

NADARAJAH
v.
DANIEL

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
CALA NO. 274/95
D.C. COLOMBO NO. 5593/L
AUGUST 24, 1998.

Civil Procedure Code – S. 75 (3) claim in Reconvention – Failure to file replication on the claim in reconvention – raising of issues – Is the plaintiff precluded from raising issues on prescription/waiver in the absence of a replication.

The plaintiff-petitioner instituted action seeking a declaration of title to the land in question and ejection therefrom and damages. The defendant-respondent prayed for a dismissal of the action and for a declaration that a certain deed be declared null and void on the ground of *laesio enormis*. After issues were accepted, trial *de-novo* commenced before another Judge. The same issues were then raised. The learned District Judge refused three issues which had earlier been accepted by her predecessor. It was contended that court had erred by holding that a claim in reconvention had been made and that court has misdirected itself by holding that the failure to file replication debarred the plaintiff-petitioner from raising any issue on matters arising from pleadings.

Held:

- (i) A claim in reconvention need not arise out of or even be closely connected with the original claim. It should in its nature be capable of being set off against or adjusted with the plaintiff's claim.

Per Weerasuriya, J.

"It is settled law that Civil Procedure Code does not restrict the issues to the pleadings. The trial Judge is vested with the duty to ascertain what the parties have intended by the pleadings and frame issues."

- (ii) A party is not debarred from raising an issue on any matter arising from a claim in reconvention even in the absence of a replication.

Cases referred to:

1. *Nandias Silva v. Unambuwa* – 76 CLW 25.
2. *Brampy Appuhamy v. Gunasekera* – 50 NLR 235.
3. *Babapulle v. Rajaratnam* – 5 NLR 41.
4. *Fernando v. Fernando* – 23 NLR 266.
5. *Silva v. Perera* – 17 NLR 206.
6. *Weerawago v. Bank of Madras* – 2 CLR 11.
7. *Lokuhamy v. Sirimal* – 2 CLR 125.
8. *Appuhamy v. Kirihamiya* – 2 NLR 155.
9. *Bank of Ceylon, Jaffna v. Chelliah Pillai* – 64 NLR 25.
10. *Liyanage and others v. Seneviratna* – 1986 (1) CALR 308.

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

S. Mahenthiran for plaintiff-petitioner.

Pubudu Alwis for substituted defendant-respondent.

Cur. adv. vult.

September 30, 1998.

WEERASURIYA, J.

By this application, plaintiff-petitioner is seeking to set aside the order of the District Judge dated 20.11.1995, rejecting issues Nos. 13, 14 and 15 raised by him at the trial.

The facts as set out by learned counsel for the plaintiff-petitioner are briefly as follows. The plaintiff-petitioner instituted action by plaint dated 25.09.1987, against the defendant-respondent for a declaration of title to the land morefully described in the schedule to the plaint, ejectment of the defendant-respondent therefrom and damages. The defendant-respondent by his answer dated 04.01.1989, prayed for a dismissal of the action and for a declaration that deed No. 264 be declared null and void on the ground of *laesio enormis*. The case proceeded to trial on 10.01.1991 on the amended answer dated 02.03.1990. Thereafter, the case was taken up for further trial on 15.03.1991 and 14.08.1992 where an application was made to amend

the answer. This application was resisted by the plaintiff-petitioner and the learned District Judge after an inquiry, by her order dated 12. 03. 1992, rejected the said amended answer.

On 12.10.1994, trial commenced *de novo* before a new Additional District Judge and the plaintiff-petitioner raised issues Nos. 1 - 8 and the defendant-respondent raised issues Nos. 9 - 12. Since the plaintiff-petitioner objected to issue No. 12 of the defendant-respondent, the District Judge after hearing Counsel by her order dated 30.03.1995, accepted the said issue. However, on 29.08.1995, plaintiff-petitioner raised issues Nos. 13 - 15 and upon the objections raised by the defendant-petitioner, after hearing the parties the trial Judge by her order dated 30.11.1995, rejected the said three issues. The present application has been filed against the aforesaid order.

At the hearing of this application, learned Counsel for the plaintiff-petitioner submitted the following matters:

- (a) that the learned District Judge had erred by holding that the defendant-respondent had made a claim in reconvention;
- (b) that the learned District Judge had misdirected herself by holding that failure to file a replication debarred the plaintiff-petitioner from raising any issue on matters arising from pleadings.

Learned counsel for the defendant-respondent submitted:

- (a) that the plaintiff-petitioner had failed to file a replication on the claim in reconvention of the defendant-respondent based on *laesio enormis*;
- (b) that issues Nos. 13 and 14 being special pleas of waiver and prescription respectively, plaintiff-petitioner is precluded from raising such issues in the absence of a replication.

He cited the cases of *Nandias Silva v. Unambuwa*⁽¹⁾ and *Brampy Appuhamy v. Gunasekera*⁽²⁾ in support of his submission.

Section 75 (3) of the Civil Procedure Code provides for a claim in reconvention which will have the same effect as a plaint in a cross action so as to enable court to pronounce a final judgment in the same action both on the original and on the cross claim. This provision affords an opportunity for a defendant to have the whole of his counter claim adjudicated upon in the same action.

A claim in reconvention need not arise out of or even be closely connected with the original claim. (vide *Babapulle v. Rajaratnam*⁽³⁾). For instance, in an action based on house rent, it is open to the defendant to claim title to the premises and compensation for improvements.

Further, it was held in *Fernando v. Fernando*⁽⁴⁾ that where a plaintiff sues on a deed in which there is a mistake of which the plaintiff is aware, the defendant is entitled to claim in reconvention, rectification of the deed.

In *Silva v. Perera*⁽⁵⁾ where the law relating to claim in reconvention was discussed it was laid down as follows:

"A claim in reconvention should be of such a nature that the respective claims of the plaintiff and the defendant may be mutually adjusted and a final decree entered in favour of one party or the other. The claim in reconvention need not be based on, or connected with the transaction or matter out of which the plaintiff's cause of action arises, but it should in its nature be capable of being set off against or adjusted with the plaintiff's claim."

In the instant case, in the amended answer dated 02. 03. 1990, the defendant-respondent prayed that deed No. 264 dated 28. 05. 1981, attested by S. Selvanayagam be declared null and void on the ground of *laesio normis*.

Upon an examination of all the material, I am of the view that the learned District Judge had rightly come to a conclusion that there was a claim in reconvention in the amended answer.

The question which remains to be considered is, whether or not a plaintiff has the legal right to frame issues on matters raised in the answer by way of a claim in reconvention in the absence of a replication which deny such averments.

It was observed by Clarence, J. in *Weerawago v. The Bank of Madras*⁽⁶⁾ as follows:

"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. Sirima*⁽⁷⁾ it was held that under the Civil Procedure 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.

Where a defendant makes an averment in his answer, and no replication has been filed to meet it, it is open to the plaintiff if he denies the averment, to have an issue raised on it, and thus put the defendant to the proof of the facts averred, (vide *Appuhamy v. Kirihamiya*⁽⁸⁾).

It is settled law that Civil Procedure Code does not restrict the issues to the pleadings. The trial Judge is vested with the duty to ascertain what the parties have intended by the pleadings and frame issues. This proposition of law was reiterated in the case of *Bank of Ceylon, Jaffna v. Chelliah Pilla*⁽⁹⁾.

Learned counsel for the defendant-respondent cited the case of *G. P. Nandias Silva v. T. P. Unambuwa* (*supra*) and *Brampy Appuhamy v. Gunasekera* (*supra*) in support of the proposition that waiver and prescription being special pleas, a plaintiff is precluded from raising such issues in the absence of a replication to meet them. It is to

be noted that in the case of *G. P. Nandias Silva v. T. P. Unambuwa* (*supra*) it was held that –

"where the plea of estoppel has not been taken in the pleadings no issue may be raised thereon."

At page 27 Wijayatilaka, J. stated as follows:

"Learned counsel for the appellant has drawn my attention to the fact that estoppel has not been pleaded and therefore Commissioner was well within his right in rejecting his issue. I am inclined to agree with him."

It is to be observed, with respect that Wijayatilaka, J. had not indulged in a discussion of relevant provisions of law nor has he referred to any previous decisions on this point. This case had been discussed in the case of *Liyanage and Others v. Seneviratna*⁽¹⁰⁾ at page 308 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 decisions. 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 specific pleadings."

In the case of *Brampy Appuhamy v. Gunasekera* (*supra*) it was held that where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the court will not take the statute into account unless it is expressly pleaded by way of defence. Basnayake, J. (as his Lordship then was) at p. 255 stated as follows:

"An attempt was made to argue that the defendant's claim was barred by Prescription Ordinance (Cap. 55). That plea is not taken in the plaintiff's replication. There is no issue on the point nor is there any evidence touching it."

It is to be observed that in the instant case when an attempt was made to raise an issue on that point objection was taken that the plaintiff-petitioner had no legal right to raise an issue, in the absence of a replication.

In the circumstances, it seems to me that a party is not barred from raising an issue on any matter arising from a claim in reconvention even in the absence of a replication.

The District Judge by his order dated 01.01.1991, had accepted all the issues raised by the parties (1 - 13) as evidenced from the proceedings of that day. However, trial commenced *de novo* before a new District Judge on 12.10.1994 and learned counsel for the defendant-respondent on 12.10.1994, objected to issues Nos. 13-15 and the trial Judge by her order dated 03.11.1992, refused the said issues. It is thus an accepted fact that the trial Judge before whom trial *de novo* commenced by her order dated 30.11.1995 rejected the identical issues which had been accepted by her predecessor.

The District Judge had taken the view that all issues must necessarily arise from pleadings and the plaintiff-petitioner having failed to file a replication is not entitled to raise such issues. Upon an examination of the case law, the conclusion is inescapable that the District Judge had erred by refusing the issues which had earlier been accepted by her predecessor.

Therefore, I set aside the order of the District Judge dated 20.11.1995 and allow this application with costs. The District Judge is directed to accept issues Nos. 13, 14 and 15 raised by the plaintiff-petitioner and proceed with the trial and conclude it expeditiously.

DE SILVA, J. – I agree.

Application allowed.