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Present: Ennis J. and Shaw J.

SENEVIRATNA *v.* CANDAPPA.

57—D. C. Colombo, 32,388.

Amendment of pleadings—Is lateness of application ground for refusing motion for amendment?

Plaintiff instituted this action for declaration of title and damages. The District Judge decided the question of title in favour of plaintiff, and reserved the question of damages pending appeal. After the decision in appeal, the plaintiff moved to amend his claim for damages from Rs. 30 a month to Rs. 2,000 a year.

Held, that the lateness of the application was not a ground for refusing the application.

"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side."

THE facts are set out in the judgment.

Bawa, K.C. (with him *Cooray*), for appellant.—The District Judge was wrong in disallowing the amendment. The application was made a week before the trial, so as to prevent any injustice to the other side. If necessary, the trial might have been postponed, with an appropriate order as to costs. The decisions under the corresponding English rules and orders lay down that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. (See *Clarapede v. Commercial Union Association* [1] and *Tidesley v. Harper* [2]) The case of *The Alert* [3] is on all fours with this. There an amendment was allowed increasing the amount of damages claimed after the question of liability had been decided.

F. de Zoysa (with him *W. H. Perera*), for respondent.—The amendment comes too late. If allowed, it would gravely prejudice the respondent. Clearly it is not *bona fide*. The object of it is to make up for the defeat in appeal. The District Judge has exercised his discretion in the matter.

Bawa, K.C., in reply.

Cur. adv. vult.

[1] *32 W. R. 263.*

[2] *10 C. D. 396.*

[3] *72 L. T. 124.*

July 4, 1917, SHAW J.—

This is an appeal from an order of the District Judge refusing permission to the plaintiff to amend the plaint by increasing the amount of damages claimed.

The action, which commenced so long ago as 1911, claimed a declaration of title to 5/12th share of a certain land, and possession and damages at the rate of Rs. 30 a month until the plaintiff should be restored to possession.

The defendants denied the plaintiff's title, alleging that the land was subject to a *fidei commissum*, and that the vendors to the plaintiff could convey no title to the shares claimed by him.

The District Judge decided the rights of the parties in favour of the plaintiff, reserving the questions of damages and of compensation to the defendants for improvements pending appeal. On appeal the Supreme Court modified the judgment but declared the plaintiff entitled to the shares claimed during the lifetime of his vendors.

After considerable delay, due apparently to the absence of the plaintiff's proctor from the Colony, the case was again set down for assessment of damages and compensation, and the hearing fixed for March 29 last.

On March 21 the plaintiff applied to the Judge to amend his claim by increasing the amount of damages claimed from Rs. 30 a month to Rs. 2,000 a year. The Judge refused to allow the amendment, on the ground of the lateness of the application.

It does not seem to me that this is in itself a sufficient ground for refusing the application. Under the corresponding English provision contained in Order 28, rule 1, of the rules of the Supreme Court, it has been held in many cases that an amendment ought always to be allowed where the opposite party is not prejudiced thereby. " However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side " (*per Brett* M.R. in *Clarapede v. Commercial Union Association*,[1] and see also *Tidesley v. Harper* [2]). In the case of *The Alert* [3] and amendment was allowed increasing the amount of damages claimed after the question of liability had been decided, as is sought to be done in the present case, and it is common practice for an amendment to be allowed increasing the amount of damages claimed, even after verdict, where a jury has found for a larger amount of damages than has been claimed in the writ (see *Knowlman v. Bluett* [4]).

In the present case I can see no prejudice that can be sustained by the defendants by the proposed amendment being made. If the plaintiff can satisfy the Court that the amount of profits applicable

[1] *32 W. R. 263.*
[2] *10 C. D. 396.*
[3] *72 L. T. 124.*
[4] *L. R. 9 Ex. 1.*

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to the share of the property out of which he has been kept by the defendants exceeds the amount at which he originally estimated it, there is no fair reason why he should not recover it, or why the defendants should be entitled to retain what has been received by them and is his property. Late as the application was, it could have entailed no further delay in the determination of the case, as the amendment raises no new issue, and the evidence on behalf of the defendants regarding the amount received in respect of the property would have been the same on the issue, regardless of the amount of the claim. Even if they had desired to strengthen their evidence in view of the increase in the claim, they would still have had ample time to do so before the hearing, had the amendment been allowed when applied for.

I would allow the appeal, and direct the amendment asked for to be made. The plaintiff should pay the costs of the application for the amendment, and in view of the fact that the present difficulty has arisen in consequence of the delay in applying for the amendment desired, I would make no order as to the costs of this appeal.

ENNIS J.—I agree.

Set aside.