

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

Kose Mohamed Sulaiha Umma of  
Udanga, Sammanthurai

**PLAINTIFF**

**Vs**

1. Ahamed Lebbe Assanar
2. Aliyar Thangamma
3. Mahulapillai Yseenbawa  
All of Udanga, Sammanthurai

**DEFENDANTS**

**AND**

1. Ahamed Lebbe Assanar
2. Aliyar Thangamma
3. Mahulapillai Yseenbawa  
All of Udanga, Sammanthurai

**DEFENDANTS-APPELLANTS**

**Vs**

Kose Mohamed Sulaiha Umma of  
Udanga, Sammanthurai

**PLAINTIFF-RESPONDENT**

**AND NOW**

In the matter of an application for Leave to Appeal  
in terms of section 5(C)(1) of the High Court of  
the Provinces (Special Provisions) (Amendment)  
Act No. 54 of 2006 read together with Article 127  
of the Constitution.

**SC/APPEAL/174/2011  
SC/HCCA/LA/57/10  
DC Kalmunai Case No.2298/L  
HC (Civil) Kalmunai  
Case No.EP/HCCA/Kal/147/08**

1. Ahamed Lebbe Assanar
  2. Aliyar Thangamma
- All of Udanga, Sammanthurai

**Defendants-Appellants-Appellants**

Kose Mohamed Sulaiha Umma of  
Udanga, Summanthurai

**Plaintiff-Respondent-Respondent**

Before : B. P. Aluwihare PC, J.  
Priyantha Jayawardena PC, J.  
Vijith K. Malalgoda PC, J

Counsel : V. Puvitharan PC with R. A. Vishanthanie, Anuya Rasanayakam for  
the 1st and 2<sup>nd</sup> Defendants- Appellants  
  
M. Nizam Kariyaper PC with M.C.M Nausas and M.I.M Iynullah for  
the Plaintiff-Respondent-Respondent

Argued on : 1<sup>st</sup> February, 2018

Decided on : 4<sup>th</sup> October, 2023

**Priyantha Jayawardena PC, J**

**Facts**

The defendants-appellants-appellants (hereinafter referred to as “the defendants”) filed the instant appeal against the judgment of the Civil Appellate High Court of Kalmunai which dismissed the appeal filed by them against the judgment of the District Court of Kalmunai, dated 24<sup>th</sup> of April, 2002 where it was held that the learned judge of the District Court is

entitled to frame an additional issue (new issue) during the course of the judgment in terms of section 149 of the Civil Procedure Code, as amended (hereinafter referred to as the “Code”).

The plaintiff-respondent-respondent (hereinafter referred to as “the plaintiff”) instituted action against the defendants in District Court of Kalmunai on the 29<sup>th</sup> of April, 1999 and pleaded *inter-alia* that by virtue of the Permit No. AM/SP/282 dated 8<sup>th</sup> of May, 1979 issued by the Government Agent of Ampara, she became entitled to possess and occupy the land in terms of section 19(2) of the Land Development Ordinance.

Further, it was pleaded that she and her predecessors in title were in undisturbed and uninterrupted possession of the said land. However, the defendants disturbed the possession by breaking the boundary fence constructed by her.

Moreover, it was stated that when she made an attempt to repair the boundary fence by fixing new poles, the defendants not only fought with her but also made a complaint to the Sammanthurai Police. After the said complaint an inquiry was held on the 22<sup>nd</sup> of March, 1999 by the Divisional Secretary. However, no action was taken by him.

The plaintiff further stated that when the defendants again made an attempt to disturb the possession of the land, her son prevented the defendants from disturbing the possession of the property. Thereafter, the defendants made a false complaint to the Police. Subsequently, the son was arrested by Sammanthurai Police and he was remanded. She stated that the Police were helping the defendants to possess the land illegally and to fence it. Furthermore, the defendants influenced the Divisional Secretary and other State Officials preventing them from taking action against them and taking steps to enter, possess and develop the land and to deprive the plaintiff's entitlement to the land.

In the circumstances, the plaintiff stated that she instituted action in the District Court of Kalmunai and prayed *inter alia* to;

- a) ***declare that the plaintiff is entitled to be possessed and occupy in the land more fully described schedule to the plaint, and***
- b) *grant an enjoining order or interim injunction until the until the case is concluded preventing the Defendants from disturbing the possession and from doing any development to the premises, more fully described in the schedule to the plaint.*

Thereafter, the defendants filed an answer denying the averments contained in the plaint and pleaded that the plaintiff was not in possession of the land described in the schedule to the answer. Further, it was pleaded that the defendants owned the property in question under and by virtue of Permit No. AM/SP/244A issued on the 16<sup>th</sup> of November, 1989 by the Government Agent of Ampara and prayed for a dismissal of the plaint.

At the commencement of the trial, the plaintiff raised the following issues;

1. *Did Aliyar Adambawa become entitled to possess and occupy the premises fully described in the schedule to the plaint by virtue of permit No. AM/SP/282 dated 08.05.1979 issued by Government Agent of Ampara?*
2. *Is the plaintiff entitled to possess and enjoy the said premises in terms of the permit No. AM/SP/282 dated 02.02.1994 issues by Divisional Secretary of Sammanthurai?*
3. *Is the possession of the defendants in the said premises lawful?*
4. *If the above issues are answered "No" has the plaintiff incurred a loss?*
5. *If so, how much?*
6. *If the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues are answered "yes" and the 4<sup>th</sup> issue is answered "No" is the plaintiff entitled to the reliefs prayed for the plaint?*

Thereafter, the defendants raised the following issues;

7. Did the 1<sup>st</sup> defendant become entitled to the land morefully as described in the answer and by virtue of the Permit No. AM/SP/244(A) dated 16<sup>th</sup> November, 1989 issued by the Government Agent Ampara?
8. Are the defendants in possession of the said land since 1978 or 1979?
9. Is the land described in the plaint and the land given to the plaintiff on the permit identical?

10. If issue Nos 7 and 8 were answered "Yes" and issue No. 9 is answered "No" should the action of the plaintiff be dismissed?

### **Judgment of the District Court**

The trial proceeded on 1<sup>st</sup> to 6<sup>th</sup> issues raised by the plaintiff and issues 7<sup>th</sup> to 10<sup>th</sup> raised on behalf of the defendants. After the conclusion of the *inter parte* trial the learned District Judge raised the following issue as an additional issue at the time of the delivery of the judgment;

*Issue No. 11 –*

*If issue No. 3 is answered in the negative, should the possession be handed over to the plaintiff by ejecting the defendant from the land in dispute?*

Thereafter, the learned District Judge having answered the issue No. 3 in the negative, answered issue No. 11 in the affirmative and entered the judgment in favour of the plaintiff. Being aggrieved by the said judgment, the defendants filed an appeal in the Provincial High Court of Kalmunai, *inter alia*, on the following grounds;

“

- i. that the said judgment is contrary to law and against all principles governing civil procedure,*
- ii. it is a cardinal principle of law that a party is not entitled to the relief which has not been prayed for and the learned District Judge erred in law in ordering the ejectment of the defendants-appellants, when there was no prayer for such a relief,*
- iii. the learned District Judge failed to appreciate the importance of section 34 of the Civil Procedure Code, where the plaintiff-respondent had opted to restrict her claim for declaration of title only and not prayed for the ejectment of the defendant-appellant,*

- iv. *the learned District Judge erred in law in granting the prayer for ejectment on his own, when the plaintiff has not prayed for it,*
- v. *the learned District Judge wrongly applied the principle of framing issues and framed a fresh issue at the time of delivery of the judgment which was not warranted in law,*
- vi. *it is for the party to include all claims and not for the learned District Judge to grant relief which has not been prayed for and,*
- vii. *on the whole there is a clear misdirection of law and the judgment of the District Court should be set aside.”*

### **Judgment of the Civil Appellate High Court**

After the hearing of the said appeal, the learned judges of the said High Court held *inter alia*, that the learned judge of the District Court acted within the scope of section 149 of the Civil Procedure Code and thus, it is not necessary to interfere with the judgment of the learned District Judge. Accordingly, the appeal was dismissed.

Being aggrieved by the said judgment, the Defendants-Appellants-Appellants appealed to this court and this court granted Leave to Appeal on the following question of law;

*"Did the Civil Appellate High Court err when it affirmed the decision of the District Court which had the effect of granting relief that had not been prayed for on the basis a fresh issue which had been raised by the District Judge in the course of preparing his Judgment?"*

### **Submissions on behalf of the Defendants**

The learned President's Counsel for the defendants submitted that the plaintiff **did not pray for the ejectment of the defendants from the premises in-suit**. Further, the plaintiff opted to restrict her claim only for a declaration and not prayed for the ejectment of the defendants. Therefore, the learned District Judge was clearly in error when, he on his own accord granted the relief to eject the defendants from the land on his own accord. Further, the plaintiff failed

to make her full claim as required by section 34 of the Civil Procedure Code and therefore, she was not entitled for the additional relief granted by the learned District judge.

Moreover, the plaintiff did not amend the plaint to include a prayer for ejectment of the defendants and they became aware of the new issue framed by the learned District Court Judge only at the time of delivery of the judgment. In the circumstances, it was submitted that the defendants were not heard or allowed to adduce evidence as to why the said new issue relating to the ejectment should not be answered in favour of the plaintiff.

He drew the attention of court to the judgment delivered in *Hameed V Cassim (1996) 2 SLR 30*, which the learned District Judge and the learned judges of the High Court based their decision and submitted that it is distinguishable from the instant appeal as in the said judgment no relief was granted which was not prayed for. Thus, the said judgment does not support the impugned judgment. Further, it was submitted that the plaintiff had not prayed for the ejectment of the defendants and hence, the court cannot grant a relief which was not prayed for by a party.

The learned President's Counsel further submitted that in *Perera V Perera 68 NLR 262*, the plaintiffs-respondents filed an action for a declaration that they were entitled to draw water from a well and for a sum of Rs.250/- as damages for being deprived of that right. Moreover, after the plaintiffs-respondents obtained a decree moved for a writ of possession, which was allowed. Thereafter, in Appeal, it was contented that the right to draw water carries the right to use a footpath. It was held that the question to be decided was whether the plaintiffs-respondents having failed to ask for anything more than a declaration of their right and damages, can now ask for a writ of possession. The appeal should be allowed.

### **Submissions on behalf of the plaintiff**

The learned President's Counsel who appeared for the plaintiff submitted that the objective of the *rei vindicatio* action is to recover the possession of the land back to the lawful owner, as such actions arise from the right to *dominium*. Moreover, the instant action was filed to recover a property belonging to the lawful owner. He further submitted that both the learned District Judge and the learned High Court Judge relied on the case of *Hameed V Cassim*

(1996 ) 2 SLR 30 which is binding on them. Therefore, both the judgments of the District Court and Civil Appellate Court have to be upheld by this court.

***Did the Civil Appellate High Court err when it affirmed the decision of the District Court which had the effect of granting relief that had not been prayed for in the plaint?***

### **The scope of an action filed in the District Court**

Section 33 of the Civil Procedure Code as amended requires every regular action to be framed in order to achieve a final decision of the disputes between the parties so that it will prevent further litigation between them. Further, section 34 (1) of the said Code states that a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of the court. However, subsection (2) of the said section *inter alia*, states that if a 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.

Moreover, section 93 of the said Code sets out the circumstances in which amendments of pleadings are allowed and section 406 set out the circumstances in which a court would allow a withdrawal and adjustments of claims stated in the pleadings and consequences of such matters.

Further, section 207 of the Civil Procedure Code states that;

*“All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited.”*

Moreover, the explanation to section 207 states;

*“Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties, to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a **res adjudicata**, which cannot*



*afterwards be made the subject of action for the same cause between the same parties.”*

[Emphasis added]

A careful consideration of the aforementioned provisions and the other provisions of the Civil Procedure Code shows that one of the prime objects of the said Code is to prevent multiplicity of actions between the parties on the same causes of action.

### **Marking Admissions and Raising Issues**

A trial in the District Court commences by marking admissions and framing issues on matters which the parties are at variance. In terms of section 72 of the Civil Procedure Code, if the defendants admit the claim of the plaintiff, the court shall deliver the judgment against the defendants according to the admissions so made. Further, in terms of section 146 of the Civil Procedure Code if the parties agree as to the facts, such facts should be recorded as admissions between the parties. Moreover, if the parties agree upon the matters that are required to be decided in the case, they may be recorded as issues to be decided in the case.

However, subsection (2) of section 146 states;

*“If the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to record the issues on which the right decision of the case appears to the court to depend.”*

The said sub section casts a duty on the learned trial judge to settle the issues by identifying the dispute between the parties before the evidence is recorded in the case. When parties are unable to agree on the admissions and issues, the learned judge ought to rule on the rival sets of admissions and issues, and decide on the admissions to be recorded in the case and the issues on which the parties should go to trial to arrive at the right decision in the case.

A similar view was expressed in *Pathmawathie Vs. Jayasekare (1997) 1 SLR 248* where it was held;

*"Though in practice Counsel appearing for the plaintiff and defendant do suggest the issues it is the prime responsibility of the judge to frame issues. This is more so because it is ultimately the judge who should make a finding and without a clear understanding of the dispute and the issues that he has to determine it would be a most dangerous exercise to embark upon."*

Moreover, if evidence is elicited during the trial either by oral evidence or documentary evidence which is necessary to decide the dispute between the parties to the case, the court may amend the existing issues or frame additional issues on such terms as it thinks either at the request of a party to the case or on its own motion.

A plain reading of section 146 of the Civil Procedure Code does not impose a blanket prohibition to frame issues on the matters that have not been averred in the pleadings filed in the case. The object of the legislature in having section 146 is to allow the issues on which the right decision of the case identified by the court.

Further, in *Bank of Ceylon V Chellaiahpilli 64 NLR 25* it was observed that;

*"a 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 issues is not restricted by the pleadings."*

Moreover, in *Avudiappan V Indian Overseas Bank (1995) 2 SLR 131* it was held;

*"...S.146 of the Civil Procedure Code permits Court to record issues on which the right decision of the case appears to Court to depend, on the pleadings, documents and evidence led at the trial."*

However, explanation (2) to section 150 of the Civil Procedure Code, prohibits a party from making at the trial, a case materially different from that which he has placed on record and which his opponent is prepared to meet the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

The aforementioned provisions show that though the Civil Procedure Code contemplates an adversarial procedure, it casts a duty on the learned judge of the District Court to mark the admissions and raise issues in order to arrive at the right decision in the case.

**Did the learned District Judge err in law by framing the issue No. 13 (new issue) referred to above at the time of the delivery of the judgment under section 149 of the said Code, without giving an opportunity to the parties to respond to the said issue?**

Section 149 of the Civil Procedure Code states;

*“The court may, at any time **before passing a decree**, amend the issues or frame additional issues on such terms as it thinks fit.”*

[Emphasis added]

Section 149 of the Civil Procedure Code does not preclude a District Judge from framing a new issue after the parties have concluded their respective cases and at the time of the judgment is read out in open Court. On the contrary, it allows the District Judge to amend or frame additional issues before passing a decree.

However, a careful consideration of the provisions of the said Code shows that section 149 of the Code cannot be considered in isolation. Hence, the said section should be considered along with the other sections applicable to framing of issues and be interpreted in harmony with them. The analysis of the said provisions in the Civil Procedure Code show that the power conferred on the District Court by section 149 of the said Code to amend the issues before passing a decree is subject to the other restrictions imposed by the Code. When the sections relating to such matters are considered together the cumulative effect is that the discretion conferred by section 149 of the Civil Procedure Code on the District Court should be exercised subject to the following;

- (a) a new issue cannot be framed which will have the effect of converting an action of one character into another,

- (b) the issues shall not be altered or raise new issues to change the scope of the action and thus, deprive a party from obtaining reliefs already pleaded in the case,
- (c) raising new issues shall not be prejudicial to a party to an action,
- (d) it should be necessary to decide the real issue between the parties,
- (e) it should be necessary to raise further issues in the interest of justice to adjudicate the dispute/s between the parties, and
- (f) none of the parties should be taken by surprise and thereby it will adversely affect their respective cases.

In the instant appeal, it is common ground that the plaintiff did not have a prayer to eject the defendants from the property described in the schedule to the plaint. However, in her evidence she stated that she became the owner of the land described in the schedule to the plaint by a permit bearing No: AM/SP/282 which was issued on the 2<sup>nd</sup> of February, 1992 in terms of section 19(2) of the Land Development Ordinance. She further stated that the defendant-appellant forcibly fenced part of her land and started possessing it. Moreover, in her evidence in chief she stated that she be given the possession of the land under consideration. It is pertinent to note that the plaintiff was not cross examined on this point.

Furthermore, the pleadings filed in the District Court and the evidence led at the trial show that the plaintiff and the defendants proceeded to trial on the basis that the peaceful possession of the land by the plaintiff was disturbed by the defendants. Further, as stated above, the plaintiff requested to put her in possession of the land in her evidence. Thus, the evidence led at the trial and issues No.2 and 3 clearly show that the entire case proceeded on the basis that the defendant disturbed the possession of the land belonging to the plaintiff and that she wants to enjoy the peaceful possession of the said land.

In the circumstances, the defendants were fully aware of the grievance of the plaintiff and the relief that she was seeking from the court. In fact, prior to the institution of the action the plaintiff has sought administrative reliefs to prevent the defendants disturbing the peaceful possession of the land by encroaching it. In this regard, it is pertinent to note that the appellant did not contest the findings of the learned District Judge with regard to the ownership of the land and granting the prayer for the declaration of title pleaded in the plaint.

Having considered the evidence led at the trial and the issues framed by the parties, I am of the opinion that there is no element of surprise by raising the additional issue by the learned District Judge at the time of the delivery of the judgment. Further the learned District Judge in framing the new issue has taken steps to arrive at the correct decision with regard to the dispute between the parties to the case. Further, it prevents further litigation between the parties and thus, raising the said additional issue is necessary to meet the ends of justice.

*In Silva v. Obeysekera 24 NLR 97* it was held in the preamble;

*“No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.”*

In the case of *Hameed V Qasim (1996) 2 SLR 30* it was held as follows:

*“(1) the Provisions of S.149 of the Civil Procedure Code do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open Court.*

*It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of the documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case”.*

The learned President’s Counsel for the appellant submitted that the facts of the judgment decided in *Hameed v Quasin* were different to the facts of the instant appeal. However, a careful consideration of the said judgment it shows that the ratio decidendi of the said judgment is applicable to the issue that needs to be decided in the instant appeal and thus, it is applicable to the instant appeal.

Therefore, the learned District Court Judge who heard the trial and the learned judges of the Civil Appellate High Court have correctly applied the ratio decidendi in the said case by following the doctrine of *stare decisis*.

Further, in *In Dharmasiri V Wickrematunga (2002) 2 SLR 218, it was held;*

*“Issue raised on titled pleaded, Held;*

- 1) *Once issues framed and accepted, pleadings recede to the background.*
- 2) *Even though the plaintiff has not asked for a declaration of title it does not prevent him from seeking the relief for ejectment*
- 3) *Absence in the prayer for a declaration of title causes no prejudice, if in the body of the plaint, the title is pleaded and issues were framed and accepted by Court on the title so pleaded. It cannot be overlooked that title pleaded in the body of the plaint formed the basis for the issues raised at the trial and the question of title was examined by the trial judge before arriving at a finding that the plaintiff-respondent has obtained title.”*

Section 149 of the Civil Procedure Code states as follows:

*“The court may at any time before passing a decree, amend the issue or frame additional issue on such terms as it thinks fit.”*

Moreover, I am of the view that though there is no specific relief prayed by the plaintiff to eject the defendants, the cumulative effect of the averments in the plaint show that she wanted to possess the land and enjoy her rights under the aforementioned permit without any hindrance from the defendants. As the evidence elicited at the trial showed that the defendants were in possession of the part of the land under consideration, it is essential to evict them in order to occupy the said land of the plaintiff. If the District Court did not order the defendants to be evicted from the land, the purpose of only granting a declaration in favour of the plaintiff will make the entire relief futile as the plaintiff will have to file a fresh case to eject the defendants. Thus, I am of the view that the District Judge has exercised the discretion conferred on him under section 149 of the Civil Procedure Code. In view of the aforementioned findings, sections 33 and 34 of the Civil Procedure Code have no application to the instant appeal.

Accordingly, the question of law is answered as follows;

*"Did the Civil Appellate High Court err when it affirmed the decision of the District Court which had the effect of granting relief that had not been prayed for on the basis a fresh issue which had been raised by the District Judge in the course of preparing his Judgment?"*

No.

Accordingly the appeal is dismissed without costs.

Judge of the Supreme Court

B.P. Aluwihare PC, J

I Agree

Judge of the Supreme Court

Vijith K. Malalgoda PC, J

I Agree

Judge of the Supreme Court