaintiff-respondent has no basis for this action. Hence, the added defendant-respondent must become a party to these proceedings to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the action.

Thirdly, with the added defendant-petitioner and the plaintiff-respondent joining hands as it were to keep the added defendant-petitioner out of this case, the defendant-respondent cannot expect much help from the added defendant-petitioner as a simple witness.

(iii) *Prescription :*

The matter under consideration is whether the added defendant-petitioner has been correctly added as a party to these proceedings. This Court is not called upon to consider the defences that may be taken up by the added defendant-petitioner. Thus, the raising of the question of prescription is premature at this stage.

(iv) *Laesio Enormis :*

The same observation set out under (iii) above applies to this too.

On the other hand the question of *res judicata* was considered above since, if the plea was accepted by this Court, it would have precluded the addition of the added defendant-petitioner. But, the question of Prescription and *Laesio Enormis* are defences to be taken up, if so advised, after being made a party to the case.

(v) *Added defendant-petitioner at most an important witness :*

Added defendant-petitioner is more than a witness in this whole episode. Learned District Judge had no doubt said in his order that its evidence is very important. But, he has also said in the very next *sentence* that without the added defendant-petitioner being made a party the matter would not be justiciable. The relevant words in Sinhala are as follows:

'මේ අනුව විත්තිකාරියගේ උත්තරයේ ඇති හිමිකම් පෑම සලකා බැලීමට නම් පානදුර පිනෑන්ස් සමාගමේ සාක්ෂිය වැදගත් වන බව මෙම අධිකරණයේ නිගමනයයි. අනික් අතට යම් හෙයකින් එවැනි නිගමනයකට එළඹීමට අධිකරණයට සිදු වුවහොත් පානදුර පිනෑන්ස් සමාගමෙන් කරණු නොවිමසා එවැනි නිගමනයකට එළඹීම අසාධාරණ බව මෙම අධිකරණයේ නිගමනයයි.'

Thus, there is no doubt that the order dated 7.10.97 has been correctly made. Further, in the context of an allegation of fraud remaining unresolved against the added defendant-petitioner it is in its best interest to be made a party to this case to have all matters adjudicated upon effectually, completely and finally.

We, therefore, confirm the order dated 7. 10. 97 of the District Judge of Panadura and dismiss the Revision Application No. 821/97 and refuse to grant leave in C.A.L.A. No. 197/97 and dismiss same too. The added defendant-petitioner and the plaintiff-respondent shall *each* pay Rs.10,500 as costs of these two applications to the defendant-respondent (in all Rs. 21,000).

JAYAWICKREMA, J. – I agree.

Application dismissed.