

*Present:* Shaw J.

CASSIM LEBBE *v.* NATCHIYA *et al.*

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233—C. R. Kegalla, 15,091.

*Amendment of pleadings—Allowed at any time if no injustice to other side.*

“ An amendment which is *bona fide* desired should be allowed at any period of the proceedings, if it can be allowed without injustice to the other side, and in most cases conditions as to costs will ensure no prejudice being caused to the other side. ”

THE facts appear from the judgment.

*Cooray*, for defendants, appellants.

*H. V. Perera*, for plaintiff, respondent.

November 21, 1918. SHAW J.—

In this case the plaintiff sued the defendants, who are the heirs of one Idroos Lebbe Marikar, upon a promissory note made by Marikar in his lifetime. The defendants denied all knowledge of the making of the note by the deceased, and put the plaintiff to the proof of the note. When the case came on for trial, they desired to raise a new defence, namely, that the note had been paid off by the deceased. The reason that they wished to raise this new defence was that there had been a discovery amongst the deceased's papers of a document which referred to a note, which was lost, having been discharged. The Commissioner refused to allow any amendment to be made

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raising this defence, or any issue being raised as to whether or not the note had been paid off. The reason that was given was the lateness of the application, which the Judge thought was due to the defendants wishing to take the plaintiff by surprise at the trial by the new defence. He, therefore, tried the case on the defence as it originally stood, and found that the deceased had made the note sued on and gave judgment for the plaintiff accordingly. Section 814 and the following sections of the Civil Procedure Code relate to pleadings in the Courts of Requests. Section 815 provides that a variance between an allegation in a pleading and the proof shall be disregarded as immaterial, unless such proof discloses a new cause of action, and section 816 provides that the Court shall, upon application, allow a pleading to be amended at any time before trial or during the trial if substantial justice will be promoted thereby. It provides that in the case of an amendment an adjournment may be granted if it is necessary in the interest of the adverse party, and that the Court may in its discretion, as a condition of allowing an amendment, require the payment of costs. The general rule with regard to amendments of pleadings which has been laid down by this Court in previous cases is that an amendment which is *bona fide* desired should be allowed at any period of the proceedings, if it can be allowed without injustice to the other side, and in most cases conditions as to costs will ensure no prejudice being caused to the other side. In the present case the defence sought to be raised was a very substantial one, and I think that the Commissioner might properly have allowed the defence to be raised upon sufficiently providing that the plaintiff should not be prejudiced by conditions with regard to costs. It is clear that the reason for desiring to set up this defence was the discovery of some evidence since the answer was filed, and also that the defendants exercised some laxity in not applying to the Court earlier to amend their defence so as to raise the new point they desired to take, but they could by an order as to costs have been sufficiently penalized for that neglect, and the plaintiff could have been put in a position which would have insured no injustice being caused to him by the amendment being made. The Commissioner, although he refused to allow the defence to be gone into, and although there was no issue on the subject, appears to have looked at the document which had been found by the defendants, and to have come to the conclusion that it would not, on account of its wording, have enabled the defendants to substantiate the defence which they desired to raise, but no issue having been framed, no proper argument could have been addressed to him on the subject, nor is the Court of Appeal in a position to know whether his opinion as to the weight that should be given to the document is correct or not, because the document, in consequence of what has happened, is not before the Appeal Court. I think that the case must be sent back for the purpose of allowing the

defendants to raise the issue desired, and, if necessary, to amend their answer, but I think that it should be upon terms, as it was the delay of the defendants in applying for an amendment that has caused the present difficulty. I would, therefore, direct that upon the defendants paying or giving security for the costs incurred in the Court below within twenty-one days, the decree should be set aside *pro formâ*, and the case re-listed by the Commissioner for the trial of the further issue. The costs of appeal to abide the final result of the action.

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*Sent back.*

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