

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

In the matter of an Application for Leave to Appeal Under Article 128 of the Constitution read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006.

Bastian Koralalage Kingsley Rodrigo,
No. 616/D, Karathhawela,
Nugape,
Bopitiya.

Plaintiff

**SC Appeal No. 24/2020
SC/HCCA/LA/No. 434/2018
WP/HCCA/NEG/LA/No. 23/2018
DC Negombo Case No. 7143/L**

Vs.

1. Bastian Koralalage Camillus Sunny Rodrigo,
No. 616/B, Karathhawela,
Nugape,
Bopitiya.
2. W.D. Sumudu Madhuwantha,
No. 685, Nugape,
Bopitiya.
3. J. Edward Perera,
Nugape, Bopitiya,
Pamunugama.

Defendants

NOW BETWEEN

1. Bastian Koralalage Camillus Sunny Rodrigo,
No. 616/B, Karathhawela,
Nugape,
Bopitiya.

1st Defendant-Petitioner

Vs.

Bastian Koralalage Kingsley Rodrigo,
No. 616/D, Karathhawela,
Nugape,
Bopitiya.

Plaintiff-Respondent

2. W.D. Sumudu Madhuwantha,
No. 685, Nugape,
Bopitiya.
3. J. Edward Perera,
Nugape, Bopitiya,
Pamunugama.

Defendant-Respondents

AND NOW BETWEEN

1. Bastian Koralalage Camillus Sunny Rodrigo,
No. 616/B, Karathhawela,
Nugape,
Bopitiya.

1st Defendant-Petitioner-Petitioner

Vs.

Bastian Koralalage Kingsley Rodrigo,
No. 616/D, Karaththawela,
Nugape,
Bopitiya.

Plaintiff-Respondent-Respondent

2. W.D. Sumudu Madhuwantha,
No. 685, Nugape,
Bopitiya.
3. J. Edward Perera,
Nugape, Bopitiya,
Pamunugama.

Defendant-Respondent-Respondents

Before: **Justice Vijith K. Malalgoda, PC**
 Justice A.L. Shiran Gooneratne
 Justice Mahinda Samayawardhena

Counsel: Dr. Sunil Cooray **for the 1st Defendant-Petitioner-Petitioner.**

 S.N. Vijithsingh with Anuruddha Weerakkody **for the Plaintiff-**
 Respondent-Respondent.

Argued on: 18/03/2021

Decided on: 08/11/2021

A.L. Shiran Gooneratne J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted this action in the District Court of Negombo against the Defendant-Petitioner-Petitioner (hereinafter referred to as the Defendant) and prayed, *inter-alia*, to grant a declaration that the Plaintiff is the owner of the land more fully described in the 1st schedule to the Plaint, to grant an order declaring that the Plaintiff has acquired a prescriptive right to dispose water accumulating in his land, across the land more fully described in the 2nd schedule to flow down to Muthurajawela, to grant an enjoining order and an interim injunction preventing the Defendant filling soil in the land described in the 2nd schedule.

The Defendants position is that he cultivates “Gotu Kola” for export and therefore, a top layer of soil was necessary to be added for cultivation purposes.

The learned District Judge by order dated 03/02/2009, issued an interim order preventing the Defendant from filling soil on the land until the final determination of this action.

The Plaintiff has obtained several Commissions to survey the land in question and the resultant plans and commission reports tendered to Court are filed of record. On 20/10/2009, the Plaintiff made an application to amend the plaint. However, having obtained a final date to tender an Amended Plaint, the Plaintiff failed to do so.

Thereafter, the Plaintiff by Petition dated 04/05/2010, made an application in terms of Section 18 of the Civil Procedure Code to add parties named as 1st to 8th Respondents to the Plaint. Accordingly, the learned District Judge by order dated 24/09/2012, permitted the Plaintiff to add the 3rd and 5th Respondents to the said application, who are now sought to be added as 2nd and 3rd Defendants. Thereafter, the case was called on 20/01/2015, and was fixed for trial on 30/04/2015, against the 1st Defendant and ex-parte trial against the 2nd and 3rd Defendants.

On the date first fixed for trial, ie. 30/04/2015, on an application made by the Plaintiff, the case was taken out of the trial roll and listed to be called to accommodate parties to take steps.

On 21/02/2018, the Plaintiff filed an amended Plaintiff consisting amendments to the original Plaintiff dated 05/11/2008. The Defendant objected to the Amended Plaintiff and accordingly, the matter was fixed for inquiry.

After considering the written submissions tendered by both parties, the learned District Judge by his order dated 05/10/2018, permitted certain amendments proposed by the Plaintiff's amended plaintiff dated 21/02/2018. (The order dated 05/10/2018 is at p.386 marked 'X8')

Being aggrieved by the order of the learned District Judge permitting the Plaintiff to amend the Plaintiff, the Defendant appealed to the Provincial High Court of Negombo.

When the case came up for support on 21/11/2018, the Plaintiff was absent and unrepresented. The Court, having observed that the notices were dispatched, permitted the Counsel for the Defendant to support the application ex-parte. Having heard the Defendant, the Court by Order dated 21/11/2018, refused the said application. Being aggrieved by the said Order of the Provincial High Court, the Defendant-Petitioner-Appellant is before this Court to set aside the original order dated 05/10/2018 and the order given by the Court sitting in appeal dated 21/11/2018.

This Court by its order dated 13/02/2020, granted leave to appeal on questions of law set out in paragraph 19 (v), (vi), (vii), (xi) and (xv) of the Petition of Appeal dated 17/12/2018 which are set out below.

- I. *The learned District Court Judge and the learned High Court Judges have failed to consider that this case has been first fixed for trial on 30.04.2015 and therefore Section 93(2) of the Civil Procedure Code should apply in this case, and accordingly the requirements of Section 93(2) had to be satisfied before the amendment of plaintiff could be allowed;*

- II. *The learned District Judge and the learned High Court Judges failed to consider that the Plaintiff was guilty of laches within the meaning of Section 93(2) and therefore the amendment of the plaint should have been refused;*
- III. *The learned High Court judges failed to consider the time (nearly 10 years) taken by the Plaintiff to amend the plaint;*
- IV. *The learned High Court Judges erred by failing to consider that the provisions of Section 21 of the Civil procedure Code cannot be read in isolation and that the same has to be read along with the provisions of Sections 93(1) and 93(2) which deal with amendment of pleadings including amendment of the plaint, as has been held in Colombo Shipping Co., Ltd. V. Chirayu Clothing (Pvt) Ltd, (1995) 2 SLR 97.*

In the written submissions filed of record, the learned Counsel for the Plaintiff refers to the following consequential issue of law which is purported to have been raised on the said date, ie,

“Whether the first date of trial can be considered as 30/04/2015, when the learned District Judge has taken this case out of the trial roll for further steps without any objections by the Petitioner”.

When this matter was taken up for argument, both parties were in agreement that the main issue of contention between the parties was,

“whether the provisions of Section 93(1) or 93(2) of the Civil Procedure Code would apply to the said application for amendment of Plaint.”

The Defendant submits that the learned Judge sitting in appeal erred by failing to consider that the provisions of Section 21 of the Civil Procedure Code cannot be read in isolation but has to be read along with the provisions of Section 93(1) and 93(2) of the said Code. It is to be noted that prior to the impugned order which permitted the amendment of Plaint, the Plaintiff sought permission of Court to amend the plaint but failed to take necessary steps to that effect.

The position of the Defendant is that in the circumstances of this case, both the learned Trial Judge and the learned High Court Judge erred by applying Section 93(1) of the Civil Procedure Code. The Defendant contends that both courts have failed to appreciate the grounds to be considered as provided, before a Court makes an order in terms of Section 93(2). The Defendant argues that the original Plaintiff was filed in 2008 and the application for an Amended Plaintiff made almost 10 years later with no reasons given, has not been considered by Court and questions the Plaintiff's failure to give reasons to satisfy Court to permit the amendment, which in effect was not considered by Court. The Defendant also submits that both the Trial Judge and the learned Judge sitting in appeal failed to consider that the Plaintiff was guilty of laches within the meaning of Section 93(2) of the Code of Civil Procedure.

The Plaintiff's position is that in terms of Section 93(1), the date first fixed for trial is not necessarily the first date on which the case is first fixed for trial but would include any date to which the trial is postponed and therefore, the Trial Judge is given a wide discretion to allow amendments made prior to the first date of trial.

To strengthen this position, the Plaintiff relies on the Judgment delivered by the Court of Appeal in the case of *Karunaratne vs. Alwis (2007) 1 SLR 214* and a similar view taken in the case of *Sri Lanka Savings Bank vs. Global Tea Lanka (Pvt) Ltd and others SC/Appeal/ 171/2015, decided on 12/06/2019*.

Accordingly, it is submitted that 30/04/2015 was not the date the case was first fixed for trial within the meaning of Section 93(2) of the Civil Procedure Code. The Plaintiff further states that since the case was fixed for pre-trial steps on 27/02/2018, the said date should be considered as the date first fixed for trial and not 30/04/2015.

It is also contended that since Section 93(1) of the Civil Procedure Code applies to the amendment of pleadings sought by the Plaintiff, it is not necessary to satisfy the requirements in Section 93(2) of the Civil Procedure Code as wide discretion is given to the learned District Judge to permit amendments which come under Section 93(1). It is

further contended that the question of laches would not come into consideration since the laps of time was due to numerous steps taken and applications made by both parties. It is also noted by the Plaintiff that the Defendant did not object to the case been taken off the trial roll on 30/04/2015.

Section 93(1) and (2) of the Civil Procedure Code, as amended, reads thus: -

“93 (1). Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the 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.

93 (2). On or after the day first fixed for trial of the action and before the final judgment, no application for the amendments of any pleadings shall be allowed unless the Court is satisfied, for 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 ground, and that the party so applying has not been guilty of laches.”

As observed before, this case was first fixed for trial on 30/04/2015 and thereafter, the case was mentioned for steps in order to facilitate a commission to issue at the instance of the Plaintiff. After several dates of court sittings, the learned Trial Judge fixed the case for pre-trial hearing on 27/02/2018.

However, on 21/02/2018, the Plaintiff moved to amend the plaint at which point the Defendant objected. The amended Plaint dated 21/02/2018, seeks to add the 2nd and 3rd Defendants who were permitted to be added by order dated 24/09/2012, which is over five years from the date of the said order. It also seeks to amend paragraph 7 and 8 of the Plaint to include the 3rd and the 4th schedule, to describe the lands, over which the Plaintiff claims a servitude right to dispose water from his land to Muthurajawala.

It is noted that in paragraph 8 of the original plaint the Plaintiff describes that the flow of water from the land described in the 1st schedule over the land described in the 2nd schedule of the plaint to have prevailed for the past forty years.

Section 93 of the Civil Procedure Code was amended by Act No. 9 of 1991, and the rationale underlying the amendment introduced by the said Act was recognized by G. P. S. De Silva C.J. in the case of ***Kuruppuarachchi vs. Andreas (1996) 2 SLR 11***, in the following manner;

*“The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trials by placing a significant restriction on the power of the court to permit amendment of pleadings on or after the day first fixed for the trial of the action. An amendment of pleadings on the date of trial, more often than not, results in the postponement of the trial. In this connection it would not be inappropriate to refer to the observations of Sansoni, J. (as he then was) in ***Daryanani vs. Eastern Silk Emporium Ltd.***, I have also always understood the rule to be that an amendment should be applied for as early as possible and as soon as it becomes apparent that it would be necessary”.*

It was further observed that;

“While the Court earlier discouraged amendment of pleadings on the date of trial. Now the court is precluded from allowing such amendments save on the ground postulated in the subsection.”

In this background it would be pertinent to discuss as to what constitutes the first date fixed for trial within the meaning of Section 93(2) of the Civil Procedure Code.

The 1st question of law is structured on the basis that, 30/04/2015 can be considered as the first date fixed for trial and therefore Section 93(2) of the Civil Procedure Code should apply.

In ***Ceylon Insurance Co. Ltd vs. Nanayakkara and Another (1999) 3 SLR 50***, Weerasuriya J., *inter alia*, dealt with what constitutes the first date fixed of trial, when he observed;

“that section 80 of the Civil Procedure Code provides for fixing the date of trial and such date constitutes, the day first fixed for trial. Section 48 of the Judicature Act

provides for continuation of a trial before the Judge who succeeds the Judge before whom trial commenced. The discretion vested in that succeeding Judge either to continue with the trial or to commence proceedings afresh does not affect the nature of the order made in terms of section 80 of the Civil Procedure Code relating to the fixing of the first trial date. Thus, the order made fixing the date of trial in terms of section 80, becomes the "day first fixed for trial" within the meaning of section 93 (2) of the Civil Procedure Code."

The same rational was echoed in the case of ***Maseena vs. Sahud and Another (2003) 3 SLR 109*** where it was held that,

"Section 80 of the Civil Procedure Code provides for fixing the date of trial and such date constitutes the day first fixed for trial."

The Plaintiff contended that the day first fixed for trial is not necessarily the first date on which the case is first fixed for trial but would include any date to which the trial is postponed and when an application for amendment of pleadings is made, the Judge is granted a discretion to permit amendments made prior to the first date of trial under Section 93(1) of the Civil Procedure Code.

The plaintiff relied on ***Karunaratne vs. Alwis (2007) 1 SLR 214***, where Eric Basnayake J. took a wide approach following the ratio-decidenti in ***Siripura Hewawasam Pushpa vs. Leelawathie Bandaranayake and three others – (2004) 3 Sri LR 162***, where S.N. Silva C.J. referring to the day first fixed for trial said thus:

"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".

Thus, Eric Basnayake J. held:

"Therefore, the day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun therefore comes under section 93 (1) empowering the Judge granting wide discretion in allowing amendments."

However, in *Kanagaraj vs. Alankara (2010) 1 SLR 185*, Eric Basnayake J. commenting on “*the initial date that was fixed for the trial*”, stated that:

“the fact that the trial did not commence has no bearing. What is important is the date, first fixed for trial.”

The Plaintiff also relied in the unreported case of *Sri Lanka Savings Bank Ltd Vs. Global Tea Lanka (Pvt) Ltd & Others, SC/App./171/2015*, where the Supreme Court discussed the “*date of trial first fixed*” or “*first date of trial*” and “*the date fixed for the trial of an action*” in the context where the Court had struck out the date from the trial roll scheduled for the date appointed for the trial, as such, the facts of the said case can be clearly distinguished from the instant application.

Section 80 of the Civil Procedure Code stipulates an appointed date for the trial of the action. Journal entry dated 20/01/2015, makes it abundantly clear that the appointed date for the trial of the action was 30/04/2015. In an action, the appointed date for the trial of the action and/or the first date fixed for trial can be one and the same.

As observed in *Ceylon Insurance Co. Ltd vs. Nanayakkara and Another (1999) 3 SLR 50 (supra)*:

“the order made fixing the date of trial in terms of section 80, becomes the “day first fixed for trial” within the meaning of section 93 (2) of the Civil Procedure Code”.

In this case, the amendments sought to be made are moved after the day first fixed for trial and therefore, for the reasons set out above, it is imperative that Section 93(2) should apply.

Application of *Section 93(2)* was discussed by Ranaraja J. in *Gunasekera and another Vs. Abdul Latiff (1995) 1 SLR 225* at 232, where he stated thus: -

“The amendments to pleadings on or after the first date of trial can now be allowed only in very limited circumstances. It prohibits court from allowing an application for amendment at this stage unless (1) it is satisfied that grave and irremediable injustice

will be caused if the amendment is not permitted, and (2) the party applying has not been guilty of laches. On no other ground can court allow an application for an amendment of pleadings. Furthermore, court is obliged to record reasons for concluding that the two conditions referred to have been satisfied."

In the impugned judgment, the learned Trial Judge noted the laxity on the part of the Plaintiff to follow the appropriate procedure to add the 2nd and the 3rd Defendants in keeping with the order dated 24/09/2012.

The Court further observed that in view of the orders made on 24/09/2012 and 17/01/2013, the Plaintiff failed to amend the Plaint to disclose a cause of action and also the relief sought against the Defendants to be added. The learned Trial Judge permitted the Plaint to be amended on the basis that the amendments would not change the scope of the action or cause any prejudice to the Defendant already made known. The Court, having noted that this action was instituted in 2008, observed that the Plaintiff did not act promptly according to procedure prescribed by law to tender the proposed amendments. However, subject to costs the Plaintiff was permitted to amend the Plaint.

The lower Court in its order emphasized the fact that, subsequent to an addition of a party, it is mandatory that the Plaint is amended in terms of Section 21 of the Civil Procedure Code. The learned President's Counsel for the Defendant argued that Section 21 cannot be considered in isolation and cited the case *Colombo Shipping Co vs. Chirayu Clothing (1995) 2 SLR 97*, where Ranaraja J. dealing with the said issue extensively, held that,

"Since the amendment by Act, No. 9 of 1991, if an application is made to add a party as a defendant after the first date of trial, Sections 18, 21 and 93(2) of the Code have to be read together, in allowing or refusing such an application".

The learned Judges sitting in appeal too, observed that an application was not filed to add the 2nd and 3rd Defendants, even though the Court permitted the said parties to be added by order dated, 24/09/2012. The Court also observed the long delay on the part of the

Plaintiff to amend the Complaint, however, the Court did not make any finding on the party applying, of being guilty of laches.

Even though the trial court and the Court sitting in appeal recognized the delay on the party applying for an amended complaint, failed to make a finding that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party.

The doctrine of laches is based on the maxim that *"equity aids the vigilant and not those who slumber on their rights."* (Black's Law Dictionary). The outcome is that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party.

In *Paramalingam vs. Sirisena and Another (2001) 2 SLR 239*, Wigneswaran J. drew a distinction between *"before the day first fixed for trial"* and *"on or after the day first fixed for the trial."* Where it was held that:

"The Court's discretion was unfettered with regard to amendments before the first date of trial subject to an application having to be made to do it with notice to all other parties. But its powers on or after the first date of trial were severely curtailed. The present Section 93 has come through many vicissitudes".

and further observed that;

"Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is that delay defeats equities. The second is that equity aids the vigilant and not the indolent. Lord Camden said "Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence"

Similar conclusions were made in *Nimalraj vs. Thamarajah and others (2005) 3 SLR 309*; *Rushantha Perera vs. Wijesekera (2005) 3 SLR 105*; *Gunasekera vs. Abdul Latiff, (1995), 1 SLR 225*; *Ceylon Insurance Co. Ltd vs. Nanayakkara (1999) 3 SLR 50*;

Colombo Shipping Co. Ltd. vs. Chirayu Clothing (Pvt) Ltd. (supra); Avudiappan vs. Indian Overseas Bank, (1995) 2 SLR 131; Kuruppuarachchi vs. Andreas (supra); Paramalingam vs. Sirisen and Another (supra); Ranaweera vs. Jinadasa (2001)2 SLR 239.

Therefore, it is well founded and prudent to pose the question as to whether the long delay on the part of the Plaintiff in asserting his right or claim has prejudiced the interest of the Defendant.

The delay of over 10 years on the part of the Plaintiff to move for an amendment of the Plaintiff was observed by both courts, however, there was no order made or reasons given by the Court to absolve the Plaintiff of such delay. The delay on the part of the Plaintiff is not reasonably explained.

The cause of action which is alleged to have accrued against the 2nd and the 3rd Defendants arise as a result of the right to dispose of rain water from the Plaintiff's land to Mutturajawela. In paragraph 8 of the original Plaintiff, the Plaintiff states that for the last 40 years the water collected in the Plaintiff's land (described in the 1st schedule) flowed across the 1st Defendant's land (described in the 2nd schedule) to Mutturajawela. The Defendant was made a party to this case on the basis that he obstructed the flow of rain water by unlawfully filling gravel in the land described in the 2nd schedule, which was brought to the attention of the relevant authorities. Having heard both parties the District Court issued an injunctive order preventing the Defendant from filling soil in the said land.

In *Ranaweera vs. Jinadasa (2001)2 SLR 239*, Amerasinghe, J. held that:

"No postponements must be granted or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot otherwise be provided for."

There is no mention in the original Plaintiff that the rain water collected in the Plaintiff's land flowed over the lands described in the 3rd and 4th schedules. At the time of filing the

original Plaintiff, the Plaintiff was aware that for the last 40 years the rain water flowed to Mutturajawela across the Defendant's land. The proposed amendment to the Plaintiff is to emphasize the fact that the rain water flowed to Mutturajawela across the described lands belonging to the 2nd and 3rd Defendants. Therefore, an amendment to the Plaintiff would not have arisen if the Plaintiff acted with due diligence when filing the Plaintiff.

Apart from the procedural delay more akin to the Plaintiff's failure, as observed, an application was made way back in 20/10/2009, where the Plaintiff moved to file an amended Plaintiff, but failed to do so even on the final date granted by Court. (Journal entry 18 page 28).

Taking into consideration the delay and the circumstances peculiar to this case, an amended Plaintiff, if permitted, would cause grave prejudice to the Defendant. Therefore, the Court holds that the application to amend the Plaintiff should be rejected in terms of Section 93(2) of the Civil Procedure Code.

Accordingly, the 1st to 4th questions of law are decided in favor of the Defendant Appellant.

In the consequential issue of law, the Plaintiff-Respondent points out that the learned District Judge has taken this case out of the trial roll for further steps without any objection by the Petitioner. As held in *Kuruppuarachchi vs. Andreas (supra)*:

"The rationale underlying the amendment introduced by Act No. 9 of 1991 is when the Court earlier discouraged amendment of pleadings on the date of trial, now the court is precluded from allowing such amendments save on the ground postulated in the subsection."

In terms of **Section 93 (2)**, the onus is on the party who moves for an amendment to satisfy Court,

"that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches."

Therefore, the absence of an application objecting to listing the case to be called, cannot be held against the Defendant.

In the circumstances, the consequential issue of law raised by the Plaintiff is answered in the negative.

Accordingly, the order of the learned District Judge of Negombo dated 05/10/2018, and the Judgment dated 21/11/2018, delivered by the High Court of Civil Appeal Negombo is set aside. The application to amend the Plaint is rejected. I make no order as to costs.

Appeal is allowed.

Judge of the Supreme Court

Vijith K. Malalgoda PC. J.

I agree

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree

Judge of the Supreme Court