

MACKINNON MACKENZIE & CO.

v.

GRINDLAYS BANK LTD.

SUPREME COURT.

SHARVANANDA, C.J., WANASUNDERA, J. AND ATUKORALE, J.

S.C. APPEAL No. 72/85.

C.A. No. 38/85.

D.C. COLOMBO 87249/M.

MAY 7, 13 AND 14, 1986.

*Pleadings—Amendment to plaint—Claim for damage by fire to building referring to one assessment number—Omission to mention other assessment numbers—Sections 93, 146(1) and (2) of the Civil Procedure Code—Guidelines on when amendments should be allowed.*

The amendment of pleadings is in the discretion of the court. The test is whether in order to effectively adjudicate upon the dispute between the parties, amendment of the

pleadings is necessary. The main considerations to be borne in mind in exercising the discretion whether to allow or refuse the amendment are—

- (a) that the rules of procedure have no other aim than to facilitate the task of administering justice;
- (b) that multiplicity of suits should be avoided. As a general rule leave to amend ought not to be refused unless the applicant is acting mala fide and the blunder has resulted in injustice to the other party which cannot be compensated with costs. An amendment of a clerical error or a bona fide wrong description of property should be allowed—so also an amendment clarifying the position put forward in a pleading. Amendments which do not alter the fundamental character of the action or the foundation of the suit are readily granted. But if injustice and prejudice of an irremediable character will be inflicted on the opposite party the amendment will not be allowed. As a rule an amendment will not be allowed if a fresh suit on the amended claim would be barred by prescription but while this is a factor to be taken into account it does not affect the power of the court to order it if that is required in the interests of justice. 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.

Where the property was referred to in the plaint and the damage quantified but the property incorrectly described and the amendment was required in the interests of justice and for the right decision of the case, it should be allowed.

#### Cases referred to:

- (1) *Attorney-General v. Smith*—(1905) 8 N.L.R. 229, 241.
- (2) *Silva v. Abeysekera*—(1922) 24 N.L.R. 97, 107.
- (3) *Bank of Ceylon v. Chelliahpillai*—(1962) 64 N.L.R. 25, 27.
- (4) *Ma Shwe Mya v. Maung Mohnaung*—A.I.R. 1922 P.C. 249, 250.
- (5) *Charan Das v. Amir Khan*—A.I.R. 1921 P.C. 50.
- (6) *Welden v. Neal*—(1887) 19 Q.B.D. 394, 395.
- (7) *Robinson v. Unicas Property Corporation*—[1962] 2 All E.R. 24, 26.
- (8) *Jagat Singh v. Sangat Singh*—A.I.R. 1940 P.C. 70, 73.
- (9) *De Alwis v. De Alwis*—(1971) 76 N.L.R. 444.
- (10) *Jalal Din v. Quaim Din*—A.I.R. 1914 Lahore 263.
- (11) *Shree Narain v. Krishanlal*—A.I.R. 1952 Rajasthan 15.

APPEAL from judgment of the Court of Appeal.

*K. N. Choksy, P.C.* with *N. S. A. Gunatilake, J. de A. Gunaratne, A. B. Muttunayagam* and *Miss T. Rodrigo* for plaintiff-appellant.

*Dr. H. W. Jayewardene, Q.C.* with *H. L. de Silva, P.C., I. S. de Silva* and *Miss T. Keenawinna* for defendant-respondent.

July 16, 1986.

**SHARVANANDA, C.J.**

The plaintiff-appellant instituted this action on 1st October, 1982 for the recovery of damages in a sum of Rs. 12,320,000 sustained by it by a fire which originated in the building and premises belonging to the defendant and spread to and destroyed a portion of plaintiff's building. The plaintiff pleaded that the damage caused to plaintiff's building was due to the defendant's negligence in one or more of the ways specified in paragraph 10 of the plaint. The defendant-respondent filed answer denying liability and pleaded inter alia that the damage alleged in the plaint was caused by the plaintiff using the fire gap or the space between the two buildings referred to in the plaint, viz. the plaintiff's building and defendant's building. According to the plaint, the plaintiff which is a Company duly incorporated became the owner of all the land and premises with the buildings standing thereon bearing assessment No. 4, Layden Bastian Road, Fort, Colombo by virtue of deed Nos. 1372 dated 30.9.1952 and 1203 of 6.8.1776. The plaintiff has its registered office in this building. The respondent is a Bank and had its building and premises at No. 37, York Street, Fort. On or about 4th October, 1980, a fire which originated in the defendant's building had due to the negligence of the defendant spread to the plaintiff's said building, and completely destroyed the southern portion of the plaintiff's building and also damaged a part of the northern portion thereof. The plaintiff sustained loss and damage which is estimated at Rs. 10,250,000, being the capital loss in respect of the said buildings. The plaintiff further stated that the said southern portion of plaintiff's building had been let to various tenants at the time of the said fire and the plaintiff was collecting rents from the said tenants and that by reason of the destruction of the said portion of the building, the plaintiff incurred loss and damage by reason of being deprived of the said rent which is estimated to be Rs. 86,286.29 per month, from October 1980 totalling to a sum of Rs. 2,070,000 up to the end of September 1982. The aggregate sum claimed is Rs. 12,320,000.

The action came up for trial on 22nd January, 1985 on which date the following amongst other issues were raised on behalf of the parties and were accepted by the Court.

- (1) Did a fire take place on 4th October 1980 in the said premises bearing No. 37?

- (2) Did the said fire take place on account of a defect in the electrical wiring system of the defendant's building?
- (3) Was the entirety of the defendant's said building engulfed by the said fire which spread and damaged the plaintiff's building?
- (4) .....
- (5) Was the damage caused to the plaintiff's building referred to in issue 3 above caused by one or more or all of the acts or omissions set out in paragraph 10 of the plaint?
- (6) (a) If the above issues 1-5 are answered in favour of the plaintiff, is the plaintiff entitled to recover damages?  
(b) If one (above) is answered in the affirmative what quantity of damages is the plaintiff entitled to?
- (7) At the time of the said fire was the southern portion of the said building rented out to various tenants?
- (8) Was the plaintiff deprived of the said rents, by reason of the fact that the said portions let to the said tenants were destroyed by the aforesaid fire?
- (9) If issues numbered (1) to (5) and (7) to (8) are answered in favour of the plaintiff, is the plaintiff entitled to recover damages?
- (10) If issue (9) is answered in the affirmative what damages is the plaintiff entitled to recover?
- (11) .....
- (12) .....
- (13) Did the said fire on the 4th October 1980 take place accidentally?
- (14) Was the said fire not expeditiously extinguished and prevented from spreading by reason of the incompetency and or lack of necessary equipment on the part of the Fire Brigade of the Colombo Municipal Council?

- (15) Was the loss and damage alleged in the plaint caused by and/or contributed to by the plaintiff or its predecessors building upon and using the fire gap and the space between the buildings referred to in the plaint?
- (16) Is the occurrence of the aforesaid fire and/or its spreading attributable to the defendant?
- (17) If issues Nos. 12 and 15 or any one of them are answered in the negative, is the plaintiff entitled to recover any damages?

After the framing of the issues the hearing of the evidence commenced and plaintiff called and concluded the evidence of the Government Analyst, who testified to the destruction and damage caused to the building belonging to the plaintiff. Thereafter the evidence of the other witnesses was also called by the plaintiff and concluded. Throughout the evidence of the said witnesses both in examination in chief and cross examination reference was made to the Mackinnon building belonging to the plaintiff as one entity and without any mention of any assessment number and the cross-examination of witnesses was done on the basis that the damages claimed were in respect of the plaintiff's building which is adjacent to the defendant's building.

On 7.3.1985, the plaintiff called one Abeynayake, a Director of the plaintiff company to depose to the title to plaintiff's building. In the course of his evidence Abeynayake said "...the buildings at these premises consist of premises with several assessment numbers. . . . These buildings are situated adjoining the premises of Grindlays Bank" (the defendant). The schedule to the deeds of title, produced by him, referred to the allotment of land with the buildings thereon bearing several assessment numbers.

When this evidence was given counsel for the defendant invited the attention of court to the plaint and stated that the plaintiff claimed compensation only in respect of No. 4, Layden Bastian Road and not in respect of all the premises affected by the fire. In reply counsel for the plaintiff stated that an omission had been made and that several assessment numbers are included in the building in respect of which compensation is claimed. He said that the compensation is claimed in respect of the entire building and that those numbers have been omitted by an oversight. He requested permission to amend the

material description of the property as there had been an oversight in this respect. The plaintiff was granted a date for filing amended plaint. The amended plaint was tendered on 14.3.85. It said that plaintiff's building is fully described as subject matter of acquisition in the Gazette of 17.6.1980.

The defendant objected to the acceptance by the court of the amended plaint. By its order dated 2nd April 1985, the District Judge rejected the amended plaint on the ground that the plaintiff has claimed compensation in the original plaint only in respect of one part of the larger building, referred to in the amended plaint. He said that—

“The plaintiff could have instituted action by including the premises numbers along Layden Bastian Road, the premises numbers along York Street and premises along York Arcade Road, that is for claiming compensation for the damages caused to this large building. But he selected to claim compensation only in respect of premises No. 4, Layden Bastian Road. . . . Compensation other than for premises No. 4, Layden Bastian Road, cannot be claimed, for rest of the premises now, as the fire had broken up in October 1980 and the present application is prescribed under the provisions of the Prescription Ordinance. If the amended plaint is allowed the plaintiff will be able to recover compensation on a prescribed application. There is no provision for the plaintiff to amend this plaint contrary to the provisions of the Prescription Ordinance.”

The plaintiff appealed from the said order of the District Judge to the Court of Appeal. The Court of Appeal by its judgment dated 10th September 1982, affirmed the order of the District Judge and directed that the trial do continue and proceed on the footing of the claim in the original plaint and dismissed the appeal with costs. The plaintiff has with the leave of this court preferred this appeal to this court.

The power to amend pleadings is granted by section 93 of the Civil Procedure Code. It provides that—

“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 to amend in its discretion, and upon such terms as to costs and postponement of the 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 alterations or of omission,.....” This section gives ample power to amend pleadings.

Section 146 (1) of the Civil Procedure Code provides that—

“... if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and the court shall proceed to determine the same...”

Section 146 (2) provides that—

“... if the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint... ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to *record the issue on which the right decision of the case appears to the court to depend.*”

The Privy Council has stressed that—

“the case must be tried upon the issues on which the right decision of the case appears to the court to depend and it is well settled that the framing of such issue is not restricted by the pleadings. See section 146 of the Code, *Attorney-General v. Smith* (1) and *Silva v. Abeysekera* (2), *Bank of Ceylon Jaffna v. Chelliah Pillai* (3).”

The amendment of pleadings is in the discretion of the court. The discretion must however be exercised according to judicial principles and not in arbitrary, vague or fanciful manner so as to cause injustice to the opposite side. The test is whether in order to effectively adjudicate upon the dispute between the parties, amendment of the pleadings is necessary. It must be borne in mind that—

“All rules of court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised.” *Ma Shwe Mya v. Maung Mohnaung* (4).

The main considerations to be borne in mind in exercising the discretion whether to allow or refuse the amendment are:

- (a) that the rules of procedure have no other aim than to facilitate the task of administering justice.
- (b) that multiplicity of suits should be avoided. — (1857) 6 Moore Ind. App. 393 at 411.

As a general rule leave to amend ought not to be refused unless the applicant is acting mala fide and the blunder has resulted in injustice to the other party which cannot be compensated with costs. The court should allow the amendment of a pleading where there has been a clerical error or a bona fide wrong description of property. An amendment merely clarifying the position put forward in a pleading must be allowed.

The liberal principles which guide the exercise of discretion in allowing amendments have been laid down in decisions of the Privy Council and of the Supreme Court. Multiplicity of proceedings being avoided is one of the criteria. Amendments which do not alter the fundamental character of the action or the foundation on which the suit is based are readily granted, while care is taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under pretence of amendment of pleadings. The court must be guided by the rule of justice. It is no doubt true that the court would as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in the exercise of the discretion as to whether amendment should be ordered, and does not effect the power of the court to order it, *if that is required in the interests of justice.* In *Charan Des v. Amir Khan* (5) the Privy Council has emphasised—

“that there was full power to make the amendment cannot be disputed and though such power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case.”

Provisions for the amendment of pleadings 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.



In *Weldon v. Neal* (6) Lord Esher, M.R. said—

“We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the statute of limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment but certainly as a general rule it will not do so.”

These words were used in a case where the plaintiff had brought a slander action, had been non-suited, and had then obtained from the Court of Appeal an order for a new trial, and then sought to amend by setting up false imprisonment, assault and other causes of action. It was therefore a clear case where the plaintiff was trying to set up not only a cause of action, but several new causes of action. Commenting on Lord Esher’s statement, Holyroyd Pearce, L.J. said—

“In my view, the dictum of Lord Esher was not intended to lay down a rule that no material averment could ever be amended or added to after the period of limitation had expired. When he said a cause of action, he was, I think, referring to what is popularly known as a cause of action, namely a claim made on a certain basis. By ‘a new cause of action’, he meant a new claim made on a new basis”  
— *Robinson v. Unicas Property Corporation* (7).

No amendment will generally be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time.

How does the instant case stand on the above principles? Does the amendment introduce a new cause of action or a new case? The suit is founded on negligence—damage caused to plaintiff’s building as a result of the negligence of the defendant. Issues (iii), (v), (vii), (viii), (ix) and (x) refer to the “plaintiff’s building”. The plaintiff described the building which is alleged in the plaint to have been destroyed by the fire, which originated in the defendant’s building. In paragraph 4 of the plaint, the plaintiff sets out how it became the owner of the said building. It reads thus:

"That under and by virtue of Deed No. 1372 dated 30.9.1952 attested by G. N. S. de Saram, N.P., and by Deed No. 1203, attested by B. M. Amarasekera, N.P., dated 6th August 1966 and by prescriptive possession the plaintiff became the lawful owner and proprietor of all the land and premises with the buildings standing thereon bearing assessment No. 4, Layden Bastian Road, Fort, Colombo."

By the proposed amendment, the said paragraph 4 of the plaint is sought to be amended to read thus:

"That under and by virtue of Deed No. 1372 dated 30.9.1952 attested by G. N. S. de Saram, N.P., and deed No. 1203 attested by B. M. Amarasekera, N.P., dated the 6th day of August, 1966 and by prescriptive possession the plaintiff became the lawful owner and proprietor of all that land and premises with the buildings standing thereon bearing assessment Nos. 1, 3, 5, 7, 9, 11, 19 (with the sub-divisions), 21, 23, 25, 27 (with its sub-divisions) York Street Nos. 4 & 6, Layden Bastian Road, and Nos. 6 & 8, York Arcade Road, situated at Fort, Colombo, which said land and premises are *in the schedule, hereto more fully described.*"

The schedule carried by the amended plaint sets out very fully the plaintiff's land, and premises by reference to metes and bounds and survey plans. The amended plaint seeks to correct the erroneous description of the building/buildings and premises, to which the plaintiff became entitled on the deeds referred to in paragraph 4 of the plaint and portions of which are alleged to have been damaged or destroyed by the fire. Apart from that amendment, all the other allegations remain the same. The quantification of the damage suffered by plaintiff remains unaltered. The relief prayed for both in the plaint and the amended plaint is "judgment in the aggregate sum of Rs. 12,320,000 with legal interest." On these facts, in my view, the amendment does not introduce a new cause of action or a new case. The tort which formed the cause of action on which the action is based remains identical. The Court of Appeal has erroneously assumed that—

"In the present case the plaintiff's intention is clearly to claim damages for destruction and damage caused by fire to the plaintiff's building No. 4, Layden Bastian Road and no more, while the amendment seeks to substitute in place of that one building, other buildings damaged by the fire along with that building."

The assumption that there is more than one building is based on a misconception. Physically there is only one building, one entity, which for purposes of assessment for rates, the local authority has divided into separate premises. Elements such as fire or floods do not, when they cause damage or destruction, go by such artificial divisions of a building into numbered premises. The plaintiff had only one cause of action against the defendant for the recovery of the total damage sustained by it on account of the defendant's negligence and not several causes of action in respect of damage or destruction of each of the assessed premises in the building. The Court of Appeal has erred in taking the view that damage to each portion of the building represented by an assessment number gives rise to a distinct and separate cause of action.

Section 34 (1) of the Civil Procedure Code mandates that—

“every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action”.

Section 34 (2) provides that “if the plaintiff omits to sue in respect of  
° or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.”

The bar of suits applies only where a decree has been passed in the previous suit. The rule does not preclude the amendment of plaintiff by the addition of the claim which had been omitted—*Jagat Singh v. Sangat Singh* (8). Hence it is open to plaintiff to amend his plaintiff by the addition of any claim which he is entitled to make in respect of the cause of action pleaded in the plaintiff. The most that may be said of the original plaintiff, in this case is that the plaintiff had inadvertently failed to relate the total sum of compensation claimed by him to all the premises affected by the fire. By suitable amendment of the plaintiff this omission may be rectified.

The judgment of the Court of Appeal is vitiated by this misconception that the plaintiff is seeking to plead by way of amendment of the plaintiff, one or more causes of action which is or are statute barred.

It is to be noted that issues 3 and 5 which had been accepted by court without objection by the defendant and on which the trial proceeded relate to the damage caused to “the plaintiff's building.” The issues do not identify plaintiff's building as that portion bearing

assessment number 4, Layden Bastian Road. The amended plaintiff describes very fully and accurately the plaintiff's building, by reference to the several assessment numbers which the building bore in addition to number 4, Layden Bastian Road with the boundaries enclosing the building.

The Court of Appeal has held that the amendment is not bona fide desired. There is absolutely no warrant for this finding. The whole course of the proceedings militates against the suggestion of mala fides on the part of the plaintiff in seeking to amend the plaintiff. It is evident that the mistake in the description of plaintiff's building in the plaintiff was discovered by all parties concerned only when Mohan Abeysekera stated in evidence that the building consists of premises with several assessment numbers. It was then that counsel for defendant invited the attention of the court to the plaintiff and stated that "the plaintiff has claimed compensation, only in respect of No. 4, Layden Bastian Road, and not *in respect of all the premises affected by the fire.*" Then counsel for plaintiff replied that "several assessment numbers are included in the building in respect of which compensation is claimed and that these numbers had been omitted by an oversight."

It was consequent to this discovery at that stage of the error in the description of the premises affected by the fire that plaintiff moved to file amended plaintiff to describe, correctly the plaintiff's premises that were affected by the fire. In my view there is no foundation for the Court of Appeal finding that the amendment of the description of the affected property is not bona fide desired.

That an amendment of the plaintiff, has the effect of depriving the defendant of his right to plead limitation is only a factor to be taken into account in the exercise of the court's discretion as to whether the amendment should be allowed and does not affect the power of the Court to order it, if that is required in the interests of justice was stressed in *De Alwis v. De Alwis* (9).

In my view this seems to me pre-eminently a case for allowing the amendment. Both the Court of Appeal and the District Court have failed to address themselves to the decisive question whether the amendment is required in the interests of justice. The amendment sought is necessary for the right decision of the case—the extent of plaintiff's property which was damaged or destroyed by the fire in question for which defendant was responsible. The question is

involved in the plaint as originally framed. Though the property was referred to in the plaint and the damage quantified, the property has not been described correctly. The amended plaint describes fully the plaintiff's building in respect of whose damage or destruction, the plaintiff is claiming in the plaint a sum of Rs. 10,250,000 as compensation.

Counsel for the plaintiff cited the judgment of the Lahore High Court in *Jalal Din v. Quaim Din* (10). In that case which was a pre-emption suit, the plaintiff inadvertently omitted to mention in the plaint a portion of the property claimed. He was subsequently allowed to amend his plaint after the expiry of the ordinary period of limitation. The court held that everything pointed to the conclusion that it was merely a case of inadvertence and misdescription of property. It also held that as the amendment did not alter the character of the suit or introduce a different cause of action it should be allowed, even after the lapse of the period of limitation, if the defects in the plaint were not intentional. Counsel also referred to the case of *Shree Narain v. Krishanlal* (11), where it was held that where the amendment did not seek to change the subject-matter, but sought only to alter the description of the property in dispute, amendment should be allowed. In that case plaintiff complained of encroachment upon a piece of land 185ft x 24ft which formed part of plot No. 1607. The land in dispute was shown as A, B, C, D in the sketch attached to the plaint. In the course of the trial, it was found that the land in dispute did not form part of plot No. 1607 but 1610, of which also the plaintiff was the owner. When the plaintiff moved to amend the plaint to have plot No. 1610 substituted for plot No. 1607, it was objected that the amendment substituted a new subject-matter but the court allowed the amendment on the ground that the subject-matter of the suit was the land A, B, C, D shown in the sketch and that the number of the plot had been mentioned only in connection with the description of the land in suit and as plaintiff was the owner of both plots 1607 and 1610, the amendment should be allowed. On application of the principles of amendment, which underly the decisions in these cases, the amendment sought by the plaintiff has to be allowed.

I allow the appeal, set aside the judgment of the District Judge and of the Court of Appeal, and direct the District Judge to accept the

amended plaint and to take consequent steps according to law. Parties will bear their own costs of the inquiry in the District Court but plaintiff-appellant will be entitled to the costs of the Court of Appeal and of this court. As this is an old case, I also direct that the trial of the case should be proceeded with expeditiously.

WANASUNDERA, J. – I agree.

ATUKORALE, J. – I agree.

*Appeal allowed.*

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