

GORDON FRAZER & CO. LTD. v. LADY GYMARA FERNANDO

COURT OF APPEAL

RANASINGHE, J & RODRIGO, J.

C.A. APPLICATION 82/1979/LA; D.C. MT. LAVINIA 610/RE

DECEMBER 19, 1979 AND JUNE 10, 11, 1980

Landlord and Tenant – Estoppel – Framing of issues – Evidence Ordinance, Section 115 – Civil Procedure Code, Sections 93 and 146.

The respondent (plaintiff) sued the petitioner (defendant) for ejectment and arrears of rent alleging that the petitioner was her tenant. The petitioner took up the position that at all times material to the action the tenant of the premises was one R. W. and that the respondent had represented to the said R. W. and the petitioner that R. W. was the tenant and that therefore she is estopped from asserting that the petitioner was the tenant during the relevant period. R. W. was no party to the action and the respondent averred no relationship between the petitioner and R. W. issues framed by the petitioner's counsel on estoppel on the ground of representations made by the respondent to R. W. were rejected by the District Judge and the petitioner's counsel thereafter recast his issues which were accepted by court. Before the trial commenced the petitioner appealed from the order rejecting the issues.

Held:

The fact that the petitioner's counsel had without informing court immediately of his intention to appeal, proceeded to recast the issues which were ruled out, does not amount to an unquestioned and final acceptance of the order so made by the District Judge. Any representation alleged to have been made by the respondent to the said R. W. could also be relied on by the petitioner in support of the plea of estoppel. If it could be shown that notice of representations which were so said to have been made to the said R. W. "was intended to and did in fact come" to the petitioner. The petitioner should be given an opportunity of having his pleadings amended to set out fully the particulars which would entitle him to rely on the representations made to the said R. W. before his being permitted to frame the relevant issues based on estoppel.

Cases referred to:

- (1) *Thevagnanasekeran v. Kuppamal* 36 NLR 337.(1)
- (2) *Weerasooriya v. Controller of Establishments* 51 NLR 189 at 191.
- (3) *Alagappa Chetty v. Arumugam* 2 CL Rep. 202.
- (4) *Bank of Ceylon, Jaffna v. Chelliapillai* 64 NLR 202.
- (5) *Attorney-General v. Smith* 8 NLR 229.
- (6) *Silva v. Obeysekera* 24 NLR 97 at 107.
- (7) *Mariya Umma v. The Oriental Government Security Life Assurance Co, Ltd.* 57 NLR 145.
- (8) *Abeysekera v. de Livera* 71 NLR 465 at 473.
- (9) *Martin v. Thenuwara* 70 NLR 332.
- (10) *De Alwis v. De Alwis* 76 NLR 444.

APPEAL from the Order of the District Court of Mt. Lavinia

C. Ranganathan Q.C. with *Mark Fernando* for Defendant-Petitioner

H. W. Jayewardene Q.C. with *P. A. D. Samarasekera* for Plaintiff-respondent.

Cur adv vult.

19th July, 1980

RANASINGHE, J.

The Plaintiff-Respondent (hereinafter referred to as the Respondent) instituted proceedings in the District Court, Mt. Lavinia, in Case No. 610/RE against the Defendant-Petitioner (hereinafter referred to as the Petitioner); for ejection of the petitioner from Premises No. 232/3, Havelock Road; for arrears of rent in a sum of Rs. 49,000/-; for damages at the rate of Rs. 900/- per month from 1.8.1978 until the Respondent is placed in possession of the said premises.

The position taken up by the Respondent briefly is that: the Respondent leased out the said premises to the Petitioner by Indenture of Lease bearing No. 3113 dated 24.7.1971 (a copy of which has been annexed to the Respondent's statement of objections, as "A") for a period of three years at an annual rental of Rs. 10,800/- payable in twelve equal monthly instalments of Rs. 900/- each: that, upon the provisions of the Rent Act No. 7 of 1972 coming into operation on 1.3.1972, the said lease became invalid and the Petitioner became a monthly tenant as from the said date, 1.3.1972: that the Petitioner had, as such tenant, paid all rents up to the end of December 1972 and has fallen into arrears thereafter: that, on or about 4.10.1977, the respondent gave the Petitioner notice to quit said premises.

The Petitioner, in the Petitioner's answer has taken up the position; that, at all times material to the action, and more particularly in and after January 1974, the tenant and the authorised occupant of the said premises was a person named Ranjan Wijeratne: that the said Ranjan Wijeratne was accepted and recognised by the Respondent as the tenant; that, on and after 13th January 1974, the Respondent has acted on the basis, has represented to the said Ranjan Wijeratne and the Petitioner, and has also intentionally caused and permitted the said Ranjan Wijeratne and the Petitioner to believe that the said premises were a surplus house, that the said Ranjan Wijeratne was the tenant and authorised occupant thereof, that the Respondent did not wish to retain the ownership of the said premises, that the said that the said Ranjan Wijeratne was entitled on purchase the said

premises have vested in the Commissioner; of National Housing, and that the said Ranjan Wijeratne was entitled to purchase the said premises from the said Commissioner: that the Respondent is therefore now estoppel from denying the said facts. The essence of the defence was, therefore, that the Petitioner was not during the material period, the tenant of the said premises, and that, in truth and in fact, the tenant was the person named Ranjan Wijeratne, and that the Respondent is estopped from asserting that the Petitioner was the tenant during the relevant period.

The case was taken up for trial on 9.10.97 and after certain admissions were recorded, learned Counsel appearing for the respondent suggested the solitary issue as to whether, upon the admissions recorded, the Respondent is entitled to ejection as prayed for.

Learned counsel appearing for the Petitioner then suggested the following issues:

- (2) At all times material to this action, was Ranjan Wijeratne of 232/3, Havelock Road, Colombo.
 - (a) the occupant of the premises in suit?
 - (b) the tenant of the premises in suit?
- (3) Has the plaintiff accepted and recognized the said Ranjan Wijeratne as the tenant and/or the authorised occupant of the said premises.
 - (a) at all times material to the action;
 - (b) from the end of December, 1973?
- (4) As set out in paragraph 4 of the answer, is the plaintiff estopped from denying that:
 - (a) the said premises were a surplus house within the meaning of the Ceiling on Housing Property Law?
 - (b) the said Ranjan Wijeratne was the tenant and the authorised occupant thereof?

- (c) the plaintiff did not wish to retain the ownership of the said premises?
 - (d) the said premises vested in the Commissioner of National Housing?
 - (e) the said Ranjan Wijeratne was entitled to purchase the said premises from the Commissioner of National Housing?
- (5) On and after 13th January 1974:
- (a)
 - (b)
 - (c) have the said premises vested in the Commissioner of National Housing by reason of being a surplus house in relation to Dr. A. M. Fernando and/or other co-owner of the said house?
 - (d)
 - (e) is the Plaintiff estoppel from asserting or claiming that the defendant is the tenant of the said premises or is obliged to pay her rent in respect of these premises?

Issues bearing Nos. (6) and (7) are not very material for the purpose of the matters arising in this appeal.

Paragraph (4) of the Petitioner's answer is as follows:-

"Further answering, the defendant states that on and after 13th January 1974 the Plaintiff has acted on the basis, has represented to the said Ranjan Wijeratne and the Defendant, and has intentionally caused and permitted them to believe that:

- (a) the said premises were a surplus house,
- (b) the said Ranjan Wijeratne was the tenant and authorised occupant thereof;
- (c) She did not wish to retain the ownership thereof;

- (d) the said premises vested in the commissioner of National Housing; and
- (e) the said Ranjan Wijeratne have acted on the plaintiff's said representations and conduct. The Plaintiff is estopped from denying the said fact."

and the defendant and the said Ranjan Wijeratne have acted on the Plaintiff's said representations and conduct. The plaintiff is estopped from denying the said fact".

Upon objections being taken by learned Queen's Counsel appearing for the Respondent, the learned District Judge rejected the issues Nos. 2, 3, 4 on the ground that: the action has been instituted against the Petitioner on the basis of a failure to act in accordance with the indenture of lease; these issues relate to a Ranjan Wijeratne: the said Ranjan Wijeratne is nowhere referred to in the answer as an attorney of the petitioner, or as a Director, nor has any relationship being set out: the said Ranjan Wijeratne is not a party to this case. The learned District Judge ruled out issue 5(c) as it also related to persons who are not parties to the action. Issue 5(c) was rejected for the reason that the grounds on which the said estoppel is based have not been set out.

Thereupon learned Counsel for the Petitioner suggested four new issues numbered as 8, 9 and 10 and 11 as follows:-

- "(8) (a) was the defendant in this case the tenant of the said premises in January 1974 or at any time thereafter?
- (b) If not, can the plaintiff have and maintain this action?
- (9) (a) In January 1974 or thereafter has the Plaintiff admitted that the defendant in this case is not the tenant?
- (b) If so, can the plaintiff have and maintain this action?
- (10) As set out in paragraph (4) of the answer, is the plaintiff estoppel as against the defendant from denying the facts therein set out?"

Issues 11(a) and (b) are not relevant for the questions which arise for decision in this appeal.

Learned Queen's counsel appearing for the Respondent the informed Court that he was not objecting to issues 8(a), (b) and 9(a), (b), but that he objects to the words "as set out in paragraph 4 of the answer" in issue No. 10. The learned District Judge upheld the objection so put forward to issue 10 on the ground that the said Ranjan Wijeratne is neither a defendant nor an agent of defendant in this case and that the defendant in this case is only the Petitioner. Thereupon learned Counsel for the Petitioner moved to recast issues 10 and 11 as follows:-

10(a) Upon the facts set out in paragraph 4 of the answer, did the plaintiff intentionally act and so permit

(a) Ranjan Wijeratne;

(b) the defendant

to accept the said facts?

11. If so, is the plaintiff estoppel from denying the said facts?".

The learned District Judge disallowed these two issues too for the reason that Ranjan Wijeratne is not a party to this case.

Thereupon learned Counsel for the Petitioner moved to omit the name of Ranjan Wijeratne, and recast issue (10) as follows:-

"10. Upon the facts set out in paragraph (4) of the answer, did the plaintiff intentionally act and so permit the defendant to accept the said facts?

This issue was then accepted by the learned District Judge. Consequent upon this issue being accepted, an issue numbered (12) was suggested on behalf of the Respondent to the effect whether, in any event, an estoppel, in terms of the provisions of Section 115 of the Evidence Ordinance, arises upon the facts set out in the said issue (10). Thereafter the trial of the said issues was fixed for 19.8.1980, and the further proceedings were then adjourned.

The Petitioner filed the application, for leave to appeal from the order made by the learned District Judge on 9.10.79 disallowing the issues suggested on behalf of the Petitioner, in this Court on 9.10.79. When the matter of the Petitioner's application for leave to

appeal was taken up, it was agreed between learned Queen's Counsel appearing for the respective parties, after preliminary argument, that this Court do hear arguments of learned Counsel in respect of the interlocutory appeal itself, as it leave to appeal has been granted, and that this Court do consider the said Order made by the learned District Judge on 9.10.79 upon the issues suggested by learned Counsel for the petitioner.

A consideration of the said Order of the learned District Judge made on 19.10.79 disallowing issues Nos. 2, 3, 4, 5(c) and (e) suggested on behalf of the Petitioner shows that the reason why they were disallowed was because the said Ranjan Wijeratne was not a party to the action, and nowhere in the answer has any relationship, either as an Attorney or as a Director of the Petitioner or of any other kind, been shown as between the petitioner and the said Ranjan Wijeratne.

Learned Queen's Counsel appearing for the Respondent, whilst supporting the order of the learned District Judge, also argued that, in any event, it is not open to the Petitioner to file an appeal because learned Counsel did accept and acquiesce in the said order of the learned District Judge, and did thereafter even re-cast his issues, which as so re-cast were ultimately accepted both by the Respondent and the learned District Judge, so much so that the issues upon which the case has now been set down for trial are all issues which have been agreed upon and accepted by both parties.

It was also contended that the principles set out in the cases of *Thevagnanasekaran v. Kuppamal*⁽¹⁾, *Weerasooriya v. Controller of Establishments*⁽²⁾ at 191, and *Alagappa Chetty v. Arumugam*⁽³⁾ apply; and that the petitioner cannot now be heard to complain against the said Order of the learned District Judge. The essence of the principle adopted in these cases is summed up in the quotation set out by Macdonell C.J. at page 344 of the judgment in *Thevagnanasekeran's case* (*supra*).

"Where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round to challenge the legality of proceedings due to his own invitation or negligence".

A consideration of the position taken up on behalf of the petitioner does not show that the petitioner is in any way challenging the

jurisdiction of the Court. The Petitioner does not complain that the court has wrongly arrogated to itself a jurisdiction which the Court is not entitled in law to exercise. The Petitioner's complaint is that the court, whilst exercising an undoubted jurisdiction which the Court was possessed of, has, however, in the course of so exercising its powers, made a wrong order. The petitioner complains only of a wrong order made in the course of a lawful exercise of jurisdiction. Furthermore, a consideration of the proceedings does not, in my opinion, show that learned Counsel for the Petitioner could be said to have in any way contributed towards any error committed by the learned District Judge. The error, if any cannot be considered to have been due to any negligence on the part of the Petitioner. Nor can the Petitioner's Counsel be considered to have acquiesced in the order complained of. The fact that learned Counsel had, without informing court immediately of his intention to appeal, proceeded to re-cast the issues which had been earlier suggested by him and which were ruled out by the learned District Judge, does not amount to an unquestioned and final acceptance of the order so made by the learned District Judge. The Petitioner has within the time granted to him by law exercised his right to come before this Court – well before the date which the court had fixed as the date for the trial of the issues accepted by Court on the day the said order was made by Court. The conduct of the Petitioner (either by himself or through his attorney-at-law) either immediately after the said order was made on 9.10.79 or thereafter up to the 25th October 1980, on which date the application to this Court was filed, cannot be said to have caused any detriment to the Respondent for which the Petitioner should in law, be held to be answerable. In this view of the matter, I am of opinion that this contention put forward on behalf of the Respondent is not entitled to succeed.

The position taken up by the Petitioner, as set out in paragraph 4 of the answer, is that the representations, which are alleged to have been made by the Respondent and which are relied upon by the Petitioner as constituting the estoppel set out therein, were made by the Respondent not only to the Petitioner but also to Ranjan Wijeratne referred to in the said answer. The said Ranjan Wijeratne, as already stated, is not a party to this case.

Learned Queen's Counsel, appearing for the Respondent, contended that the Petitioner is entitled, with regard to the said plea of estoppel, to rely not only upon the representations made by the Respondent directly to the Petitioner, but also upon the

representations said to have been made to the said Ranjan Wijeratne. Learned Queen's Counsel relies on Sector 19 of Chapter VI of Spencer Bower's book entitled *The Law Relating to Estoppel by Representation (2 ed.)* wherein it is stated:

"A representee is deemed in law to include not only any person to whom the representation was directly and immediately made, but also any person to whose notice the representation though not made to him, was intended to, and did in fact, come. Such intention may be shown to have been expressed by the representator, when making the representation, in the form of a request or authority to the person addressed in the first instance to pass it on or report it to the person whom it was intended to reach, and who thus becomes the representee, or one of several representees, as the case may be. Or such intention may be inferred from the representator's proved or presumed knowledge that the representation was of such a character that, in the ordinary course of business, it would naturally and probably be transmitted to third persons".

Having set out this general rule the learned author, at page 111, states that the position therefore is that there are four main classes of possible representees, viz:

- "(i) any person to whom the representation was physically and directly made;
- (ii) any principal or partner of such person...
- (iii) any specific person, not being a representee of either of the above types, whom nevertheless the representator actually or presumptively intended the representation to reach and effect, and whom it did in fact so reach and effect; and
- (iv) any member of the public or of a section of the community, who is proved to have acted on a representation addressed in the first instance, not to any specific individual, but to such public or section".

On a consideration of the abovementioned principle set out by Spencer Bower, with reference to the facts and circumstances set out in defence of the Petitioner, it would appear that any representations

alleged to have been made by the Respondent to the said Ranjan Wijeratne could also be relied on by the Petitioner in support of the Petitioner's plea of estoppel if the Petitioner could show that notice of the representations which are so said to have been made to the said Ranjan Wijeratne "was intended to, and did in fact, come" to the Petitioner. Such intention on the part of the Respondent could be proved either by any express declaration said to have been made by the Respondent or by inference from the Respondent's knowledge, either proved or presumed, that the representation was of such a character at, in the ordinary course of business, it would naturally and probably be transmitted by the said Ranjan Wijeratne to the Petitioner. Thus, if the Petitioner could show that the representation, which is said to have been made to the said Ranjan Wijeratne falls within either class (ii) and or class (iii) of the four main classes referred to by Spencer Bower, then the Petitioner would be entitled to rely on the said representation, which is alleged to have been made by the Respondent to the said Ranjan Wijeratne, as well.

As set out earlier the basis of the learned District Judge's said order is that the said Ranjan Wijeratne is not a party to these proceedings and that no relationship, as between the said Ranjan Wijeratne and the Petitioner, has been set out in the answer. In view of the principle set out by Spencer bower, referred to above, it is clear that the mere fact that the said Ranjan Wijeratne is not a party to he proceedings would not be decisive in determining the said question; for if the facts and circumstances are such as to enable the Petitioner to bring himself within either of the two classes referred to above, the Petitioner would then be entitled to prove the representation so alleged to have been made by the Respondent to the said Ranjan Wijeratne.

A consideration of the averments of paragraph (4) of the answer, however, shows that the particulars that would be required to be established by the Petitioner to bring the Petitioner within either class (ii) and or class (iii) referred to above have not been fully set out. The question which now arises, therefore is whether the Petitioner is nevertheless entitled to have such matters as are necessary to bring the Petitioner within either one or both of classes (i) and (ii) of the four classes specified above, put in issue even though the particulars of all such matters have not been specifically pleaded in the Petitioner's answer.

Section 146 of the Civil Procedure Code makes provision for the determination of issues on the day fixed for hearing of the action.

Sub-section (2) of section 146 provides that, if the parties do not agree as to the questions of fact and law to be decided between them, it shall be the duty of the Court, upon the allegation made, in the plaint or in answer to the interrogations or the contents of documents produced by the parties and also after such examination of the parties as the Court considers necessary, to ascertain upon what propositions of fact or of law the parties are at variance and then proceed to record the issues on which the right decision of the case appears to the court to depend. Section 93 of the Civil Procedure Code deals with the power of the Court to amend the pleadings.

In this case as the Petitioner and the Respondent could not at the outset agree upon the issues on which the case should proceed to trial, the duty was cast on the learned District Judge to decide, upon a consideration of the material referred to in Section 146(2) of the Civil Procedure Code the issues upon which it seemed to the learned District Judge that the right decision of the matters in dispute between the parties depended.

In the case of *Bank of Ceylon Jaffna v. Chelliapilla*⁽⁴⁾ Lord Devlin stated:

"The civil Procedure Code gives in section 93 ample power to amend pleadings. Moreover the case must be tried upon the issues on which the right decision of the case appears to the Court to depend' and it is well settled that the framing of such issues is not restricted by the pleadings; see Section 146 of the Code, *Attorney-General v. Smith*⁽⁵⁾ and *Silva v. Obeysekera*⁽⁶⁾".

Where an answer was found to be defective for want of precise information as to the grounds on which liability is repudiated and where it had not been referred for amendment, Gratiaen J. held in the case of *Mariya Umma v. The Oriental Government Security Life Assurance Co. Ltd.*⁽⁷⁾ that in such circumstances: "Section 146 of the Civil Procedure Code imposed a special duty on the Judge himself to order the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself 'the propositions of fact or of the law' upon which the parties were at variance".

Mariya Umma's case (supra) was subsequently cited with approval and followed in the case of *Abeysekera v. de Livera*⁽⁸⁾ where

the Supreme Court, holding that an issue which had been framed was too vague to enable a court to satisfactorily arrive at a just decision, sent the case back to the District Court directing the party concerned to furnish the necessary particulars to enable the District Court to frame issues as contemplated in the judgment of the Supreme Court.

The view that the framing of issues should not be restricted to the pleadings as they stand was also affirmed in the case of *Martin v. Thenuwara*⁽⁹⁾ where it was held that pleadings may be amended after issues which do not strictly arise from the pleadings are permitted to be framed. The same view was also taken in the case of *De Alwis v. De Alwis*⁽¹⁰⁾.

It is, therefore, settled law: that the framing of issues on which the parties are to proceed to trial is not strictly confined to the pleadings as they stand: that it is open to the trial Judge, if it appears to him to be necessary for a proper decision of the matters which are in dispute between the parties, either to permit the party concerned to suggest, or *ex mero motu* for the trial judge himself to adopt such issues as are so considered necessary, even though such issues do not strictly arise upon the pleadings already filed: that the trial judge could also, if it becomes necessary to do so, direct a party defendant, whose answer is found to be defective for want of precise information as to the grounds on which liability is repudiated, to furnish, before such issues are adopted, full particulars of the grounds on which liability is sought to be avoided.

A consideration of the averments set out in paragraph (4) of the answer shows that not only have several particulars, which have to be established by the defendant before the defendant could, on the basis of the abovementioned general principle set out by Spencer Bower, seek to rely on the representations, which are said to have been made by the Respondent to the said Ranjan Wijeratne, not been averred therein, but also that the specific alternative position, coming within the scope of the said general principle and which would be relevant to the Petitioner's own defence, has not been averred with any degree of precision. This defect, however, should not at this early stage of the action be allowed to be made use of to deny the Petitioner the opportunity of placing the Petitioner's defence fully before the trial Court. It is, however, most desirable that the several particulars required to enable the Petitioner to bring the Petitioner within the ambit of the above-mentioned general principle,

set out by Spencer Bower, should be clearly and expressly averred in the answer before the Court proceeds to adopt such issues as would be considered necessary for a full and proper determination of the plea of estoppel relied on by the Petitioner and outlined in the averments of paragraph (4) of the Petitioner's answer as it presently stands.

It is not doubt true that no application was made on behalf of the Petitioner to the learned District Judge to have the answer amended. Even so, the learned District Judge had wide powers which he himself could have exercised in a situation such as this even without any application on behalf of the Petitioner. It must, however, be noted in fairness to the learned District Judge that his attention does not seem to have been drawn to the above-mentioned principle set out by Spencer Bower.

For the reasons set out above, the Petitioner's appeal is allowed; and the order of the learned District Judge, made on 9.10.79, disallowing the issues numbered 2, 3, 4, 5(c) and (e), suggested by learned Counsel for the Petitioner is set aside. The learned District Judge is directed to grant the Petitioner an opportunity of having paragraph (4) of the Petitioner's answer amended in order to set out fully the particulars which would entitle the Petitioner to rely, in accordance with the above-mentioned general principle set out by Spencer Bower, also on the representations which are said to have been made to the said Ranjan Wijeratne by the Respondent. Once the said amendment, and any necessary consequential amendments, are made, the issues properly arising therefrom are then to be suggested by the respective parties, and are to be then decided on by the learned trial judge.

In view of the foregoing order, in regard to issues numbered 2, 3, 4, 5(c) and (e), order is also made, pro forma, setting aside the order accepting issues 5(a), (b) and (d), 6, 7, 8(a) and (b), 9(a) and (b), 10(a), 11 and 12. The issues relating to matters, other than the plea of estoppel, as would be embodied in paragraph (4) as amended, could also be suggested afresh, and adopted thereafter.

The Petitioner is entitled to the costs of this appeal. The Respondent's costs of the proceedings held before the District Court on 9.10.79 will have to be paid to the Respondent by the Petitioner.

RODRIGO, J. – I agree.

Appeal allowed.