FERNANDO V. TENNAKOON

SUPREME COURT
TILAKAWARDANE, J.
AMARATUNGA, J., AND
MARSOOF, PC. J.
S. C. APPEAL NO. 19/2008
S. C. (HC) C. A. L.A NO 44/2007
WP/HCCA/ COL NO. 77/2007 (LA)
D..C. MOUNT LAVINIA NO. 951/06/SPL
JUNE 17TH, 2008.

Civil Procedure Code – Section 18 – Addition of Parties – Necessary Party – Parties improperly joined may be struck out – Section 19 – Intervention in a pending action not otherwise allowed – prescription Ordinance – Section 6 – time limit for filing an action to 'establish' a partnership? Prevention of Frauds ordinance 7 of 1840 – Section 18(c) – Partnership agreement – In writing?

An action was filed in the District Court of Mount Lavinia for the dissolution and winding up of an alleged partnership between E.V.T. de Silva, Geetha Amarasinghe and Sena Ranjith Fernando in the name of 'General Trade Agency'. The District Court permitted the Intervenient – Petitioner - Respondent – Respondent. 'Tennakoon' to intervene in the action filed by E.V.T de Silva and Geetha Amarasinghe who were the 1st and 2nd Plaintiffs in the District Court Action.

The High Court (Civil Appeal), by its order dated 3rd December 2007, affirmed the Order of District. Judge permitting the intervenient-Petitioner. Tennakoon to intervene in the District Court action and refused leave to appeal.

It the Supreme Court the main question for determination was whether Tennakoon has slept over his rights, and if so, whether his delay and/ or laches would disentitle him to intervene into the action in the District Court.

Held

In deciding whether the addition of a new party should be allowed under Section 18(1) of the Civil Procedure Code, which is already pending in Court between two parties, - to avoid multiplicity of

actions and to diminish the cost of litigation, the lower Courts were justified in permitting intervention and determine the rights of all in one proceeding.

Per Saleem Marsoof J. –

"I have no hesitation in following the wider construction expounded by Lord Esher" in (*Byrne v. Browne and Diplock)*

Cases referred to:-

(1) *Norris v. Breazley* (1877) 2 CPD 80

(2) *Byrne v. Browne and Diplock* (1889) 22 QBD 657

(3) *Ammugam Coomaraswamy v. Andiris Appuhamy and Others* (1985) 2 S.L.R. 219

(4) *Hilda Enid Perera v. Somawathie Lokuge and Another* (2000) 3 S.L.R. 200.

APPEAL from an order of the High Court (Civil Appeal) Western Province.

Nihal Fernando, PC with *Rajindra Jayasinghe* and *Ranil Aangunawela,* instructed by *Ms. Iresha Soysa* for the Defendant-Respondent-Petitioner-Appellant.

Rohan Sahabandu with *Ranjith Perera* for the Intervenient- Petitioner – Respondent – Respondent.

Chathura Galhena for the Plaintiff – Respondent – Respondent – Respondents.

Cur.adv. vult.

July 22nd 2010

SALEEM MARSOOF, J.

This is an appeal against the decision of the High Court of Civil Appeal of the Western Province dated 3rd December 2007 refusing leave to appeal from the order of the District Court of Mount Lavinia dated 25th May 2007. By the said order, the learned District Judge permitted the Intervenient Petitioner – Respondent – Respondent, Tennakoon Mudiynselage Ranjith

Tennakoon (hereinafter referred to as Tennakoon) to intervene into an action instituted by Edirimuni Vijith Thejalal de Silva and Geetha Amarasinghe, who are respectively the 1st and 2nd Plaintiff - Respondent- Respondent – Respondents to this appeal against one Sena Ranjith Fernando, the Defendant-Respondent – Petitioner – Appellant, seeking to enforce a partnership agreement. This was an action for the dissolution and winging up of an alleged partnership between the said Edirimuni Vijith Thejalal de Silva (hereinafter referred to as E.V.T. deSilva),Geetha Amarasinghe (hereinafter referred to as Geetha Amarasinghe) and Sena Ranjith Fernando (hereinafter referred to as Fernando) which has been registered under the Business Names Ordinance, No. 6 of 1918 as subsequently amended, in the name and style of 'General Trade Agency.'

The facts relevant to this appeal may be briefly outlined as follows. It appears from the Certificate of Registration dated 21st June 1983 annexed to the Plaint marked 'P1', which was issued under the Business Names Ordinance, that the said Tennakoon and one Rangoda Liyanarachchige Udaya Silva (who is now deceased and who was the husband of Geetha Amarasinghe, the 2nd Plaintiff – Respondent- Respondent – Respondent to this appeal) commenced a business of repairing of motor vehicles and distribution of merchandise in partnership under the name and style of 'General Trade Agency' on 17th May 1983. It also appears that prior to migrating to Australia, the said Tennakoon executed the Power of Attorney bearing No. 176 dated 6th November 1988 and attested by K. A. Wijayadasa, Attorey-at-Law and Notary Public (A4), appointing the said E. V. T. de Silva as his Attorney to operate certain bank accounts he held in Sampath Bank, Colombo and to act for him in relation to the said partnership. By the said Power of Attorney, the said

E. V. T. de Silva was authorized by Tennakoon "to act for me and on my behalf in all matters pertaining to the Partnership called and known as 'General Trade Agency' ".

It is evidence from the extracts of the Business Names Register produced as DP (Y2) that on 7th February 1989 the said Udaya Silva made a statement of change, under oath, purportedly under Section 7 of the Business Names Ordinance, to the effect that the said Tennakoon ceased to be a partner on that date and that the said E.V.T. de Silva was admitted as a new partner in his place. It also appears from the said extract that the Registrar of Business Names, Western Province, relying on the said Statement of Change has accordingly altered the Register by the inclusion of the name of the said E.V.T. de Silva in substitution of the name of Tennakoon. However, nowhere in the Register is there an indication as to the circumstances in which Tennakoon ceased to be a partner. Thereafter in 1992, the Defendant-Respondent-Petitioner – Appellant, Fernando was admitted as a partner. In 2004, the existing business lines were expanded to include a mechanical workshop, the import, sale and distribution of moter vehicles, machinery spare parts, electrical items, drugs and chemicals, transport and tourism, insurance, and manpower services, and the partnership was re-registered (*vide* – Certificate of Registration dated 29th November 2004 marked 'P4'). After the death of Udaya Silva, his wife namely, Geetha Amarasinghe entered the partnership with E. V. T. de Silva and Fernando, and a new firm was registered in June 2005. It is noteworthy that the only record of Tennakoon's alleged partnership in the Business Names Register is in the Certificate of Registration dated 21st June 1983 marked 'P1', and in none of the subsequent registration of the partnership business Tennakoon's name is reflected as a partner.

Although the original partnership business commenced in 1983, and there is little or no evidence that the initial partner Tennakoon, who left Sri Lanka in 1988, had any role to play in the partnership business after his departure, no legal proceedings had been commenced in this regard till 31st May 2006, when E.V.T. de Silva and Geetha Amarasinghe commenced action against Fernando in the District Court of Mount Lavinia seeking to have the partnership dissolved and wound-up. It is to this action that Tennakoon, acting through his Attorney Ranjith Amarasinghe, sought to intervene by his Petition dated 2nd February 2007, which was made in terms of Section 18 of the Civil Procedure Code No. 2 of 1889, as subsequently amended. The said application for intervention was made on the basis that the business called "General Trade Agency" was started by Tennekoon on 17th May 1983 with one Udaya Silva and that the agreement between the partners was later reduced into writing, which was the Partnership Agreement dated 30th June 1988 purportedly signed by Rangoda Liyanarachchige Udaya Silva and Tennakoon in the presence of two witnesses, a copy of which was produced by Tennakoon marked 'A3' with his application for intervention.

The said Partnership Agreement expressly provides in clause 10 thereof that without the consent of all the other partners no rights of the partners may be transferred or alienated or any new partners admitted into the partnership. In paragraph 5(c) of the said application for intervention, it has been pleaded that the partnership between the said Rangoda Liyanarachchige Udaya Silva and Tennakoon came to an end by the death of the former which occurred on or about 5th June 2005, and that as the surviving sole partner, the said Tennakoon is entitled to all the assets and capital of the partnership subject to the rights of the heirs of the said Rangoda Liyanarachchige Udaya Silva. In paragraph 6

of the said application, it has been pleaded that the original plaintiffs, E.V.T. de Silva and Geetha Amarasinghe and the defendant Fernando are seeking to divide the capital and assets of the partnership exclusively amongst themselves, and that by reason of the prejudice that would thereby be caused to Tennakoon, he is a necessary party to this action, and should be added as an intervenient party.

The learned District Judge who inquired into the application for intervention after the other parties filed their respective objections thereto, has by his order dated 25th May 2007, concluded that Tennakoon is a necessary and material party and should be added. By its order dated 3rd December 2007, the High Court of Civil Appeal of the Western Province affirmed the said order of the learned District Judge and refused leave to appeal. This court has on the 22nd of February 2008 granted special leave to appeal against the order of the High Court of Civil Appeal on the following substantial questions of law:-

(a) Has the High Court of Civil Appeal (Colombo) erred in not considering the delay of almost 18 years and the fact that different partnerships came into being during the period of 18 years?

(b) Whether the High Court of Civil Appeal (Colombo) erred in dismissing the application for leave to appeal of the Defendant-Petitioner (Fernando)?

(c) Whether the High Court of Civil Appeal (Colombo) erred in holding that the Intervenient Petitioner (Tennakoon) is a necessary party to enable the court of effectually and completely adjudicate upon and settle all the questions involved in the said action?

(d) Whether the High Court of Civil Appeal (Colombo) has erred by not considering the fact that the Intervenient

Petitioner (Tennakoon) is in any event not entitled to any relief as he is guilty of laches and/or inordinate delay?

(e) Whether the High Court of Civil Appeal (Colombo) has erred in not holding that the any alleged claim of the Intervenient Petitioner (Tennakoon) is prescribed in law and as such the Intervenient Petitioner (Tennakoon) is not entitled to intervene?

The primary question for determination by this Court is whether Tennakoon has slept over his rights, and if so, whether his delay and/ or laches would disentitle him to intervene into the action in the District Court. In order to deal with the questions arising on this appeal, it is necessary to go into the facts in some depth. However, since the trial has not commenced and at the Interim Injunction Inquiry no oral evidence was led, the facts can be only be gathered from the affidavits of the parties filed in the original court and in the course of the appellate proceedings.

It may be noted at the outset that the Plaint dated 31st May 2006 filed in the original court did not disclose the existence of any partnership agreement "in writing and signed by the party making the same" which is necessary for "establishing a partnership where the capital exceeds one thousand rupees" as provided in Section 18 (c) of the Prevention of Frauds Ordinance No. 7 of 1840 as subsequently amended, and in fact, the original court has refused the grant of interim-injunction by its order dated 30th June 2006, mainly on the ground that despite the initial capital exceeding one thousand rupees, no written partnership agreement has been produced in evidence. The Application for leave to appeal against the said order dated 30th June 2006 filed in the Court of Appeal bearing No. CALA 274/06 is pending in that Court, and appears to have been kept in abeyance until the present appeal is disposed of by the Supreme Court.

However, with his application for intervention, Tennakoon has produced in court marked 'A3', a copy of the Partnership Agreement dated 30th June1988 purportedly signed by Rangoda Liyanarachchige Udaya Silva and himself in the presence of two witnesses, which expressly provides in clause 10 thereof that without the consent of all the other partners no rights of the partners may be transferred or alienated or any new partners admitted into the partnership. Furthermore, it is provided in clause 11 of the Agreement that upon the death or resignation of any partner, any part of the capital or any profits payable to such partner shall be paid to him or his legal representative or heir before the last day of the ensuing financial year. Clause 12 expressly provides that 6 months prior written notice must be given by a partner of intent to resign from the partnership firm.

It has been submitted by the learned President's Counsel for the Defendant - Respondent – Petitioner – Appellant Fernando, that the original action is a nullity *ab initio* and should be dismissed *in limine,* inasmuch as the dispute relates to a partnership business of which admittedly the capital exceeds one thousand rupees and no written partnership agreement has been produced with the plaint. As such, he submits, it is not unnecessary to add the Intervenient – Petitioner who claims to have been a partner but who resigned in 1989. I find it difficult to agree with this submission as the case is still pending in the District Court, and the fortunes of the parties cannot be predicted or prejudged at a stage when its trial has not even commenced. In any event, as far as the Intervenient Petitioner-Respondent-Respondent Tennakoon is concerned, there is no difficulty in this respect as he has produced the purported Partnership Agreement signed by the original partner Rangoda Liyanarachchige Udaya Silva,

who is the deceased husband of the 2nd Plaintiff-Respondent-Respondent- Respondent Geetha Amarasinghe.

I also have a great deal of difficulty with the submission that Tennakoon resigned from the partnership, which submission is in fact based on an averment in paragraph 6 of the Plaint dated 31st May 2006 and paragraph 7 of the affidavit of the same date filed in the District Court by E.V.T. de Silva and Geetha Amarasinghe, as the only document relied on for this purpose, which is the extract of the Business Names Register dated 7th February 1989 marked DP(Y2) which is merely a Statement of Change made under Section 7 of the Business Names Ordinance unilaterally by the said Rangoda Liyanarachchige Udaya Silva, and there is nothing to suggest that due notice of intention to resign had been given by Tennakoon as contemplated by Clause 12 of the Partnership Agreement dated 30th June 1988 (marked A3). Furthermore, the Statement of Change marked DP(Y2) does not contain the signature of Tennakoon and cannot be construed as a notice of resignation, and in the circumstances, there is insufficient material to establish that Tennakoon had resigned from the partnership or his Attorney E. V. T. de Silva has been properly added as a partner of the firm. In terms of Clause 10 of the Partnership Agreement produced by Tennakoon, no new partner could be introduced without the express consent of all other partners, and the evidence at this stage is very much suggestive of a fraud having been perpetrated by the Tennakoon's Attorney E. V. T. de Silva and his other partner Rangoda Liyanarachchige Udaya Silva. If that be so, no amount of delay and laches can defeat the claim of a person who has been defrauded by his agent and/or partner both of whom stand in a fiduciary relationship with him.

The question has also been raised by learned President's Counsel as to whether the application for intervention should

be deemed to be in effect an action by Tennakoon to assert his rights, and if so whether it has been prescribed in terms of Section 6 of the Prescription Ordinance which lays down a time limit of 6 years for filing any action to "establish" a partnership. However, the prescriptive period stipulated in that section beings to run only from "the date of the breach of such partnership deed", and Tennakoon has come to court on the basis that the partnership between Rangoda Liyanarachchige Udaya Silva and himself came to an end by operation of law upon the death of the former, on or about 5th June 2005. In terms of clause 11 of the Partnership Agreement marked 'A3' partnership accounts have to be settled after the occurrence of any event that would *ipso jure* terminate the partnership such as death or resignation of a partner, and Tennakoon may well be within the prescriptive period. In any event, in my considered opinion, these are matters that can only be considered after trial in the light of all the evidence led, and it is in my view premature to deny intervention to an aggrieved party on the basis of pre-judgment.

It is in this context, necessary to refer to Section 18 of the Civil Procedure Code No. 2 of 1889, as subsequently amended, in terms of which the Intervenient Petitioner-Respondent-Respondent Tennakoon sought to intervene into the action filed by E.V.T de Silva and Geetha Amarasinghe against Fernando. The said section provides as follows:

> *"(1) 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 ..... 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 adjudicate upon and settle all the question involved in that action, be added.

(2) Every order for such amendment or for alternation of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named, with the designation" added party", in all pleadings or processes or papers entitled in the action and made after the date of the order."

It is noteworthy that Section 19 of the Code expressly provides that no person shall be allowed to intervene in a pending action otherwise than "pursuance of, and in conformity with, the provisions of the last preceding section". The aforesaid provisions have been considered and commented upon in a large number of judgments of this Court, and learned Counsel representing the contesting parties in this appeal have invited the attention of Court to several of these decisions. However, It is not necessary to refer to all these decisions for the purpose of disposing of this appeal, except to refer to the "narrow view" on intervention as elucidated by Lord Coleridge. C. J. in *Norris v. Beazley*[1] which was to the effect that the words of the corresponding statute in England "plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint which ought to be determined in the action, and that it was never intended to apply where the person added as a defendant is a person against whom the plaintiff has no claim and does not desire to Prosecute any." On this reasoning, learned President's Counsel for the Defendant-Respondent - Petitioner - Appellant,

Fernando submitted that the original plaintiffs de Silva and Amarasinghe had no issue with Tennakoon, as they had sued Fernando on an altogether different partnership to the one that Tennakoon claimed to be a party to. He further submitted that similarly, Fernando too had no grouse with Tennakoon, as his partnership relationship with E.V.T de Silva and Amarasinghe was one that was much more recent in origin, and was very much different in character.

Learned Senior Counsel for Intervenient Petitioner-Respondent-Respondent, Tennakoon, however, submitted that his client will be affected by any decision the court might make in the original action, and in particular that he was aggrieved by the conduct of E. V. T. de Silva and Amarasinghe as well as that of Fernando. He relied on the "wider construction" placed on the very same English provision by Lord Esher in *Byrne v. Browne and Diplock*[2] in the following terms:-

> "One of the chief objects to the Judicature Act was to secure that, whenever a Court can see in the transaction brought before it that rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same: it is sufficient if the main evidence and the main inquiry will be the same, and the Court then has the power to bring in the new parties and adjudicate in one proceeding upon the rights of all parties before it. Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to

those acts in order to carry out as far as possible the two objects I have mentioned."

It is important to note that the conflicting views expressed by the English courts on this question were considered by Ranasinghe, J., (as he then was) in the course of his seminal judgment of *Arumugam Coomaraswamy v. Andiris Appuhamy and others*[3]. As his Lordship observed at 229 of the said judgment –

> "On a consideration of the respective views. . . . which have been expressed by the English courts in regard to the nature and the extent of the construction to be placed upon the rule regulating the addition of a person as a party to a proceeding which is already pending in Court between two parties, the "wider construction" placed upon it by Lord Esher, which has been set out above commends itself to me. The grounds which moved Lord Esher to take a broad view, viz: to avoid a multiplicity of actions and to diminish the cost of litigation, seem to me, with respect, to be eminently reasonable and extremely substantial. Lord Esher's view though given expression to more than a century ago, is even today as constructive and acceptable."

It is relevant to note that the above approach has been sanctioned by subsequent decisions of this Court such as *Hilda Enid Perera v. Somawathie Lokuge and Another*[4] and a large number of decisions of the Court of Appeal, and I have no hesitation in following the wider construction expounded by Lord Esher. On that reasoning, it is abundantly clear that the lower courts were justified in permitting the intervention in question and adding

Tennakoon as a party Defendant in all the circumstances of this case.

For the foregoing reasons, I am inclined to answer questions (a) of (f) on the basis of which special leave to appeal was granted by this Court in the negative, and affirm the order of the High Court of Civil Appeal dated 3rd December 2007. I do not make any order for costs in all the circumstances of this case.

TILAKAWARDANE, J. – I agree.

AMARATUNGA, J. – I agree.

appeal dismissed.