PURE BEVERAGES LTD.,
v.
SHANIL FERNANDO

COURT OF APPEAL.
YAPA, J.
U. DE Z. GUNAWARDENA, J.,
C.A. NO. 675/97
D.C. COLOMBO 16384/MR
SEPTEMBER 17, 1997.

Civil Procedure Code Section 147 - Issues of Law and Fact - In what circumstances should the court try Issues of Law first?

The plaintiff-respondent filed action on 24.5.1995 praying for judgment in a sum of Rs. 300,000/- being damages that he had suffered on account of illness caused to him by the trauma that he suffered in consequence of the consumption of the contents of a Coco-Cola Bottle that allegedly contained parts of a decomposed worm. As stated in the plaint the consumption was on 12.6.84 - however one of the issues (3) raised by the plaintiff without objection was that consumption was on 12.6.94.

The District Court rejected the application of the defendant-petitioner to try issue (9) - is the alleged cause of action ex facie prescribed - first.

Held:

(1) As to whether the incident or the facts constituting the cause of action arose on 12.6.1984 or 12.6.1994 is a proposition of fact upon which the parties are at variance on the issues that have been settled and accepted by Court.

If an issue of law arises in relation to a fact or factual position in regard to which parties are at variance that issue cannot and ought not to be tried first as a preliminary issue of law.

(2) The plaintiff respondent by raising issue (3) on the footing that the relevant date was 12.6.1994 and not 12.6.1984 (date set out in the plaint) must clearly be taken to have abandoned the date given in the plaint and the defendant-petitioner not objecting to such a departure or abandonment must be deemed to have clearly acquiesced on the plaintiff raising the issue giving a new date.

If there was no such acquiescence the defendant-petitioner ought to have signified or made his objections known.

Silence on the part of the defendant-petitioner when there was a duty to object must be taken to mean not only that the defendant-petitioner did in fact consent to the issue being raised on the basis of 12.6.94 but also the defendant did so consent because no prejudice was occasioned to him thereby.

***Per* Gunawardena, J.**

"It also needs to be stressed that in a trial of an action the question as to how or in what manner the issues have to be dealt with or tried is primarily matter best left to the discretion of the trial Judge, and a Court exercising appellate or revisionary powers ought to be slow to interfere with that discretion except perhaps, in a case where it is patent or obvious that the discretion has been exercised by the trial Judge not according to reason but according to caprice."

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Porolis v. Sawara* – 1913 2 Bal. Notes 15.
2. *Soysa v. Van Langenberg* – 1913 4 Bal Notes 6
3. In the matter of the Estate and effects of Don Cornelis Warnasuriya. – 2 NLR 144
4. *Attorney-General v. Smith* – 8 NLR 229.
5. *Bank of Ceylon v. Chelliah Pillai* – 64 NLR 25.
6. *Dharmadasa v. Gunawardena* – 2 CLW 385.
7. *Silva v. Obeysekera* – 24 NLR 97.
8. *Dharmadasa v. Gunawardena* – 12 Times of Ceylon Law Reports 5.

S. A. Parathalingam P.C. with *Kuwera de Zoysa* for the petitioner.

Srinath Perera P.C. with *P. B. Herath, Damayanthi Fernando* and *Prasanna de Soysa* for plaintiff-respondent.

Cur. adv. vult.

September 29, 1997.
U. DE Z. GUNAWARDENA, J.

This is an application in revision in respect of an order dated 13.08.1997 whereby the learned Additional District Judge had refused an application made by the defendant-petitioner in terms of section 147 of the Civil Procedure Code that issue No. 9 which was in the following terms be tried first. **Is the alleged cause of action of the plaintiff ex facie prescribed?**

When issues both of law and fact arise in an action, section 147 of the Civil Procedure Code enables or empowers the court to try the issues of law first, if the court is of opinion that the whole case may be disposed of on the issues of law only.

The learned Additional District Judge had by the aforesaid order decided that all the issues in the case would be tried together. The background facts relevant to this application are as follows: The plaintiff-respondent filed this action on 24.05.1995 praying for judgment in a sum of Rs. 300,000/- being the damages that he had suffered on account of the illness caused to him by the trauma that he suffered in consequence of the consumption of the contents of a coca-cola (Soft-drink) bottle that allegedly contained parts of a decomposed worm.

It is be observed that if the date of the accrual of the cause of action which was the consumption of the contents of the said coca-cola bottle was 12.06.1984, as stated in the plaint, the action would for certain be time-barred and the defendant in his answer had, in fact, pleaded so. But strange as it may seem, one of the issues which was numbered 03, raised by the plaintiff at the trial (and that too without objection) was as follows: (03) Did the plaintiff on or about 12.06.1994 open a sealed coca-cola bottle of the capacity of 01 litre and consume a part of the contents (soft drink) thereof which issue was clearly framed on the basis that the consumption of the contents of the bottle (in which a decomposed parts of a worm were allegedly found) occurred on 12.06.1994 in which case no question of prescription can possibly arise - the action having being instituted on 24.05.1995. But stranger still was the fact that the defendant-petitioner's counsel had not raised any objection to the above issue No. 3 raised by the plaintiff being rested on the factual position that the contents of the bottle in question was consumed in 12.6.1994 which was 10 years later than the year referred to or stated in the plaint.

In the circumstances of this case it would be injudicious to direct the learned Additional District Judge to try the above issue No: 9 (raising the question of prescription) first, or as a preliminary issue for in the generality of cases an issue can be tried *in limine*, that is, as a preliminary issue, only if that issue is an issue of law and the factual position, from which that issue of law emanates is common-ground. If an issue of law arises in relation to a fact or factual position in regard to which parties are at variance that issue cannot and ought not to be tried first, as a preliminary issue of law. In this case as to whether the

incident or the facts constituting the cause of action arose on 12.06.84 or a decade later is a proposition of fact upon which the parties are at variance, be it noted, on the issues that have been settled and accepted by the learned trial Judge. In this state of things, the Court, as a preliminary to deciding whether or not the action is prescribed, has to reach a finding in regard to a question involving the fact or concerned with the fact viz. whether the consumption of the coca-cola bottle allegedly containing parts of a worm took place on 12.6.1994 as is the position adopted in issue No. 3 raised by the plaintiff or whether that occurrence was on 12.06.1984 which was obviously the date relied upon by the defendant-petitioner in the issue No: 9 raised by him, although the date is not mentioned specifically as he ought to have done. The manner in which the issue No: 9 had been formulated is far from satisfactory for it is vague and as pointed out above, too, reads thus: Is the alleged cause of action of the plaintiff prescribed ex-facie?

The question is ex-facie what? It would have conduced to clarity if it had been said ex-facie the plaint without leaving anything to surmise. There is no gainsaying that this case had been confused through clumsy handling at the incipient stage. For instance, in the plaint at paragraphs 10 - 12 the damages that the plaintiff-respondent suffered had been stated as Rs. 300,000/- whereas in the prayer the amount claimed by way of damages had been stated as Rs. 3,000,000/-. Such mistakes cannot be airily and flippantly explained away as typist's mistakes as had been done in this case, for the Attorney-at-law who filed the plaint and those responsible for drafting it ought to have corrected such mistakes before the plaint was filed in court. Everyone has suffered, in consequence, one way or the other, except those who ought to be held responsible for such lapses or careless slips.

When as in this case, as explained above, there is an issue of fact to be decided before the issue of law can be dealt with all the issues in the case should be tried together as had been held in following cases reported in *Porolis v. Sawara*[1] and *Soysa v. Van Langenberg*[2]. It has been so held obviously because it would be manifestly inconvenient to try that issue that is, the issue of law, separately and thus to proceed with the case piece by piece at a time.

It goes without saying that the ultimate decision in a case depends on the answers to the issues given by the court and it is well known as had been held in several decided cases that the case must be tried upon issues upon which the right decision appears to the court to depend and in this case, on the issues raised and what is more accepted by the court, as at present, the parties, as pointed out above, disagree sharply and acutely with respect to the said relevant dates. THE PLAINTIFF-RESPONDENT BY RAISING ISSUE NO. 3 ON THE FOOTING THAT THE RELEVANT DATE WAS 12.06.1994 AND NOT 12.06.1984 (WHICH LATTER DATE WAS THE DATE SET OUT IN THE PLAINT) MUST CLEARLY BE TAKEN TO HAVE ABANDONED THE DATE GIVEN IN THE PLAINT AND THE DEFENDANT-PETITIONER IN ADVISEDLY NOT OBJECTING TO SUCH A DEPARTURE OR ABANDONMENT MUST BE DEEMED TO HAVE CLEARLY ACQUIESCED IN THE PLAINTIFF RAISING THE ISSUE GIVING A NEW DATE of Course, the formal practice supported by authority is to amend the plaint thereafter, that is, after the issue is framed so as to make the pleadings square with the issues. But in this instance, such a course or formality is rendered needless or even otiose since the issue setting out a new date had been raised with the acquiescence and knowledge of the defendant-petitioner. If there was no such acquiescence the defendant-petitioner ought to have signified or made his objection known. Silence on the part of the defendant-petitioner when there was a duty to object if, in fact, the defendant-petitioner was prejudiced as a result of a new date being adopted in the issue, must be taken to mean not only that the defendant-petitioner did, in fact, consent to the issue being raised on the basis of 12.6.1994 but also that the defendant did so consent because no prejudice was occasioned to him thereby. Furthermore, the issues were raised in court in the presence of the defendant and his pleaders who would have undoubtedly taken notice of the new date of the incident relevant to the cause of action pleaded in the plaint.

There is a somewhat different view-point from which this question can be considered. *In the matter of the Estate and effects of Don Cornelis Warnasuriya*[3], it has been decided that it was competent to court to determine issues in a matter even when the proceedings

were irregular when there is acquiescence on the part of parties. Even if the raising of an issue setting out a date different from that stated in the plaint, without amending the plaint to make it square with the position outlined in the issue, were to be treated as an irregularity yet it was competent to the court to consider the issue inasmuch as the court had accepted all the issues without objection. Against that background all the issues, that had been raised at the outset of the trial, including issue No:3 setting out a new date different from that stated in plaint, must be treated as issues agreed upon by the parties who necessarily must be deemed to have invited the court to consider them. As explained above, upon issue No: 3 on the one hand, which has been raised on the factual position that the consumption of coca-cola took place on 12.06.1994, and issue No: 9 on the other, which has been raised on the basis of the original date set out in the plaint i.e. 12.06.1984, there is a clear dispute arising on the facts, as between the two parties, upon which the court has to adjudicate as a condition precedent to answering the legal question (issue) whether or not the plaintiff's cause of action is prescribed. That being so, it is a great convenience or an advantage to try all the issues together.

It is to be observed that the framing of issues is not restricted by the pleadings as was held in the following cases: *Attorney-General v. Smith*[4] and by the Privy Council in *Bank of Ceylon v. Chelliah Pillai*[5], *Dharmadasa v. Gunawardena*[6], *Silva v. Obeysekera*[7], *Dharmadasa v. Gunawardena*[8]. And subject, of course, to the over-riding and basic principle that just as much as pleadings cannot be amended converting an action of one character into an action of another of inconsistent character so also the issues cannot be raised setting up a case changing the essence or the substance of the case originally set up in the plaint or the answer as the case may be or enlarging the scope of the action or the claim originally made by the party in his pleadings.

Virtually, the sole object of pleadings is to avoid prejudice through catching the party's adversary unprepared, so to say. But in this case in hand it cannot be supposed that the plaintiff-respondent in raising an issue on the basis that the incident, relevant to the cause of

action, occurred on 12.06.1994 had caused any prejudice to the defendant-petitioner by taking him (the defendant) by surprise:
(a) for, had the defendant been so affected he (the defendant-petitioner) ought to have, as stated above, objected to the said issue No. 3. But he had not done so. The fact that the defendant-petitioner refrained from objecting to, issue No. 3 being raised in the manner in which it has been raised i.e. by stating a date different from that stated in the plaint inferentially proves that the defendant-petitioner was not, in fact, prejudiced through being surprised by change of front in regard to the date of consumption of the contents of the bottle;
(b) also, any prejudice that could have possibly arisen had been cleared away by the fact that after the said issues were raised the adduction of evidence had not commenced forthwith and there had been an interval of nearly 10 months between the date i.e. 3.10.1996 on which the issues were settled and accepted by the Court and the next trial date i.e. 13.8.1997 on which latter date the evidence had commenced. And it was on the latter date that the counsel for the defendant-petitioner had moved court to try issue No.: 9 first as a preliminary issue. In other words, the defendant-petitioner has had more than sufficient time to meet the new date outlined in issue No. 3 that is, that the consumption of the contents of the coca-cola bottle occurred on 12.6.1994 and not on 12.6.1984 as was originally stated in the plaint.

In this regard an overwhelmingly significant fact calls for remark. It is this: the fact that the insertion of the new date i.e. 12.6.94 in the issue No. 3 in place of that stated in the plaint i.e. 12.6.1984 affects neither the scope nor the character of the case or the cause of action enunciated in the plaint which continues to remain the same the cause of action being the alleged finding or presence of the parts of a worm in a beverage bottle (coca-cola) - a part of the contents of which the plaintiff-respondent claims to have consumed.

It is to be observed that the phraseology of section 147 of the Civil Procedure code itself vests a discretion in the trial court for the section states that issues of law shall be tried first when "the Court is of opinion" that the case may be disposed of on issue of law only and

postpone the settlement of issues of fact "if it thinks fit". Clearly, the matter is left very much in the discretion of the trial judge.

As a final note, it also needs to be stressed that in a trial of an action, the question as to how or in what manner the issues have to be dealt with or tried is primarily a matter best left to the discretion of the trial judge. And a court exercising appellate or revisionary powers ought to be slow to interfere with that discretion except, perhaps, in a case where it is patent or obvious that the discretion has been exercised by the trial Judge not according to reason but according to caprice. If one were to take a view of this matter shorn of all technicalities, it would be clear that the defendant-petitioner is seeking knowingly to exploit what, in fact, is a typographical slip, for his own ends, that is, to set up a plea of prescription. The defendant-petitioner, perhaps, would do well to remember that the law because of the necessary imperfections of its methods confers many rights and allows many liberties which a just and honourable man will not claim or exercise for all that is lawful is not honourable.

For the aforesaid reasons we do hereby refuse the application in revision and affirm the order of the learned Additional District Judge dated 13.08.1997.

YAPA, J. – I agree.

Application dismissed.