GUNASEKERA AND ANOTHER
v.
ABDUL LATIFF

COURT OF APPEAL
S. N. SILVA, J. (P/CA)
RANARAJA, J.
C.A. APPLICATION NO. 188/94
D. C. COLOMBO CASE NO. 15040/L
JULY 25, 1994.

Civil Procedure – Pleadings – Sections 93 of the Civil Procedure Code as amended by Act, No. 9 of 1991 – Meaning of 'laches' – Sections 146 and – proviso to section 46 of the Civil Procedure Code.

The amendment (by Act No. 9 of 1991) to section 93 of the Civil Procedure Code has for the first time taken away the power of court *ex mere motu* to amend pleadings. An amendment could be allowed only upon the application of a party. If the Application was made before the first date of trial, the court once again enjoyed the full power of amendment at its discretion. The court at this stage was no longer required to look for exceptional circumstances or record reasons for permitting amendment to pleadings.

The amendment of 1991 has omitted the words "or processes affected by the order" thereby taking away the power court enjoyed earlier of permitting the amendment of processes.

Amendments to pleadings on or after the first date of trial can be allowed only –

(1) If the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted; and (2) the party applying has not been guilty of laches.

Further, the court is obliged to record reasons for concluding that the above two conditions have been satisfied.

The object of these amendments is to eliminate unnecessary delay in litigation and ensure that the work of the court flows smoothly.

A correction of a clerical or typographical error still comes within the meaning of an amendment under section 93. There is no logical reason why courts should show more leniency towards the amendments to pleadings by alteration and treat additions or omissions less indulgently.

Once the two conditions are satisfied, the party making the application is required to satisfy the court that circumstances that warrant an amendment to pleadings under section 93(1) also exist, namely, that no irremediable prejudice will be caused to the respondents, such an amendment will avoid a multiplicity of actions and facilitate the task of administration of justice. An obvious example of prejudice being caused to the opposing side is when the amendment would deprive the opposing party of the plea of prescription. Beside these considerations, there is also the general bar set out in the proviso to section 46 of the Civil Procedure Code against permitting amendments which would have the effect of converting an action of one character into an action of inconsistent character.

Section 146 of the Civil Procedure Code gives the trial judge wide powers to record the issues on which the right decision of the case appears to court to depend. This can be done upon a consideration of the pleadings filed, or documents produced and if necessary, on examination of parties. In fact issues could be framed during the course of the trial upon the evidence of witnesses.

Laches itself means slackness or negligence or neglect to do something which by law a man is obliged to do. It also means unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon the principle *vigilantibus non dormientibus jura subveiunt.* The neglect to assert ones rights or the acquiescence in the assertion of adverse rights will have the effect of barring a person from the assertion of adverse rights will have the effect of barring a person from the remedy which he might have had if he resorted to it in proper time. When 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 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 to be afterwards asserted, in either of these cases lapse of time and delay are most material. What is reasonable time and what will constitute delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay.

The principles are :

(1) Delay alone will not bar a person from obtaining relief which he may be entitled to.

(2) Court will grant relief only if the delay can be reasonably explained.

The provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances.

Under subsection 93(3) an order for payment of costs can be made only upon an application for amendment of pleadings being allowed. There is no provision for such an order to be made conditional upon the amendments being accepted after hearing objections thereto by the opposing party. When section 93(3) is read with section 93(4) this becomes clear. The court is required to make the amendments on the face of the pleadings and place its signature thereon. In other words, court should whenever possible, make the amendments immediately after they are permitted on the plaint, answer or replication and continue the proceedings. It is only when such a course is not convenient, that a postponement should be allowed for filing of a copy of the pleadings as amended.

A postponement may also be granted with or without costs when pleadings are amended at the trial stage, for the opposing party to meet the new situation.

Obiter :

The court should not in any event permit more than one application for amendment of pleadings in a case.

Cases referred to

1. *Mackinnons v. Grindlays Bank* (1986) 2 Sri LR 272.
2. *Ranaweera v. Jinadasa* S. C. Appeal 41/91.
3. *Lindsay Petroleum Co. v. Hurd* (1874) LRPC 221, 239.
4. *Biso Menika v. Cyril de Alwis* (1982) 1 Sri LR 368.

APPEAL from judgment of District Judge of Colombo.

Romesh de Silva, P.C. with *P. Kumarasinghe* for defendant-petitioners.

S. Sivarasa, P.C. with *N. Sivendran* and *plaintiff-respondent.*

Cur. adv. vult.

September 08, 1994.

RANARAJA, J.

The respondent filed action on 28.6.90 against the petitioners praying for a declaration that he is the owner of premises no : 122 Sea Street, Colombo 11, ejectment of the petitioners therefrom and damages. The petitioners filed answer on 11.9.91 stating that they and one Jayapala, as partners of the business "The Bombay

Harmonium Company", were the tenants of premises no: 102, paying a rental of Rs. 3397.67 per month to the respondent. They prayed for a dismissal of the action. On 1.7.92 when the matter came up for trial, two admissions were recorded. When two issues were raised by the respondent, they were objected to by the petitioners. Court delivered order accepting the two issues and directing the petitioners to commence the trial. On 25.2.93, the third day of trial, the case was postponed as the principal witness for the petitioners was absent. Trial was postponed once again on 1.7.93 for 2.11.93. When the trial was taken up on the fifth date, the petitioners suggested 10 further issues which were objected to by the respondent, as they were in respect premises no: 122 whereas, the answer referred to premises 102. The objection was upheld. The court granted leave to the petitioners to tender an amended answer upon the pre-payment of Rs. 15,000/= as costs and subject to any objection that may be taken by the respondent to the acceptance of the amended answer. The petitioners filed an amended answer wherein the figure 102 in paragraph 5(a) of the answer was altered to 122. There was no accompanying affidavit explaining the need to amend the answer or the delay of over two years to do so. The respondent objected to the Court accepting the amended answer on the following grounds. Namely, the petitioners were guilty of undue delay, the trial had already commenced, no reasons were adduced for the amendment and the proposed amendment if accepted, would cause grave and irreparable loss to the respondent. The learned additional District Judge by the order dated 7.3.94 rejected the amended answer. This application is for the revision of that order.

It is submitted by learned President's Counsel for the petitioners that the reference to premises no: 102 instead of no: 122 in paragraph 5(a) of the answer is clearly a clerical error and that the order rejecting the amended answer would cause grave and irremediable injustice to the petitioners in that their total defense would be rejected. It is further submitted that the petitioners are not guilty of laches as they became aware of the error only on 2.9.93. Provisions for the amendment of pleadings are found in section 93 of

the Civil Procedure Code. This section itself has been the subject amendments. As it stood originally it read;

> "At any hearing of the action, or at any time in the presence of or after reasonable notice to all parties to the action before final judgment, the Court shall have full power of amending in its discretion and upon such terms as to costs and postponement of day of filing answer or replication or for hearing of cause, or otherwise, as it may think fit all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleadings or process affected by the order, or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the judge."

These provisions were considered by Sharvananda CJ. in *Mackinnons v Grindlay's Bank*[1]. His Lordship expressed the view that "the test that should be applied in exercising the discretion to permit the amendment of pleadings is whether such amendment is necessary to effectively adjudicate upon the dispute between the parties. Provisions for the amendment of pleadings, he added, 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. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence. 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."

Not long after the decision in the *Mackinnons* case, section 93 was amended by Act no: 79 of 1988 to read;

> 93(1) "The Court may in exceptional circumstances and for reasons to be recorded, at any hearing of the action, or

at any time in the presence of, or after reasonable notice to all parties to the action, before final judgment, amend all pleadings and processes in the action by way of addition, or of alteration or of omission.

(2) Every order for amendment made under this section shall be upon such terms as to costs and postponement of the date fixed for the filing of answer, or replication, or for the hearing of the case or otherwise, as the Court may think fit.

(3) The amendments or additions made in pursuance of an order under this section shall be clearly written on the pleadings or processes affected by the order, or if it cannot be conveniently so done, a fair draft of the document as altered shall be appended to the document intended to be amended and every such amendment or alteration shall be initialled by the judge."

A very significant change was brought about in the earlier section by the omission of the words "the court shall have full power of amending in its discretion" and the inclusion of the phrase " the court may in exceptional circumstances and for reasons to be recorded". The amendment thereby curtailed the full power court had earlier of amending in its discretion pleadings and processes in the action. The replacement of the word "shall" with the word "may" in the amended section is an indication that court was to act sparingly in interpreting the words "exceptional circumstances". Furthermore, court was required to record reasons for permitting any amendment to the pleadings or processes. This is a requirement to enable a party aggrieved with the reasoning to challenge it in a higher court and to facilitate the task of an appellate court when it is called upon to review the decision of the trial judge. The trend in curtailing the unlimited powers of court to allow amendments to pleadings generally and specially at the trial stage was continued in the subsequent amendment to the section by Act No: 9 of 1991. The amended section read;

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 of omission.

(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 that the party so applying has not been guilty of laches.

(3) Any application for amendment of pleadings which may be allowed by the court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the court may think fit.

(4) The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall be appended in the record of the action to the pleading amended. Every such addition, or alteration or omission shall be signed by the judge."

The amendment of 1991 has for the first time taken away the power of court *ex mero motu* to amend pleadings. An amendment could be allowed only upon the application of a party. If the application was made before the first date of trial, the court once again enjoyed the full power of amendment at its discretion. However, if the application for amendment of pleadings was made on or after the first date of trial, the court's powers were severely curtailed.

It is important to note at this stage that Sharvananda CJ. in the *Mackinnons* case (supra), considered section 93 as it originally stood, in conjunction with section 146 of the Civil procedure Code, which deals with the determination of issues. Significantly, section 93, as amended by Act No: 9 of 1991, provides for amendments to pleadings at two stages; vis, prior to the first date of trial, and on or

after the first date of trial. The liberal principles enunciated in the *Mackinnons* case was to apply only when the court exercised its powers of amendment at the first stage. The court at this stage was no longer required to look for exceptional circumstances or record reasons for permitting amendments to pleadings. However, the removal of these fetters should not be interpreted to mean that court could entertain or allow any number of applications made by parties to amend pleadings. For reasons given below, court should not in any event permit more than one application for amendment of pleadings in a case.

Interestingly, the amendment of 1991 has omitted the words "or processes affected by the order" thereby taking away the power court enjoyed earlier of permitting the amendments to processes.

The amendments to pleadings on or after the first date of trial can now be allowed only in very limited circumstances. It prohibits court from allowing an application for amendment at this stage unless (1) it is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted, and (2) the party applying has not been guilty of laches. On no other ground can court allow an application for an amendment of pleadings. Furthermore, court is obliged to record reasons for concluding that the two conditions referred to have been satisfied.

Learned President's Counsel for the petitioners submitted that the main objective of the amendments was to eliminate unnecessary delay in litigation. In other words, requests for amendments should not be resorted to as a subterfuge for delaying proceedings in cases. How accurate the learned President's Counsel's submission on this point is seen when it is considered in the context of the observations made by the Wanasundera Committee in its report on the "Sri Lanka Laws Delays and Legal Culture" at page 11, which states –

> "When amendments of pleadings are sought, the nature and content of the amendments should be brought to the notice of court, because the court will not willy-nilly allow any and every amendment especially where by framing appropriate issues the purpose of the desired amendment

> could often be achieved. If the judge exercises greater control in dealing with applications to amend pleadings, years of delay could be cut."

Delay affects not only the parties to the action. The presiding judge and the system of justice are often forgotten when applying the liberal principles set out in Mickinnon's case (supra), to amendment of pleadings. It is only a trial judge who experiences first hand the obstacles to the due administration of justice, when applications for postponements are made by parties, to rectify matters which could have been avoided by the exercise of due diligence. Justice has many facets. It is worth remembering, for every case that is brought before a court, there are many others that do not reach it, due to the reluctance of an aggrieved party to undergo further agony of delay and expense a court trial entails. As Dr. Amerasinghe J. in *Ranaweera v Jinadasa* [2] observed;

> "A court is under a duty to see that its business is disposed of in an orderly, prompt and effective manner. Unnecessary postponements are wasteful, non productive, time consuming and result in the confusion and congestion of work. They provide fertile ground for public criticism of the whole system"

It is the duty of parties to ensure that the work of court flows smoothly. This can be done by taking necessary action in a case at the appropriate time.

It seems to us reasonable therefore, to consider the present application not from the very narrow point of the petitioners, to whom it may appear to be a simple alteration of figures, but from a wider perspective of its effect on the due administration of justice and especially the intent and purpose of the successive amendments to section 93 of the Civil Procedure Code.

Section 93 empowers court, upon application made, to amend pleadings by way of addition, or alteration or of omission. This application is to alter the figures "102" in paragraph 5(b) in the

answer to "122". They claim this mistake which they seek to correct, was the result of a mere clerical or typographical error. How this clerical error appeared in both the Sinhala and English copies of the plaint is left unexplained. What matters here however is, whether it is a correction of a clerical or typographical error, it still comes within the meaning of an amendment under section 93. As, the alteration of such an error could be done only under the provisions of that section. There is no logical reason why courts should show more leniency towards the amendments to pleadings by alteration and treat additions or omissions less indulgently.

The petitioners have to clear two hurdles. They have to satisfy court firstly that, (1) grave and irremediable injustice will be caused to them if the amendment is not permitted, (2) there has been no laches on their part in making the application. Once this hurdle is overcome, they are further required to satisfy court the circumstances that warrant an amendment to pleadings under section 93(1) also exist. Namely, that no irremediable prejudice will be caused to the respondents, such an amendment will avoid a multiplicity of actions and facilitate the task of administration of justice. (See *Mackinnons* case-supra). An obvious example of prejudice being caused to the opposing side is when the amendment if allowed, would deprive that party pleading prescription of the cause of action. Besides these considerations, there is also the general bar set out in the proviso to section 46 of the Civil Procedure Code, against permitting amendments which would have the effect of converting an action of one character into an action of inconsistent character.

It was agreed between the parties at the commencement of the trial that the respondent was the owner of premises no 122 Sea Street, and it was from those premises that he sought to have the petitioners ejected. Section 146 of the Civil Procedure Code gives the trial judge wide power to record the issues on which the right decision of the case appears to court to depend. This can be done upon a consideration of the pleadings filed, or documents produced and if necessary, on examination of parties. In fact, issues could be framed during the course of the trial upon the evidence of witnesses. The record of the proceedings in the lower court, filed along with this

application does not disclose the petitioners invited court to exercise its powers under that section.

Nor have the petitioners themselves, sought to frame issues on the basis of the plaint read along with their answer. In the circumstances, the petitioners cannot be heard to say that they will suffer irremediable injustice if their application for amendment of the answer is refused.

The word "laches" is a derivative of the French verb *Lacher,* which means to loosen. Laches itself means slackness or negligence or neglect to do something which by law a man is obliged to do. (Stroud's Judicial Dictionary 5th Ed Pg 1403.) It also means unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon the principle vigilantibus non dormientibus jura subveniunt. The neglect to assert one's rights or the acquiescence in the assertion or adverse rights will have the effect of barring a person from the remedy which he might have had if he resorted to it in proper time. (Mozley & Whiteley's Law Dictionary 10th Ed pg 260). When 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 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 to be afterwards asserted, in either of these cases lapse of time and delay are most material. (*Lindsay Petroleum Co v Hurd*) [3]. What is reasonable time and what will constitute delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained the court will not decline to interfere. (*Per Sharvananda J in Biso Menika v Cyril de Alwis*) [4].

The principle that emerges from the above citations is, (1) Delay alone will not bar a person from obtaining relief which he may be entitled to. (2) Court will grant relief only if the delay can be reasonably explained.

The petitioners have taken over 14 months to file answer. When the matter came up for trial on 1.7.92, they took objection to the 2 issues raised by the respondent and sought an order of court thereon, which was delivered 3 1/2 months later. On 25.2.93 the petitioners were not ready to lead evidence and the matter was postponed on their application. It was on the fifth date of trial, 2 years and 2 months after filing of the answer, that an application was made to amend it. As Amerasinghe, J observed in *Ranaweera's case* (supra);

> "No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot otherwise be provided for."

The principle laid down in *Ranaweera's* case when applied to the facts of the present case would clearly deny the petitioners the right to plead absence of laches. They will be hard put to satisfy any court that they were taken by surprise or the error could not have been discovered earlier with reasonable diligence. The petitioners' conduct points to one conclusion alone. That is, they have acted without due diligence. The delay on their part to detect the error deprives them of the right to amend their answer at the time they applied to do so. The provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances. They should not be applied in circumstances as disclosed in the present case. A glance at the plaint and answer, would have made the mistake in the number of the premises given in the answer obvious.

Another matter that needs comment is the order for prepayment of costs made by the Judge. Under section 93(3) an order for payment of costs can be made only upon an application for amendment of pleadings being allowed. There is no provision for such an order to be made conditional upon the amendments being accepted after hearing objections thereto by the opposing party. This becomes clear when section 93(3) is read with subsection (4). The Court is required to make the amendments on the face of the pleadings and place its signature

thereto. In other words, court should wherever possible, make the amendments immediately after they are permitted, on the plaint, answer or replication and continue with the proceedings. It is only when such a course is not convenient, that a postponement should be allowed for the filing of a copy of the pleadings as amended. A postponement may also be granted with or without costs, when pleadings are amended at the trial stage, for the opposing party to meet the new situation.

For the reasons given, we are not inclined to grant the relief sought by the petitioners. Their application is accordingly dismissed without costs.

S. N. Silva, J. – I agree

Application dismissed.