Hatton National Bank Ltd.

v.

Whittal Boustead Ltd.

COURT OF APPEAL.
WIMALARATNE, P. AND ABDUL CADER, J.
S.C. (C.A.) 20/78 INTY.—D.C. COLOMBO 1/1030/M.
JUNE 12, 1979.

Pleadings—Amendment of plaint—Principles governing exercise of discretion by trial judge—Action for breach of contract and defamation based on dishonour of cheques—Amendment seeking to plead endorsement of bank on the cheques and the persons to whom there was publication—Whether amendment necessary for raising real question between parties—Whether it will work an injustice to the other side—Civil Procedure Code, section 93.

The plaintiff-company sued the defendant-bank for the recovery of an aggregate amount of Rs. 6,500,000 arising out of a transaction relating to the dishonour of certain cheques drawn by the plaintiff company on the defendant bank. The plaint averred that the defendant acted in breach of its agreement with the plaintiff to pay on the said cheques ; and further averred that the dishonour was also wrongful, unlawful and malicious and that the plaintiff had been defamed by injuring its credit and business reputation. The plaintiff alleged in its second cause of action that a letter addressed by the Manager of the defendant-bank to the Additional Secretary of the Ministry of Plantation Industry contained imputations that were false, malicious and defamatory of it. The defendant filed answer setting out in detail circumstances leading to the return of certain cheques drawn by the plaintiff and presented for payment and pleaded various defences. Thereafter the plaintiff moved to amend its plaint by pleading publication of the words "cheque irregular" to the payees of the said cheques, who were set out in a schedule X and the several banks set out in schedule Y and to members and officials of the Colombo Clearing House. In the said proposed amendment the plaintiff also pleaded what it relied on as the meaning and imputation of the said endorsement on the cheques and that the aforesaid publications were defamatory.

The defendant objected to the proposed amendment of the plaint on the grounds that this sought to convert the action from one based on *dishonour* of the cheques to one based on *publication* ; and secondly, that it was not in conformity with section 40 (*d*) of the Civil Procedure Code in that each publication constituted a separate cause of action. The learned trial Judge after inquiry allowed the amendment and the defendant appealed.

Held

(1) Section 93 of the Civil Procedure Code which deals with the amendment of pleadings confers a wide discretionary power on the Court which power should be exercised judicially. In deciding whether there was good reason to interfere with the exercise of this discretion by a trial judge the appellate Court would consider the two questions " is the amendment necessary for the purpose of raising the real question between the parties ? " ; and " will the amendment if allowed work an injustice to the other side "

(2) An examination of the amendments sought to be made in the present case showed that the plaintiff sought (*a*) to specify " the answer on the cheques " dishonoured as being " cheque irregular " and (*b*) to enlarge the category of persons to whom such answer has been published. The amendment therefore did not alter the scope of the action nor did it introduce a new cause of action .

(3) The causes of action relied on by the plaintiff based on the dishonour of the cheques were in contract and in tort; the action for dishonour of a cheque being a pure action for breach of contract to which the "answer on the cheque" is not strictly relevant, while the cause of action in tort was for defamation. The amendment sought merely to clarify by including details of the words which constituted the defamation and the persons to whom the words were published. The amendment appeared to be necessary for the purpose of raising the real issue between the parties; nor did the amendment prejudice the defendant from raising the plea of prescription.

(4) Although there were as many causes of action as there were cheques dishonoured the learned trial Judge had correctly held that the plaintiff is not obliged to set out separately a statement of the circumstances constituting each cause of action.

Cases referred to

(1) *Daryanani v. Eastern Silk Emporium Ltd., (1963) 64 N.L.R. 529; 63 C.L.W. 73.*

(2) *Wijewardene v. Lenora, (1958) 60 N.L.R. 457; 56 C.L.W. 1.*

(3) *Sharp v. Wakefield, (1891) A.C. 173; 64 L.T. 180; 7 T.L.R. 189.*

(4) *Lebbe v. Sandanam, (1963) 64 N.L.R. 461; 63 C.L.W. 15*

(5) *Flach v. London and South Western Bank Ltd., (1915) 31 T L.R. 334.*

APPEAL from the District Court, Colombo.

E. S. Amerasinghe, with *H. L. de Silva* and *Mark Fernando*, for the defendant-appellant.
C. Ranganathan, Q.C., with *R. A. Kannangara, N. S. A. Goonetilleke* and *Ben Eliyathamby*, for the plaintiff-respondent.

Cur. adv. vult.

July 13, 1979.
WIMALARATNE, P.

This is an appeal from an order of the District Judge of Colombo allowing an amendment of the plaint in an action where the plaintiff's claim on two causes of action amounts to Rs. 6,500,000.

The plaintiff-respondent is a company said to be doing business as exporters, travel agents, printers, insurance agents and managing agents of companies. It maintained three current accounts with the defendant-bank at its city office bearing numbers 18439, 18440 and 18441. The plaintiff enjoyed overdraft facilities in respect of these accounts to a certain stipulated aggregate maximum amount which varied from time to time. The plaintiff averred that this amount was fixed at Rs. 1,244,140 as at 23.6.76. On 2.7.76 the defendant requested the plaintiff not to issue any further cheques on the said accounts without making prior arrangements for meeting them. The plaintiff averred that several cheques drawn prior to 2.7.76 in the course of its daily business and in reliance on and within the stipulated aggregate

limits, which were presented for payment were wrongfully and unlawfully dishonoured by the defendants. They are the cheques itemised in schedule X to the plaint.

Paragraph 8 of the concise statement of facts avers that by dishonouring the cheques the defendant acted wrongfully and unlawfully and in breach of its agreement with the plaintiff to pay cheques drawn by the plaintiff within the aggregate limit.

Paragraph 9 avers that the dishonouring of the said cheques was wrongful and unlawful and malicious and that the defendant had thereby maliciously defamed the plaintiff by injuring its credit and business reputation. The damage suffered on these causes of action was set down at Rs. 2,500,000.

The second cause of action on which the plaintiff claims damages in a sum of Rs. 4,000,000 is based upon a letter dated 14.7.76 addressed by the Manager of the defendant-Bank to the Additional Secretary, Ministry of Plantation Industry, the relevant portion of which is reproduced in paragraph 14. The plaintiff averred that the imputations in that letter are false, malicious and defamatory of the plaintiff and calculated to injure the business reputation of the plaintiff and to reflect adversely on the financial stability and probity of the plaintiff in that they were intended to mean that the plaintiff had wrongfully and unlawfully issued cheques without funds or overdraft facilities afforded by the defendant; conduct which merited the intervention of the Central Bank of Ceylon.

In its answer the defendants set out in detail the circumstances leading to the return of certain cheques presented for payment on 5.7.7.76 and on subsequent dates, and averred that in so doing it did not act wrongfully or unlawfully or maliciously or in breach of any agreement with the plaintiff, and denied that it defamed the plaintiff, as it acted in good faith, without any intention to injure the plaintiff, and in the legitimate protection of its interests. Further, the letter referred to in paragraph 14 of the plaint was made without animus injuriandi, on a privileged occasion, and in the legitimate protection of its interests.

The plaintiff moved on 17.8.77 to amend the plaint pleading that the dishonouring of the cheques and the publication of the letter were motivated by the express malice on the part of the defendant. This amendment was allowed.

On 28.6.76 the plaintiff moved to further amend the plaint by the inclusion of the following paragraphs 9(A), (B) and (C) to paragraph 9, and a further schedule Y.

"9 (A). The defendant returned all of the dishonoured cheques with the endorsement "cheque irregular". The said words were published to the payees of the cheques mentioned in Schedule 'X' annexed hereto, to the several Banks mentioned in Schedule 'Y' annexed hereto, and to the members and officials of the Colombo Clearing House.

9 (B). The said endorsement meant and imputed and was intended by the defendant to mean and impute that the paintiff was insolvent and/or financially unstable and unsound and/or dishonest and/or guilty of bad faith in its dealing with the defendant-bank.

9 (C). The plaintiff states that by reason of the said publication the defendant wrongfully, unlawfully and maliciously defamed the plaintiff and injured it in respect of its character, business reputation and credit."

The defendant objected to this amendment, on the grounds that the amendment—

(*a*) sought to convert the action from one based on *dishonour* of the cheques to one based on *publication*; and

(*b*) was not in conformity with section 40 (*d*) of the Civil Procedure Code in that each publication constituted a separate cause of action.

The learned Judge made his order on 25.10.78 allowing the amendment. He has taken the view that the purpose of the amendment is "to clarify the cause of action arising out of the defamation", and that the scope of the action is not being changed. He has also held that the plaintiff was not obliged to set out separately a statement of the circumstances constituting each cause of action. The present appeal is from that order.

Section 93 of the Civil Procedure Code deals with the subject of amendments of pleadings. It reads thus:—

"At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full

power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of ommission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

This section confers a wide discretionary power on the Court, when applications for amendment of pleadings are made. When such a wide discretion is vested in a court of original jurisdiction, the question does arise as to whether a higher court can say anything more than that the Judge who has been given that power should or should not have exercised it in the particular case. There is no doubt that the court must exercise this power judicially and is not vested with an absolute or arbitrary power. There has arisen around section 93 a body of case law which should be taken into consideration by the Judge when he comes to exercise this power. As stated by Sansoni, J. in *Daryanani v. Eastern Silk Emporium Ltd.* (1) "they are well-established rules of practice, and should not be treated as though they were statutory rules or provisions of positive law of a rigid and inflexible nature. The two main rules which have emerged from the decided cases are :—

(i) the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties; and

(ii) an amendment which works an injustice to the other side should not be allowed" at 531.

This indeed had been the view taken by Basnayake, C.J. in *Wijewardene v. Lenora* (2) at 463, when he said that "It (section 93) must be read subject to the limitation that an amendment which has the effect of converting an action of one character into an action of another or inconsistent character cannot be made thereunder. Apart from that limitation the discretion vested in the trial Judge by section 93 is unrestricted and should not be fettered by judicial interpretation. Unrestricted though it be, it must be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour. Its exercise must be uninfluenced by irrelevant considerations, must not be arbitrary, vague, and

fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself—*Sharp v. Wakefield* (3) at 179".

But in the subsequent Divisional Bench judgment in *Lebbe v. Sandanam* (4), Chief Justice Basnayake has taken the view that the court's power is limited to the correction of errors in pleadings and laid down certain rules relating to the circumstances under which the court has no power to allow amendments.

Sansoni, J. and L. B. de Silva, J. in Daryanani's case (*supra*) took a different view, and were not prepared "to subscribe to an absolute and inflexible rule that in no circumstances may a new cause of action be added" at 536; and that "the statement of the learned Chief Justice laying down what may appear to be rules for the exercise of the discretionary power of the Court under section 93, are not rules of law binding on our Courts" at 539.

Are there, then good reasons for us to set aside the exercise of the discretion by the learned trial Judge who has allowed the amendment? To answer this question we ask ourselves the questions "is the amendment necessary for the purpose of raising the real question between the parties?" and "will the amendment if allowed work an injustice to the other side?"

Paragraph 6 of the original plaint referred to schedule X which contained particulars of the cheques drawn prior to 2.7.76 which when presented for payment were dishonoured by the defendant; and paragraph 9 averred that the *dishonouring* of the said cheques was wrongful and unlawful and malicious, and that the defendant thereby maliciously *defamed* the plaintiff. The defamation resulted from the dishonouring of the cheques in schedule X. That schedule has four columns giving the number of the cheques, date of the cheque, *name of payee,* and the amount. When a cheque became dishonoured, there could be little doubt that the fact of the dishonour was communicated by the bank to the payee. The original plaint, therefore, by disclosing the names of the payees, effectively disclosed the names of the persons to whom the publication of the fact of dishonour was made. To the original plaint was attached a list of witnesses and documents. All the dishonoured cheques have been included in the list of documents, and almost all the payees on the dishonoured cheques have been included in the list of witnesses. There could therefore be no doubt that the plaintiff intended proving the fact of publication.

What does the second amendment seek to achieve. Paragraph 9A says that the cheques were dishonoured by reason of the endorsement "cheque irregular", which words were published to the payees mentioned in schedule X as well as to the banks mentioned in the new schedule Y, and to members and officials of the Colombo Clearing House. Paragraph 9B says what the endorsement meant and was intended by the defendant to mean ; and 9C avers that the defamation arose as a result of such publication.

Whereas the original plaint implied the fact of publication to the payees of the cheques, whose names were included in schedule X, the amended plaint expressly states that the publication was to the same payees as well as to the banks mentioned in schedule Y and the members of the Colombo Clearing House. The amendment therefore seeks (*a*) to specify "the answer on the cheques" dishonoured as being "cheque irregular" and (*b*) to enlarge the category of persons to whom such answer had been published. The amendment does not in my view alter the scope of the action, nor does it introduce a new cause of action. Paragraph 8 of the original plaint is based on a cause of action for breach of contract whilst paragraph 9 is based on a cause of action in tort—namely the tort of defamation by maliciously dishonouring certain cheques. An action for dishonour of a cheques is a pure action for breach of contract to which "the answer on the cheque" is not strictly relevant. "The answer on the cheque" (cheque irregular) is relevant only in an action for defamation. The two claims can and sometimes are contained in one action, the claim as to the answer being framed in libel—*Paget on Banking* (6th Ed.) 255.

As to whether the answer on the cheques "cheque irregular" amounts to defamation is a different question altogether. But what is important to note for the present purpose is that if the answer on a cheque is couched in words which may be defamatory, the cause of action arises because of communication of such answer to the payee, and perhaps to other banks and the clearing house. Reference may be made in this connection to *Flach v. London and South Western Bank Ltd.* (6), where Scrutton, J. said that the words 'refer to drawer' amounted to a statement by the bank, "we are not paying; go back to the drawer and ask him to pay". This statement can be defamatory, but a cause of action arises because the statement is made to the payee, and that is publication. In the absence of publication there can be no cause of action in tort for the dishonour of a cheque.

I am therefore of the view that the amendment does not alter the scope of the original action, nor does it seek to add a different cause of action. The causes of action based on the dishonour of the cheques were in contract and in tort. The cause of action in tort was for defamation, and the amendment seeks merely to clarify by including details of the words which constitute the defamation, and the persons to whom the words were published. The amendment appears to be necessary for the purpose of raising the real issue between the parties. Besides, as the amendment does not prejudice the defendant from raising the plea of prescription, as conceded by counsel, the learned District Judge was right in allowing the amendment.

The learned District Judge has also correctly held that although there are as many causes of action as there were cheques dishonoured the plaintiff is, however, not obliged to set out separately a statement of the circumstances constituting each cause of action. For these reasons I would dismiss this appeal with costs.

ABDUL CADER, J.—I agree.

Appeal dismissed.