

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

Jayasiri Edirisinghe,  
E and S Land Sales and Property  
Developments,  
No. 627, Maradana Road,  
Colombo 10.

**- Plaintiff -**

S.C.(CHC) Appeal No. 34/08  
S.C.H.C.L.A. 18/08  
Commercial High Court  
Case No. H.C. (Civil) 47/2006(01)

**Vs.**

City Properties (Pvt) Ltd.,  
No. 111, Negombo Road,  
Peliyagoda.

**- Defendant -**

**And now between**

City Properties (Pvt) Ltd.,  
No. 111, Negombo Road,  
Peliyagoda.

**- Defendant Petitioner -**

**Vs.**

Jayasiri Edirisinghe,  
E and S Land Sales and Property  
Developments,  
No. 627, Maradana Road,  
Colombo 10.

**- Plaintiff Respondent -**

**Before**

Tilakawardene, J.,  
Sripavan, J.,  
Imam, J.

**Counsel**

: Harsha Amarasekera with Kanchana Pieris for  
Defendant-Petitioner

Kuvera de Zoysa for Plaintiff-Respondent

**Argued on**

: 18.02.2010

**Written Submissions****Filed on**

: 26.03.2010 – By the Defendant-Petitioner  
30.03.2010 - By the Plaintiff-Respondent

**Decided on**

: 02.06.2011

**SRIPAVAN. J.**

The Plaintiff-Respondent (hereinafter referred to as the Respondent) instituted an action in the District Court and against the Defendant-Petitioner (hereinafter referred to as the Petitioner) seeking to recover a sum of Rs. 12 Million as Commission/brokerage fees due to the Respondent in respect of a sale of a particular property. Upon an objection being raised by the Petitioner to the jurisdiction of the Court, the case was transferred to the High Court of the Western Province exercising civil jurisdiction. The Petitioner filed answer

and took up the position that the Respondent did not act as a broker and as such was not entitled to recover any monies from the Petitioner.

It is noted that the Respondent based his action on an oral agreement which he alleged to have been entered into with the Petitioner. When the matter was taken up for trial on 14-05-07, the Petitioner objected to issue No. 2 raised by the Respondent on the ground that the plaint did not disclose either the date of the oral agreement nor did it disclose the identity of the person with whom such agreement had been entered into. The Learned High Court Judge thereupon made the following Order marked A6 (translated into English).

*“The Petitioner has objected to the Respondent’s issue No. 2 on the basis that the Respondent has no right to raise such issue as he has not specified the date on which the oral agreement referred to in Paragraphs 4 and 5 of the plaint was entered into. Further, the Respondent has not disclosed the identity of the person of the Petitioner Company with whom the oral agreement was said to have been entered.....*

*Having considered the submissions, I feel it is necessary to specify the date or the approximate period during which the agreement was entered into. The Civil Procedure Code requires the Respondent to annex a copy of the written agreement to the plaint where the cause of action arises out of a written agreement. If this is not done, the Petitioner would not have*

*sufficient opportunity to prepare his defence or establish his rights.*

*As the Petitioner is a Company, it is also necessary to specify with clarity the identity of the authorized representative of the petitioner with whom the oral agreement was entered into. Since this has not been disclosed, I reject the proposed issue No. 2.*

*I grant a date to the Respondent to consider this and take steps.”*

The respondent did not prefer an appeal against this Order marked A6. However, he sought to amend his plaint. Though the Petitioner, objected to the said amendment, it was allowed by Court after an inquiry. Neither the fundamental character of the suit nor its nature and scope was permitted by the amendment. Accordingly, the Respondent filed a motion dated 21-06-07 and chose to file an amended plaint. The Petitioner filed amended answer in response to the amended plaint and both parties thereafter filed their amended issues. The matter came up in Court on 13-05-2008 for consideration of issues and trial.

The Learned Counsel for the Petitioner objected to Issue No. 4 of the Respondent on the following basis:

- (a) the name of the representative of the Petitioner Company with whom the proposed agreement was said to have been entered into had not been specified in the amended plaint,

- (b) the said Issue must be rejected in view of the previous order marked “A6”, and for the same reasons set out therein,
- (c) the issue was not based on the pleadings contained in the plaint, and
- (d) that the issue was vague.

The Learned High Court Judge again made an order marked A16, stating that it was the duty of the Court to frame issues and directed the Respondent to disclose the name of the employee with whom the Respondent entered into an oral agreement. The Petitioner sought leave to appeal against the said Order marked A16 and leave was granted by this Court on 4<sup>th</sup> July 2008.

It is observed that the Respondent was given an opportunity to consider the steps he wished to take in respect of the Order marked A6. Without appealing against the Order marked A6, the Respondent sought to amend his plaint. Thus, when the Respondent sought an amendment of the plaint, he was duty bound to file an amended plaint in terms of the Order marked “A6”. It is of utmost importance to comply with the directions given by Court in order to ensure that administration of justice in a particular case or matter be protected in the interests of the society.

One of the requirements of A6 is the disclosure of the name of the Petitioner’s purported representative with whom the Respondent claims to have entered into an oral agreement. The failure to disclose the name in the amended plaint amounts to a failure to comply with the Order of Court marked A6. A party who has failed to comply with the Order made by Court,

cannot seek the protection of law thereafter on the same cause of action. He has to face the consequences of such non-compliance. Thus, when the Respondent decided to amend the plaint and was not amended in accordance with the order made by Court, I am of the view that the Court was entitled to make an appropriate order for not complying with its order.

It is significant to note that at the time of filing the amended plaint, the Court did not exercise its discretion under Section 46(2)(J) of the Civil Procedure Code to refuse to entertain the same for not complying with its order. The provision contained in Section 93 of the Civil Procedure Code grants a wide discretion to Court to amend the pleadings. Its discretionary power must, however, be exercised subject to the limitations set out in Section 46(2) of the said Code that no amendment is to be made which has the effect of converting an action one character into an action of another or inconsistent character. A case must be tried upon the issues on which a right decision could be arrived at, raising the real question between the parties. The functions of pleadings enable the Court to clarify the issues so that the real issues between the parties may be tried at the trial.

The impugned order marked A16, directed the Respondent to disclose the date and the name of the employee with whom he entered into an oral agreement. The effect of the clarification sought by Court was merely to find out the real dispute between the correct parties which would facilitate the task of administering justice and will not cause any injustice to the petitioner. The appellate court would be hesitant to interfere with the exercise of such a discretion by the trial Judge. This discretion could be viewed from the

perspective of the flexibility and the choice granted to the trial judge based upon a consideration of all factors involved. This judicial discretion of the Court must be exercised so as to do justice in a case that is being tried with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the time the proceedings were instituted.

It must however, be emphasized that it is a prime duty of the Court to consider the issues already raised and to allow any fresh issues to be formulated based on the clarification sought by Court only if such a course appears to Court to be in the best interest of justice.

For the foregoing reasons, I hold that the appeal fails. Having regard to the facts and circumstances, I make no order as to costs. The Registrar is directed to forward the Case record to the High Court forthwith so that trial could be proceeded with as expeditiously as possible.

**Judge of the Supreme Court.**

**Tilakwardena, J.**

I agree.

**Judge of the Supreme Court**

**Imam, J.**

I agree.

**Judge of the Supreme Court**