WIJESINGHE

v.

KARUNADASA

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT, C. A.) AND GOONEWARDENE, J.,
CA/LA 124/83 L.G.,
D. C. NEGOMBO 2750/L.
MARCH 6, 11 AND 12, 1987.

Trust–Unjust enrichment–Laesio enormis–Amendment–Ss. 46(2) and 93 CPC–Delay–Carelessness.

An amendment sought formulating as two separate causes of action pleas of unjust enrichment and laesio enormis which had already been pleaded in a suit for declaration of a trust cannot be said to alter the fundamental character of the suit converting it into an action of another and inconsistent character (s. 46(2) CPC). The proposed amendments do no more than clarify, elucidate and amplify the concepts of unjust enrichment and laesio enormis which were already pleaded in the plaint.

Although the amendments were being sought two years after the original plaint was filed amendments sought bona fide will not be refused on the mere ground of belatedness or negligence or carelessness.

Cases referred to:

(1) *Senanayake v. Anthonisz, –[1965] 69 NLR 225, 229*

(2) *Punchimahatmaya Menike v. Ratnayake –18 CLW 18*

(3) *Mackinnon Mackenzie & Co. v. Grindlays Bank Ltd., –[1986] 2 Sri LR 272*

(4) *Sherman de Silva v. Mrs. de Silva –77 NLR 275, 283*

APPEAL with leave obtained from order of the District Judge of Negombo.

R. K. W. Gunasekera with *Ranjan Mendis* and *Miss M. Weerasooriya* for defendant-appellant.

P. A. D. Samerasekera, P.C., with *A. L. M. de Silva* and *K. Abayapala* for plaintiff respondent.

Cur. adv. vult.

May 4, 1987.

G. P. S. DE SILVA, J.

This is an appeal by the defendant-appellant with the leave of this court first obtained, against the order of the District Judge dated 11.11.83 allowing the application of the plaintiff-respondent to amend his plaint.

The plaintiff in his original plaint dated 28th October, 1980, sought a declaration that the defendant was holding the land and premises conveyed to him by the plaintiff for a consideration of Rs. 5,000 on deed No. 1273 dated 27th January 1978 in trust for the plaintiff. He further averred: that he resides on this land which is reasonably worth Rs. 50,000; that by a writing dated 27th January 1978 the defendant promised and agreed to reconvey the land and premises to the plaintiff on payment of the sum of Rs. 5,000 together with interest at 12 1/2% per annum within 5 years of the execution of the deed; that the plaintiff and his family continued to reside and enjoy the produce of the land after the execution of the deed; that the plaintiff has not conveyed to the defendant his beneficial interest in the property; that despite several requests to reconvey the property upon payment of the principal sum and interest, the defendant has failed and neglected to perform his obligation. In paragraph 1.1 of the plaint he expressly sought a declaration that the land and premises in suit were subject to a "trust" in favour of the plaintiff. There is, however, paragraph 10 of the original plaint which sets out averments which are materially different from what is stated elsewhere in the plaint. Since much of the argument before us turned on the contents of paragraph 10, I shall reproduce it verbatim:

"(10) ඉහත සඳහන් ඡේදවල කියා තිබෙන ප්‍රකාශයන්වලට අගතියක් සහ හානියක් නොවන අන්දමට පැමිණිලිකරු තවදුරටත් කියා සිටින්නේ ඉහත සඳහන් ඉඩම සහ ස්ථානය විත්තිකරු ඉහත සඳහන් ආකාරයට පැමිණිලිකරුට ආපසු පැවරීමට බැඳී සිටින්නේ :—

(අ) විත්තිකරු අයුතු ලෙස පොහොසත් වීමේ කරුණ මතය.

(ආ) ලයිසියෝ ඉන්ෂෝම්ස් (බලවත් පාඩුව) කිසිය මතය."

(Without prejudice to the averments contained in the preceding paragraphs, the plaintiff further pleads that the defendant is bound to reconvey in the manner set out above the aforesaid land and premises (*a*) on the basis that the defendant has been unjustly enriched; (*b*) on the law of laesio enormis).

In December 1982 the plaintiff moved to amend his plaint and the defendant took objection to it. The principal amendments were the addition of what were described in the proposed amended plaint as two "alternative causes of action". Thus paragraph 10 of the original plaint was deleted and the first alternative cause of action was pleaded in the following terms:–

"විකල්පිත නඩු හිමිත්තක් වශයෙන් :–

10. විකල්පිතව පැමිණිලිකරු ප්‍රකාශ කර සිටින්නේ ඉහත සඳහන් අංක (273 සහ වර්ෂ 1978 ජනවාරි මස 27 වෙනි දින දරණ ඔප්පුවෙන් සිදු වී ඇත්තේ නීතිමය වශයෙන් පරම අයිතිය පැවරෙන විකිණීමක් යයි තීරණය කළහොත් එම දේපළ එම ඔප්පුව ලියූ දිනයේ රුපියල් පත්දහස මෙන් දෙගුණයකට ඉතා වැඩියෙන් වටිනා නියා ලයිසියෝ ඉනෝම්ස් (Laesio enormis) නීතිය යටතේ එම ඔප්පුව අවලංගු කළ හැකි බවය."

(The plaintiff pleads in the alternative that if it is decided that on deed No. 1273 of 27.1.78 there was in law an outright transfer, then on the principle of laesio enormis the aforesaid deed could be set aside because the property was worth much more than twice the sum of Rs. 5,000 on the date of the execution of the said deed).

The next major amendment was the addition of a new paragraph, namely paragraph 13, which sets out the second alternative cause of action:–

"විකල්පිත නඩු හිමිත්තක් වශයෙන් :–

13. කෙසේ වෙතත් ඉහත ජේදයන්හි සඳහන් කරුණු නිසා එකී අංක 1273 දරණ ඔප්පුව මත ඉහත කී දේපළෙහි පරම අයිතිය විත්තිකරුට පැවරුනොත් එය විත්තිකරු අයුතු ලෙස පොහොසත් වීමක් වන්නේය."

(In any event, for the reasons stated in the preceding paragraphs if on the aforesaid deed No. 1273 the defendant becomes entitled absolutely to the said property then the defendant would be unjustly enriched).

The principal objection to these amendments urged by Mr. Gunasekera, counsel for the defendant-appellant, was that the action as originally constituted has now been converted to "an action of another and inconsistent character" (see proviso to section 46(2) of the Civil Procedure Code). In short his contention was that the proposed amendments by way of two alternative causes of action based on the principle of laesio enormis and the doctrine of unjust enrichment have changed the foundation of the action. Counsel's argument was that the cause of action pleaded in the original plaint was on the footing of an obligation in the nature of a trust which is fundamentally different in character from the two new alternative causes of action sought to be introduced by way of an amendment.

Mr. Gunasekera is undoubtedly correct in his submission that an amendment which alters the fundamental character of the suit is not permissible (*Senanayake v. Anthonisz,* (1)). The question then is whether the proposed amendments seek to effect such a change in the character of the action. It is here that the averments in paragraph 10 of the original plaint set out above become very relevant and important. In that paragraph there is a specific reference to "unjust enrichment" and "laesio enormis" as the basis upon which the plaintiff seeks the relief prayed for, namely the reconveyance of the property to him by the defendant. However, it is equally clear that there was no proper and precise formulation of the causes of action based on the doctrine of unjust enrichment and the principle of laesio enormis. And it seems to me that the proposed amendments do no more than clarify, elucidate and amplify the concepts of unjust enrichment and laesio enormis which have already found a place in paragraph 10 of the original plaint. Indeed the plaintiff could well have raised issues on the basis of unjust enrichment and laesio enormis on the original plaint. In my opinion, the proposed amendments do not alter the substance or foundation of the suit. The amendments are intended to spell out and elucidate the concepts of unjust enrichment and laesio enormis averred in paragraph 10 of the original plaint. I therefore find myself unable to agree with Mr. Guansekera's submission that the proposed amendments alter the fundamental character of the suit.

Our courts have always been liberal in permitting amendments of the kind sought in the instant case. Soertsz J. in *Punchimahatmaya Menike v. Ratnayake (2) observed*:–

> ".....an amendment bona fide desired in order to elucidate the cases the parties wish to put forward should be made even though the parties had been negligent or careless in stating their cases".

Again, the learned Chief Justice in *Mackinnon Mackenzie & Co., v. Grindlays Bank Ltd.* (3) expressed himself thus:–

> "The liberal principles which guide the exercise of discretion in allowing amendments have been laid down in decisions of the Privy Council and of the Supreme Court.....Amendments which do not alter the fundamental character of the action or the foundation on which the suit is based are readily granted.....Provisions for the amendment of pleadings are intended for promoting the ends of justice and not for defeating them. The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings".

Mr. Gunasekera next contended that the doctrine of unjust enrichment is totally inapplicable to the present case. Counsel emphasised that the plea of unjust enrichment is not available in a contractual situation and that it is altogether inconsistent with the cause of action founded on a "trust." The answer to this submission has been pithily put by Pathirana J. in *Sherman de Silva and Co. v. Mrs. de Silva* (4):–

> "The substantive rights of parties are not adjudicated by the court at the stage of the amendment of the plaint .....The amendment to the plaint has to be considered without reference to the ultimate result of the case and quite apart from it.....".

Finally, Mr. Gunasekera urged that the amendment has been sought two years after the original plaint was filed and should therefore not have been allowed. It seems to me, however, that the mere fact that the application was made belatedly is not a ground for refusing it. As observed by the learned Chief Justice in *Mackinnon Mackenzie & Co. V. Grindlays Bank Ltd.* (supra):

"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side," (at page 279).

The District Judge in a well-considered order has given valid and cogent reasons for permitting the amendments to the plaint. In my opinion, he has correctly and properly exercised the discretion vested in him in terms of section 93 of the Civil Procedure Code.

I would accordingly affirm the order of the District Court and dismiss the appeal with costs fixed at Rs. 210.

GOONEWARDENA, J.—I agree.

Appeal dismissed.