PILAPITIYA
v.
BUDDADASA AND ANOTHER

COURT OF APPEAL,
WIJETUNGA, J. AND SENANAYAKE, J.,
C. A./L.A. 48/84/LG – D.C. MT. LAVINIA 2042/M.,
NOVEMBER 20, 1989.

Delict – Negligence in running down case – Amendment of plaint giving particulars of negligence – Section 93 C.P.C.– Cause of action.

In a running down case where plaint had been filed on the ground of negligence it was sought to amend the plaint by giving particulars of the negligence and stating that the driver was acting within the scope of his employment under the owner of the vehicle. The fact of notice having been given to the Attorney-General was also pleaded. Objection was taken on the ground that a new cause of action was being introduced and this would deprive the defendants of the defence of prescription.

Held :

The expression, cause of action has been defined in S. 5 of the Civil Procedure Code as the wrong for the prevention or redress of which an action may be brought and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury. One does not have to look outside the Civil Procedure Code for the meaning of the words and expressions defined in the Interpretation Section of the C.P.C.

In the amendments the plaintiffs did not introduce an additional cause of action. The two main rules which have emerged from the decided cases are :–

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

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

The amendments do not deprive the petitioner of a plea of prescription. If no injustice would result to the other side and provided the amendments do not have the effect of converting an action of one character into an action of another and inconsistent character, it is within the discretion of the trial judge to permit the amendments. The test is whether to effectively adjudicate upon the dispute between the parties amendment of the pleadings is necessary.

Cases referred to :

(1) *Cooke V. Gill, (1873) Law Rep. 8 C.P. 107, 116*

(2) *Read V. Brown (1888) 22 Q.B.D. 128, 131*

(3) *Daryanani V. Eastern Silk Emporium Ltd., 64 NLR 529*

(4) *Mackinnon Mackenzie & Co., V. Grindlays Bank Ltd.*, [1986] 2 Sri LR 272 (S.C.)

APPEAL (with leave) from judgment of the District Judge of Mount Lavinia.

N.S.A. Gunatillake, P.C. with *N. Mahinda* for 2nd defendant-petitioner.

R.L.N. de Zoysa for plaintiff-respondent.

Cur. adv. vult.

March 30, 1990

WIJETUNGA, J.

The plaintiff instituted this action on 18.9.1980 against the 1st and 2nd defendants claiming damages in a sum of Rs. 100,000 arising out of an accident which occurred on 17.9.1978, involving motor car bearing No. 6 Sri 9453. The vehicle which belonged to the State was driven by the 2nd defendant at the relevant time. By reason of the accident, injury was caused to the plaintiff.

According to the plaint, the 1st defendant has been made a party to this action as he was the Postmaster-General at the time and was the registered owner of the said motor car. It was further pleaded that the 2nd defendant had, at the time of the accident, driven the said vehicle as a servant of the 1st defendant. The defendants having filed their respective answers, the case was fixed for trial.

Thereafter, the Attorney-at-Law for the plaintiff sought to amend the plaint and submitted a draft amended plaint on 13.8.1982. The 2nd defendant objected to this amendment and the matter was fixed for inquiry.

The 2nd defendant-petitioner, in the petition filed by him in this Court, states that the proposed amendments sought to introduce for the first time, as paragraph 3A, certain particulars regarding the alleged negligence of the 2nd defendant which particulars had not been pleaded in the original plaint. Among the particulars pleaded for the first time in the draft amended plaint, *inter alia,* were averments that the said vehicle had tyres which were worn out, that the shock-absorbers of the vehicle and the alignment were not in a proper condition and that the brakes of the said vehicle were not functioning.

The defendant-petitioner submits that the particulars of negligence in a case of this nature are an integral part of the plaintiff's cause of action and should be pleaded in the first instance and any attempt to introduce them at a later stage would be to plead the plaintiff's cause of action fully for the first time at that stage or to introduce an additional cause of action to that in the original plaint.

The 2nd defendant-petitioner further states in his petition that the plaintiff also sought to introduce in two new paragraphs Nos. 5A and 5B the averments, *inter alia,* that 2nd defendant was at the material time acting on an alleged authority or permission given by the 1st defendant and/or with his approval and/or in the course of his duties. Accordingly, the two defendants were sought to be made liable jointly and severally.

He further pleads in his petition that the 3rd amendment sought to be introduced for the first time was that notice under Section 461 of the Civil Procedure Code had been given to the two defendants.

The 2nd defendant-petitioner states that he filed his objections to the said proposed amendments and pleaded *inter alia* that the plaintiff was seeking to introduce for the first time fresh particulars and/or causes of action after the plaintiff's claim was prescribed, thereby causing grave prejudice to the 2nd defendant-petitioner and depriving him of a plea of prescription which he was entitled to take. This was being done four years after the alleged cause of action is said to have accrued to the plaintiff.

The 2nd defendant-petitioner also pleads in his said objections that these amendments altered the nature and scope of the action and/or the manner in which the defendants were sought to be made liable.

After inquiry and having heard the submissions of the parties, the learned District Judge delivered his order on 21.3.1984 allowing the said amendments and stating *inter alia* in the course of his order that the said amendments did not alter the character of the action and that they only sought to introduce legal language in order to put right the averments in the plaint. He further held that under Section 93 of the Civil Procedure Code, the Court had the power to allow any kind of amendment provided the nature and scope of the action would not be changed or a plea of prescription would not be prejudiced. He held that by the proposed amendments, what the plaintiff was seeking to do was to present his plaint properly to Court. He accordingly allowed the amendments and accepted the amended plaint.

It is from this order that the 2nd defendant-petitioner has obtained leave to appeal to this Court.

Learned counsel for the appellant submitted that as the plaintiff had not pleaded the acts of negligence in the original plaint, there was no cause of action pleaded in that plaint. As it was only in para. 3A of the amended plaint that the relevant acts of negligence were pleaded, he contended that the said paragraph 3A of the amended plaint brought in, for the first time on 13.8.1982, a cause of action.

He relied on a definition of "cause of action" in *Cooke v. Gill,* (1) which states that it has been held from the earliest time to mean "every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse". This definition has been quoted with approval in *Read v. Brown,* (2) (1888), Vol. XXII Queen's Bench Division 128 at 131 where the definition is stated in these terms : "Every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".

It was his submission that the facts necessary to be proved had not been pleaded in the original plaint, in that, no reference had been made to the particulars of negligence. In the absence of such facts in the original plaint, he argued, that there was no cause of action.

In considering these submissions, it is necessary to remember that our Civil Procedure Code, in Section 5, defines "cause of action" as "the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury."

The Section further states that "the following words and expressions in this Ordinance shall have the meanings hereby assigned to them, unless there is something in the subject or context repugnant thereto".

Thus, in my view, one does not have to look outside the Code for the meaning of words and expressions such as 'cause of action' which are defined in the Interpretation Section.

Applying this definition to the original plaint in the instant case, it is seen that the plaintiff has pleaded in para. 3 thereof that the 2nd defendant drove the said vehicle without exercising due diligence, or negligently, or carelessly, thereby resulting in this accident which

caused injury to the plaintiff, in respect of which the claim for damages is made. In terms of this definition, that is the wrong for the redress of which this action has been brought.

No doubt, the particulars of negligence had to be pleaded. But, can it be said that by furnishing those particulars in paragraph 3A of the amended plaint, the plaintiff's cause of action was being fully pleaded for the first time at that stage or an additional cause of action was thereby being introduced ? In my view, the cause of action had been pleaded in the original plaint but what was sought to be done by this amendment was to furnish the particulars of negligence which were necessary to be pleaded in a case such as this. The amendments did not introduce an additional cause of action.

In *Daryanani v. Eastern Silk Emporium Ltd.*, (3) it has been held that in the exercise of the discretion vested in Court by Section 93 of the Civil Procedure Code regarding amendment of a plaint, 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.

More recently, in *Mackinnon Mackenzie & Co., v. Grindlays Bank Ltd.*, (4) (1986), 2 Sri LR 272, the Supreme Court has held that the amendment of pleadings is in the discretion of the Court and the test is whether in order to effectively adjudicate upon the dispute between the parties, amendment of the pleadings is necessary.

I am unable to agree with the submission that the said amendments would deprive the petitioner of a plea of prescription. This submission would be valid only if by reason of the amendments a fresh cause of action is introduced but to my mind, the amendments do not have that effect. If no injustice would result to the other side and provided that amendments do not have the effect of converting an action of one character into an action of another and inconsistent character, it was within the discretion of the learned trial judge to have permitted those amendments. It cannot be said that the discretion vested in the Court has not been properly exercised in this regard.

I am, therefore, of the view that the learned trial judge was right in allowing the amendments and would affirm his order accepting the amended plaint.

The appeal is accordingly dismissed with costs.

SENANAYAKE, J.– I agree.

Appeal dismissed.