

KARUNARATNE
v
ALWIS

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 7/2002
DC NEGOMBO 4787/L
DECEMBER 13, 15, 2007
MARCH 15, 2007

*Civil Procedure Code – Section 93(1) – Section 93(2) – Amendment of pleadings
– What is the day first fixed for trial? Is it the day the trial actually begun?*

Held:

The day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun comes under S93(1) empowering the Judge granting wide discretion in allowing amendments.

"It is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed".

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

Cases referred to:

- (1) *Ceylon Insurance Company v Nanayakkara and another* – 1999– 3 Sri LR 50 at 52.
- (2) *Siripura Hewawasam Pushpa v Leelawathie Bandaranayake and three others* – 2004 – 3 Sri LR 162 (SC)
- Padmasiri Nanayakkara with Indika de Alwis* for defendant-petitioner.
- Dr. S.F.A. Cooray with D.H. Siriwardane* for plaintiff-respondent.

June 15, 2007

ERIC BASNAYAKE, J.

The defendant-petitioner (defendant) filed this application 01 seeking to have the order of the learned District Judge dated 31.12.2001 set aside. By this order the learned District Judge had allowed the amended plaint.

This case was filed on 11.10.1993. The answer was filed in March 1994. A replication was filed on 4.10.1994. On 26.2.2001 the defendant filed an amended answer to which the plaintiff filed objections on 5.4.2001. However, on 10.5.2001 the plaintiff withdrew the objections due to which the amended answer was accepted. On 26.6.2001 the plaintiff filed an amended plaint 10 together with a motion giving separately the amendments. This was objected to by the defendant. The learned District Judge after inquiry accepted the amended plaint by his order dated 31.12.2001 marked "J".

Order dated 31.12.2001

The learned Judge stated in the order that the plaintiff moved to amend the plaint to include the deed number and to describe in detail the last will proved in Court. The schedule had been amended to give a detailed description. The trial had not yet begun. The answer had been amended prior to this. Therefore the learned Judge had concluded that no prejudice would be caused to the defendant. 20

The petitioner averred that the learned Judge had failed to consider section 93 of the Civil Procedure Code and also to satisfy that grave and irremediable injustice would be caused to the defendant if the amendment is not allowed. The petitioner further complained that the learned Judge had failed to consider the negligence and the long delay.

The learned Counsel for the defendant complained that the impugned order could not be considered as one valid in law. He further submitted that the learned Judge has not considered the law that is applicable to the amendments of pleadings contained in section 93 of the Civil Procedure Code. The learned Counsel mentioned the case of *Ceylon Insurance Company v Nanayakkara and another*⁽¹⁾ at 52 where Weerasuriya, J. held that "as set out in section 93 (2) the amendment of pleadings on or after the first date of trial can now be allowed only in limited circumstances. It prohibits Court from allowing an application for amendment (a) unless it is satisfied that grave and irremediable injustice be caused if the amendment is not allowed and (b) the party applying has not been guilty of laches. Further the Court is required to record reasons for concluding that both conditions referred to above have been satisfied".

The learned Counsel submitted that the learned Judge has failed to consider both aspects namely whether grave and irremediable injustice would be caused to the plaintiff if the amendment is not allowed and whether the plaintiff is guilty of laches.

Section 93 of the Civil Procedure Code is as follows:

93 (1) Upon application made to it before the day first fixed for trial of 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 the 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.

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(3) Not reproduced.

(4) Not reproduced.

In *Siripura Hewawasam Pushpa v Leelawathie Bandaranayake and three others*⁽²⁾, S.N. Silva C.J. referring to the day first fixed for trial said thus: "**it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed**" (emphasis added).

Therefore the day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun therefore comes under section 93 (1) empowering the Judge granting wide discretion in allowing amendments. While considering the impugned order, it appears that the learned Judge had considered the fact that the trial had not yet begun. He also seems to be conscious of the fact that the defendant too was allowed to amend the answer a few days before. He had also considered the fact that the amendment gives a detailed description of the plaintiff's title. The order of the learned Judge contains only 12 lines as referred to by the learned Counsel for the defendant. However those 12 lines contain all that is required.

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Therefore I do not find any reason to interfere with the order of the learned District Judge. The defendant's application is dismissed with costs fixed at Rs. 10,000/-.

WIMALACHANDRA, J.

gree.

Application dismissed.