

**THENUWARA
VS
SIMO NONA AND OTHERS**

COURT OF APPEAL,
WIJAYARATNE, J.,
SRI SKANDARAJAH, J.,
CALA 501/2002,
D.C. COLOMBO 19129/L,
FEBRUARY 07,14, 2005.

Civil Procedure Code - S. 93 (2) ; Amendment of Pleadings - Delay - Fraud - New S. 93 (2) Material Change in scope of action-Different and inconsistent character.

The 1st to 3rd plaintiffs-respondents instituted action against the defendant-appellant on the basis that the defendant-appellant who is the widow of the 1st plaintiff's son was a licensee of the premises and she wrongfully continues in occupation after termination of the licence. The defendant-appellant in her answer dated 08.11.2002 claimed compensation for bona fide improvement and jus retentionis pending payment of same.

On the 2nd date of trial, the defendant-appellant moved to amend the answer by pleading alleged fraud in the matter of the deed said to be executed in favour of the 1st plaintiff by her deceased husband who was the father in law of the defendant-appellant. The position of the defendant-appellant was that she came to know of the fraud on 13.09.2000. The plaintiff objected to the amendment, which objection was upheld by the District Judge.

HELD:

- (i) Amendment of the answer based on facts or grounds known to the defendant-appellant prior to the filing of the original answer cannot in law be allowed.
- (ii) The defendant-appellant has proposed in the amended answer to plead a promise by the 2nd plaintiff to transfer the premises in suit to her by way of dowry which position she has not taken up in her original answer, and she cannot be reasonably expected to say that such a promise was given after her having filed the original answer in this case.
- (iii) The defendant-appellant through amendment of her answer, attempts to convert the character of her answer to a different and inconsistent character.

- (iv) Such amendment cannot be allowed by Court. The Court using its discretion judicially cannot hold that neither the alleged complaint of fraud known to her from the year 2000 nor the so called promise to transfer the premises in suit as dowry were matters that came to her knowledge only after her filing the original answer.

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

Cases referred to

1. *Audiappu vs. Indian Overseas Bank* 1995 2 Sri LR 131.
2. *Hatton National Bank Ltd. Vs. Whital Baustead Ltd.*, 1978-79 2 Sri LR 257.
3. *Mackinon Mackenzie and Co. Ceylon Lts., vs. Grindlays Bank Ltd.* - 1986 2 Sri LR 272.
4. *Senanayake vs. Anthoniusze* - 69 NLR 225.

Kuvera de Zoysa for defendant-appellant.

Saman Dharmapala for 1st to 3rd plaintiff-respondents.

Cur. adv. vult

July 4, 2005.

WIJEYARATNE, J.

The 1st to 3rd plaintiff-respondents instituted the relevant action against the defendant-appellant seeking declaration of title to the premises in suit, for ejection of the defendant-appellant and for recovery of damages in a lump sum of Rs. 700,000 and continuing damages in a sum of Rs. 200/- per day. The action was instituted on the basis that the defendant-appellant who is the widow of the 1st plaintiff's son was a licensee of the premises and she wrongfully continues in occupation after termination of her license. The defendant-appellant in her answer claimed compensation for

bona fide improvements in a sum of Rs. 6,300,000/- and *jus retentionis* pending payment of the same. The 1st-3rd plaintiff-respondents in their replication denied liability to pay any compensation and reiterating their stance of the plaint, joined issue with the defendant-appellant.

The trial on the first day was postponed and on the 2nd date fixed for trial, the defendant-appellant moved to amend her answer by pleading alleged fraud in the matter of the deed said to be executed in favour of the 1st plaintiff by her deceased husband Daniel who was the father-in-law of the defendant-appellant. The plaintiffs objected to the amendment being allowed on grounds of laches as provided in section 93(2) of the Civil Procedure Code. The defendant-appellant argued that she came to know of the fraud on a complaint by a son of the 1st plaintiff herself on 13.09.2000 and hence there was no delay on her part. It is to be noted that the original answer of the defendant-appellant is dated 08.11.2002. The defendant-appellants' own statement indicated that much before her original answer was filed she was aware of this allegation of fraud levelled against the 1st plaintiff-respondent. Then she cannot be heard to say that this is new material she became aware of after the filing of her answer. There is no delay for the defendant-appellant to explain to the satisfaction of the Court.

In the case of **Audiappu vs. Indian Overseas Bank** (1) it was held,

“ the amendments contemplated by section 93(2) are those that are necessitated due to unforeseen circumstances, and not those that could have been foreseen with reasonable diligence.”

Similar view was taken in the case of *Charles vs. Samarasinghe* to the effect that amendment of the plaint arose unexpectedly and as the amendment did not cause prejudice to the defendant, it should be allowed.

In view of the above decisions, the amendment of the answer based on facts or grounds known to the defendant-appellant prior to the filing of the original answer cannot in law be allowed.

However the learned counsel for the defendant-appellant relied on the decisions of **Hatton National Bank Ltd vs. Whittal Bausted Ltd** (2) and **Mackinon Mackenzie and Co. Ceylon Ltd vs. Grindlays Bank Ltd** (3)

and submits the amendment is necessary in order to effectually adjudicate on the dispute between the parties.

Perusal of the original answer and the proposed amendment of the same, discloses the defendant-appellants prayer for the same relief without any change. However, the defendant-appellant has proposed in paragraphs 6, 11 of the amended answer to plead a promise by the 2nd plaintiff to transfer the premises in suit to her by way of dowry, which position she has not taken up in her original answer ; and she cannot be reasonably expected to say that such a promise was given after her having filed the original answer in this case. The defendant-appellant through amendment of her answer, attempt to convert the character of her answer to a different and inconsistent character.

Senanayake vs. Anthoniusze,¹⁹ the rule is that such amendment should not be allowed by Court.

Although the learned District Judge has not adverted to such rules set up by decisions of the Supreme Court and Court of Appeal, what the learned District Judge considered was whether the defendant appellant has explained the delay on her part in giving new material in favour of amendment of answer to the satisfaction of the Court. The Court using its discretion judiciously cannot hold that neither the alleged complaint of fraud was known to her from the year 2000 nor the so called promise to transfer the premises in suit as dowry were matters that came to defendant's knowledge only after her filing the original answer. The learned District Judge has correct and duly considered the relevant matters in terms of the provisions of section 93 (2) of the Civil Procedure Code.

I see no reason to interfere with the same.

The application is dismissed with costs fixed at Rs. 5,000/=

Skandaramajah, j. I agree.

Application dismissed.