CEYLON INSURANCE CO., LTD.
v.
NANAYAKKARA AND ANOTHER

COURT OF APPEAL.
DE SILVA, J.,
WEERASURIYA, J.
C.A.L.A. NO. 203/97.
D.C. GALLE NO. 6055/M.
DECEMBER 8, 1998.
JANUARY 14, 1999.
FEBRUARY 10, 1999.

Civil Procedure Code – Amendment No. 9 of 1991, S. 80 – S. 93 (2) – Amendment of pleadings – Grave and irremediable injustice – Delay – Trial de Novo – Judicature Act S. 48, – What is the first date of Trial?

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 28.7.95; after recording issues, it was postponed for 16.10.95. On this date certain objections were taken and when the trial resumed again on 9.1.97 a trial *de novo* was ordered on 13.5.97. On 7.5.97 the plaintiff sought to amend his pleadings, which was allowed by Court.

Held:

1. S. 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 inadvertance 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.

3. The plaintiffs had failed to adduce reasons for the delay of over 3 years for making an application to amend the plaint on the basis of a purported mistake by the defendant.

4. S. 80 CPC provides for fixing the date of trial, and such date constitutes the day first fixed for trial. The discretion vested in the Judge either to continue with the trial or to commence proceedings afresh does not affect the nature of the Order made under S. 80 CPC relating to the fixing of the first trial date. The order made fixing the date of trial in terms of S. 80, becomes the day first fixed for trial with the meaning of s. 93 (2) CPC.

APPLICATION for leave to Appeal from the Order of the District Court, Galle.

Cases referred to:

1. *Kuruppuarachchi v. Andreas* – [1996] 2 Sri L.R. 11 at 13.
2. *Gunasekera v. Abdul Latiff* – [1995] 1 Sri L.R. 225.
3. *Bisomenike v. de Alwis* – [1982] 1 Sri L.R. 368 at 378.
4. *Lindrey Petroleum Co. v. Hurd* – 1874 LR 5 PC 221, 239, 240.
5. *Loku Balakumar v. Balasingham Balakumar* – SC 125/94 SCM 11.9.95.

R. E. Thambiratnam with *K. Gunaretnam* for defendant-petitioner.

E. D. Wickremanayake with *R. Y. D. Jayasekera* and *Ms. Anandi Cooray* for plaintiff-respondent.

Cur. adv. vult.

April 28, 1999.

WEERASURIYA, J.

The plaintiff-respondents (hereinafter referred to as the plaintiffs) by their plaint dated 21.02.94, instituted action against the defendant-petitioner (hereinafter referred to as the defendant) seeking judgment in a sum of Rs. 3,277,518.35 with legal interest arising out of a claim based on a contract of insurance. The defendant filed answer disclaiming liability on the insurance policy and prayed for dismissal of the action. The trial commenced on 28.07.95, wherein after recording of admissions and issues further trial was postponed. On 16.10.95 when further trial commenced, the second plaintiff in the midst of his evidence sought to describe the building as having a ground floor and two upper floors contrary to the description in the insurance policy to which the defendant objected; the learned District Judge upheld the objections of the defendant. The plaintiffs thereafter, sought leave to appeal from the aforesaid order, which was disallowed by this Court. On 09.01.97 trial was resumed before a new District Judge who directed a trial *de novo* on 13.05.97. Meanwhile on 07.05.97, the plaintiffs filed an application seeking to amend the plaint by the

inclusion of an averment that although they required insurance cover for a building comprising a ground floor and two upper floors, the defendant had by mistake or inadvertence issued insurance cover for a building comprising a ground floor and one upper floor only. On 13.05.97 when the said application to amend the plaint was supported, the defendant objected to the proposed amendment and the District Judge directed the parties to file written submissions. On 13.10.97, the District Judge made order accepting the amended plaint. This application has been filed against the aforesaid order of the District Judge.

At the hearing of this application, learned counsel for the defendant submitted that the District Judge had misdirected himself on the law relating to the meaning and effect of the provisions of section 93 of the Civil Procedure Code.

Section 93 of the Civil Procedure Code as amended by Act No. 9 of 1991 read as follows:

> "93 (1) – Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to 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 omission.
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> (2) – On or after the day first 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 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 . . ."

It is to be appreciated that, section 93 as it stands now provides for amendment of pleadings at two stages namely, (i) prior to the first date of trial, and (ii) after the first date of trial.

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 will be caused if the amendment is not permitted; 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 purpose and scope of section 93 was explained in *Kuruppuarachchi v. Andreas*[1] in the following manner:

> "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 the Court to permit amendment of pleadings on or after the day first fixed for trial of the action. An amendment of pleadings on the date of trial, more often than not, results in the postponement of the trial . . . While the 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."

The doctrine of 'laches' was referred to in *Gunasekera v. Abdul Latiff*[2] to mean slackness or negligence or neglect to do something which by law a man is obliged to do.

The doctrine of laches in Courts of equity is not an arbitrary or technical doctrine. In *Bisomenike v. De Alwis*[3] Sharvananda, J. (as he then was) quoted with approval the following observations from *Lindsey Petroleum Co. v. Hurd*[4] :

> "Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equal to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. . . the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during

the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy."

Further, in *Lulu Balakumar v. Balasingham Balakumar*[5] Fernando, J. dealing with the question of laches observed as follows:

" . . . mere delay does not automatically amount to laches . . . the circumstances of the particular case, the reasons for the delay and the impact of the delay on the other party must all be taken into account . . . In any event the question of laches cannot be determined only by considering, how many trial dates or how long a period of time has elapsed. The circumstances are relevant . . . "

The following facts set out in their chronological order are highly relevant in arriving at a decision in this application.

(1) On 13.11.92 the plaintiffs submitted to the defendant a proposal for the insurance of a tea factory under construction, which on completion will be ground floor and one upper floor.

(2) On 24.11.92, on the basis of the said proposal for insurance and upon payment by the plaintiffs of the premium of the first year, an insurance policy effective from 13.11.92 was issued to the plaintiffs.

(3) In the schedule to the said insurance policy the property was described as a building being constructed with wall of bricks and on completion will be ground floor and one upper floor.

(4) On 05.03.93, the plaintiffs submitted a claim to the defendant claiming the insured value of the building that was being constructed on the ground that on or about 21.02.93, the building had collapsed.

(5) By letter dated 15.07.93 the defendant informed the plaintiffs that their inquiries revealed that the building that had collapsed was not of the type described in the proposal and the policy of insurance.

(6) By letter dated 24.01.94 the defendant making reference to the letter dated 15.07.93, informed the plaintiffs that having carefully considered the matter, the defendant was unable to accept liability for the plaintiffs' claim.

(7) On 21.02.94 the plaintiffs filed plaint with the knowledge that the defendant had disclaimed liability for the loss incurred by him, on the ground that the building that collapsed was not in conformity with the description of the property that was in fact insured.

(8) The defendant filed answer on 13.10.94 and specifically averred in paragraph 7 thereof that the building that collapsed was not in conformity with the property described in the policy of insurance.

(9) On 16.10.95 the 2nd plaintiff in the midst of his evidence sought to describe the building that was being constructed as having a ground floor and two upper floors and objection was taken for the reception of such evidence by the defendant which was upheld by the District Judge.

(10) The plaintiffs thereafter filed an application seeking leave to appeal against the said order of the District Judge and the Court of Appeal by its order dated 01.03.96, refused the application *in limine*.

(11) On 09.01.97, the District Judge who heard the case having gone on transfer, the case was fixed for trial *de novo* by the District Judge who succeeded him.

(12) On 07.05.97, the plaintiffs filed an application seeking to amend the plaint by asserting that although he desired an insurance policy providing insurance cover for a building comprising a ground floor and two upper floors, the defendant inadvertently issued a policy for a building having a ground floor.

In the light of the above facts, the application to amend the plaint by pleading mistake or inadvertence can in no sense be regarded as necessitated by unforeseen circumstances. The plaintiffs will be hard put to satisfy Court that they were taken by surprise or the error could not have been discovered with reasonable diligence. The plaintiffs' conduct point to one conclusion, namely that they have acted

without due diligence. It is manifest that the need for the amendment did not arise unexpectedly, since the defendant by letter dated 15.07.93 informed the plaintiffs that the building that had collapsed was not of the type described in the proposal and the policy of insurance. The plaintiffs had failed to adduce reasons for this delay of over 3 years for making an application to amend the plaint on the basis of a purported mistake by the defendant.

It is no excuse for the plaintiffs to assert that they proposed to raise an issue on the question of a mistake in the policy of insurance at the trial.

Learned counsel for the plaintiffs argued that the application for amendment of the plaint would fall within the ambit of section 93 (1). He submitted that trial which commenced on 28.07.95, was not continued before the new District Judge and the order was made for a trial *de novo*, on 13.05.97 and therefore the new trial date could be construed as the first date of trial. It is to be observed that section 80 of the Civil Procedure Code provides for fixing the date of trial and such date constitutes, the day first fixed for trial. Section 48 of the Judicature Act provides for continuation of a trial before the Judge who succeeds the Judge before whom trial commenced. The discretion vested in that succeeding Judge either to continue with the trial or to commence proceedings afresh does not affect the nature of the order made in terms of section 80 of the Civil Procedure Code relating to the fixing of the first trial date.

Thus, the order made fixing the date of trial in terms of section 80, becomes the "day first fixed for trial" within the meaning of section 93 (2) of the Civil Procedure Code. Thus, the order made by the District Judge allowing the amendment of plaint cannot be supported, considering the circumstances of this case. Learned District Judge had failed to appreciate the relevant facts and circumstances material to the application for amendment of the plaint. Therefore, I set aside the order of the District Judge dated 13.10.97 allowing the application to amend the plaint.

This application is allowed with costs.

DE SILVA, J. – I agree.

Application allowed.