

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

SC Appeal No. 04/2011

SC/ HCCA / LA No. 228/2010

WP/ HCCA / COL /09/2008/LA

D.C. Colombo No. 37512/MR

Mohammed Tuwan Mohammed Meezam

No. 29/12, Chapel Lane, Church Street

Colombo 02

Plaintiff

Vs

1. Ranjith Sumanasekera

2. Rukshana Deepama Nayomi
Sumanasekera

Both of No.411/2, Atygala Mawatha,
Rajagiriya

Defendants

AND

Mohammed Tuwan Mohammed Meezam

No. 29/12, Chapel Lane, Church Street

Colombo 02

Plaintiff – Petitioner

Vs

1. Ranjith Sumanasekera

2. Rukshana Deepama Nayomi
Sumanasekera

Both of No.411/2, Atygala Mawatha,
Rajagiriya

Defendants – Respondents

K.P.G Sumanasekera

No.411/2, Atygala Mawatha,

Rajagiriya

Added Defendant – Respondent

AND BETWEEN

1. Ranjith Sumanasekera
2. Rukshana Deepama Nayomi
Sumanasekera
3. K.P.G Sumanasekera

No.411/2, Atygala Mawatha,
Rajagiriya

**Defendants – Respondents –
Petitioners**

Vs

Mohammed Tuwan Mohammed Meezam

No. 29/12, Chapel Lane, Church Street

Colombo 02

Plaintiff – Petitioner –Respondent

AND NOW BETWEEN

1. Ranjith Sumanasekera
2. Rukshana Deepama Nayomi Sumanasekera
3. K.P.G Sumanasekera

No.411/2, Atygala Mawatha,
Rajagiriya

**Defendants – Respondents –
Petitioners - Appellants**

Vs

Mohammed Tuwan Mohammed Meezam
No. 29/12, Chapel Lane, Church Street
Colombo 02

**Plaintiff – Petitioner –Respondent
– Respondent**

Before: Amaratunga J.
Suresh Chandra J.
Dep. PC, J.

Counsel:

Ranjan Suwandarathne with S. Tennakoon for the Defendants – Respondents –
Petitioners - Appellants

A.H.G. Ameen with D.K.S. Kodagoda for the Plaintiff – Petitioner –Respondent –
Respondent

Argued on : 09.03.2012

Decided on : 07.06.2012

Suresh Chandra, J

This is an appeal from the Order of the Civil Appellate High Court holden at Colombo which had affirmed the Order of the District Court of Colombo.

The Plaintiff-Respondent had filed action against the 1st and 2nd Defendants-Appellants in the District Court of Colombo to recover damages in a sum of Rs.2,000,000/- as a result of receiving injuries due to a motor traffic accident. The case had gone ex-parte against the Appellants and judgment had been entered in favour of the Plaintiff-Respondent. The said Appellants objected to the ex-parte decree and sought to set aside the said decree and moved to tender their answer. The Court had held an inquiry into the said application of the Appellants and had made order setting aside the ex-parte order and allowed the Appellants to tender their answer. Thereafter the Plaintiff-Respondent had made an application to add the 3rd Defendant-Appellant as a Defendant in terms of S.18 of the Civil Procedure Code. The basis of the said application was that it had transpired at the inquiry to set aside the ex-parte order, that the 1st Defendant was the father of the 2nd Defendant and that the 3rd Defendant was the mother of the 2nd Defendant and that it was the 3rd Defendant who was the registered owner of the vehicle which had been driven by the 2nd Defendant (Daughter) of the 1st and 3rd Defendants and had caused the injuries to the Plaintiff.

The District Court allowed the application of the Plaintiff and added the mother of the 2nd Defendant as the 3rd Defendant. Being aggrieved by the said order of the learned District Judge the Defendants-Appellants had sought leave to appeal to the Civil Appellate High Court holden at Colombo and the High Court having granted leave when the application was supported, dismissed the appeal. The Defendants-Appellants filed an application for leave to appeal to this Court and the Court had granted leave on the following questions as set out in paragraphs 22(a), (b) and (c) of the petition:

22(a) Could the District Court permit the Plaintiff to add a party after the prescriptive period, when the action is instituted against a party who had no right, title or interest in the matter sued on?

22(b) Did the impugned order cause prejudice to the Defendants as the Defendants are not able to raise the question of prescription against the added party ?

22(c) Do laches on the part of the Plaintiff disentitle him to an order in his favour?

It is necessary to consider the sequence of events in order to arrive at a final conclusion regarding the questions on which leave has been granted.

The accident had taken place on 2nd April 2002 when Vehicle No.32 Sri 6076 had been driven by the 2nd Defendant who was the daughter of the 1st Defendant (father) and the 3rd Defendant (mother). The action had been filed in the District Court of Colombo on 29th August 2003 well within the prescriptive period for the filing of such actions which is two years. The ex parte decree had been entered on 13th December 2005. The ex parte decree had been set aside after inquiry by order dated 29th March 2007. The Application to add the 3rd Defendant was filed on 25th July 2007 which was objected to by the Defendants. After an inquiry was held regarding same, the learned District Judge by order dated 30th January 2008 allowed the 3rd Defendant to be added as a party. It is rather unfortunate that the proceedings up to this stage had taken such a long period of time as the accident had occurred on 2nd April 2002.

The above sequence of events would show that the cause of action arose on the occurrence of the accident which was the 2nd of April 2002 and the action had been filed on 29th August 2003 within the prescriptive period against the 1st and 2nd Defendant. The application to add the 3rd Defendant as a party on the basis that she was the registered owner of the vehicle in question was made on 25th July 2007. As the 1st and 2nd Defendants had objected to the addition of the 3rd Defendant , an inquiry was held by the District Court and the learned District Judge after inquiry allowed the addition of the 3rd Defendant on the basis that it is necessary to allow amendments and add parties for the proper dispensation of justice. It was further stated that by allowing the amendment no change would be made to the subject matter of the action by such

addition and that the case would not change its character. All that would happen is that by adding a necessary party it would become convenient to give a decision in the case. The learned District Judge cited S.18(1) of the Civil Procedure Code and the decision in CALA 276/95 and went on to state that it is the duty of the Court in dispensing justice to use its discretion and admit the registered owner of the vehicle as a party to the case. Further that by adding the 3rd Defendant no prejudice would be caused to the 1st and 2nd Defendants.

In the appeal before the Provincial High Court, the High Court affirmed the decision of the learned District Judge on the basis that there was no valid reason to vacate the learned District Judge's comprehensive order.

This appeal raises an important issue as to the amendment of pleadings in a case before a District Court where the purpose of the amendment is to add a party. The relevant sections of the Civil Procedure code in regard to this matter would be S.18 and S.93 of the Civil Procedure Code.

S.18(1) reads as follows:

“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 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.”

The purpose of addition of parties according to S.18(1) is to enable the Court to “effectually and completely adjudicate upon and settle all the questions involved “ in an action. However, the addition of a party should be subject to any positive rule of law that would be applicable in relation to the cause of action against such party sought to be

added, specially relating to limitation of time as set out in S.9 of the Prescription Ordinance No.22 of 1871 which states that

“No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within **two years** from the time when the cause of action, shall have arisen “

The learned trial Judge has referred to the unreported decision in C.A.L.A.276/95 which has been endorsed by the High Court in Appeal and relied on same to add the 3rd Defendant as a party. In the said case Justice Wigneswaran discussed the application of S.18(1) and set out the purpose of the section but in deciding the matter before Court held that the Section would not permit the addition of the party sought to be added in the circumstances of that case which was a situation where a party was sought to be added after a consent decree had been entered between the original parties. The Court held that the Court was functus after the entering of the consent decree and had no jurisdiction to add parties. Thus the reliance of the learned District Judge and the subsequent endorsement by the High Court has been totally erroneous.

As the sequence of events set out above revealed, the application to add the 3rd Defendant as a party had been made only on the 25th of July 2007 which is more than five years after the cause of action had arisen on 2nd April 2002, if any, against the 3rd Defendant. The Plaintiff being unaware of the proper registered owner of the vehicle is no excuse as it was possible to ascertain the name of the registered owner from the registrar of Motor Vehicles before institution the action.

It would also be relevant to consider the effect of S.93 which relates to amendment of pleadings.

S.93 provides as follows:

(1) Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of

addition, or alteration, or of omission.

(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.

Justice Pathirana in *Sherman De Silva & Co. Ltd v Ariyalatha De Silva* 77 N.L.R. 275 at pp.279-280 stated thus in relation to the application of S.93 which would be very relevant in deciding the issue that has arisen in the present case:

“Under Section 93 of the Civil Procedure Code, the Court has full power of amending a plaint in its discretion, but this discretion must be exercised judicially and not arbitrarily. The circumstances under which an Appeal Court would review the exercise of the discretion are set out by Jenkins L.J. in G.L.Baker Ltd v Medway Building & supplies Ltd. 1958 1 W.L.R. 1216 at 1231; “I would make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever in granting or refusing an application for such leave is eminently a matter for the discretion of the Judge with which this Court should not in ordinary circumstances interfere unless it is satisfied that the Judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties.”

“There are two main rules of practice that have emerged from the decided cases regarding the principles which a Court should take into consideration when it exercises the power to amend the plaint. Firstly, the amendment should be allowed, if it is necessary for the purpose of clarifying or raising the real question or issues between the parties. This rule is based on the principle that a multiplicity of actions should be avoided. The whole purpose of pleading is to define, clarify and to limit the issues which

are to be subject of the pending contest. *Daryani v Eastern Silk Emporium Ltd* 64 N.L.R. 529 at 531.

Secondly, an amendment which works an injustice to the other side would not be allowed, namely, an amendment:-

- (a) Which alters the nature or scope of the action or which has the effect of converting an action of one character into an action of another or inconsistent character;
- (b) which has the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment of law;**
- (c) Which has the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, or which is made *mala fide*.

The principle set out in Sherman De Silva's case in relation to an amendment which would have the effect of taking the action out of the provisions governing prescription was applied in the unreported case of *Lloyd Berenger v F.N.De Silva and Others C.A.* Appeal No.884/92 decided on 16.7.1994, in relation to the amendment of an application before a Labour Tribunal where an application to add a 3rd Party purporting to be the employer was made after the prescribed limit of six months was refused.

Therefore in the present case the application made by the Plaintiff to add the 3rd Defendant was well outside the prescriptive period of two years which was 2 years from the arising of the cause of action (date of the accident). The learned District Judge erred in law in deciding to add the 3rd Defendant as a party by relying on S.18(1) only and not taking into account the principles relating to the application of S.93 of the Civil Procedure Code regarding amendment of pleadings which has been discussed above. The High Court too erred in law in affirming the decision of the learned District Judge without considering the relevant principles of law relating to addition of parties and amendment of pleadings.

The questions of law on which leave was granted are answered as follows:

- (a) The District Court could not permit the Plaintiff to add a party after the prescriptive period.
- (b) The impugned order caused prejudice to the 3rd Defendant who was added as a party.
- (c) The laches on the part of the Plaintiff disentitled him from getting an order in his favour regarding his application to add the 3rd Defendant as a party.

In the above circumstances the judgment of the Civil Appellate High Court dated 17th June 2010 and the order of the District Court dated 30th January 2008 are set aside. The appeal of the Appellants is allowed and the case is sent back to the District Court , for the plaintiff to proceed against the 1st and 2nd Defendants and the District Court is directed to give this case priority and dispose same expeditiously. There will be no costs.

JUDGE OF THE SUPREME COURT

AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT

DEP PC, J.

I agree.

JUDGE OF THE SUPREME COURT