

S.C.Appeal 106/2011

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

In the matter of an application for
Leave to Appeal from the order dated
30.05.2011 of the Commercial High
Court of the Western Province holden
in Colombo.

Abans Retail (Pvt) Ltd.,
498, Galle Road, Colombo, 3.

Plaintiff

SC.Appeal No:-106/2011

SC.HC LA No:-52/2011

Commercial High Court Colombo

Case No:-37/2009 MR

V.

H.N.Jayaratne Bandara,
No. 448, Buddhayaye, Galmuna,
Hingurakgoda, Polonnaruwa.

AND NOW BETWEEN

Abans Retail (Pvt) Ltd.,
No. 498, Galle Road, Colombo 3.

Plaintiff-Petitioner

V.

H.N.Jayaratne Bandara,
NO.448, Buddhayaye, Galamuna,
Hingurakgoda, Polonnaruwa.

Defendant-Respondent

BEFORE:- B.P ALUWIHARE, PCJ.

SISIRA J.DE ABREW, J.

H.N.J.PERERA,J.

COUNSEL:- K.N.Choksy for the Plaintiff-Petitioner

Pubudu Alwis with Nandana Perera and

K.A.D.Karasinghe for the Defendant-Respondent

ARGUED ON:- 06.06.2016

DECIDED ON:-04.08.2016

H.N.J.PERERA, J.

The Plaintiff-Petitioner filed action against the Defendant-Respondent seeking inter alia:-

- (A) For judgment and Decree against the Defendant in a sum of Rs.5,068,074/26 together with legal interest thereon from 25th July till payment in full;
- (B) For costs; and
- (C) For such other relief as to the Court shall seem meet.

The Defendant-Respondent filed his answer and prayed for a dismissal of the action and further sought a sum of Rs.2,500,000/- as

compensation from the Plaintiff-Petitioner as a cross claim. Thereafter the Plaintiff-Petitioner filed Replication and denied the claim in Reconvention of the Defendant-Respondent and further stated that the assets, liabilities and stocks of Abans Ltd was taken over by the Plaintiff's company as from 24.08.2008.

The said matter was fixed for written Admissions and Issues for 23.06.2010 and for trial on 03.08.2010. Thereafter by motion and draft plaint both dated 14.05.2010 the Plaintiff-Petitioner moved to amend the Plaintiff's Plaint. The amendments sought by the Plaintiff were as follows:-

- (1) In paragraph 3 by the deletion of the word "the Plaintiff Company" and addition of the word "Abans Ltd;"
- (2) In paragraph 5 by the deletion of the word "Plaintiff" and addition of the word "Abans Ltd"
- (3) In paragraph 9 by the deletion of the word "Plaintiff" and the addition of the word "Abans Ltd"
- (4) By the addition of a new paragraph 9A "The Plaintiff states that as from 24.07.2008 the assets, liabilities and stocks of Abans Ltd., were taken over by the Plaintiff."

The Defendant-Respondent objected to the said amendments and after inquiry the Learned Trial judge made order on 30.05.2011 refusing the application of the Plaintiff-Petitioner to amend its Plaint. The Supreme Court granted leave to Appeal on the following ground:-

"Whether the Commercial High Court of the Western Province holden in Colombo erred in dismissing the application of the Plaintiff-Petitioner to amend its Plaint by its application dated 14.05.2010."

It was contended by the learned Counsel for the Plaintiff-Appellant that the said application to amend the Plaint was an application made under

Section 93(1) of the Civil Procedure Code which grants the Court the full power of amending in its discretion all pleadings in an action by way of addition, alteration and/or omission. It was the contention of the Counsel for the Plaintiff-Appellant that the learned High Court Judge has failed to consider that the said application has been made by the Plaintiff-Appellant long prior to the first trial date and that notice of the said application had been served on the Defendant-Respondent.

The power to amend pleadings is granted by Section 93(1) of the Civil Procedure Code, it provides that:-

“Upon application made to Court before the first date of trial of the action the presence or after giving reasonable notice to all the parties to the action the Court shall have full power of amending its discretion all pleadings in the action by way of addition or alteration or omission.”

It is to be noted that this is not an application made under Section 93(2) of the Civil Procedure Code as the application made long prior to the first date of trial. Section 93(1) of the Civil Procedure Code applies to all instances where an application is made as in the present case, before the day first fixed for trial.

In Mackinnon Mackenzie & Co V. Grindlay’s Bank Ltd [1986] it was held:-

“That the rules of procedure have no other aim than to facilitate the task of administering justice and that multiplicity of suits should be avoided.”

In Senevitarne V Candappa 20 NLR 60 quoting with approval the observations of Bret M. R in Clarapede V. Commercial Union Association 32 W.R 263 it was held that an amendment should be allowed, if it can be made without injustice to the other side “however negligent or careless may have been the first omission, and however late the proposed amendment.”

Further in Cassim Lebbe V. Natchiya 21 NLR 205 Shaw, J. stated

“The general rule with regard to amendments of pleadings which has been laid down by this Court in previous cases that an amendment which is bona fide desired should be allowed at any period of the proceedings, if it can be allowed without injustice to the other side, and in most cases conditions as to costs will ensure no prejudice being caused to the other side.”

This action has been filed on the basis that the Defendant-Respondent had been an employee of the Plaintiff Company and he violated his terms of employment causing loss to the Plaintiff Company. In the caption of the original plaint as well as the draft amended Plaint the Abans Retail (Pvt) Limited has been named as the Plaintiff. The Defendant has filed answer and stated that he has never been an employee of the Plaintiff Company and he was employed at the Company called Abans Limited as the Show Room Manager of the Hingurakkoda Branch from 25.08.2003.

By the draft amendment the Plaintiff Petitioner had sought to include the words “Abans Limited” instead of the word “Plaintiff” in paragraph 3,5 and 9 of the Plaint and proposed to add a new paragraph as 9(a) stating that the plaintiff has taken over all the assets, liabilities and stocks from Abans Limited with effect from 24.07.2008.

Answering paragraph 3 of the answer in paragraph 6 of its replication the Plaintiff has clearly stated that as from 2008 07.24 the assets, liabilities and stocks of Abans Limited was taken over by the Plaintiff. The plaintiff has moved to bring in the said amendments to the plaint in order to clarify the said position of the plaintiff as to how the plaintiff became the employer of the Defendant-Respondent in this case. It is clearly seen that by this amendment the plaintiff tries to explain or clarify the relationship of the parties at the time the plaint was filed in Court. There is no attempt by the plaintiff to change the name of the plaintiff or to bring in another party as a plaintiff to this case by this amendment.

As held in *Cassim Lebbe V.Natchiya* an amendment which is bona-fide should be allowed at any period of the proceedings if it can be allowed without injustice to the other side. Clearly this amendment deals with the real issue between the parties and does not convert the character of the said action.

Further it was held in *Mackinnons V. Grindlays Bank* that provisions for amendment of pleadings are intended for promoting the ends of justice and not for defeating them. The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence. However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.

In my opinion this amendment would clearly facilitate the task of administering justice between the parties. Section 93(1) of the Civil Procedure Code confers on the Court a wide discretion to amend all pleadings. The discretionary power must, however, be exercised according to the principles applicable to the exercise of such a power and is subject to the limitations imposed by section 46(2) of the Civil Procedure Code that an amendment cannot be made which has the effect of converting an action of one character into an action of another character. Apart from that limitation the discretion vested in the trial Judge by section 93(1) is unrestricted and should not be fettered by judicial interpretation. The discretion must be exercised according to law. The learned High Court Judge has failed to address himself to the decisive question whether the amendment is required in the interest of justice. The amendment sought is necessary for the right decision of the case - whether the defendant was an employee of the plaintiff and whether he is liable to pay damages as pleaded by plaintiff in his plaint.

I am of the view that the learned High Court Judge has erred in disallowing this amendment. In my view the said amendment did not alter the character of the case or introduce a different cause of action and that it should be allowed.

I allow the appeal, set aside the order of the Commercial High Court Judge dated 30.05.2011 and direct the Commercial High Court Judge to accept the amended plaint of the Plaintiff and to take necessary steps according to law. The learned Judge is directed to proceed with the trial expeditiously.

The appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

SISIRA.J.DE ABREW

I agree.

JUDGE OF THE SUPREME COURT

