
**NIMALRAJ
VS.
THARMARAJAH AND OTHERS**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA)
WIMALACHANDRA, J.
CA LA 23 1200/2004.
DC MT. LAVINIA 1061/98/L.
JUNE 29th, 2005.

Civil Procedure Code - amended by Act, section 9 of 1991-section 18, section 21, section 93 (2)-Addition of a party - Opting to file replication - No steps taken to comply with section 21-Application to amend plaint - Laches.

The Plaintiff-respondents instituted action against the 1st respondent and 2nd defendant-respondents seeking a declaration of title to the property in question. The 3rd defendant was added as a party subsequently. No steps were taken by the plaintiffs under section 21, and without filing an amended plaint proceeded to file a replication. After 3 days of trial, the plaintiffs-respondents moved to amend the plaint, the trial Judge permitted the amendment. The defendant-petitioner contended that the order was erroneous in the face of the mandatory provisions contained in section 93 (2) and section 21.

HELD :

- (1) The application to amend the plaint was clearly a belated application made after three trial dates - section 93 (2) would become operative and applicable.
- (2) There are two limbs in section 93 (2) and the two ingredients are separate and distinct requirements and a party seeking to amend the pleadings after the first date of trial should establish the existence of both ingredients.
- (3) In the instant action the plaintiff-respondents are clearly guilty of laches. The proposed amended plaint was filed nearly 2 years after the 3rd defendant-petitioner was added as a party.

Per Somawansa, J. (P/CA) :

"Where a defendant is added in terms of section 18, depending on the facts and circumstances of each case the provisions of section 21 only or provisions of section 21 read with section 93 of the Code would apply-in the instant case, certainly in view of the facts and circumstances the provisions of section 93 (2) could also apply".

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia.

Cases referred to :

- (1) *Atalugamage Herath Prasanna Silva vs John Arul Rajah* - CALA 41/2001 -DC Colombo 17771/L-CA M 27.06.2002.
- (2) *Arudiappam vs The Indian Overseas Bank* - 1995 2 SRI LR 131
- (3) *Paramalingam vs Sirisena and Another* - 2001 2 SRI LR 239
- (4) *Ceylon Insurance Co. Ltd vs Nanayakkara* - 1993 3 SRI LR 50

Ranjan Suwandaratne with Ranjan Perera for 3rd defendant - petitioner
J. D. Kahawithana for plaintiff-respondent.

Cur. adv. vult.

November 25, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking leave to appeal from an order made by the Additional District Judge of Mt. Lavinia dated 14.01.2004 over-ruling the objection taken by the 3rd defendant-petitioner to the acceptance of an amended plaint and accepting the same and if leave is granted to set aside the aforesaid order impugned by the 3rd defendant-petitioner and to refuse the plaintiffs-respondents' belated application to amend the plaint.

As per minute dated 31.08.2004 leave to appeal has been granted on the following question of law :

“When a defendant is added in terms of section 18 of the Civil Procedure Code what is the provision of the Code which is applicable to the amendment of the plaint? In such a situation is the plaintiff required to satisfy Court of the existence of the conditions laid down in section 93(2) of the Code before he is allowed to amend the plaint or can the plaintiff, without satisfying the conditions laid down in section 93(2), amend the plaint by virtue of the right conferred on him by section 21 of the Code ?

When the appeal was taken up for argument both parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submission. However prior to the consideration of the aforesaid questions of law it would be pertinent to ascertain the relevant facts which culminated in the learned Additional District Judge making the impugned order.

The plaintiffs-respondents instituted the instant action against the 1st defendant-respondent and the deceased 2nd defendant seeking a declaration of title to the subject matter of this action and ejection of the defendants and those holding under them and for recovery of damages. The defendants in their answer pleaded that their son-in-law Nimalarajah who was subsequently added as the 3rd defendant-petitioner is the lawful tenant of the premises in suit since 1991 and that the 1st defendant-respondent and the deceased 2nd defendant who is the wife of the 1st defendant-respondent are holding under the tenant the 3rd defendant-petitioner as his agent or licensees in the said premises, that in the year 1994 the son-in-law and the daughter left to the United Kingdom

and are resident there and that the 1st defendant-respondent has been duly appointed as the power of Attorney holder of the aforesaid Nimalraj. They further pleaded that the 1st Plaintiff-respondent has agreed with the said Nimalraj to sell the premises in suit as per agreement marked X and the said Agreement and the 1st plaintiff-respondent in violation of the said agreement failed and neglected to transfer the premises in suit and in the premise prayed for a dismissal of the action and also moved to add the aforesaid Nimalraj as a party defendant to the instant action on the basis that he is a necessary party for the full and final adjudication of the dispute.

However Nimalraj was not added as a party and after the commencement of the trial and the recording of issues on an application of the aforesaid Nimalraj he was added as the 3rd defendant to the instant action as per order dated 15.06.2001. It appears that although Nimalraj was added as 3rd defendant the plaintiffs-respondents totally failed to take steps in terms of mandatory provisions contained in section 21 of the Civil Procedure Code. Be that as it may, after the 3rd defendant-petitioner was added as a party he filed answer disclosing matters pertaining to his tenancy and the agreement to sell the property in suit and moved for a dismissal of the plaintiffs-respondents' action and also claimed in reconvention for a declaration that the 3rd defendant-petitioner is the lawful tenant of the premises in suit and is entitled to remain in occupation of the premises in suit and for an order directing the plaintiffs-respondents to pay a sum of Rs. 3.5 million together with legal interests from the year 1995 to the 3rd defendant-petitioner and also claimed the right to retain possession until the payment of the aforesaid amount. Thereafter the plaintiffs-respondents without filing an amended plaint in terms of Section 21 of the Civil Procedure Code proceeded to file a replication on 1st February 2002 and the case was fixed for trial for the first time

thereafter for 4th June, 2002. After three postponements of trial when the case was taken up for trial on the March 2003 certain objections were raised by the counsel for the 3rd defendant-petitioner and counsel for the plaintiffs-respondents obtained a date to consider whether the plaint should be amended. Thereafter on or about 02.04.2004 plaintiffs-respondents sought to amend the plaint. The 3rd defendant-petitioner objected to the application made on behalf of the plaintiffs-respondents to amend the plaint and after the conclusion of the inquiry into these objections taken by the 3rd defendant-petitioner the learned Additional District Judge permitted the amendment of the plaint and it is from this order that the 3rd defendant-petitioner has preferred this appeal.

It is contended by counsel for the 3rd defendant-petitioner that the order dated 14.01.2004 made by the learned Additional District Judge of Mt. Lavinia is completely erroneous on the face of the mandatory provisions contained in Section 93(2) and Section 21 of the Civil Procedure Code and the order should necessarily be set aside. Further it is argued by counsel for the 3rd defendant-petitioner that the plaintiffs-respondents are guilty of laches and should suffer the consequences of their laches and negligence in prosecuting the instant action and there is no basis to condone such a blatant and apparent laches and to permit the aforesaid extremely belated amended plaint. I would say I am impressed with these matters raised by counsel for the 3rd defendant-petitioner for there is blatant and apparent laches on the part of the plaintiff-respondent in applying to amend the plaint.

At this point, it would be useful to refer to the sections of the Civil Procedure Code which are relevant to the issue at hand.

Section 18(1) "The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.

(2) Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added the added party or parties shall be named, with the designation "added party" in all pleadings or processes or papers entitled in the action and made after the date of the order".

Section 21 "Where a defendant is added, the plaint shall, unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants".

93(2) "On or after the day first fixed for the trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches".

It is contended by counsel for the plaintiffs-respondents that Sections 18 and 21 are time tested provisions of the Civil Procedure Code on which there is a plentitude of judgments and judicial dicta which have become an important part of our law. What is more important is that Section 21 is a special provision of law, dealing with a particular situation, that is an amendment consequent upon an order for addition under section 18. In every sense, it is a special and particular legislative provision.

Section 93(2) of the Civil Procedure Code, covers amendment to pleadings in general and is clearly a general enactment. The amending Act No. 9 of 1991 which brought in Section 93(2) does not expressly amend either Section 21, which stands as it stood all these years. It cannot be contended that Section 21 has been by implication varied or restricted by the general enactment of 93(2). Thus, he submits that the special provision in Section 21 read with Section 18 cannot be affected or varied or restricted by a general enactment as authoritative statements of the rule *generalia specialibus non derogant*.

In this respect counsel has made reference to quotations from Halsbury 4th Edition Vol. 44 paragraph 875. Caries on Statute Law 7th Edition page 222 also 5th Edition page 349. Maxwell on the Interpretation of Statutes 12th Edition page 196. However in view of the facts and circumstances of this case, I am unable to agree that the aforesaid rules of interpretation would be applicable to the issue at hand for the simple reason that after the 3rd defendant-petitioner was added as a party the plaintiffs-respondents for reasons best known to them without complying with the mandatory requirements in section 21 has opted to file a replication and thereafter proceed to trial.

Counsel for the plaintiffs-respondents further submits that the 3rd defendant-petitioner having secured his addition as a party, ostensibly to enable Court to effectually and completely adjudicate upon and settle all the questions involved in the action, and having made a very substantial counter claim, the 3rd defendant-petitioner is now seeking to undermine the letter and the spirit of Section 18 of the Civil Procedure Code by opposing the amendment of the plaint.

He further submits that if the plaint is not amended the plaintiffs-respondents will not be able to get a binding judgment against the 3rd defendant-petitioner or seek the ejection of the 3rd defendant-petitioner and recover damages from him. This is exactly what the amendment in the plaint of the plaintiffs-respondents marked "G1" accepted by the original Court has sought to achieve. This relief was particularly important because the other defendants in their answer claim to occupy under the 3rd defendant-petitioner.

However if the amended plaint is not accepted and in the event of the plaintiffs-respondents being successful in the District Court action, they will have to file another action to seek the said relief from the 3rd defendant-petitioner, thereby leading to multiplicity of actions and defeating the very objective of Section 18.

In this respect he refers to the decision of an unreported case of *Atalugamge Herath Prasanna Silva vs. John Arul Rajah*⁽¹⁾ wherein Nanayakkara J. held :

"Having granted permission to the plaintiff to add the new owner of the property in suit, as a party, can the court prevent the plaintiff from taking the next logical

step of amending the plaint? Once a party is added next inevitable and logical step would be an amended plaint.

Therefore all the argument advanced on the basis of section 93(2) of the Civil Procedure Code would be rendered futile in the circumstances when the facts and circumstances of the case are also examined it becomes evident that the addition of a new owner of the property in suit as a party and also an amendment to the plaint resulting from such addition would be vital to the proper and complete effectual determination of the issue involved in this case."

However the Judge according to the photo copy of that judgment annexed to the written submissions of the plaintiffs-respondents the order for the adding a new party had been made on 18.02.2001 while the order for rejecting the amended plaint is dated 23.01.2001. Facts in that case appears to be misleading.

Be that as it may, in the instant action the facts and circumstances does not warrant the application of any of the rules of interpretations or decisions referred to by counsel for the plaintiffs-respondents for the simple reason that the plaintiffs-respondents had purposely not complied with the mandatory provisions of Section 21 of the Civil Procedure Code but had opted instead to file a replication and proceed to trial. I might also say that the facts and circumstances in the instant action clearly warrants the application of provisions contained in section 93(2) for as already stated by order dated 15.06.2001 the 3rd defendant-petitioner was added as a party defendant. However the plaintiffs-respondents for reasons best known to them did not take steps to comply with the mandatory provisions of Section 21 of the Civil Procedure Code. In November

2001 the 3rd defendant-petitioner filed his answer with a counter claim and on or about 1st February 2002 the plaintiffs-respondents filed replication but did not seek to comply with the provisions of Section 21 of the Civil Procedure Code. Thereafter the trial was fixed for 10.07.2002 and was postponed for 06.11.2002 and again postponed to 05.03.2003. On 05.03.2003 the 3rd defendant-petitioner objected to any issue being raised against him claiming any relief from him. Thereafter counsel for the plaintiffs-respondents had obtained a date to consider whether the plaint should be amended and on 02.04.2003 a proposed amended plaint was filed nearly 2 years after the 3rd defendant-petitioner was added as a party.

On a consideration of facts and circumstances of this case the aforesaid application to amend the plaint was clearly a belated application made after three trial dates and thus provisions of Section 93(2) would become operative and applicable. Undoubtedly the plaintiffs-respondents are guilty of laches in prosecuting this action and the said laches cannot be condoned or excused by any means.

It is to be seen that there are two limbs in Section 93(2) that needs consideration.

- (I) The party seeking the amendment should satisfy Court for the reason to be recorded by the Court that a grave and irremediable injustice will be caused if such amendment is not permitted.
- (II) The party seeking to amend the pleadings should not be guilty of laches.

These two ingredients are separate and distinct requirements and a party seeking to amend the pleadings after the day first fixed for trial should establish the existence of both these ingredients. Thus in the instant action the plaintiffs-respondents are clearly guilty of laches in prosecuting this action and the plaintiffs-respondents have not up to date given any explanation for the belatedness of this application and there is nothing to indicate that they occurred beyond the control of the plaintiffs-respondents.

For the foregoing reasons, I would hold that the order of the learned Additional District Judge is erroneous and should necessarily be set aside. The plaintiffs-respondents who apparently are guilty of laches should suffer the consequences of these laches and negligence in prosecuting the instant action and there is no basis to condone such blatant and apparent laches and permit the extremely belated amended plaint.

In the case of Arudiappan vs. Indian Overseas Bank⁽²⁾

"The amendments contemplated by Section 93(2) are those that are necessitated due to unforeseen circumstances. Laches does not mean deliberate delay, it means delay which cannot be reasonably explained. The plaint was filed in July 1988, the amendment was sought in September 1994. No explanation was forthcoming from the respondent for the delay. Such a delay in seeking amendment of pleadings of the 5th day of trial cannot be countenanced".

In the case of Paramalingam vs. Sirisena and Another⁽³⁾

Per Wigneswaran, J (P/CA)

“Indeed in this case injustice may be caused to the plaintiff respondent by the non-allowing of the new amended plaint in that a plea of *res judicata* might be raised in a subsequent action since the added defendant had been named in this case though relief not claimed - but to allow amendments which are necessitated by the carelessness and negligence of the plaintiff-respondent himself or his lawyers would be to perpetrate and perpetuate such careless and negligent behaviour by litigants and their lawyers despite the amendment brought to section 93.

Laches means negligence of unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent.

P was known to claim title to the subject matter, when this case was first filed-not against P but against another-original defendant, despite an amendment no reliefs were claimed against P. Thereafter there had been undue delay in applying for amendment which was done only after issues were framed, and on the second date of trial”

Ceylon Insurance Co. Ltd., vs. Nanayakkara ⁽⁴⁾

“The plaintiff-respondent instituted action against the defendant-petitioner claiming a certain sum due on a contract of insurance. The defendant disclaimed liability.

Trial commenced on 28.07.1995 after recording issues, it was postponed for 16.10.1995. On this date certain objections were taken and when the trial resumed again on 9.1.97 a trial *de novo* was ordered on 13.05.97. On 7.5.97 the plaintiff sought to amend his pleadings, which was allowed by Court.

Weerasuriya, J held that,

1. Section 93(2) prohibits Court from allowing an application for amendment, unless it is satisfied that grave and irreparable injustice will be caused if the amendment is not permitted and the party applying has not been guilty of laches.

The Court required to record reasons for concluding that both conditions referred to have been satisfied.

2. The application to amend by pleading mistake or inadvertence can in no sense be regarded as necessitated by unforeseen circumstances. The plaintiffs' conduct point to one conclusion, *viz* that they have acted without due diligence, this error could have been discovered with reasonable diligence; the need for the amendment did not arise unexpectedly.
3. The plaintiffs had failed to adduce reasons for the delay of over 3 years for making an application to amend the plaint on the basis of a purported mistake by the defendant.
4. Section 80 of the Civil Procedure Code provides for fixing the date of trial, and such date constitutes the day first fixed for trial. The discretion vested in the Judge either to

continue with the trial or to commence proceedings afresh does not affect the nature of the order made under section 80 of the Civil Procedure Code relating to the fixing of the first trial date. The order made fixing the date of trial in terms of section 80 becomes the day first fixed for trial within the meaning of section 93(2) of the Civil Procedure Code.”

For the foregoing reasons, I would answer the questions of law formulated for determination in the following manner :

“Q. When a defendant is added in terms of Section 18 of the Civil Procedure Code what is the provision of the Civil Procedure Code which is applicable to the amendment of the plaint? Depending on the facts and circumstances of each case provisions of Section 21 only or provisions of Section 21 read with Section 93 of the Civil Procedure Code would apply.”

In the instant action certainly in view of the aforesaid facts and circumstances provisions of Section 93(2) would also apply. In the circumstances in considering the aforesaid mandatory provisions of law and the authorities cited above the impugned order of the learned Additional District Judge is per se erroneous in law.

For the foregoing reasons, I would allow the appeal and set aside the order of the learned additional District Judge canvassed in these proceedings and direct the Additional District Judge to proceed to trial on the original plaint filed by the plaintiffs-respondents. The 3rd defendant-petitioner will be entitled to costs of these proceedings fixed at Rs. 10,000/-

WIMALACHANDRA, J. - I agree.

Appeal allowed.