1958 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

WIJEWARDENE, Appellant, *and* LENORA, Respondent

S. C. 72, with Application 295—D. C. Colombo, 40,751/M

Civil procedure—Pleadings—Amendment thereof—Discretion of Court—Power of Court to award costs of hearing of application to amend—Defamation—Evidence of publication—Can a witness who is not mentioned in the plaint be called ?—Postponement—Should application be supported by memorandum in writing ?—Civil Procedure Code, ss. 40, 46 (2), 80, 91 (1), 93, 121, 175, 211.

Appeal—Exercise of discretionary power by Court of first instance—Power of appellate Court to review it.

Section 93 of the Civil Procedure Code confers on the Court a wide discretion to amend all pleadings. The discretionary power must, however, be exercised according to the principles applicable to the exercise of such a power and is subject to the limitation imposed by section 46 (2) of the Civil Procedure Code that an amendment cannot be made which has the effect of converting an action of one character into an action of another or inconsistent character.

Mode of approach of an appellate Court to an appeal against an exercise of discretion, considered.

Section 211 of the Civil Procedure Code empowers the Court to order the costs of the hearing into an application to amend pleadings. Accordingly, where a plaintiff's application to amend the plaint is unsuccessfully resisted by the defendant, the Court may, acting under section 211, order the defendant to pay the costs of the hearing while ordering the plaintiff under section 93 to bear the costs of the amended answer, if any.

Quaere, (i) whether, in an action for defamation, the plaintiff would be entitled, without amending his plaint, to call a witness not mentioned expressly in the plaint as a person to whom publication of the defamatory statement was made.

(ii) whether an application for postponement made under section 80 of the Civil Procedure Code should always be supported by a motion and memorandum in writing in terms of section 91 (1).

APPEAL, with application in revision, from a judgment of the District Court, Colombo.

C. Thiagalingam, with *P. Navaratnarajah*, *V. Arulambalam* and *Dunstan de Alwis*, for Defendant-Petitioner in Application No. 295 and for Defendant-Appellant in Appeal No. 72.

H. V. Perera, Q.C., with *Izadeen Mohamed* and *H. D. Thambiah*, for Plaintiff-Respondent in Application No. 295 and for Plaintiff-Respondent in Appeal No. 72.

Cur. adv. vult.

2—J. N. B 2828—1,593 (7/59)

August 27, 1958. BASNAYAKE, C.J.—

At the conclusion of the hearing of this appeal we made order dismissing the appeal with costs and intimated to counsel that we would deliver our reasons in writing on a later date, and we accordingly do so. We also made order dismissing the application for revision but reserved our order for costs.

The questions that arise for decision on this appeal are whether the discretion of the learned District Judge was properly exercised—

(i) in permitting the amendment of the plaint, and

(ii) in ordering the defendant-appellant to pay the costs of the inquiry into the application for the amendment of the plaint.

Shortly the facts are as follows: On 25th May 1957 the plaintiff instituted this action against the defendant alleging that the defendant wrongfully, unlawfully, falsely, and maliciously spoke and published of and concerning the plaintiff certain defamatory words specified in the plaint and that by reason of the said defamatory words his good name and reputation had been injured and he had thereby sustained damage which he assessed at Rs. 100,000.

Paragraphs 3 and 4 of the plaint read as follows :—

"3. At a largely attended meeting held in the afternoon of Sunday the 17th February 1957 at Kukulnape in Mirigama in the course of a speech made in the presence and within the hearing of many members of the public the defendant wrongfully, unlawfully, falsely and maliciously spoke and published of and concerning the plaintiff the defamatory words underlined in the following passage from her said speech to wit :—

සමහරු අමරසිංහ වෙද මහත්තයා නුසුදුසු වෙද මහතෙක් යැයි කියනවා. ඔහු අට සැරයක් පේල් වූ බව කීවේ බොරුවක්. ඔහු සම්පූර්ණ වැදගත් වෙද මහතෙක් ය. අවුරුදු තුනක් උගන්වන්ට හොඳ නම් ඇයි උපදේශක සභාවට හොඳ නැත්තේ.

අමරසිංහ වෙද මහතා පේල් කළේ ලෙනෝරා මහතාගේ පුද්ගලික වෛරයක් නිසාය. තමන්ගේ දරුවන් හදන්නට දෙමව් පියන් දුනගන්ට ඕනෑ.

An English translation of this passage is given in schedule 'A' hereto with the words complained of underlined.

"4. The said words mean that the plaintiff being an examiner of Ayurvedic Students dishonourably, dishonestly and corruptly 'failed' that is to say deliberately deprived Ayurvedic Physician Amerasinghe of the qualifying marks in his examination owing to personal malice and hatred."

The defendant states in paragraph 4 of her answer filed on 26th July 1957—

"4. The defendant further states that on the occasion referred to she did address a meeting of about 200 persons and as a Minister of State dealt with some of the questions raised therein."

The case was fixed for trial on 21st January 1958. On that day counsel on both sides stated that the case was a very long one and that consecutive days should be fixed for the trial. On 22nd January 1958 the Court refixed the case for trial on 1st, 2nd, 3rd, 4th and 5th September. On 24th March 1958 the Proctor for the plaintiff filed the following motion :—

" I move to amend the plaint as follows :—

1. To delete paragraph 3 and insert in its place the following paragraph :—

'3. On 17th February 1957 at a Public meeting held at Kukulnape in Mirigama the defendant falsely and maliciously spoke and published of the plaintiff to G. Jakolis of Kukulnape, Pallawalla, (2) S. A. Perera of Kuligedera, Kotadeniyawa, (3) S. M. A. D. Perera of No. 15 Campbell Place, Colombo, and (4) G. William Ekanayake of Aluthepola, Minuwangoda, and divers other persons whose names are at present unknown to the Plaintiff the words following in the Singhalese language that is to say—

සමහරු අමරසිංහ වෙද මහත්තයා නුසුදුසු වෙද මහතෙක් යැයි කියනවා. ඔහු අට සැරයක් පේල් වූ බව කීවේ බොරුවක්. ඔහු සම්පූර්ණ වැදගත් වෙද මහතෙක් ය. අවුරුදු තුනක් උගන්වන්ට හොඳ නම් ඇති උපදේශක සභාවට හොඳ නැත්තේ.

අමරසිංහ වෙද මහතා පේල් කලේ ලෙනෝරා මහතාගේ පුද්ගලික වෛරයක් නිසාය. කම්කරුවන් හදන්නට දෙමව් පියන් දුනගන්ට ඕනෑ.

An English Translation of this passage is given in Schedule 'A' hereto with the words complained of underlined.'

2. To delete paragraph 4 and insert in its place the following paragraph :—

'4. By the said words the defendant meant and was understood to mean that the Plaintiff being an examiner of Ayurvedic Students dishonourably, dishonestly and corruptly 'failed' that is to say deliberately deprived Ayurvedic Physician Amarasinghe of the qualifying marks in his examination owing to personal malice and hatred'. "

The Court thereupon noticed the defendant's proctors for 9th May. On 9th April 1958 the plaintiff filed the following further motion :—

" With reference to the order of Court dated 24th March 1958 to issue notice on the defendant for 9th May 1958 I beg to submit that the defendant's Proctors have already taken notice of the amendment and that they have made an endorsement that they object. In the circumstances I move that the Court be pleased to order the defendant's Proctors to file their objection, if any, on 9th May 1958. I shall inform the Defendant's Proctors after the order is made."

On this application the Court made order " Mention on 9th May 1958 with notice to the defendant's Proctors " and vacated the order issuing

notice of the application for the amendment of the plaint, as it appeared from the motion of 9th April that they had already received notice and intended to oppose the application to amend the plaint. On 9th May counsel for the respective parties appeared and counsel for the defendant stated that he objected to the application. The hearing of the objection was thereupon fixed for 12th June 1958. On 27th May 1958 the plaintiff's Proctor filed a third motion in which he moved to add to the proposed amended paragraph 3 of the plaint the name of P. Rajapakse. The inquiry commenced on 12th June and was adjourned for 17th and 18th June. It was concluded on the latter date.

The learned Judge delivered his order on 9th July 1958 allowing the application and declaring the plaintiff entitled to the costs of the hearing and ordering him to pay to the defendant the costs of the amendment of the answer in case it became necessary to amend it in consequence of the amendment of the plaint, and fixed 24th July 1958 as the date for such amendment. But up to the time of the hearing of this appeal the answer has not been amended.

Being dissatisfied with the order of the learned District Judge the defendant appealed therefrom on 18th July 1958 and on 21st July made an application to the District Judge that as she had appealed against the order of the Court dated 9th July 1958 it would not be in the interests of the parties concerned to proceed to trial until the appeal is decided and moved that the case be taken off the trial roll. On the memorandum in writing of the motion itself the plaintiff's Proctor stated that he objected to the application. On 24th July the defendant's application was heard and on 28th July 1958 the learned Judge made order refusing it. There has been no appeal from that order. On 31st July 1958 the defendant filed a petition in this Court in which she invited this Court—

(*a*) to revise the order of the District Judge of 9th July 1958, and

(*b*) to direct a stay of proceedings pending the hearing and determination of the appeal filed on 18th July.

When that application came on for hearing we ordered notice on the respondent for 25th August and directed that the appeal from the order of 9th July 1958 be listed on the same day.

The contention of counsel for the appellant is that the learned District Judge was wrong in law in making the amendments set out in the plaintiff's application. The argument before the District Judge at the hearing of the application for amendment appears to have proceeded on the basis that the plaintiff would in law be precluded from calling as witnesses the persons named in the amended paragraph 3 of the plaint and proving that they heard the alleged defamatory words unless their names were stated in the plaint even though their names appeared in the list of witnesses filed by the plaintiff on 6th January 1958, notice of which the defendant had received. It appears to have been assumed that the English law is the law of Ceylon in this respect. I am unable to find any ground for that assumption. Nor has learned counsel satisfied

me that the English law is applicable in Ceylon. Learned counsel was unable to refer us to any provision of the Civil Procedure Code or the Evidence Ordinance or to any decision of this Court which supported his contention that witnesses whose names are not mentioned in the plaint cannot be called to prove defamatory statements made in their hearing. Learned counsel for the respondent confessed that he was unaware of any such law.

Learned counsel for the appellant cited to us the following passage from page 304 of The Law of Defamation in South Africa by Manfred Nathan (1933)—

> " In slander, the plaintiff, if he relies on publication to particular persons, must plead the names of all such persons as are known to him."

The above statement is based on the case of *Pillay v. Naidoo* [1]. It would appear from the judgment in that case that in South Africa there is no such provision as section 121 of our Civil Procedure Code which makes it obligatory on the plaintiff to file a list of witnesses within a reasonable time before the trial with notice to the opposite side. Under our Code no witness whose name is not on the list of witnesses can be called on behalf of a party except with the leave of the Court and that in special circumstances only (s. 175). Section 40 of the Code prescribes the requisites of a plaint. That section does not prescribe a special rule in the case of a plaint in an action for defamation. I am unable to see any basis on which the South African rule of pleading can be introduced into Ceylon. The rules of pleadings are prescribed by the Civil Procedure Code and I do not think it is open to us to add to those rules by judicial authority except in the circumstances provided in section 4.

The learned District Judge has amended the plaint on the application of the plaintiff in the exercise of the power vested in him by section 93 of the Civil Procedure Code which reads—

> " At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the 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 for 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 of additions shall be clearly written on the face of the pleading 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."

This section confers on the Court a wide discretion to amend all pleadings. The words " as it may think fit " and " it thinks fit " in the section do not enable the Court to do what it chooses. Those words

[1] *1916 W. L. D. 151.*

create a discretionary power which must be exercised according to the principles applicable to the exercise of such a power (*Roberts v. Hopwood* [1]).

Except in a case where the plaint is returned to the plaintiff for amendment under section 46 of the Code it is the Court alone that can amend a plaint once it is filed and not the plaintiff. The motion filed by the plaintiff's Proctor does not show that that fact was appreciated, for his motion reads "I move to amend the plaint as follows". The power given to the Court by section 93 may be exercised *ex mero motu* or upon the application of one of the parties. It would be unsafe to lay down any rules as to the limits of the exercise of the discretion vested in the Judge by that section. Nevertheless pronouncements of this Court and of the Superior Courts in England afford some guidance in its exercise. It has been stated by this Court (*Seneviratne v. Candappa* [2]), quoting with approval the observations of Brett M. R. in *Clarapede v. Commercial Union Association* [3], that amendment should be allowed if it can be made without injustice to the other side "however negligent or careless may have been the first omission, and however late the proposed amendment". In the later decision of *Cassim Lebbe v. Natchiya et al.* [4], Shaw J. stated—

> "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 English case of *Re Trufort; Trafford v. Blanc* [5], cited by learned counsel for the appellant, Kay J. cites an observation of Bramwell L. J. in *Tildesley v. Harper* [6] wherein he states—

> "My practice has always been to give leave to amend, unless I am satisfied that the party applying was acting *mala fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."

The recent English case of *Clear v. Clear* [7] also contains some useful observations of Hodson L. J. on this topic—

> "The mere fact that delay would be caused by serving him is not of itself, in my judgment, a sufficient ground for not granting an adjournment in order that an amendment may be made and the necessary steps taken. On the other hand, I am not prepared to say that in every case where the parties come to trial, one knowing nothing of the circumstances in which the other side is asking for discretion, and finding the evidence for the first time at the hearing, leave to amend

[1] *(1925) A. C. 578 at 613.*
[2] *(1917) 20 N. L. R. 60 at 61.*
[3] *32 W. R. 263.*
[4] *(1918) 21 N. L. R. 205.*
[5] *53 L. Times Reports (N. S.) 498.*
[6] *39 L. T. Reps. N. S. 552—10 Ch. Div. 393.*
[7] *(1958) 1 W. L. R. 467.*

must be given *ex debito justitiae*. It is quite true the courts have gone a long way in civil actions in saying that leave to amend will always be granted where injustice will not thereby be done, and where any injustice which is temporarily done can be remedied by costs, but it must always be remembered that there is a discretion to be exercised judicially in this case, and in this matrimonial jurisdiction very often the exercise of the discretion is peculiarly difficult. It would, I think, be wrong to say that, where a party had merely lain by and waited so to speak for the evidence to fall into his or her lap at the trial, the amendment must necessarily be given."

An examination of the provisions of Chapter VII of the Civil Procedure Code discloses that the power conferred by section 93 is subject to one limitation. Section 46 (2) provides that before a plaint is allowed to be filed, the Court may refuse to entertain it for any of the reasons specified therein and return it for amendment *provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another or inconsistent character*. If before a plaint is allowed to be filed an amendment which would have the effect of converting an action of one character into an action of another or inconsistent character is not permitted, the power conferred on the Court by section 93 for amending the plaint after it is filed cannot be greater. It must be read subject to the limitation that an amendment which has the effect of converting an action of one character into an action of another or inconsistent character cannot be made thereunder. Apart from that limitation the discretion vested in the trial Judge by section 93 is unrestricted and should not be fettered by judicial interpretation. Unrestricted though it be, it must be exercised according to the rules of reason and justice, not according to private opinion ; according to law, and not humour. Its exercise must be uninfluenced by irrelevant considerations, must not be arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to discharge his office ought to confine himself (*Sharp v. Wakefield* [1]).

The mode of approach of an appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principle of law or allowed extraneous or irrelevant considerations to guide or affect him, or that he has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court.

Now where such a wide discretion has been given to a subordinate Court the appellate Court should be careful not to restrict it by laying

[1] *(1891) A. C. 173 at 179.*

down rules which the Legislature has not prescribed. In this connexion the words of Swinfen Eady M. R. in *Wickins v. Wickins* [1], quoted with approval by Viscount Simon in *Blunt v. Blunt* [2], bear repetition—

> " Where Parliament has invested the Court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the Judge of the Divorce Division than the Legislature has thought fit to impose."

In the instant case I am satisfied that the learned Judge has not exceeded the powers given to him by section 93 and that he has properly exercised the discretion vested in him by that section.

I shall now come to the second question for decision. Counsel for the appellant contended that she should not have been ordered to pay the costs of the hearing of the application to amend the plaint, because such an order amounts to making her to pay the costs occasioned by the omission of the plaintiff, and he maintained that the order for costs is contrary to the provisions of section 93. That section gives the Court full power to amend in its discretion all pleadings and processes of Court by way of addition, or of alteration, or of omission, as it may think fit upon such terms as to costs and postponement of day for filing answer or replication, or hearing of cause, or otherwise, as it may think fit. The terms are to be imposed upon the defaulter, i.e., the party seeking the amendment, only when an amendment is made. The object of conferring on the Court the power to impose terms is to enable it to compensate the innocent party in respect of costs already incurred and any additional expenditure which may be occasioned by the amendment. The power to order the costs of the hearing into an application to amend is not contained in section 93 for it does not empower the Court to cast in costs the person who unsuccessfully moves the Court to amend his pleadings. The power to order the costs of the hearing into an application to amend where it is resisted by the opposing party is to be found in section 211 of the Code which reads—

> " The court shall have full power to give and apportion costs of every application and action in any manner it thinks fit, and the fact that the court has no jurisdiction to try the case is no bar to the exercise of such power :
>
> Provided that if the court directs that the costs of any application or action shall not follow the event, the court shall state its reasons in writing."

In the instant case as the costs followed the event the learned Judge did not give reasons for his order that the defendant should pay the costs of the inquiry. In the order for costs the learned Judge has quite

[1] *(1918) P. 265 at 272.* [2] *(1943) A. C. 517 at p. 525.*

rightly acting under section 211 ordered the defendant to pay the costs of the hearing while ordering the plaintiff under section 93 to bear the costs of the amended answer, if any. His discretion as to costs has been properly exercised under both provisions of the Code.

There is one other matter which must be dealt with in this judgment as it was strenuously argued at length though not finally pressed by learned counsel who intimated to us in the course of the respondent's reply that he was not pressing his case for a postponement of the trial and that he was ready to go on with it. He contended that the learned Judge should have granted a postponement of the trial fixed for 1st—5th September, and that as the learned Judge had not postponed the trial he had not exercised the discretion vested in him by section 93. The application for amendment was made in March and heard in June. The learned Judge's order was made on 9th July. No application was made to the learned Judge before or after 9th July for a postponement nor was there any material before him to show that the defendant was unable to get ready for trial in the time between 9th July and 1st September. No material was placed before him for the purpose of satisfying him that in consequence of the amendment made on 9th July more time was necessary for the defendant to prepare for the trial. Learned counsel relied on the following passage in his address to the Judge as containing an application to him for a postponement—

> "This application of the plaintiff must be refused. Whether it is refused or not, all costs of the dates for which the case is fixed for trial must be paid by the plaintiff. Costs always do not follow the event. Court may give judgment to one party and give costs to the other. The whole application of the plaintiff lacks *bona fides*."

I am unable to find therein any indication whatsoever of an application for a postponement. Learned counsel stressed that the fact that the learned Judge has not referred to the question of postponement in his order indicated that he had not exercised his discretion in regard to the matter. It is true that the learned Judge has not discussed in his judgment the reason for not imposing a term as to postponement of the trial when making the amendment. Although it does not appear from the judgment or order of the trial Judge how he has reached the result embodied in his order, upon the facts the order is not manifestly unreasonable or plainly unjust. It is only where upon the facts the order is manifestly unreasonable or plainly unjust that the appellate Court may infer that in some way there has been a failure to exercise the discretion vested in the trial Judge. In such a case although the nature of the error is not manifest, the exercise of the power confided in the Judge may be reviewed on the ground that he has not exercised his discretion, *Lovell v. Lovell* [1]. In my opinion upon the facts of this case there is no justification for inferring that the Judge did not exercise his discretion when he refrained from imposing a term as to postponement

[1] *(1950) 81 Commonwealth Law Reports p. 513.*

of the trial when amending the plaint. If the defendant desired a postponement of the trial she should have made an application in that behalf. Section 80 of the Civil Procedure Code provides that after the day for the hearing and determination of the action is fixed the Court may subsequently on application made by either party, and after hearing both parties, or after proof of notice of motion to the absent party, direct that the day for the hearing of any case shall be advanced or deferred. No such application has been made at any time after January 1958.

In this connexion learned counsel's attention was drawn to section 91 (1) of the Civil Procedure Code which reads—

> "Every application made to the court in the course of an action incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his advocate or proctor, and a memorandum in writing of such motion shall be at the same time delivered to the Court."

He submitted that it was the practice in the District Court of Colombo for counsel to apply for postponement of trials without a memorandum in writing as required by section 91 (1) being filed. Such a practice is contrary to the provisions of sections 80 and 91 (1) of the Code and should not in my view be continued. Counsel for the respondent pointed out in the course of his argument a further obstacle in the way of the appellant. She had not raised the point about the postponement in the petition of appeal.

In regard to the costs of the application for revision I see no ground for departing from the usual rule that costs should follow the event.

SINNETAMBY, J.—

I have seen the judgment prepared by my Lord the Chief Justice and I agree with the order that he proposes to make. I should like, however, to make a few brief observations in regard to certain matters which it seems to me it is not necessary to decide to arrive at the conclusions we have reached. In regard to these matters I find that I hold views which, with all respect, are not in complete accord with those held by my Lord the Chief Justice.

On the question of the power of the Court of Appeal to review an order made by a Court of first instance in the exercise of its discretion, I agree generally with the principles enunciated but I would add that where the trial Court has expressed no views and given no reasons for making such an order it is in my opinion within the province of the Court of Appeal to bring its independent judgment to bear on the facts and to make an appropriate order which it is within the jurisdiction of the trial Court to make but which it omitted to make. In the present case learned Counsel

for the appellant submitted that he had made an application for the postponement of the hearing in the event of the amendment being allowed. The trial Judge has made no reference to it in his order which means that the date originally fixed would stand. Learned Counsel stated that when he made the application the learned Judge interposed with the remark "How do you know that I am going to allow the amendment?". I see no reason to reject the statement made by learned Counsel having regard to the somewhat unintelligible note of Counsel's address, which my Lord the Chief Justice has quoted in his judgment and having regard also to the fact that Counsel's statement was not contradicted by the other side.

Learned Counsel for the appellant at the commencement of the hearing of the appeal strenuously urged that an order postponing the dates of trial should be made by this Court and speaking for myself I was disposed to give it favourable consideration for reasons which it is unnecessary to recapitulate as it is now only of academic interest. On a subsequent date in view of certain submissions made by learned Counsel for the respondent, learned Counsel for the appellant withdrew his application for a postponement and stated that he had advised his client to proceed with the trial on the dates fixed.

In regard to the scope of sections 80 and 91 of the Civil Procedure Code I agree that where there is both the opportunity and the time available an application for the postponement of the hearing should always be made by motion but there are occasions when this cannot be done and in such cases the *cursus curiae*, if I may speak from personal experience, has been to permit an application to be made *ore tenus*. Such a situation, for instance, would arise if on a date of trial an issue not covered by the pleadings is framed and accepted: then the party who is thus taken by surprise has always been permitted to apply *ore tenus* for a date. In any event I take the view that the provisions of section 91 of the Civil Procedure Code are only directory and not imperative. Failure to comply strictly with its terms does not carry with it the penalty of disentitling the Court to entertain an application or of invalidating all orders made in respect of it.

In regard to the question of whether the plaintiff without amending his plaint would have been entitled to call a witness not mentioned expressly in the plaint as a person to whom publication of the defamatory statement was made, I do not think it necessary to express an opinion. Both sides in the lower Court took the view that without the amendment such a witness could not be called and this view appears to have found favour with the trial Judge also. The matter was not fully argued before us in view of the opinion we held that irrespective of the answer to that question the amendment should be allowed. I therefore refrain from expressing any views on the matter.

Appeal dismissed.