

JAYAMPATHI AND ANOTHER
v
KUDABANDA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 919/03(F)
DC MATALE 4681/MR
JUNE 10, 2005
JUNE 8, 2006

Civil Procedure Code – Sections 17, 18 and 18(2) – Section 755(1)C, Section 758(1)(b)(c), Section 759(2) – Necessary party not named in the notice of appeal and petition of appeal – Fatal? Is the failure to comply with Section 18(2) a procedural irregularity? Does non-joinder of parties defeat an action? – Accident – Proper evaluation on damages necessary? – Court making an equitable assessment – When?

The plaintiff and his daughter who were injured, as a result of a motor cycle and a bus collision were awarded damages against the defendant-appellants. In appeal the respondent contended that, the daughter has not been included as a party in the notice of appeal and the petition of appeal and therefore the appeal should be dismissed in limine. The defendant-appellants contended that, the Court erred on the law and facts.

Held:

- (1) The original record indicates that an application was made to add the daughter and it was allowed, but no amended caption had been filed. The respondent is himself responsible for not taking steps under Section 18.
- (2) There was no proxy filed on behalf of the intended added party, the order to add has been made after the commencement of trial, several lapses had

taken place in the original Court itself, these lapses cannot be cured in the Court of Appeal.

- (3) This being a case of general damages and special damages not being pleaded, Court could only make an equitable assessment.

Appeal from the judgment of the District Court of Matale.

Cases referred to:

- (1) *Wijeratne v Wijeratne* 74 NLR 193.
- (2) *Ibrahim v Bee bee* 19 NLR 289(FB)
- (3) *Nanayakkara v Warnakulasuriya* 1993 2 Sri LR 289.
- (4) *Nadarajah v CTB* 79 NLR at 53.
- (5) *Jayakody v Jayasuriya* 2005 1Sri LR at 220 and 221.

S.J. Mohideen for defendant-appellant.
Bimal Rajapakse for plaintiff-respondent.

August 27, 2007

ANIL GOONERATNE, J.

This is an appeal from the judgment of the District Court of Matale awarding a sum of rupees Three Hundred Thousand against the two defendant-appellants jointly and severally for causing severe injuries to the plaintiff and his daughter, as a result of a motor cycle and a bus collision on the Matale/Dambulla road as described in paragraph 5 of the plaint, on 20.2.1994.

The 1st defendant was the driver of the bus owned by the 2nd defendant at the time of the collision. Plaintiff attributed the collision to the negligence of the 1st defendant and the District Judge has entered judgment in favour of the plaintiff.

When this appeal was listed on 30.5.07 Counsel on both sides indicated to Court that they are agreeable to resolve this matter by way of written submissions filed of record, and this judgment is based on the written submissions and the material contained in the appeal brief.

The Plaintiff-Respondent has contended as a preliminary issue that the appeal is bad in law in as much as the plaintiff's daughter who was a pillion rider and a minor at the time of the collision (as in

paragraph 5 of the plaint) has not been included as a party in the Notice of Appeal and the petition of appeal filed of record though the daughter had been added as a party in the original court. The original court record indicates that an application was made to add the daughter (18 years) and it was allowed without any objection (proceedings of 7.9.2000). The Appellant however contends that although the District Court permitted to add a party no amended caption had been filed. On a perusal of the record, I find that the appellant's position is correct in this regard.

The relevant portion of Section 18(2) of the Civil Procedure Code reads thus *"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"*.

The record does not show any amended caption being filed in the original court and it is apparent that the above Section 18(2) of the Civil Procedure Code has been breached by the plaintiff. Therefore, the question is whether the authorities cited by the respondent viz. Wijeratne vs Wijeratne⁽¹⁾.and Ibrahim vs Bee Bee⁽²⁾. etc. would have any application? Is there a failure on the part of the appellant to name the necessary party as a respondent to the appeal where there is non-compliance with Section 18(2) of the Code, by the plaintiff. Further the judgment of the District Judge dated 9.9.2003 refer only in the opening sentence to the plaintiff and the plaintiff added subsequently but does not thereafter specifically refer to the added plaintiff. However, the issues have been raised based on the injuries suffered to both plaintiff and his daughter. (Issue No. 7) There had been no objection to any of the plaintiff's issues. Even the plaint refer to injuries caused to both.

Failure to comply with Section 18(2) is definitely a procedural irregularity. On the other hand Section 17 of the Code states that non-joinder of parties does not defeat an action. All these matters should have been considered in the original court.

The Respondent though raised an objection as above for the omission/mistake of the Appellant for not including the plaintiff's daughter (who was added) as a party in the notice of Appeal/Petition of Appeal is himself responsible for not taking the steps as required

to do under Section 18(2) of the Code. One has to consider this from the point of view of the original court order permitting addition of parties under Section 18 of the Civil Procedure Code.

Section 755(1) (c) and (d) and Section 758 (1)(b) and (c), requisites of notice of Appeal and Petition of Appeal respectively of the Civil Procedure Code contemplates of the following particulars:

1. Names and addresses of parties
2. Names of the Appellant and Respondent.

Except in the Petition of Appeal, the notice of Appeal suggest inclusion of the address of parties.

In the above circumstances I would observe that much confusion would have prevailed upon on Attorneys on either side resulting from the lapse that occurred from the original court. However the code has made provision to cure a lapse but it is doubtful whether the following provision would apply in a situation of this nature, and to the case in hand.

Section 759(2) reads thus

In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done) the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.

Decisions of the Appellate Court in which Section 759(2) could be invoked may be gathered from the following case law.

The power of the court to grant relief under Section 759(2) of the code is wide and discretionary and is subject to such terms as the court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

Nanayakkara v Warnakulasooniya⁽³⁾.

However, there appears to be fundamental mistake, though procedural, which will cause difficulty as a result of non-compliance with mandatory provision of the Civil Procedure Code (Section 18(2)). The District Judge by order dated 7.9.2000 permitted the addition of the 2nd added plaintiff (daughter of the plaintiff). As observed above there is no amended caption/pleadings filed subsequent to the said order. There was no proxy filed on behalf of the intended added party. The order to add has been made after the commencement of trial. Several lapses had taken place in the original court itself. The above lapses cannot be cured in the Court of Appeal. In spite of all this case proceeded to trial and I find the following material on which a judgment had been pronounced.

The learned District Judge has more or less narrated the evidence, but has referred to the cross-examination of each important witness from which the truthful account of the story could be gathered. The plaintiff's version is that the accident occurred on the Matale-Dambulla road at a place called Huganwella, Naula, when he was riding his motor cycle and his daughter on the pillion. After having had tea with the daughter at a kiosk he proceeded on the highway about a 100 yards, when a bus approaching from the opposite direction on the wrong side collided with the motor cycle and caused severe injuries to him and the daughter. At that point of impact there was a hilly area or higher elevation of the road and the bus had been coming down the slope. It is his evidence that as a result of the accident he suffered a fracture of the hip and right leg. He was also unconscious until he was taken to the Matale hospital, and later transferred to the Peradeniya Teaching Hospital. The daughter's evidence also had been considered by court with the narration of the evidence and reference being made to cross examination of the witness. The medical reports of both were marked as 'P1' & 'P2'.

The plaintiff according to 'P1' had the following injuries.

- (a) contusion left foot.
- (b) fracture of pubre bone.

The added plaintiff (daughter) according to 'P2' had the following injuries (a) compound fracture of the bones of the lower limb (Tibia & Fibula). Both reports indicate grievous injuries. The Doctor who gave

evidence concludes that in view of the severe injuries caused to the added plaintiff it cannot be said that the patient would after some time be her normal self, of what she was prior to the accident. In fact the injuries caused to her may have been fatal. However the Doctor states that since the added plaintiff was not available in court he cannot comment on the added plaintiff's present condition. This seems to be the reason for the original court to answer issue No. 4 as not proved. This Doctor was not examined on report marked 'P1'.

The sketch plan was marked as 'P3', which also gives an indication as to how the accident occurred. The bus had gone across the road and very much on the wrong side. The breadth of the road is 6.1 meters. Left side of the motor cycle had been damaged, and at a point from about 3 meters from the edge of the road.

On the question of damages I find that the learned District Judge has not made a proper evaluation on damages although his ultimate decision was to award damages on a reduced amount from the amount claimed in the prayer to the plaint. (may be for the reason of plaintiff's contributory negligence).

I wish to cite the following authorities where awarding of damages under various heads had been considered. This being a case of general damages and special damages not being pleaded, court would only make an equitable assessment. In *Nadarajah v C. T.B.*⁽⁴⁾ at 53....

In a claim for damages for personal injury, whether caused by negligence or otherwise, the damages are, apart from special damages, at large, and will be given for the physical injury itself, and in case of disablement, for its effect upon the physical capacity of the injured person to enjoy life as well as for his bodily pain and suffering. "Such damages cannot be a perfect compensation but must be arrived at by a reasonable consideration of all the heads of damages in respect of which the plaintiff is entitled to compensation and of his circumstances, making allowances for the ordinary accidents and chances of life Halsbury-Laws of England (3rd Edition), Vol. 11, paragraph 427.

Jayakody v Jayasuriya⁽⁵⁾ at 220 and 221.

McKeron in the Law of Delict (1965) 6th edition at page 114 under the heading personal injuries has stated:

In an action for personal injuries the plaintiff is entitled to claim compensation for:

- (1) actual expenditure and pecuniary loss;
- (2) Disfigurement, pain and suffering and loss of general health and the amenities of life;
- (3) Further expenses and loss of earning capacity ...

The damages recoverable under the second head cannot be assessed on any arithmetical or logical basis ...

The usual method adopted is to take all the circumstances into consideration and award substantially an arbitrary sum.

Macintosh and Scoble, on "Negligence in Delict" 5th edition at page 261, under the head of "Damages for Personal Injury" has stated that "the general principles in relation to compensation payable for injuries negligently inflicted on oneself personally have been laid down in a number of decisions to the effect that the plaintiff is entitled to compensation for both pecuniary and non-pecuniary loss such as:

- (a) all necessary expenses such as medical and hospital alteration.
- (b) Loss of future earnings.
- (c) compensation for loss of amenities.
- (d) compensation for the shortening of one's expectation of life.
- (e) compensation in respect of pain, suffering or deformity sustained Where damages are claimed for bodily injury, the plaintiff is not required to put a separate money value on each different element of the general damages he has sufferedIn regard to pain and suffering there are really no scales by which pain and suffering can be measured and there is no relationship between pain and money.
- (f) Loss of wages.
- (g) compensation for change in personality

Item (c) and particularly (e), however are not capable of any precise estimate, the court can only give a general equitable assessment".

This Court need not come to a finding on the negligence aspect of the defendants or support the views of the District Judge as the Judgment of the Original Court cannot stand in view of the above procedural lapses. The answers to issue Nos. 6, 7 & 8 being important issues cannot be considered without a proper addition of parties until and unless the lapses stated above are rectified. In the circumstances I would set aside the Judgment of the District Judge and direct that a re-trial be held. The Registrar of this Court is directed to forward the record in D.C. Matale 4681/MR to the relevant District Court.

EKANAYAKE, J. - I agree.

Appeal allowed.

Re-trial ordered.