

AVUDIAPPAN  
v.  
INDIAN OVERSEAS BANK

COURT OF APPEAL  
S. N. SILVA, J., (P/CA)  
DR. RANARAJA, J.  
C.A. 951/94  
D.C. COLOMBO 4211/M.  
MARCH 13, 1995.

*Civil Procedure Code – Amendment 9 of 1991 – S. 93(2) Amendment of pleadings – S. 146 Civil Procedure Code – Issues – Laches.*

The Respondent-Bank instituted action on 24.6.88 to recover a certain sum of money with interest due on a temporary overdraft facility. The Petitioner filed answer on 5.11.93, and the matter was fixed for trial on 24.02.94. After several dates of postponement it was taken up for Trial on 21.9.94. On an objection raised by the Petitioner that the issues framed did not arise from the pleadings, the Respondent was allowed to file amended plaint, subject to the right of the petitioner to raise any objection. The Amendment sought was to include a claim based on a term loan. The application was resisted on the grounds of (1) an application for amendment could not be allowed after the first day, the case is fixed for trial (2) laches (3) absence of any material in support of the fact that the Respondent will suffer irreparable injustice. The court allowed this amendment on the ground that the Respondent will suffer irreparable injustice, the Petitioner moved in Revision against the order.

**Held:**

(1) The Amendment sought by the Respondent was clearly foreseeable. The amendments contemplated by S. 93(2) are those that are necessitated due to unforeseen circumstances.

(2) 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.

(3) The Respondent had filed action to recover sums due on a temporary overdraft, there was nothing to prevent the Respondent raising issues on that basis, as S. 146 of the Civil Procedure Code permits Court to record issues on which the right decision of the case appears to Court to depend, on the pleadings, documents and evidence led at the trial.

The Court has come to a premature conclusion that the Respondent would suffer irreparable injustice.

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

*Gomin Dayasiri with K. D. Alwis* for Petitioner.  
*S. Mandaleswaran with B. Peramuna* for Respondent.

March 13, 1995.

**RANARAJA, J.**

This is an application in revision from the order of the Additional District Judge dated 13.12.94. By that order the respondent was permitted to amend its plaint after the first date of trial.

Section 93(2) of the Civil Procedure Code provides:

“On or after the first day fixed for the trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the court is satisfied for reasons to be recorded by court, that grave and irreparable 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.”.

The court may under that section, permit an amendment of a plaint only if it is satisfied that; (1) the plaintiff will suffer an irreparable injustice if the amendment is not permitted and (2) the plaintiff has not been guilty of laches.

The respondent Bank instituted action on 24.6.88 against the petitioner to recover a sum of Rs. 290,146.60 with interest, due on a temporary overdraft facility. The petitioner filed answer on 5.11.93 and the matter was fixed for trial on 24.2.94. The trial was however postponed on that day and on three occasions subsequently. When trial was taken up on 21.9.94, the petitioner objected to the issues raised by the respondent on the basis that they did not arise from the pleadings. The respondent then moved to amend its plaint. This application was allowed by court subject to the right of the petitioner to raise any objections to the amendments. The proposed amended

plaint was filed on 28.9.94. By that amendment the respondent sought to include a claim based on "pecuniary aid and/or assistance by way of term loans subject to the obligation and/or promises to repay on demand", in addition to the claim on temporary overdraft facility. The petitioner filed objections to the proposed amendment. They were; (1) an application for amendment of the plaint could not be allowed after the first day the case is fixed for trial. (2) laches and (3) absence of any material in support of the fact that the respondent will suffer irremediable injustice.

The Learned Additional District Judge allowed the amendment holding that the respondent would suffer irremediable injustice since it would not be able to raise relevant issues on the original plaint, that laches means deliberate delay on the part of the respondent and that the amendment does not disclose a new cause of action.

The reasoning of the Learned Judge that the respondent would suffer irremediable injustice if the amendment is not allowed is a non sequitur. The respondent had filed action to recover moneys due on a temporary overdraft facility. There was nothing to prevent the respondent raising issues on that basis. In any event, section 146 of the Civil Procedure Code permits court to record issues on which the right decision of the case appears to court to depend, on the pleadings, documents and evidence led at the trial. In other words, the court has come to a premature conclusion that the respondent would suffer irremediable injustice. The amendments contemplated by section 93(2) are those that are necessitated due to unforeseen circumstances, and not those that could have been foreseen with reasonable diligence. The amendments sought by the respondent were clearly foreseeable, because it was aware of the transactions it had with the petitioner. It chose to restrict the claim to moneys due on the temporary overdraft facility. The fact that it failed to include the claims on loans etc; in the original plaint was due solely to its lack of diligence. Such amendments cannot be allowed under the section.

Laches does not mean "deliberate delay". It means "delay which cannot be reasonably explained". The original plaint was filed in June

1988. The amendment was sought in September 1994, that is over six years after the original plaint was filed. No explanation, let alone a reasonable explanation, has been forthcoming from the respondent for the delay. The application for amendment was made on the fifth date of trial. Such a delay in seeking amendment of pleadings cannot be countenanced. The learned Additional District Judge was clearly in error in holding that there was no laches on the part of the respondent.

For the reasons given, the order of the Learned Judge accepting the amended plaint dated 13.12.94 is set aside. The application is accordingly allowed, but without costs.

**S. N. SILVA, J.** – I agree.

*Application allowed.*