

**EDIRISINGHE**  
**v.**  
**WIMALAWARDANE AND ANOTHER**

COURT OF APPEAL  
AMARATUNGA, J. AND  
BALAPATABENDI, J.  
CALA NO. 186/02  
DC COLOMBO NO. 19046/L  
AUGUST 15 AND 16, 2002

*Civil Procedure Code, section 35 (1) – Leave of court sought to join 2nd cause of action with 1st cause of action – Refusal on the ground of belatedness.*

**Held:**

- (1) The object of the Civil Procedure Code is to prevent civil proceedings from being frustrated by any kind of irregularity or lapse which has not caused prejudice or harm to a party.
- (2) The two claims urged by the petitioner in the plaint could be tried in law in the same action under section 35 (1) to avoid a multiplicity of actions.
- (3) The application even belated, would not cause grave prejudice to the respondents if the application was allowed.

"Rules of procedure have been designed and formulated to facilitate due administration of justice".

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

**Cases referred to :**

1. *Distilleries Co., Ltd. v. Kariyawasam* – (2001)3 Sri LR 119.
2. *Velupillai v. The Chairman, District Council of Jaffna* – 39 NLR 464.
3. *Appuhamy v. Dionis* – 12 NIR 382.

*Ranjan Suwandarathne* for petitioner.

*S. Mithakrishnam* for 2nd defendant-respondent.

*Cur. adv. vult.*

November 29, 2002

**BALAPATABENDI, J.**

The plaintiff-petitioner (hereinafter referred to as the petitioner) by <sup>01</sup> the plaint dated 17. 10. 2000 instituted an action in the District Court on two causes of action and prayed in the prayer :

- (a) for a declaration of title to the land morefully described in the Schedule to the plaint, and
- (b) for a declaration that the 1st and 2nd defendant-respondents (hereinafter referred to as respondents) do not get any right, title or interest to the land (referred to in the Schedule to the plaint) by virtue of deed of declaration bearing No. 95 and / or by the transfer deed No. 11846.

In paragraph 13 of the plaint and in paragraph 3 of the prayer <sup>10</sup> to the plaint the petitioner had urged and sought *leave of court* to join the 2nd cause of action / claim with the 1st cause of action / claim in the same action under the provisions of section 35 (1) of the Civil Procedure Code.

On 29. 01. 2001 the 2nd defendant-respondent and on 13. 03. 2002 the 1st defendant-respondent had filed their answers.

In their answers they have *inter alia* denied paragraph 13 of the plaint, and also averred that as the plaintiff had failed to obtain leave of court under the provisions of section 35 (1) of the Civil Procedure Code to join the two claims in the same action, the two causes of <sup>20</sup> action mentioned in the plaint were misconceived in law, and therefore, the plaint should be dismissed.

The petitioner had filed the replication also *inter alia* praying again to seek leave of court to join both claims in the same action.

When the case was called to fix for trial on 10. 05. 2002, the counsel for the petitioner made an application to court, to obtain leave, to join the two claims in the same action under the provisions of section 35 (1) of the Civil Procedure Code, to which the respondents objected on the basis that, *the application of the petitioner was belated.*

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The learned District Judge after hearing both sides, refused and rejected the application of the petitioner on 10. 05. 2002. This appeal was preferred against that order.

Section 35 (1) of the Civil Procedure Code states that: "In an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the 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.*

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According to the above-mentioned section 35 (1) it is apparent that, in an action for recovery of immovable property or to obtain a declaration of title to an immovable property, the leave of court should be obtained, to join the second cause of action or claim, except claims mentioned in subsections (a), (b) and (c) of the provisions of section 35 (1).

In the answers filed by the 1st and 2nd respondents, it is manifest that the respondents while denying the title of the petitioner to the land in dispute, they have asserted prescriptive rights to the land.

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The 1st respondent had executed a deed of declaration (deed No. 95) on the prescriptive rights that he asserts to have acquired

to the land and had transferred his rights, title and interest of the said land to the 2nd respondent by the deed of transfer No. 11846.

On a careful perusal of the answers of the respondents, it is obviously clear that, they have answered to both claims or causes of action disclosed, in the averments to the plaint.

The only objection taken by the respondents to the application of the petitioner made under the provisions of section 35 (1), was that, *it was a belated application.* 60

The point in issue to consider in this case was, whether the application made by the petitioner on the date the case was called to fix for trial (even belated) would cause grave prejudice to the respondents, if the application was allowed?

As stated above, the respondents were confronted with both claims or causes of action urged by the petitioner in the plaint and they had answered every averment in the plaint, and also stated their case in the answers filed. Also the two claims urged by the petitioner in the plaint could be tried in law in the same action under the provisions of section 35 (1) of the Civil Procedure Code, to avoid multiplicity of actions. 70

The object of civil procedure is to prevent civil proceedings from being frustrated by any kind of technical irregularity, or *lapse which has not caused prejudice or harm to a party.* (*vide* the decision of *Distilleries Co., Ltd. v. Kariyawasam*<sup>(1)</sup>).

In the same case Nanayakkara, J. said that :

As Chief Justice Abraham remarked in the case of *Velupillai v. The Chairman, District Council Jaffna* that "*the Court of law is a Court of Justice and it is not an academy of law should be always uppermost in one's mind. The court should not approach the task of interpretation of a provision of law with excessive formalism and technicality. The Code of Civil Procedure provides* 80

*a series of rules designed to facilitate the orderly and impartial conduct from the stage of drafting of the pleadings until the judgment and execution of decree. Therefore, the rules of procedure have been designed and formulated to facilitate due administration of justice".*

On a consideration of all the facts and circumstances of this case, <sup>90</sup> I am of the view that the interests of justice demands that leave of court should be granted, to join the two claims or causes of action in the same plaint as filed by the petitioner.

No prejudice will be caused to the respondents, even though the application made under section 35 (1) by the petitioner was belated. In *Appuhamy v. Dionis*<sup>(3)</sup> Middleton, J. observed that : *According to the provisions of section 35 and the example thereto, the Judge, no doubt, was strictly right, but the provisions of our Code to be found in section 46 show that the presentment of a plaint is subject to the approval of the Judge, and his reception of the plaint in this case <sup>100</sup> was tacit waiver of the terms of section 35. It seems to me, therefore, that it was a case in which the Judge might well have exercised his discretion, and have made the order requisite under section 35 at a later period in the action. I think, therefore, that we, on the grounds given by my lord of convenience and for the avoidance of the multiplicity of actions, should now make the order which the Judge declined to make.*

For the aforesaid reasons, I set aside the order made by the learned District Judge on 10. 05. 2002, and direct the learned District Judge to permit the plaintiff-petitioner to proceed on both causes of action <sup>120</sup> and consider both reliefs claimed under section 35 (1) of the Civil Procedure Code in the plaint already filed.

The appeal is allowed. No costs.

**AMARATUNGA, J.** – I agree.

*Application allowed.*