FAILURE TO DISCLOSE A CAUSE OF ACTION - A FAILED ACTION?
A PRAGMATIC REVIEW OF THE LEGAL PROCEDURE

Swasha Fernando
Attorney-at-Law
LL.B(Hons)(University of London)

And

Shiloma David
Attorney-at-Law
LL.B(Hons)(University of Jaffna)

INTRODUCTION

Following the introduction of the Pre-Trial Process to the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, No. 8 of 2017 ("Amending Act"), the question of how and when a purely legal objection such as the failure to disclose a cause of action *inter alia*, should be raised has proved to produce two competing views. This paper seeks to analyse the procedure adopted by courts prior to the amendment in 2017 *vis-à-vis* the Amending Act, to understand if the intention of the Act was to depart from the inveterate practice adopted by court prior to it.

This paper will first explore the procedure adopted by courts in dealing with defective plaints, namely the failure to disclose a cause of action prior to 2017, and thereafter deliberate on the Amendment introduced to the Civil Procedure Code ("Code") in 2017. The relevant provisions of the amendment will also be analyzed to understand whether a departure from the established procedure was intended by the Act, culminating in a discussion as to how the Amending Act ought to be reconciled with the basic scheme of the Code with relation to addressing pure legal objections.

FAILURE TO DISCLOSE A CAUSE OF ACTION PRIOR TO 2017

Section 46(2)(d) of the Code states that the Court may reject a plaint if no cause of action has been disclosed.[1]

The Court in **Lowe vs. Fernando**[2] explained,

> *The expression 'cause of action' generally imparts two things, viz, a right in the plaintiff and a violation of it by the defendant…*

Hence the plaintiff **must** adequately set out the basis of the action, namely the right (whether positive or any other) that has been violated including the manner in which such party has wronged the

[1] Section 46(2)(d), Civil Procedure Code.
[2] [1913] 16 N.L.R. 398 at p 404. See also, K. D. P. Wickremesinghe, Civil Procedure in Ceylon, (1st edn, 1971) 32.

plaintiff.[3] If the plaintiff fails to state the involvement of the defendant in the alleged violation or infringement of the purported right, it would be that a cause of action has not been disclosed against the relevant defendant, culminating in the rejection of the plaint.

When and how does one invoke the jurisdiction of the court to exercise the power to reject a plaint in terms of section 46(2)(d) of the Code?

The earliest case on record relating to this matter is **Mudali Appuhamy vs. Tikarala**, which held that;

> *[A]n objection for want of particulars is not a matter to be set up by plea. If defendants desired to require more particulars, they should at once instead of answering to the merits, have moved to have the plaint taken off the file for want of particulars, such motion being made in the manner required by section 91.*[4]

This position was followed in **Actalina Fonseka vs. Dharshani Fonseka**, which clearly stated that if the defendant is of the opinion that no cause of action is disclosed or sufficient particulars relating thereto have not been furnished;

> *…the defendants should,* ***before pleading to the merits****, move to have the plaint taken off the file for want of particulars - Mudali Appuhamy v. Tikarala. Under Section 46(2) of the Civil Procedure Code this is the correct procedure even in a case where it is alleged that the plaint does not disclose a cause of action.*[5]

The Supreme Court in **Seetha Luxmie Arsakulasooriya vs. Avanthi Sudharshanee Tissera nee Wadugodapitiya**[6] reinforced this procedure, stating as follows in the context of a failure to disclose a cause of action;

> ***it is trite law that the correct procedure is for the defendant, before filing answer, to move court as contemplated by Section 46(2) of the Code to return the plaint to the plaintiff for amendment****.*

In view of the aforesaid authorities, where a plaint does not disclose a cause of action the correct or proper procedure is to file a motion, and have the matter temporarily removed off the trial roll, even before an answer is filed. Thus an objection of this nature must be taken at the very inception, quite independently of other objections that may be raised in the answer.

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[3] As per the interpretation in Section 5, Civil Procedure Code, the wrong may include; (a) denial of a right, (b) a refusal to fulfill an obligation, (c) the neglect to perform a duty a duty, and (d) the infliction of an affirmative injury.

[4] [1892] 2 Ceylon Law Recorder 35 at p 36.

[5] [1989] 1 Sri L.R. 95 at 100.

[6] S.C. Appeal No. 54/2008, SC Minutes dated 09.09.2010 at p 5.

Anil Gooneratne J., in **Alvitigalage Padmasiri vs. K.L. Anulawathie**[7] states;

> *I am convinced that parties could not have proceeded to trial on the plaint filed of record. Court on its own motion could have rejected the plaint at the earliest available opportunity. If that was the case Plaintiff would have been able to present a fresh plaint without difficulty or even at an earlier stage (may be prior to issue of summons) it could have been rejected if the Defendant by way of motion objected to the plaint. Section 46(2) of the Civil Procedure Code is designed to cure such defects by giving an opportunity to remedy the situation and permit filing of a fresh plaint.*

When a motion to dismiss an action has been filed on the basis of a failure to disclose a cause of action, the court is statutorily vested with discretion to determine whether the plaint ought to be returned for correction or not. If the plaint is returned without adequate change the court is vested with the power to reject the plaint. More importantly, the defendant is free to move for a rejection/refusal of the plaint on that ground at the earliest opportunity.

PROCEDURE CONSEQUENT TO THE 2017 AMENDMENT

The Amending Act introduced a significant change to the litigation process, viz., the 'pre-trial hearing'.[8] The pre-trial hearing chiefly involved the settling of written issues and admissions.

Consequent to the introduction of the pre-trial process, a school of thought has developed that jurisdictional issues can only be raised at the pre-trial hearing and not before that, in view of section 142D, which empowers the Judge to ascertain jurisdictional issues at the pre-trial. If jurisdictional issues may only be raised at the pre-trial stage, the argument is made that all other applications including infirmities relating to the plaint are *a fortiori* prevented from being raised prior to the pre-trial.

However, this line of thinking is not reconcilable with the entire framework of the civil procedure. As the Code provides for the refusal of a plaint, where a *prima facie* cause of action is not disclosed,[9] it ought not be taken up in the answer, instead, an objection as to nonconformity under section 46(2)(d) of the Code must be raised by way of a motion before the pre-trial commences. The Amending Act does not amend Section 46. Thus there is no basis to deviate from the procedure adopted prior to the amendment.

[7] CA 323/1997(F), CA Minutes 06.10.2011 at p.6.

[8] Sections 142A-142I, Civil Procedure Code (Amendment) Act, 8 of 2017.

[9] Section 46(2)(d), Civil Procedure Code.

Courts have consistently held that where a plaint is *ex facie* defective, it must be rejected or returned **at the earliest opportunity**. Bonser C.J., in **Read vs. Samsudin**[10] held;

> *If the plaint is defective in some material point and that appears on the face of the plaint, but by some oversight the court has omitted to notice the defect, then the defendant on discovering the defect, may properly call the attention of the court to the point, and then it will be the duty of the court to act as it ought to have done in the first instance, either to reject the plaint or to return it to the plaintiff for amendment*.

A failure to satisfy the criteria stipulated in the Code relating to a plaint does not involve evidential proof. Insofar as an evidential burden is not required to determine such an objection, a party should be at liberty to draw judicial attention to the matter.[11]

This position is logically and legally supported by the fact that the provisions which empower court to reject/return of a plaint for want of jurisdiction are left untrammeled by the amendment.[12] This is consistent with the scheme and structure of the Code, which clearly envisages the power of court to reject/return a plaint (which is *ex facie* defective) at the first available opportunity.[13]

It is pertinent to note that although section 142D provides for jurisdictional issues to be ascertained at pre-trial, it does not preclude such objections from prior consideration. The fact that sections 47 and 48 dealing with jurisdictional issues have not been amended reinforces this position.

Therefore, where a plaint is not *ex facie* defective, all objections to the merits of the matter must be taken up in the answer.

Moreover, one must keep in mind that the pre-trial procedure comes after the filing of an answer. Therefore, if the contention of the defendant is based on the fact that no cause of action has been disclosed, the only 'issue' to be determined would be whether a cause of action has been disclosed or not. In order to determine that sole legal issue, one need not file an answer and prolong the litigation process. Moreover, where the court is of the view that sufficient particulars have not been furnished with respect to the cause of action, the court cannot return the plaint to be amended consequent to the pre-trial process unless

[10][1895] 1 N.L.R. 292 at 295. See also K. D. P. Wickremesinghe, Civil Procedure in Ceylon, (1st edn, 1971) 71-76,

[11] [1913] *Soysa v. Soysa* 17 N.L.R. 118; [1922] *Avva Ummah v. Casinader* 24 N.L.R. 199.

[12] Section 40, 41, 46(2), 47 and 48, Civil Procedure Code.

[13] [2007] *Piragalathan v. Shanmugam* 1 Sri L.R. 320 at 328.

grave and irremediable injustice would be caused.[14] It is not reasonable to construe that the pre-trial process disposed of the practice adopted over the ages, to file a motion to reject a plaint for want of a cause of action, especially in the absence of provisions precluding the same.

Further, Section 39 of the Judicature Act provides that once a defendant has pleaded in any action, the defendant is no longer entitled to object to the jurisdiction of such court.[15] Practically, to 'answer' the plaint, would mean to acknowledge the existence of a cause of action. Therefore, once the defendant files the answer, the defendant loses the right to take up a purely legal objection as to maintainability of the plaint.[16]

This would be true concerning any fundamental infirmity in the plaint. Therefore, by this reasoning, such legal objections should be raised before an answer is filed i.e., well before the pre-trial.

The next issue to be addressed is the procedure by which such objections should be raised. Section 91 of the Code states;

> *Every application made to the count in the course of an action, incidental thereto, and not a step in the regular procedure shall be made by motion…and a memorandum in writing of such motion shall be at the same time delivered to the court.*

The Amending Act did not amend the aforesaid section relating to motions. Although, the pre-trial provides for the ascertaining of jurisdictional issues, a motion may be filed before the pre-trial hearing to move for a dismissal of an action where there is a fundamental and material defect in the plaint. The need to draw the attention of Court to this fact, which is *not a step in the regular procedure,* ought to be done by way of a motion.

The authority to act on motions not in step with the ordinary procedure form part of the inherent powers of the Court as observed by Wigneswaran J., in **Muthucumaran vs. Wimalaratne and Another**[17] that;

> *There is nothing in the Civil Procedure Code which prohibits a party to an action filing a motion at any stage and claiming an appropriate relief. A motion is a document which moves Court to act. Filing of a motion may not be a step in the regular procedure, which procedure lays down the type of pleadings that should be filed. But it is*

[14] Section 93(1)-(2) as amended by the Civil Procedure Code (Amendment) Act, No. 8 of 2017.
[15] Section 39, Judicature Act 1979.
[16] Naturally, this does not include instances where there is a patent lack of jurisdiction *vide*, section 636, Civil Procedure Code. See also, [1974] *P. Beatrice Perera v. The Commissioner of National Housing* 77 N.L.R. 361 at 366.
[17] [1999] 1 Sri L.R. 139 at 142-143.

nevertheless an application to Court made in the course of an action incidental to the procedure adopted by Court either Regular or Summary, calling upon the Court for its intervention.

Section 46 (2) of the Civil Procedure Code gives right to the Court to refuse to entertain a plaint or reject a plaint. This right can be used by Court ex mero motu though generally due to the large number of cases filed in a Court of Law in present times, the Court does not have the time to look initially into the matters set out in section 46 or 47 of the Civil Procedure Code until the Court's attention is drawn either by the Registrar of the Court or subsequently by a party to the action. Suppose a Court has patent lack of jurisdiction to entertain a plaint in its Court, the Registrar of the Court has the right to bring this matter to the notice of Court not by motion but by an endorsement made on the journal. Similarly a party to an action could bring any matter incidental to the action which needs the attention and intervention of Court to the notice of the latter by motion. (vide section 91 of the Civil Procedure Code). A Court's right to entertain such application by motion and act upon them derives sanction apart from specific provisions in law, from also the inherent authority granted to it by law to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court (vide section 839 of the Civil Procedure Code)

Thus, the power to file motions *at any stage* of the action has not been derogated by the Amending Act since it contains no positive rule prohibiting the same. This is congruent with the procedure adopted by the Indian Civil Procedure Code which expressly states that if a plaint does not disclose a cause of action against defendant, it may be rejected on an application filed by the defendant at any stage before trial.[18] This position has been considered by the Supreme Court in **Ram Sukh vs. Dinesh Aggarwal**[19] where it was emphasized that the purpose of Order VII Rule 11 is to ensure that litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of Court.

It is manifestly clear that the Civil Procedure Code of Sri Lanka echoes the same position even after the Amending Act. Had the Amendment sought to alter this position, it would have done so expressly. Therefore, an interpretation of the Amendment contrary to this position is not

[18] Order VII, Rule 11 (a); *S.M.P. Shipping Services Pvt. Ltd. v. World Tanker Carrier Corporation* [2000] AIR Bom 34; *K. Roja v. U. S. Rayu* [2016] 14 SCC 275.

[19] [2009] 10 SCC 541. See also, *Colonel Shrawan Kumar Jaipuriyar v. Krishna Nandan Singh and Another*, Civil Appeal No.6760/2019 decided on 02-09-2019.

cohesive with a holistic reading of civil procedure.

Whilst a significant change in procedure was introduced by way of the Amending Act, the discretion of the Court to refuse to entertain a plaint under Section 46(2) remained untrammeled. Although the pre-trial procedure provides for jurisdictional issues to be ascertained, the Amendment does not seek to suggest that such issues should only be raised during the said hearing. If the legislative intent was to overturn what judicial authority referred to as 'trite law' in rejecting a plaint at the earliest opportunity, it would have done so expressly without leaving it to the imagination of the judiciary.

CONCLUSION

As considered above, the need to disclose a cause of action in a plaint is vital to the tenability of the action. Failure to do so would warrant a rejection of the plaint.

A comparative analysis between the pre 2017 and the alleged post 2017 procedure reveals that the Amending Act, which introduced the pre-trial process also provided for jurisdictional matters to be ascertained. Nevertheless, nothing contained in the Amendment precludes Court from considering a legal objection which renders the plaint defective/nugatory prior to the pre-trial

The power of the Court to reject a plaint has not been subject to amendment. This therefore leads to the logical conclusion that it was **not** the intention of the legislature to alter the existing practice of drawing the attention of Court (by way of motion) to a defect in the plaint that renders it void for further consideration.

The scheme of the Code seeks to draw an intentional distinction between matters involving an evidential determination and matters involving a legal determination. While the former would have to be addressed in the answer, the latter ought to be addressed before pleading to the action. Upon the pleading to the action, the party relinquishes his right to canvas the same.

Therefore, the power of the Court to reject a plaint *in limine* may be understood both logically and legally in the context that where a plaint is intrinsically defective for want of disclosing a cause of action, there can be no further action taken upon it; to do so, would only result in futile litigation.