

RUSHANTHA PERERA
VS
WIJESEKERA

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 110/2005.
DC MATALE 7200/MR.
AUGUST 3, 2005.

Civil Procedure Code, section 93(2) - Amendment of plaint after first date of trial - Circumstances to be taken into consideration - What is the purpose of the Amendment No. 9 of 1991 ?

The plaintiff-petitioner instituted action on a purported cause of action accrued to him on a defamatory statement alleged to have been made by the defendant-respondent. The defendant-respondent specifically took up the position that the action cannot be maintained as the plaintiff-petitioner has failed to properly state the date on which the purported cause of action accrued to him. In his replication the plaintiff-petitioner averred that, he has properly stated the dates on which the causes of action accrued to him. Thereafter the

plaintiff-petitioner sought to amend the plaint on the second date of trial to give the relevant date. The trial judge refused the said application.

HELD:

- (1) The provisions applicable to the amendment of pleadings after the first date of trial are the provisions contained in section 93(2) of Act No. 9 of 1991.

Per Somawansa, J. (P/CA) :

"In the instant application for leave the amendments the plaintiff-petitioner is seeking to effect are matters which existed at the time of the plaintiff filing the action and within his knowledge and/or was made aware by the defendant-respondent."

- (2) The plaintiff has waived his right to amend the plaint by his averments in his replication.
- (3) The amendment introduced by Act, No. 9 of 1991 was clearly intended to prevent the undue postponement of trials.

APPLICATION for leave to appeal from the order of the District Court of Matale.

Case referred to :

- (1) *Dane vs. Abdul Latiff* (1995) 1 Sri LR. 225
- (2) *Ceylon Insurance Co. Ltd. vs. Nanayakkara* (1999)3 Sri LR 50
- (3) *Colombo Shipping Co. Ltd Vs. Chiaya Clothing (Pvt) Ltd.* (1995)2 Sri LR 97
- (4) *Avudiappan vs. Indian Overseas Bank* (1995)2 Sri LR 131
- (5) *Kurupparachchi vs. Andreas* (1996) 2 Sri LR 11
- (6) *Ranaweera vs. Jinadasa* - SC Application 4/91
- (7) *Paramalingam vs. Sirisena and Another* (2001)2 Sri LR 239

Upul Ranjan Hewage for plaintiff-petitioner.

C. Wickramanayake for defendant-respondent.

November 11, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking leave to appeal from the order of the learned Additional District Judge of Matale dated 10.03.2005 refusing an application made by the plaintiff-petitioner to amend the plaint and if leave is granted to set aside the aforesaid order and allow the application dated 30.11.2004 for amendment of the plaint.

When this application was taken up for inquiry both parties agreed to resolve the entire matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are on 30.11.2004 which was the second date of trial two admissions were recorded and on behalf of the plaintiff-petitioner 10 issues were raised. Thereafter counsel for the plaintiff-petitioner made an application to amend the plaint.

The defendant-respondent objected to this application and parties were directed to tender written submissions. Having considered the written submissions so tendered by both parties the learned Additional District Judge by his aforesaid order dismissed the plaintiff-petitioner's application to amend the plaint. It is from this order that the plaintiff-petitioner has preferred this appeal.

It is contended by counsel for the plaintiff-petitioner that the learned Additional District Judge has erred in law when he made the impugned order for the following reasons :-

(a) Additional District Judge has failed to consider the grave and irremediable injustice that would be caused to the plaintiff-petitioner if the application for amendment was not granted.

(b) He has failed to give any reasons as to whether grave and irremediable injustice would not be caused to the plaintiff-petitioner if his application for amendment was not granted.

(c) That he failed to consider that the amendment sought to be made was to correct a genuine and *bona fide* error in the plaint for the purpose of clarifying the true dispute and by his request to replace the wrong month

with the correct month the plaintiff-petitioner was not trying to convert the action of one character to an action of a different character.

(d) That he erred in law when he came to a finding that it was held in *Gunasekera vs. Abdul Latiff* that an amendment cannot be allowed to correct a clerical error or a typographical error in terms of section 93(2) of the Civil Procedure Code.

(e) That he failed to consider that the real date of alleged cause of action is mentioned in document marked P1 annexed to the plaint and that it is also referred to in paragraph 7 of the plaint and any amendment would only clarify the real dispute.

(f) That he has erred in law inasmuch as he has considered the aspect of delay without first considering whether grave and irremediable injustice would be caused to the plaintiff-petitioner if his application for amendment is refused.

It is interesting to note that the plaintiff-petitioner has instituted this action on a purported cause of action accrued to him on a defamatory statement alleged to have been made by the defendant-respondent as pleaded in paragraph 7 of the plaint which reads as follows :

07. නඩු නිමිත්ත සඳහා

වර්ෂ 2002ක් වූ සැප්තැම්බර් මස 31 වැනි දින පල්ලේපොල ප්‍රාදේශීය සභාවේ මහා සභා රැස්වීම පැවැත්වූ බව පැමිණිලිකරු ප්‍රකාශ කර සිටී. එකී මහා සභා රැස්වීමේදී විත්තිකරු ජේ. එස්. විජේසේකර මහතා පැමිණිලිකරු සම්බන්ධයෙන් පහත ප්‍රකාශය කල බව පැමිණිලිකරු ප්‍රකාශ කර සිටී.

The defendant-respondent filed answer denying the averments contained in the aforesaid paragraph 7 of the plaint and in paragraph 9 of the answer specifically took up the position that the plaintiff-petitioner cannot maintain this action as presently constituted inasmuch as the plaintiff-petitioner has failed to properly state the date on which the purported cause of action accrued to him. Paragraph 9 of the answer reads as follows :

9. ඉහත කරුණුවලට අගරහිතව මෙම විත්තිකරු ප්‍රකාශ කර සිටිනුයේ පැමිණිලිකරුට නඩු නිමිත්තක් උද්ගතවී ඇත්තේ නම් එසේ උද්ගත වූවායැයි කියනු

ලබන නිමිත්ත උද්ගත වූ දිනයක් පැමිණිල්ලේ නිශ්චය ලෙස දක්වා නොමැති හෙයින් පැමිණිලිකරුට මෙම නඩුව පවරා ඇති ආකාරයෙන් පවරා පවත්වාගෙන යා නොහැකි බවයි.

It appears that thereafter the plaintiff-petitioner disputed the aforesaid position taken by the defendant-respondent and in paragraph 3 of the replication the plaintiff-petitioner further stated that by paragraphs 7 and 11 of the plaint he has separately averred the causes of action and that he has properly stated the dates on which the causes of action accrued to him. Paragraph 3 of the replication reads as follows :

විත්තිකරුගේ උත්තරයේ 9 වන ඡේදයට වැඩිදුරටත් පිලිතුරු දෙමින් පැමිණිලිකරු ගරු අධිකරණයට ගොරවයෙන් ප්‍රකාශ කර සිටිනුයේ පැමිණිල්ලේ 7 වන සහ 11 වන ඡේදවලින් අදාළ නඩු නිමිති වෙන් වෙන්ව විස්තර කර නිවැරදි කාල වකවානු එහි නිශ්චිතව දක්වා ඇති බවයි.

Thus it could be seen that when the defendant-respondent in paragraph 9 of his answer specifically stated that the plaintiff-petitioner has failed to properly state the date on which the purported cause of action accrued to him the plaintiff-petitioner without seeking to amend the plaint so as to give the correct date, in fact disputed the aforesaid position taken by the defendant-respondent and went on to state in his replication that by paragraphs 7 and 11 of the plaint he has stated correctly the dates on which the causes of action accrued to him. Having taken such a stand he now seeks to amend paragraph 7 of the plaint by substituting the words "October 2002" instead of the words "September 2002" found therein.

It is common ground that the plaintiff-petitioner has sought to amend the plaint on the second date of trial and the relevant provisions applicable to the amendment of pleadings after the day first fixed for trial are the provisions contained in Section 93(2) of the Civil Procedure Code which reads as follows :

93. (2) "On or after the day first fixed for the trial of the action and before final judgement, 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".

Section 93(2) of the Civil Procedure Code has been considered in a number of cases and in the case of *Gunasekera vs. Abdul Latiff*¹ cited by counsel for the plaintiff-petitioner himself it was held :

"Court will grant relief under section 93(2) of the Civil Procedure Code only if the delay can be reasonably explained. The provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances. Further it was held amendment to pleadings on or after the 1st date of trial can be allowed only if the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying has not been guilty of laches."

Counsel for the plaintiff-petitioner while relying heavily on the aforesaid decision goes onto say that the facts and circumstances of that case *Gunasekera vs. Abdul Latiff (supra)* are entirely different from the instant action. Counsel for the plaintiff-petitioner also cited the decision in *Ceylon Insurance Co. Ltd., vs. Nanayakkara*². The facts were as follows :

The plaintiff-respondent instituted action against the defendant-petitioner claiming a certain sum due on a contract of insurance. The defendant disclaimed liability. Trial commenced on 28.07.95 ; after recording issues, it was postponed for 16.10.95. On this date certain objections were taken and when the trial resumed again on 09.01.97 a trial *de novo* was ordered on 13.05.97. On 07.05.97 the plaintiff sought to amend his pleadings, which was allowed by Court.

It was held in that case :

"1. section 93 (2) prohibits Court from allowing an application for amendment, unless it is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying has not been guilty of laches.

The Court is required to record reasons for concluding that both conditions referred to have been satisfied.

2. The application to amend by pleading mistake or inadvertence can in no sense be regarded as necessitated by unforeseen circumstances. The plaintiffs' conduct point to one conclusion, viz. that they have acted without

due diligence “ this error could have been discovered with reasonable diligence ; the need for the amendment did not arise unexpectedly.

It is contended by counsel for the plaintiff-petitioner that the requirement that the application to amend pleadings on the basis of mistake or inadvertence should have been necessitated by unforeseen circumstances as held in the aforesaid case has introduced a restriction not imposed by legislature.

In the case of *Colombo Shipping Co. Ltd., vs. Chirayu Clothing (Pvt) Ltd.*,³ it was held :

“Amendments on and after the first date of trial can now be allowed only in very limited circumstances namely, when the court is satisfied that grave and irremediable injustice will be caused, if the amendment is not permitted and the party is not guilty of laches”.

Also in the case of *Avudiappan vs. Indian Overseas Bank*⁴ it was held :

“The amendments contemplated by section 93(2) are those that are necessitated due to unforeseen circumstances. Laches does not mean deliberate delay, it means delay which cannot be reasonably explained. The plaint was filed in July 1988, the amendment was sought in September 1994. No explanation was forthcoming from the respondent for the delay. Such a delay in seeking amendment of pleadings on the 5th day of trial cannot be countenanced.”

In the case of *Kuruppuarachchi vs. Andreas*⁵ wherein the Court considered the effect of the amendment introduced to the Civil Procedure Code by Act No. 9 of 1991 :

“The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trials by placing a significant restriction on the power of court to permit amendment of pleadings ‘on or after the day first fixed for trial of the action”.

The Court further went on to state at page 13 that :

“The relevance of those observations for the present purposes is that they indicate the rationale underlying the amendment introduced by Act No. 9 of 1991. While court earlier “discouraged” amendment of pleadings on the date of trial. Now the court is precluded from allowing such amendments save on the ground postulated in the subsection.”
(emphasis added)

I would also cite the following decisions :

*Ranaweera vs. Jinadasa*⁶

Per Amerasinghe, J.

“No postponements must be granted or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot otherwise be provided for.”

Also in the case of *Paramalingam vs. Sirisena and Another*⁷ it was held :

“Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent”.

In the instant application for leave the amendments the plaintiff-petitioner is seeking to effect are matters which existed at the time of the plaintiff-petitioner filing this action and within his knowledge and/or was made aware by the defendant-respondent. The plaintiff-petitioner now cannot be heard to say that the date on which the purported cause of action accrued to him was another date. In the circumstances, I am unable to see how grave and irremediable injustice would be caused to the plaintiff-petitioner unless the amendment is accepted by Court. It is very clear the plaintiff-petitioner has waived his right to amend the plaint by his averments in his replication. It is apparent that the learned Additional District Judge in a closely considered order has come to a correct finding that the plaintiff-petitioner's own conduct prevents him from amending the pleadings in terms of section 93(2) of the Civil Procedure Code.

In the circumstances, I do not think any further consideration is necessary as to the submissions made by counsel for the plaintiff-petitioner. I have no hesitation in rejecting the application for leave with costs fixed at Rs. 20,000/-.

WIMALACHANDRA J. – I agree.

Application dismissed.