

UNION ASSURANCE LIMITED

v.

PEIRIS

COURT OF APPEAL.

DE SILVA, J.,

WEERASURIYA, J.

C.A. NO. 635/96.

D.C. COLOMBO NO. 10089/MR.

JANUARY 14, 1999.

Civil Procedure Code – S. 146, S. 754 (2) – Raising of Issues – Consequential Issues – Plea of estoppel – Does it amount to a new cause of action – Exceptional circumstances not pleaded.

The plaintiff-respondent instituted action claiming a certain sum due on a contract of Insurance entered into with the defendant. The defendant denied liability. After certain issues were accepted by Court, the plaintiff raised a new issue (Issue No. 15) for which the defendant objected, Court allowed same. It was contended by the defendant-petitioner that the issue raising a plea of estoppel has not been pleaded and the alleged grounds of estoppel in the purported issue had been framed on the basis that they are admitted facts, and that the plaintiff cannot be permitted to alter the nature of the case presented after the close of pleadings.

Held:

1. It is manifest that issue No. 15 had been raised as a consequential issue arising from issue No. 13 which was accepted by Court. It is an inveterate practice in the District Court to permit a party to raise consequential issues arising from issues raised by the opposing party.
2. The test relating to a consequential issue would be whether such issue arises from an issue raised by the opposing party.

Per Weerasuriya, J.

"The plea of estoppel raised does not amount to a new cause of action, this plea was only a defence pleaded to issue No. 13 formulated on a clause

of the policy of insurance, there is no basis for one to contend that the plaintiff has changed the nature of the case presented to Court."

3. The question that would arise is whether or not the defendant had been prejudiced by such disclosure. The letter referred to in the issue and the response of the plaintiff and the consequent conduct of the defendant are not matters which were outside the knowledge of the defendant.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Weeravago v. The Bank of Madras* – 2 Ceylon LR 11.
2. *Lokuhamy v. Sirimal* – 2 Ceylon LR 125.
3. *Silva v. Obeysekera* – 24 NLR 97.
4. *Nandias Silva v. Unambuwa* – 76 NLR 25.
5. *Liyanage v. Siriwardena* – 1986 1 Colombo Appellate Law Reports 306.

N. S. A. Goonetillake, PC with *M. E. Wickremasinghe* for defendant-petitioner.

Chula de Silva, PC with *Kushan de Alwis* for plaintiff-respondent.

Cur. adv. vult.

March 25, 1999.

WEERASURIYA, J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) by his plaint dated 03. 09. 1990, instituted action against the defendant-petitioner (hereinafter referred to as the defendant), claiming judgment in a sum of Rs. 1,023,500 due on a contract of insurance entered into with the defendant. The defendant filed answer denying liability and prayed for dismissal of the action. The trial commenced on 18. 06. 1992 wherein two admissions were recorded relating to the jurisdiction and contract of insurance. Thereafter, the defendant objected

to the 4 issues formulated by the plaintiff and the learned District Judge having directed the parties to tender written submissions by his order dated 17. 06. 93, allowed the aforesaid issues.

On 16. 02. 96 when further trial commenced, defendant raised 8 issues which were objected to by the plaintiff, whereupon the District Judge having directed the parties to tender written submissions by his order dated 19. 02. 96, accepted issues No. 7 and 13 and rejected the rest. The plaintiff thereafter raised issue No. 15 for which the defendant objected and the District Judge by his order dated 01. 08. 96 allowed the same. It is against the said order of the District Judge that the defendant has filed this application for revision.

Learned President's Counsel for the defendant submitted that –

- (a) the issue raising a plea of estoppel has not been pleaded by the plaintiff;
- (b) the alleged grounds of estoppel referred to in the purported issue had been framed on the basis that they are admitted facts; and
- (c) the plaintiff cannot be permitted to alter the nature of the case presented after the close of pleadings.

Issue No. 15 permitted by the District Judge is as follows:

"15 – Is the defendant estopped from pleading that the plaintiff's claim is out of time by reason of the following matters:

- (i) By reason of letter dated 23. 08. 89 addressed by the defendant's agent, Pioneer Loss Adjusters Limited requesting an estimate to repair the plaintiff's bungalow.
- iii) Since the plaintiff has by reason of the aforesaid matters forwarded such an estimate to the defendant.
- (iii) Since the defendant has on or about 22. 09. 89 accepted the said estimate and forwarded it to its agent.

- (iv) Since the defendant has denied liability for the first time by letter dated 22. 01. 90."

Learned President's Counsel for the plaintiff contended that issue No. 15 was raised as a consequential issue arising from issue No.13 accepted by the District Judge is as follows:

"13 – In any event was the claim set out in the plaint made after the expiry of time."

It is appropriate at this stage to reproduce issue No. 7 which was founded on a plea of prescription to illustrate the significance of issue No. 13.

"7 – In any event, is the claim prescribed on the face of it."

Thus, in the light of issue No. 7, issue No. 13 was not founded on the premise that the claim of the plaintiff was prescribed but that it was made out of time, in the sense that the claim was made after the expiry of a limited period specified in the policy of insurance.

Admittedly, the averment that the plaintiff had failed to make a claim within a specified time had been raised in the answer of the defendant. However, this averment in any manner cannot be construed to constitute a claim in reconvention. The Civil Procedure Code does not provide for pleadings after the tendering of answer except in the case of a claim in reconvention. Further, pleadings by way of replication is permitted by order of Court after notice to the opposing party and before the date of trial.

In *Weeravago v. The Bank of Madras*⁽¹⁾ it was observed that although under the Civil Procedure Code, pleadings are not to go beyond answer except by special leave, yet if a defendant's answer contains averments requiring to be met, it is none the less incumbent upon plaintiff to meet them, either by obtaining leave to reply or by asking the Court under section 146 of the Code, to frame an issue upon defendant's averments.

In *Lokuhamy v. Sirimal*⁽²⁾ it was held that under the Code there is no necessity for a replication to any new matter in the answer,

but such new matter will be taken as denied or if the plaintiff desires to question its sufficiency as an answer to the declaration, he may at the trial have an issue settled by the Court on the point.

It is manifest that issue No. 15 had been raised as a consequential issue arising from issue No. 13 which was accepted by the District Judge. It is an inveterate practice in the District Court to permit a party to raise consequential issues arising from issues raised by the opposing party. This is in keeping with the principle that it is within the discretion of the District Judge to allow fresh issues to be formulated when such a course appears to be in the interest of justice even after the commencement of the trial. (vide *Silva v. Obeysekera*⁽³⁾). The test relating to a consequential issue would be whether such issue arises from an issue raised by the opposing party.

Learned President's Counsel for the defendant cited the case of *Nandias Silva v. Unambuwa*⁽⁴⁾ in support of his proposition that where the plea of estoppel has not been taken in the pleadings, no issue can be raised therein. However, the above decision was not followed in *Liyanage v. Siriwardena*⁽⁵⁾ at 308 where it was observed as follows:

"The learned Judge in that case has expressed an opinion which is purely obiter. There has been no discussion of or reference to any relevant decision. I am, therefore, of the view the case is not an authority for the proposition that an issue relating to estoppel cannot be raised in the absence of pleadings."

Learned counsel for the defendant submitted that in that case the basic facts on which the plea of estoppel was based were clearly pleaded in the plaint and that there was no introduction of new material. Admittedly, the principal submission of the defendant in that case was that the issue was not pleaded and prejudice could be caused by accepting the issue at the trial.

In the instant case, the plaintiff provided the necessary particulars on which he based his plea of estoppel affording an opportunity for the defendant to ascertain with certainty details before the commencement of the trial. The particulars provided by the plaintiff were the acts of the defendant covering the period between the demand and the institution of the action. The question that would arise in this

context would be whether or not the defendant had been prejudiced by such disclosure. The letter referred to in the issue and the response of the plaintiff and the consequent conduct of the defendant are not matters which were outside the knowledge of the defendant. The contention that the particulars provided convey the impression that such facts are true does not prejudice the defendant, if the matters referred to by the plaintiff are incorrect or false. The burden of proving the matters referred to in the issue forming the basis for the plea of estoppel lay with the plaintiff. The burden lay on the plaintiff to produce the letter purportedly written by the agents of the defendant and the response of the plaintiff.

The plea of estoppel raised by the plaintiff does not amount to a new cause of action. This plea was only a defence pleaded to the issue No. 13 founded on a clause of the policy of insurance. Therefore, there is no basis for one to contend that the plaintiff has changed the nature of the case presented to Court.

As was stated earlier, reference had been made in prayer (a) to this application to the order of the District Judge dated 19. 02. 96. On a reading of the petition, one is justified in forming the impression that relief has been sought by way of revision against the order of the District Judge dated 01. 08 96.

The defendant has failed to adduce any reason for his failure to canvass the order of the District Judge dated 16. 02. 96. The failure of the defendant to invoke the provisions of section 754 (2) of the Civil Procedure Code against the order dated 16. 02. 96 cannot be overlooked. In the absence of exceptional circumstances pleaded by the defendant, his application for relief should fail.

For the foregoing reasons, this application is dismissed with costs.

DE SILVA, J. – I agree.

Application dismissed.