

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

In the matter of an application to the Supreme Court against the Judgment dated 11th May 2015 delivered by the Provincial High Court of the Western Province exercising Civil Appellate jurisdiction at Avissawella in WP/HCCA/AV/08/2014/LA (D.C. Avissawella Case No. D/6739)

SC/ Appeal/ 86/ 2017

WP/ HCCA/ AVI/ 08/ 2014

D.C. Awissawella Case No. D/6739

Karadana Lekamlage Nilupa Sittari
Jayaratne,

53/2, Colombo Road,
Avissawella.

PLAINTIFF

Vs

Waisadura Samantha Priyaruwan
Jayaweera,

316/1, Hendala Road,
Hendala,
Wattala.

DEFENDANT

AND THEN

Waisadura Samantha Priyaruwan
Jayaweera,
316/1, Hendala Road,
Hendala,
Wattala.

DEFENDANT-APPELLANT

Vs

Karadana Lekamlage Nilupa Sittari
Jayaratne,
53/2, Colombo Road,
Avissawella.

PLAINTIFF - RESPONDENT

AND NOW

Waisadura Samantha Priyaruwan
Jayaweera,
316/1, Hendala Road,
Hendala,
Wattala.

DEFENDANT-APPELLANT-
APPELLANT

VS

Karadana Lekamlage Nilupa Sittari
Jayaratne,
53/2, Colombo Road,

Avissawella.

PLAINTIFF-RESPONDENT-
RESPONDENT

BEFORE : Vijith Malalgoda, PC. J

A.H.M.D. Nawaz, J

Achala Wengappuli, J

COUNSEL : Dr. Sunil Coorey with Diana Stephanie

Rodrigo for the Defendant-Appellant-
Appellant.

Kaushalya Nawaratne PC with Saumya
Wickremasinghe for the Plaintiff-
Respondent-Respondent.

ARGUED ON : 18.05.2023

DECIDED ON : 23.08.2024

A.H. M. D. Nawaz J,

1. This case illustrates the acrimony that can arise in matrimonial disputes. A proposed amendment by the husband, the Defendant-Appellant-Appellant (the “Defendant”), to his answer—contested by the wife, the Plaintiff-Respondent-Respondent (the “Plaintiff”)—has made its way up to this Court.
2. In the process, the substantive merits of the divorce sought by both spouses—albeit on different grounds in their Complaint and Answer—remain unresolved in the District Court. The wife (the Plaintiff) seeks a divorce *a vinculo matrimonii* on the ground of the husband’s (the Defendant’s) constructive malicious desertion, while he seeks to end the marriage on the grounds of her malicious desertion.
3. The Defendant’s proposed amendment to his Answer—his second amendment—aimed to introduce an allegation of adultery against the Plaintiff, bringing another man into the case as a co-respondent. This amendment was contested by the Plaintiff-wife, and both courts *a quo* ruled in her favour, rejecting the amendment. The Defendant now appeals to this Court.
4. To better understand the trajectory of the case, the timelines are crucial. I will outline them below in a tabular form.

Chronology of Events

Step	Date
Date of marriage	10th May 2010
Alleged date of desertion	10th November 2010
Plaint filed on	6th June 2011
Answer filed on	31st October 2011
First date of trial to be on	19th October 2012
Application for 1st amendment	5th October 2012
Objection (1st amendment) withdrawn	6th August 2013
1st Amended answer filed on To substitute the word “compensation with alimony” - done after 1st day fixed for trial	28th October 2013
Trial fixed for the 2nd time to be on	7th March 2014
2nd Application for amendment	29th January 2014
Alleged adultery ongoing (even at the time of leaving the husband and the matrimonial home)	10th November 2010
Bride & Groom photoshoot with Co- Defendant	10th March 2012

Actual Knowledge of adultery	20th November 2013
DC Order (6739/D)	2nd June 2014
HC judgment WP/HCCA/AV/8/2014(LA)	11th May 2015

5. The key issue is whether the Defendant is entitled to amend his answer after the first trial date has been fixed, as outlined in Section 80 of the Civil Procedure Code (CPC). Dr. Sunil Coorey, the learned Counsel for the Plaintiff conceded during the argument that Section 93(2) of the CPC would govern this situation. For clarity, the relevant sections of the CPC permitting amendments to pleadings are outlined below.

Sections 93 (1) and (2) of the Civil Procedure Code as amended by Act No. 9 of 1991 reads as follows;

Section 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.

Section 93 (2)

*On or after the day first fixed for the trial of the action and before final judgement, no application for the amendment 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.

6. The crucial question of law for resolution looms large as follows:

Did the High Court err in law by holding that the rights of the Parties in an action must be decided as at the date of institution of the action and that alternative causes of action arising subsequently cannot be pleaded by amending the answer, i.e., the Defendant is not entitled to introduce a new cause of action based on adultery?

7. Having outlined the relevant provisions permitting amendments, it is clear that the Defendant seeking to amend his answer must satisfy two key thresholds: first, that *grave and irremediable injustice would result if his amendment based on adultery is not permitted*, and second, that *he has not been guilty of laches in bringing forth the amendment*.
8. It is therefore appropriate to examine how the District Court of Avissawella and the Civil Appellate High Court of Avissawella addressed these thresholds. The factual matrix having regard to timelines set out above becomes relevant at this stage.
9. The Plaintiff instituted this action on the grounds of constructive malicious desertion, seeking a sum of Rs. 2 million as permanent alimony from the Defendant. In his original answer dated October 31, 2011, the Defendant countered by seeking a divorce on the grounds of the Plaintiff's malicious desertion and claimed what he termed as compensation.
10. The case was first fixed for trial for October 19, 2012. After this date, the Defendant sought to make a first amendment to his answer, which was accepted. The first amended answer, filed on October 28, 2012, was relatively uncontroversial as it merely substituted the word 'compensation'

with 'alimony. A replication soon followed and the trial was rescheduled for March 7, 2014-the 2nd date for trial.

The 2nd Amendment seeks to introduce Adultery

11. What triggered objections and appeals was the Defendant's attempt to make a second amendment to the amended answer through a motion dated January 29, 2014. In this amended answer, the Defendant introduced a new cause of action, alleging the Plaintiff's adultery with one Vithanage Don Ranjith Sirisena, and sought to add him as a Co-Defendant in the divorce action.
12. The Plaintiff objected to the said application and both parties were directed to file written submissions. The learned District Judge by his order dated 2nd June 2014 rejected the Defendant's application to further amend the answer on the following grounds;
 1. Pleadings cannot be amended more than once
 2. The Defendant had not disclosed the source of information of the claim of adultery he made in his 2nd application to amend the answer
 3. The Defendant is guilty of laches and thereby does not surpass the hurdle laid down in Section 92(2) of the Civil Procedure Code.
 4. The claim against the co-respondent is barred by prescription.
 5. The amendments sought would widen the scope of the action.
13. The main point of contention in the High Court was whether the District Judge had erred in law by rejecting the application to amend the answer after the date first fixed for trial on the basis that the case at hand did not fall within the ambit of Section 93(2) of the CPC. After considering the

arguments from both sides, the learned High Court Judges upheld the District Judge's decision, drawing on various judicial precedents.

14. The most significant of these was *Jayaratne v. Jayaratne and Another*¹ where Justice Gamini Amaratunga held that if a cause of action based on adultery arises after the Petitioner has filed their answer, it constitutes a separate and independent cause of action, and the rights of the parties must be determined as of the date of the plaint.²
15. The learned High Court Judges concluded that the District Judge had not erred in law. Under Section 93(2) of the CPC, an amendment to the pleadings can only be permitted if the court is satisfied that grave and irreparable injustice will occur if the amendment is denied, and that there has not been laches. Consequently, the High Court affirmed the District Court's decision, holding that the Petitioner was not entitled to amend the answer to introduce a new cause of action based on adultery.
16. This Court by a divided decision granted leave to appeal in this case on the questions of law set out in Paragraphs 17 (1) a, b, c of the Petition of June, 2015, but essentially the pith and substance of the questions is summarized in Paragraph 6 of this judgment.
17. I will not concern myself with the slew of cases that have sought to define the term “**the day first fixed for trial**” encapsulated in Section 93 of the CPC as amended by Act No. 9 of 1991. The learned Counsel for the Defendant accepted before this Court that “**the day first fixed for trial**” in

¹ (2002) 3 Sri.LR 331.

² See *Silva v Fernando* 15 N.L.R 499 (PC); *Sherieff v Marikkar* 27 N.L.R 349 at 350; *Eminona v Mohideen* 32 N.L.R 145 at 147; *Lenorahamy v Abraham* 43 N.L.R 68 at 69; *Kader Mohideen & Co Ltd v Nagoor Gany* 60 N.L.R 16 at 19; *Sirisena v Doreen de Silva and Others* (1998) 3 Sri.LR 197; *HNB v Silva* (1999) 3 Sri.LR 113; *Jayaratne v Jayaratne and Another* (2002) 3 Sri.LR 331.

this case was October 19, 2012 and the amendment in question was indeed sought to be introduced after that date. This is on top of his concession that the Defendant has to satisfy the stringent requirements of Section 93 (2). I would only refer to some seminal cases that focussed on Section 93(2).

18. The application of Section 93 (2) was discussed by Ranaraja J. in *Gunasekera and Another Vs. Abdul Latiff*³, 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."

19. In *Paramalingam vs. Sirisena and Another*⁴, Wigneswaran J. drew a distinction between "before the day first fixed for trial" and "on or after the day first fixed for the trial".

"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".

20. Moving forward, it is necessary to assess the merit of the proposed amendment against the thresholds that the Defendant is required to meet. Regarding the issue of whether multiple amendments can be made, as

³ (1995) 1 Sri LR 225 at 232.

⁴ (2001) 2 Sri LR 239.

highlighted by the learned High Court Judges, I would bear in mind that the first amendment in this case was not contested by the Plaintiff. While the case of *Gunasekera and Another v. Abdul Latiff (supra)* established that a court cannot permit more than one application for amendment, I take the view that this is not an inflexible rule. The Court's observation in that case was aimed at preventing unnecessary delays, but it should not be used to bar amendments that would facilitate the administration of justice and prevent multiplicity of litigation. Moreover, since the first amendment in this case was minor and accepted without objection from the Plaintiff, it would be overly rigid to refuse further amendments, provided that the relevant legal tests are met.

Non-disclosure of the source of information

21. In the motion that was filed before the District Court justifying the amendment on adultery, the Defendant brought to the notice of court that he had become aware of an adulterous relationship between the Plaintiff and the person sought to be made as a co-respondent. It was the implication of the motion that even when the Plaintiff left the matrimonial home on October 10, 2010, this adulterous relationship had existed. The Defendant stated that he acquired this information in November 2013 and the application for the 2nd amendment to the answer to bring in adultery was made on January 29, 2014.
22. In my view, even if the source of information remains anonymous, this could be verified at the trial and if the Defendant is disbelieved on his information, the new cause of action based on adultery will fail in the District Court. Therefore, there is no prejudice that faces the Plaintiff and *Jayaratne v Jayaratne* is no bar to the introduction of adultery by way of an amendment

in this case, as the facts in this case as alleged are distinguishable from *Jayaratne v Jayaratne*. Whilst *Jayaratne v Jayaratne* dealt with adultery after answer was filed in the case, it would appear that the allegation in this case is that the adultery existed at the time the plaint was filed on June 6, 2011.

23. In view of the fact that the Plaintiff is not going to be prejudiced by the amendment which will only shed light on the respective cases of the parties, I take the view that grave and irremediable injustice would ensue if this amendment is not allowed. If the allegation as averred by the Defendant is established, that will entitle the Defendant to secure damages against the co-respondent subject to the possibility that the assertions of the Defendant could be tested by the Plaintiff for their testimonial trustworthiness. As I said before, in the event that the allegation made by the Defendant turns out to be untrustworthy, unfounded and baseless, the cause of action based on adultery is bound to fail.
24. The learned High Court Judges make the point that the damages that would be sought against the co-respondent would be prescribed if the amendment was to be allowed. Section 15 of the Prescription Ordinance takes away divorce actions from the ambit of prescription and therefore, no such plea could be made to defeat a claim of damages against the co-respondent.
25. What constitutes laches within the ambit of Section 93 (2) has been extensively dealt with in the case law of this country and the doctrine of laches is based on the maxim that "*equity aids the vigilant and not those who slumber on their rights.*" The outcome is that a legal right or claim will be unenforceable or disallowed if a long delay in asserting the right or claim has prejudiced the adverse party.

26. The doctrine of 'laches' was extensively discussed in *Gunasekera v. Abdul Latiff (supra)* to mean slackness, negligence or neglect to do something which by law a man is obliged to do. The doctrine of laches in Courts of equity is not an arbitrary or technical doctrine. In *Biso menike v. Cyril De Alwis and Others*⁵ Sharvananda, J. (as he then was) quoted Ferris - Extra-Ordinary Legal Remedies - para 176;

"Laches is such negligence or omission to assert a right and taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party operate as a bar in a Court of equity.

27. In *Paramalingam vs. Sirisena and Another (supra)*, Wigneswaran J. 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".

28. Having regard to the promptitude with which the application for amendment has been made as soon as information was acquired as to the alleged adultery, I do not regard laches to be raised as an impediment to the adduction of the new cause of action and the addition of the alleged co-respondent.
29. On an overall consideration of the facts and law surrounding this case, I take the view that the amendment sought to be made must be allowed along with the addition of the alleged co-respondent to the case. Accordingly, I

⁵ (1982) 1 Sri LR 368.

set aside the order of the District Court dated June 2, 2014 and the judgment of the High Court dated May 11, 2015.

30. I direct that the learned District Judge allows the amendment sought to be made to the answer based on adultery and the consequent addition of a co-respondent. The learned District Judge is directed to give priority to this case as the interlocutory order made in the District Court has made a long and tortuous journey to this Court and the case requires expeditious disposal. Subject to these observations, we allow the appeal of the Defendant and answer the question of law in favour of the Defendant.

Judge of the Supreme Court

V. K. Malalgoda, PC. J

I agree,

Judge of the Supreme Court

Achala Wengappuli, J

I agree,

Judge of the Supreme Court