

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

**S.C.Appeal No.108/2011
SC (LA) No. SC(HC) LA/47/11**

**Commercial High Court Case No:
HC/(Civil)/105/2002(1)**

J P I Sisira Susantha
Administrator of the Estate of
late,

Mr. J.P.I Piyadasa,
No.170, Inner Flower Road,
Colombo 03.

And now
No. 291/5, 1/1, Edward Avenue,
Colombo 06.

Plaintiff

Vs

1. Indian Overseas Bank Plc
No.139, Main Street, Pettah
Colombo 11.

Defendant

2. Randunu Dissanayakalage
Sarath
Kumara Wijewickrama,
No.295, Hokandara South,
Hokandara.

Added Defendant

AND NOW BETWEEN

J P I Sisira Susantha
Administrator of the Estate of
late,

Mr. J.P.I Piyadasa,
No.170, Inner Flower Road,
Colombo 03.

And now
No. 291/5, 1/1, Edward Avenue,
Colombo 06.

Plaintiff – Petitioner –

Appellant

Vs

1. Indian Overseas Bank Plc

No.139, Main Street, Pettah
Colombo 11.

Defendant - Respondent

2. Randunu Dissanayakalage
Sarath
Kumara Wijewickrama,
No.295, Hokandara South,
Hokandara.

Added Defendant - Respondent

Before: Amaratunga J,
Ekanayake J,
Suresh Chandra J.

Counsel:

S.A. Parathalingam, PC with C.Liyanapatabendi instructed by P.B.
Rajakarunaratne for Plaintiff -Petitioner -Appellant
Harsha Zosa, PC with V. Puvitharan instructed by Murugesu and Neelakandan
for Defendant-Respondent

Argued on : 29.11.2011

Decided on : 05.03.2012

Suresh Chandra J,

This is an appeal against an order of the Commercial High Court regarding an application made by the Appellant to amend the plaint after adding a party. Initially the Appellant as the Administrator of the estate of the late J.P.I.Piyadasa ,instituted action in the District Court of Colombo seeking a declaration that the said J.P.I.Piyadasa was the lawful owner of premises No.432, Sri Sangaraja Mawatha, Colombo 10 which had been advertised for sale by the 1st Respondent, to have the Resolution passed by the 1st Respondent as void and bad in law, for a declaration that Mortgage Bond No.1975 dated 17.11.1982 was void and could not be enforced, to set aside and postpone the sale of the said property which had been scheduled to be sold, an enjoining order and/or interim injunction preventing the auction sale of the said premises. An enjoining order had been issued by the District Court as prayed for by the Appellant. Thereafter the case had been transferred to the Commercial High Court. After an inquiry regarding the extension of the enjoining order, Court had refused to extend same. The 1st Respondent had thereafter sold the property in question by Public Auction and since there were no other buyers the said property was purchased by and vested with the 1st Respondent. Thereafter the 1st Respondent had sold the said premises to the 2nd Respondent. Thereupon the Appellant sought to add the 2nd Respondent as a party to the said action and Court had directed that notice be given to the said Respondent. The 1st Respondent had not objected to the said application to add the 2nd Respondent and the Court had directed the Appellant to amend the caption of the plaint. Thereafter the Appellant had tendered to Court the amended caption together with a motion moving to

amend the plaint. Subsequently, the Appellant had tendered a draft amended plaint and the 1st Respondent had not objected to the amendment of the plaint. However by order dated 13.05.2011 the learned Judge of the Commercial High Court refused to entertain and/or accept the said amended plaint. Being aggrieved by the said order the Appellant filed an application for leave to appeal to this Court and Court granted leave on the following questions of law which were marked as follows in para.22 of the petition of the Appellant:

- (c) In directing the Petitioner to submit facts to establish that irremediable injustice will be caused to the Appellant if such amendment is not permitted and he had not been guilty of laches the learned Commercial High Court Judge was of the view that the Appellant had to comply with the provisions of S.93(2) of the Civil Procedure Code.
- (d) The learned Commercial High Court Judge erred in law in coming to the conclusion that, in the given circumstances of this case, an application to amend the plaint was made after the first date of trial, when in fact the necessity to add the said new party defendant arose subsequent to the resale of the said property in suit and after the said new party defendant became the new purchaser of the land and property in suit.
- (e) After accepting the application to add the new party defendant and after accepting the amended caption, the learned Commercial High Court Judge erred in law in refusing to and/or rejecting to accept the said proposed amended plaint.
- (f) The learned Commercial High Court Judge erred in law in not coming to the conclusion that if the amendment sought for is not granted and the case is not proceeded with as per the said amended plaint, grave and irreparable loss and damage would be caused to the Appellant and to the estate of which he is the Administrator.

The questions of law raised by the Appellant in this case involve a consideration of the law relating to amendment of a plaint. The learned Judge in the course of his judgment referred to the fact that according to S.21 of the Civil Procedure Code, when a party is added that the plaint can accordingly be amended. But having referred to this fact, the learned Judge went on to discuss the effect of S.93(2) of the Civil Procedure Code and stated that when allowing an amendment after the case has been fixed for trial for the first time, that party seeking the amendment has to state to Court that if such an amendment is not allowed that the party is not responsible for undue delay and that serious injustice would be caused if such amendment is not allowed. The learned Judge went on to hold that even if the 1st Respondent had not objected to the amendment, it is the duty of Court to record the reasons for the delay and satisfy Court as required by that section.

The question that arises for consideration is as to whether S.93 was applicable in the special circumstances of the case or whether it is S.21 that applies. It is to be noted that since there was a change of circumstances relating to the case in that the 1st Respondent had sold the property in question to the 2nd Respondent after the enjoining order obtained initially by the Appellant had been dissolved, and since the Appellant was challenging the vesting of the property in the 1st Respondent at the outset itself, it was necessary to bring in the 2nd Respondent as a party to the action. The Court in fact when these matters were brought to its notice had directed the amendment of the

caption but when the Appellant moved to amend the plaintiff had made order refusing same as stated above citing S.93 of the Civil Procedure Code.

S.21 of the Civil Procedure Code states that where a defendant is added, a plaintiff shall, unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaintiff shall be served on the new defendant and on the original defendants.

S.93(2) of the Civil Procedure Code states that on or after the day first fixed for the trial of the action and before the 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.

As stated above the 2nd Respondent was not a party to the original action filed by the Appellant and it was due to the change of circumstances during the pendency of the case that it became necessary to add the 2nd Respondent as a necessary party which would attract the application of S.21 of the Civil Procedure Code. The necessity to add the 2nd Respondent had arisen as the 1st Respondent had sold the property to the 2nd Respondent. A perusal of the draft amended plaintiff filed by the Appellant shows that the Appellant's basis of the plaintiff and its scope had not been changed except for the addition of the 2nd Respondent as a party and the consequential position resulting from the sale of the property by the 1st Respondent to the 2nd Respondent. Although the case had been fixed for trial when the motion to amend the plaintiff was filed, the trial had not commenced. Further the 1st Respondent had not objected to the filing of the amended plaintiff and even when the case was argued before this Court, learned Counsel for the 1st Respondent stated that they were not making any submissions regarding the application of the Appellant seeking leave and the consequential relief from this Court. For a final and proper adjudication of the matter before Court it is necessary that all matters relating to the dispute be placed before Court and therefore the matter relating to the amended plaintiff becomes all the more important to achieve same.

The case of the Appellant had been filed in the year 2001 and had gone on for a considerable period of time without it being taken up for trial due to the various circumstances that had arisen during the pendency of the case. Apparently the learned Judge had been apprehensive of the period involved in making his order as is apparent from the fact that in the course of making his order he has set out the sequence of events that had taken place upto the making of the impugned order. Furthermore the Appellant had taken time to attend to various steps during the pendency of the case which would have contributed to the case going on for such a considerable period of time. It appears to be these factors that would have induced the learned Judge to have recourse to S.93(2) rather than S.21 of the Civil Procedure Code. However, in the interests of justice the proper procedure has to be followed and allowing the amendment of the plaintiff was necessary in those circumstances. The learned Judge of the Commercial High Court by applying S.93(2) to base his order erred in law as the application to amend the plaintiff with the addition of the new party would not come within the purview of S.93(2).

This court observes with much concern the manner in which the parties have proceeded with this action. The Learned Judge of the Commercial High Court has in the process

of giving his order narrated the sequence of events from the inception of this case in the year 2001. He has perused the journal entries and observed that no less than 7 trial dates had gone by upto the year 2006 without the case being taken up for trial. After the change of circumstances namely the sale of the property to a 3rd party in 2006 the Plaintiff had taken an unduly long time to bring the 3rd party in as a Defendant only towards the end of the year in 2008. The Court had observed that as the Plaintiff had not taken any steps for a period of 1 year the Plaintiff had been required to show cause in terms of s.402 of the Civil Procedure Code as to why the action should not be abated. No attempt has been made to comply with that order. However without complying with that order the Plaintiff had moved to issue notice on the party to be added as the 2nd Defendant and several dates had been taken for same. Notice on the new party had been issued on 30th March 2009 and since it has not been possible to serve the notice the Plaintiff had moved to serve notice by substituted service. As such substituted service had been effected and as there were no objections, the Order had been made to add that party and to call the case on 08.10.2009 to fix for trial. On that date an application had been made to amend the caption. The Court had allowed the amendment of the caption and fixed the trial for 12.01.2010 in which date as the Learned Judge had been on leave the trial had been postponed for 17.05.2010. On that date an application had been made to amend the Plaint and that application had been allowed subject to any objections and a final date had been given thereafter for 16.11.2010 for filing of the amended Plaint. The 1st Defendant had stated on 28.02.2011 that they were not objecting to the amendment. It is thereafter that the Court had set the matter for an order regarding the same and gave the impugned Order on 13.05.2011 refusing to accept the amended plaint. The Court had overlooked the order relating to the effect of s.402 stated above when it was raised in this case in 2008 which is much regretted as the court should have gone into that matter at that early stage. The foregoing would show the laxity with which the parties to the case had proceeded with this case and the Court too had been accommodating the parties with far too much leniency. This court observes with much regret the manner in which the parties have proceeded with this case which is a very good example of showing laws delays. This Court also expects justice to be dispensed expeditiously in the interests of all parties concerned and also that Courts should not show too much leniency to parties as such delays cause much prejudice to litigants.

This Court would answer the questions of law on which leave was granted as follows:

(c) The direction by the learned Judge to submit facts in terms of S.93(2) was not necessary as the relevant section regarding amendment of the plaint when adding a party is S.21 of the Civil Procedure Code .

(d) Even though the case had been fixed for trial, a new situation had arisen as the 1st Respondent had sold the property in dispute to the 2nd Respondent during the pendency of the action.

(e) The learned Judge of the Commercial High Court erred in not accepting the amended plaint after allowing the caption to be amended.

(f) The learned Judge of the Commercial High Court erred in refusing to accept the amended plaint and proceeding to trial on that basis.

For the reasons set out above, the order of the learned Judge of the Commercial High Court is set aside and the Court is directed to accept the amended plaint and proceed to

trial and conclude same expeditiously. In the circumstances of this case we make no order for costs.

JUDGE OF THE SUPREME COURT

AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT

EKANAYAKE J.

I agree.

JUDGE OF THE SUPREME COURT