

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

C.A.L.A. No. 132/2005

**1. I.G.Tikiribanda Attanayake
(Deceased)**

D.C.Kandy No. 19273/L

**2. A.M.Kularatne Devasiri
Both of Pitawela, Dehipe,
Padiyapellella**

Plaintiffs

- 1. Punchibanda Ratnayake**
- 2. A.M.P.Alahakone of Watagoda,
Dehipe, Padiyapellella**

Defendants

AND NOW BETWEEN

- 1. Punchibanda Ratnayake**
- 2. A.M.P.Alahakone of Watagoda,
Dehipe, Padiyapellella**

Defendant-Petitioners

A.M.Kularatne Devasiri

Both of Pitawela, Dehipe,

Padiyapellella

2nd Plaintiffs-Respondent

BEFORE: Deepali Wijesundera J and

M.M.A. Gaffor, J

COUNSEL: Chandana Wijesuriya for the Petitioner

C.E.de Silva with Sarath Walgama for the 2nd Plaintiff Respondent

ARGUED ON: 11.06.2015

DECIDED ON : 07.12.2015

Gaffoor J.,

The 1st Plaintiff (decd) and the 2nd Plaintiff Respondent filed this action in the District Court of Kandy on or about 02.07.1998 inter alia for :

- i) A declaration that the 1st Plaintiff and the 2nd Plaintiff Respondent are entitled to use the right of way pleaded in the Plaint;
- ii) An interim injunction and an enjoining order restraining the Defendant Petitioners from carrying out construction work on the said right of way and for an order on the Defendants Petitioners to demolish the constructions made on the said right of way;
- iii) A permanent injunction restraining the Defendant Petitioners from obstructing the 1st Plaintiff and the 2nd Plaintiff Respondent from driving vehicles over the said right of way;

In the Plaint filed in this case, the 1st Plaintiff and the 2nd Plaintiff-Respondent pleaded inter alia :

- a) Their title to the property described in the schedule to the Plaint;

- b) That the 1st Plaintiff and the 2nd Plaintiff Respondent had a right of way to the said land described in the schedule to the Plaint, over the land of the Defendant Petitioners which is situated close to the land described in the schedule to the plaintiff;
- c) That on or about 07.07.1998, the Defendant Petitioners commenced causing obstructions to a portion of the right of way situated over the land of the Defendant Petitioners;

The Counsel submitted that at the time of instituting this action :

- a) There was no plan available depicting the said right of way;
- b) There was no possibility of preparing a plan depicting the said portion of the right of way, which has been obstructed by the Defendant Petitioners as the said portion of the right of way was over the land of the defendant Petitioners and ;
- c) As there was no plan available depicting the said right of way or the portion of the said right of way which is being constructed by the Defendants Petitioners, the said right of way or the portion of the said right of way could not be described in a separate schedule to the plaintiff;

Accordingly an application for a commission was made to the Court and court allowed the application. The Surveyor submitted his plan to Court and there was no objection to the plan from Defendant-Respondents.

The 1st and 2nd Plaintiffs by their plaint dated 2.07.1998 instituted action against 1st and 2nd Defendants in the District Court of Kandy seeking several

reliefs prayed for in the Plaint. The 1st Plaintiff died during the pendency of the case and the 2nd Plaintiff was substituted as the "1A Plaintiff."

The 1st and 2nd Defendants jointly filed their answer on 01.08.2003. praying that the action of the 1st and 2nd Plaintiff be dismissed. Trial was fixed for 20.10.2003 for trial. When the case was taken up on 20.10.2003 an application was made to amend the Plaint. The said application was allowed subject to the objections of the Defendants.

The 2nd Plaintiff filed a Motion in the District Court dated 12.12.2003 seeking to amend the Plaint. With the said Motion the 2nd Plaintiff filed the amended Plaint also dated 12.12.2003, wherein the amendments sought to the Plaint had been incorporated.

The Defendants filed statement of objections to the amended plaint. The Defendants thereafter filed their written objections dated 25.06.2004 objecting to the said amendments of the plaint on the basis that the 2nd Plaintiff was guilty of laches and that the amendments cannot be allowed in terms of provisions of Section 93(2) of the Civil Procedure Code.

The 2nd Plaintiff filed his written submissions dated 23.08.2014 in support of his application to amend the plain where he stated that he is not guilty of laches within the meaning of Section 93(2)

By Order dated 23.03.2005 the District Judge of Kandy allowed the said application to amend plaint and accepted the said amended plaint .

Being aggrieved by the said Order the 1st and 2nd Defendant Petitioners filed papers seeking Leave to Appeal from this Court on the following grounds:

- a) The said order is wrong and contrary to law and to the facts of the case;
- b) The 2nd Plaintiff is guilty of laches within the meaning of Section 93(2) of the Civil Procedure Code, therefore the application to amend the plaint cannot be allowed;
- c) Having filed this action on 2.07.1998 the 2nd Plaintiff took as much as 5 years and 5 months to make the application to amend the plaint and that there is no reasonable explanation given for this long delay;
- d) The learned Additional District Judge has misdirected himself by coming to the finding that the 2nd Plaintiff is not guilty of laches because the application to amend the plaint was made on the first date fixed for trial of this action;
- e) The learned Additional District Judge has failed to appreciate that for more than five years the 2nd Plaintiff failed and neglected to amend the plaint and that therefore he is guilty of laches within the meaning of Section 93(2) as the 2nd Plaintiff has not disclosed any reasonable explanation for the undue delay over 5 years; .

Counsel for the Respondent cited the following authorities :

Chettinad Corporation Ltd., vs Fernando – 48 N.L.R (1) it was held that the Court has under Section of the Civil Procedure Code to issue a commission for the survey and inspection of the Defendants property..

Perera vs Weerasinghe 5 Sri Skanthas Law Reports 124 at 127 – it was held that the purpose of a commission is for elucidating any matters in

dispute and the Court may issue a commission to such persons as it thinks fit directing him to make such investigations and to report to Court.

Canapathipillai vs Adanappa Chetty – 21 NLR 217 – it was held that even after the case is closed, the District Judge has the power to issue a commission when he is unable to decide a question.

Section 93 of the Civil Procedure Code provides that, 'upon application ' made to it before the date first fixed for trial of the action in the presence of, or after reasonable notice to all parties to the action, the court shall have full power of amending in its discretion, all pleadings in the action, by way of addition or alteration or of omission. Subsection (2) of Section 93 states that on or after the day first fixed for the trial of the action and before final judgment no application for amendment of any pleadings shall be allowed unless the court is satisfied , for the reasons to be recorded by the Court that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other grounds and that the party so applying has not been guilty of laches. Under Section 93 of the Civil Procedure Code regarding amendment of the plaint, the Court should take into consideration well established rules of practice. The rules should not be treated as though they were statutory rules or provisions of positive law of a rigid and inflexible nature. The The two main rules which have emerged from the decided cases are :

- i) The amendment should be allowed if it is necessary for the purpose of raising the real question between the parties;

- ii) An amendment which works an injustice to the other side should not be allowed See. *Durayani vs Eastern Silk Emporium Ltd* – 64 NLR 529. The limitations enumerated in *Lebbe vs Sandanam* – 64 NLR 461 were disapproved in this case.

Therefore the first rule is based on the principle that a multiplicity of action should be avoided. The second rule is based on the ground that where injustice would be caused to the other side by allowing an amendment it should be refused. There is also a cardinal principle of law followed by Courts that an amendment should not be allowed if the effect of it would be to convert the action of one character into an action of a different and inconsistent character.

In the case of *Ratwatte vs Owen* – 2 NLR 141 – Lawrie J observed that, *“The principle by which a Court ought to be guided in deciding to alter a pleading is that alteration will make the real issue clear. Withers J., in the same case said “After a plaint has once been accepted, it should not as a general rule, be amended until after the issues have been settled. The office of an amendment will generally at that stage be to square the plaint with the issues framed”.*

In the case of *Anushka Wethasinghe vs Nimal Weerakody and others* 1981 (2) Sri Lanka Law Reports page 423, Soza J., held that :

“The granting of leave to appeal depend on the circumstances of each case. But the guidelines are :

- i) **The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at the final stage;**
- ii) **Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the floodgates to interminable litigation. But the incidental order goes to the root of the matter it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage, then leave to appeal will be granted;**

In this case, I am of the view that the amendment sought and the application to superimpose the plan must be allowed, which I think will clinch the issue between the parties correctly, and therefore this application can be allowed.

Counsel further argued that for the purpose of elucidating the situation and the extent of the said right of way and to ascertain the rights of the parties in respect of the said right of way and to arrive at a correct decision the plan and the report prepared by the Surveyor is very essential.

During the pendency of the action the 1st Plaintiff Respondent died and the 2nd Respondent was substituted and he filed the answer. On 20.10.2003, the 2nd Plaintiff Respondent made an application to court to

amend the **Plaint**. 2nd Plaintiff Respondent sought to introduce an amendment to the **plaint**.

Counsel submitted that it is an admitted fact that in this case upto date no issues have been raised and upto date trial has not commenced.

In this regard Counsel cited Independent News Papers Ltd., vs Gunasingham 1991 (1) SLR 285 – which states as follows *“The trial commences with the framing of issues”*. He further submitted that the District Judge of Kandy had allowed the amendment to the **Plaint** prior to the commencement of the trial in this case.

Counsel further cited Karunaratne vs Alwis 2007 (1) SLR 214 – this court has stated the law in regard to the amendment of the pleadings in a trial

“The day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date of the trial was begun comes under Section 93(1) empowering the Judge granting wide discretion in allowing amendments.”

It is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed.

In this regard Counsel also cited the case of Pushpa vs Leelawathie and others - (2004) 3 SLR 162.

Counsel further submitted that according to provisions in Section 93(1) of the Civil Procedure Code delay is no bar to amend the pleadings. It was also submitted that an application to amend the plaint does not come under Section 93(2) of the Civil Procedure Code and the Petitioners cannot raise any objection on a delay. It appears that the delay is not solely due to the 2nd Plaintiff Respondent.

In the light of the above authorities I am of the view that the pleading should be amended for the purpose of settling the real issues between the parties and also allow the commission sought by the 2nd Defendant Petitioner, because it will make the corpus in dispute very clear facilitating the Judge to clearly decide the subject matter.

Leave to appeal is refused. There will be no order for costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL