ROHANA
v.
SHYAMA ATTYGALA & OTHERS

COURT OF APPEAL.
WEERASURIYA, J.,
KULATILLEKA, J.
CA NO. 1169/98.
DC COLOMBO NO. 16155/L.
MAY 21, 1999.

Civil Procedure Code – SS. 18, 21, 93 (2) – Addition of parties – Delay – Discretion – Due diligence.

The plaintiff-petitioner instituted the above styled action and sought a declaration for a right of way, over lot 10, for a demolition order to demolish all structures constructed on the said road reservation. The position of the 1st defendant-respondent was that the said lot 10, is not a road reservation. Commission was issued to ascertain whether there are structures on the road reservation (lot 10). After the Commissioner returned his Commission on 18.10.93 application was made to add 2nd and 3rd respondents, and the said application was allowed. At the trial when the plaintiff was being cross-examined an application was made on 29.7.98 to add the 4th and 8th respondents. This was disallowed by court.

On appeal –

Held:

(1) So long as the Court has exercised its discretion judicially an appellate court would not disturb and interfere with such an order.

(2) Plan and the Report were tendered to court on 16.10.93. The plaintiff-appellant's failure to act upon the report tendered to court by the Commissioner as far back as 16.10.93 until 29.7.98 is indicative of the absence of due diligence on his part.

(3) The conclusion arrived at by the learned trial Judge is a justifiable conclusion because it is a well-established rule of practice that an amendment which works an injustice to the other side should not be allowed.

(4) Further, the application to add the 4th and 8th respondents-respondents as defendants was made 4 years and 5 months after the plaintiff-petitioner

became aware that there had been a number of structures obstructing the alleged road reservation. The need for the amendment did not arise unexpectedly.

(5) S. 18 – CPC, the words "the Court may . . . in such terms as the Court thinks just . . .", creates a discretionary power which must be exercised according to the principles applicable to the exercise of such a power.

APPEAL from the order of the learned District Judge, Colombo.

Cases referred to:

1. *Colombo Shipping Co., Ltd. v. Chirayu Clothing (Pvt) Ltd., [1995]* 2 Sri LR 97, 102.
2. *Roberts v. Hopwood* – 1925 AC 578 at 613.
3. *Wijewardena v. Lenora* – 60 NLR 457 at 463.
4. *Lulu Balakumar v. Balasingham Balakumar* – SC Appeal No. 125/94. CA No. 58/84, DC 16211/D – CAM 11.9.1995.
5. *Daryanani v. Eastern Silk Emporium Ltd.* – 64 NLR 529 at 531.

M. L. M. Hidayatulla with *Upali Wijeratne* and *S. Bavrie* for plaintiff-petitioner-petitioner.

Ikram Mohamed, PC with *Hemantha Situge* for 1st defendant-respondent.

Ranjan Suwandaratne for 2nd and 3rd defendant-respondents.

Cur. adv. vult.

December 6, 1999.

KULATILAKA, J.

The plaintiff-petitioner instituted these proceedings in the District Court of Colombo in case No. 16155/L seeking, *inter alia,* the following reliefs:

(*a*) for a declaration that the road reservation depicted as lot 10 in plan No. C/47 dated 25.1.1971 made by M. S. Ranathunga, Licensed Surveyor, as a right of way.

(*b*) for a demolition order to demolish all structures constructed on the said road reservation, and

(c) for a declaration that the plaintiff-petitioner has a right to use the said road reservation as a right of way.

On 17.3.1993 the 1st defendant-respondent-respondent filed her answer and averred that lot No. 10 in plan No. C47 is not a road reservation. Thereafter, on an application preferred by the plaintiff-petitioner a commission was issued by the court to ascertain whether there are structures on lot No. 10 in plan No. 47C. The Commissioner had tendered his report to court marked as 'D' on the 18th of October, 1993. Thereupon, the plaintiff-petitioner made an application in terms of section 18 of the Civil Procedure Code to add the 2nd and the 3rd defendants-respondents-respondents as defendants in the case which application was allowed by the learned trial Judge.

Thereafter, the case had come up for trial on several dates and the plaintiff whilst being cross-examined admitted that there were several structures constructed by others on the alleged right of way and that those structures were shown in the Commissioner's report and plan.

On 29.7.1998 an application was made to add the 4th to 8th respondents-respondents as defendants. This application was objected to by the 1st defendant-respondent-respondent and parties had tendered their respective written submissions to court. The learned trial Judge having considered the written submissions tendered by the parties made order dated 22.9.1998 disallowing the application. By this appeal the plaintiff-petitioner is seeking to impugn the learned District Judge's order.

Point raised and urged by the learned counsel who appeared on behalf of the plaintiff-petitioner is that the learned trial Judge has failed to appreciate the objectives of section 18 of the Civil Procedure Code and thereby erred himself in law. Counsel referred to the fact that section 18 of the Civil Procedure Code provides for parties improperly joined to be struck out and also for the addition of parties.

Counsel submitted that an application under section 18 to have a person added as a party can be made at any time in order to enable court effectually and completely to adjudicate upon and settle all the

questions involved in that action. He contended that in this case the learned trial Judge has failed to exercise the discretion given to him in terms of this section judicially.

On a careful scrutiny of the order we find that the learned District Judge has observed in his order that in the plan and report dated 27.9.93 tendered to court by Licensed Surveyor Saliya Wickremasinghe, he had depicted and described the obstructions to the alleged road reservation and as such the plaintiff had all the opportunity to be aware of the necessary parties and to take steps in terms of section 18 of the Civil Procedure Code at that point of time. The learned Judge has held that by waiting so long a period of time until 4.3.98 to make an application to add the 4th to the 8th respondents-respondents, he becomes guilty of laches and that if the application was to be allowed by court it would cause irremediable loss to the defendants. It appears that the learned Judge was conscious of the judgment of Ranaraja, J. in *Colombo Shipping Co., Ltd. v. Chirayu Clothing (Pvt) Ltd.*[1] where he expressed the view that sections 18, 21 and 93 (2) of the Civil Procedure Code have to be read together in allowing or refusing an application made in terms of section 18 of the Civil Procedure Code.

The words "The Court may . . . in such terms as the court think just" in section 18 create a discretionary power which must be exercised according to the principles applicable to the exercise of such a power. Vide *Roberts v. Hopwood*[2] at 613. So long as the court has exercised its discretion judicially this court sitting in appeal cannot and will not disturb and interfere with such an order. On the other hand, this court may do so if it appears that some error has been made in exercising the discretion and that the Judge has acted illegally, arbitrarily or upon a wrong principle of law. This principle of law is embodied in the decision of Basnayake, J. in *Wijewardane v. Lenora*[3] at 463.

One of the reasons adduced by the learned District Judge in refusing the application is that the petitioner had been guilty of laches. Leave apart the period of time that had elapsed, it is pertinent to consider whether the need for amendment arose unexpectedly. Vide the decision of Justice Fernando in *Lulu Balakumar v. Balasingham Balakumar*[4].

We reiterate the fact that the plan and the report of the Commission issued by court had been tendered to court on 16.10.93 on which date the plaintiff was made aware of the obstructions to the alleged road reservation in respect of which he was asking for a declaration. The application to add the 4th to the 8th respondents-respondents as defendants was made on 30.3.98, 4 years and 5 months after the plaintiff-petitioner bacame aware of the fact that there had been a number of structures obstructing the alleged road reservation. Therefore, we are of the considered view that in this case the need for amendment did not arise unexpectedly. Therefore, we do not see any reason to interfere with the learned Judge's finding that the plaintiff-petitioner was guilty of laches.

The other ground relied upon by the learned Judge in refusing the application was that if the application to add the 4th to the 8th respondents as defendants in the case after a lapse of 5 years and 5 months from the date of the institution of the action was allowed it would prolong the case and thereby would cause irremediable loss to the defendants. We hold that this conclusion arrived at by the learned Judge is a justifiable conclusion because it is a well-established rule of practice that an amendment which works an injustice to the other side should not be allowed. Vide the decision by Sansoni, J. in *Daryanani v. Eastern Silk Emporium Ltd.*[5] at 531.

Further, we observe that the plaintiff-petitioner's failure to act upon the report tendered to court by the Commissioner as far back as 16.10.93, until 29.07.98 is indicative of the absence of due diligence on his part.

In the circumstances, we see no merit and substance in the submissions advanced by the learned counsel for the plaintiff-petitioner. Hence, we dismiss the appeal with costs.

WEERASURIYA, J. – I agree.

Appeal dismissed.