

LAW RELATING TO AMENDMENT OF PLEADINGS

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In a civil action, pleadings include plaint, answer and, in the event, answer contains a claim in reconvention, replication. Law permits to amend these pleadings in limited circumstances, within a specific period. The law relating to amendment of pleadings is set out in Section 93 of the Civil Procedure Code. Section 93 has been replaced by Act No 79 of 1988 and Act No 09 of 1991. Thus, the replacement brought to Section 93 by the Act no 9 of 1991 is now in force.

Section 93 as repealed by the Act no 9 of 1991 reads as follows.

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.

(2) On or after the day first fixed for the trial of the action and before final judgment, 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 no on other ground,

and that the party so applying has not been guilty of laches.

(3) Any application for amendment of pleadings which may be allowed by the court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the court may think fit.

(4) The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall be appended in the record of the action to the pleading amended. Every such addition, or alteration or omission shall be signed by the judge."¹

Purpose of the amendment brought to section 93

One of main objectives of the amendment brought to section 93 by Act No 9 of 1991 is to avoid unnecessary postponement of trials. The amendment clearly set out a bar against the power of amendment of pleadings on the day of trial and allows such amendments only on the ground specified in section 93 (2). This has been discussed in Kuruppuarachchi V Anderas². There the court held that, the

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¹ Section 93 of the Civil Procedure Code as amended by Act No 9 of 1991

² 1996 2 SLR 11

amendment was clearly intended to prevent 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 Trial. Further, in VipassiNayakaThero V JinaratneThero³ the court held that the object of the rules governing amendments is to obtain a correct issue between the parties. If a mistake has been made in an original pleading, there is no objection to a correction, provided no injustice is done to the other party. In Ratwatte V Owen⁴ Lawrie J expressed a similar view. In Mackinnons v Grindlay's Bank⁵ Sharvananda CJ held that the object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings.

Accordingly, the purpose of Section 93 is to avoid undue delay in trial and to identify the real dispute between the parties. However, court should not permit any amendments which cause an injustice to the opposite party as held in Darayani V eastern Silk Emporium Ltd⁶ and Senanayaka V Anthonez⁷.

Amendment is allowed only upon an application made by a party to the action

As per the amendment by Act No 9 of 1991, an amendment to a pleading is only allowed upon an application by a party to the action. The courts are of the view that, the amendment by Act No. 9 of 1991 to section 93 of the Civil Procedure Code has for the

first time taken away the power of court *ex mere motu* to amend pleadings (Gunasekera and another V. Abdul Latiff⁸ and Maseena V Sahud and another⁹).

Accordingly, the new amendment precludes court from exercising its power to amend pleadings in its discretion as vested to it, by repealing the words “the Court shall have full power of amending in its discretion” in the original section and by repealing the words “Court may.....amend all pleadings” in the amendment made to Section 93 of the CPC by act No 79 of 1988.

When can a party apply for amendment of pleadings?

Section 93 provides two instances where a party can apply for amendment of pleadings, i.e. before the first date fixed for trial and on or after the first date fixed for trial and before judgment.

Before the first date fixed for trial

Section 93 (1) as Amended by Act No 9 of 1991 provides that, "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”.¹⁰ Thus it is important to examine what is meant by “the day first

³ 66 CLW 43

⁴ 2 NLR 141

⁵ 1986 2 SLR 272

⁶ 64 NLR 529

⁷ 69 NLR 225

⁸ 1995 1 SLR 225

⁹ 2003 3 SLR 109

¹⁰ Section 93 (1) of the Civil Procedure Code as replaced by Act No 9 of 1991

fixed for trial". Section 80 of the Civil Procedure Code provides for fixing the date of trial.

In Ceylon Insurance Co. Ltd. V. Nanayakkara And Another¹¹ it was held that, 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.

Court is of the view that the day first fixed for trial could mean the day the trial began. In Karunaratne V Alwis¹² the court held that, "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". The same position has been taken in Siripura Hewawasam Pushpa v Leelawathie Bandaranayake and three others¹³ where the court held 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.

Accordingly, it is clear that the first date of trial means the day which the trial actually begun, and any amendment made prior to the date the trial was begun comes under Section 93(1).

On or after the first date fixed for trial and before judgment

However, section 93 (2) provides that, an amendment can be done on or after the day first fixed for trial and before final judgment. In fact,

Section 93 (2) itself provides two restrictions for such amendment. Hence, in order to amend the pleadings after the first day of trial, the party applying so must satisfy the court that a grave and irremediable injustice would cause if such amendment is not permitted and that the party is not guilty of laches. Further, the court is obliged to record reasons that above two conditions have been satisfied. Section 93 (2) read as follows.

"On or after the day first fixed for the trial of the action and before final judgment, 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 no on other ground, and that the party so applying has not been guilty of laches."¹⁴

In Kuruppuaracchi V Andreas¹⁵ G. P. S. De Silva CJ held 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 sub-section. Furthermore, it should be noted that the amendments permitted by section 93 (2) are the amendments required due to unforeseen circumstances which could not have been foreseen with reasonable diligence. In Avudiappan V. Indian Overseas Bank¹⁶ and Ceylon Insurance Co., Ltd. V. Nanayakkara and Another¹⁷, the court has taken up the same position. Furthermore, in the latter case the court specifically held that the application to amend pleadings by mistake or inadvertence

¹¹ 1999 3 SLR 50

¹² 2007 1SLR 214

¹³ 2004 3 SLR 162

¹⁴ Section 93 (2) of the Civil procedure Code as replaced by Act No 9 of 1991

¹⁵ 1996 2 SLR 11

¹⁶ 1995 2 SLR 131

¹⁷ 1999 3 SLR 50

can in no sense be regarded as necessitated by unforeseen circumstances.

The court is also in concern with the irremediable prejudice that can be caused to the other party by allowing an amendment. One of a good example is where the court held in **Gunasekera and Another V Abdul Latiff**¹⁸ that, “Once the two conditions are satisfied, the party making the application is required to satisfy the court that circumstances that warrant an amendment to pleadings under section 93 (1) also exist, namely, *that no irremediable prejudice will be caused to the respondents*, such an amendment will avoid a multiplicity of actions and facilitate the task of administration of justice. An obvious example of prejudice being caused to the opposing side is when the amendment would deprive the opposing party of the plea of prescription”.

Grave and irremediable injustice

The first ground enumerated in section 93 (2) permitting amendments on or after the day first fixed for trial is that the party so applying should satisfy the court that grave and irremediable injustice would be caused if the amendment is not permitted (**Ranaraja J in Colombo Shipping Co. Ltd V Chiraty Clothing Pvt. Ltd**¹⁹). The same dictum has been followed in **Ceylon Insurance Co. Ltd. V Nanayakkara**²⁰ and **Avudiappan v Indian Overseas Bank**²¹

Party applying should not be guilty of laches

The second condition of permitting an amendment after the first day fixed for trial is that the party applying should not be guilty of laches. Ranaraja J in **Gunasekera and another V Abdul Latiff**²² had analyzed broadly the word “Laches” by citing judicial dictionaries. Accordingly, it was held that, “The word ‘laches’ is a derivative of the French verb *Lacher*, which means to loosen. Laches itself means slackness or negligence or neglect to do something which by law a man is obliged to do. (Stroud's Judicial Dictionary 5th Ed Pg 1403) It also means unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon the principle *vigilantibus non dormientibus jura subveniunt*. The neglect to assert one's rights or the acquiescence in the assertion 'or adverse' rights will have the effect of barring a person from the 'remedy which he' might have had if he resorted to it in proper time (Mozley & Whiteley's Law Dictionary 10th Ed pg 260)”. Furthermore, it was held that, Laches means an unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon. However, the delay that can be explained does not spell laches.

In **Avudiappan V. Indian Overseas Bank**²³ it was held that Laches does not mean “deliberate delay” and it means “delay which cannot be reasonably explained”. A similar position has been taken up by Fernando J in **Lulu Balakumar v.**

¹⁸ 1995 1 SLR 225

¹⁹ 1995 2 SLR 97

²⁰ 1999 3 SLR 50

²¹ 1995 2 SLR 131

²² 1995 1 SLR 225

²³ 1995 2 SLR 131

Balasingham Balakumar²⁴. What is reasonable time and what will constitute delay will depend upon the facts of each case. The circumstances of the case such as the number of trial dates and the period which has been elapsed can be taken into account by courts in determining the reasonable time. However, the court must notice the impact of the delay on the other party.

However, Sharvananda J (as he was then) in **Biso Menika v Cyril de Alwis**²⁵ held that If the delay can be reasonably explained the court will not decline to interfere. Thus, the courts are of the view that delay alone will not bar a person from obtaining relief which he may be entitled to. But the court will grant relief only if the delay can be reasonably explained.

Accordingly, there are two equitable principles which the courts are in concern when it refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent **Paramalingam V. Sirisena and Another**²⁶

However, in one unreported case²⁷ Edussuriya J held that negligence and lack of vigilance on the part of the Lawyers for a party would not be covered by the provisions of Section 93(2) of the CPC.

Pleadings can be amended by way of addition, alteration, or omission

Section 93 (1) empowers the amendment of all pleadings in the action, by way of addition or alteration or of omission. However, it does not permit to change the character of the original cause of action. In **Gunasekera and another V Abdul Latiff**²⁸ the court discussed whether correction of a clerical or typographical error is comes within the meaning of an amendment under section 93.

Although the law permits the amendments of pleadings by way of additions, alterations and omissions, the court should not in any event allow the plaintiff to file a new plaint instead of an amended plaint. In **Lokkumarakkala V Sri Lanka Telecom**²⁹ the court of Appeal held that the District Court erred in allowing the plaintiff to file an amended plaint consists of 13 paragraphs instead of the original plaint consists with 19 paragraphs.

Further, in several instances, it was held that the court allows amending the caption of the plaint. The underlying principle of this rule is that the right of a party must not be refused merely based on mistakes. Thus, in **Velupillai V the Chairman, Urban Council Jaffna**³⁰ the court permits to amend the Caption. In **Perera V Geekiyana**³¹ the court permits the plaintiff to cut off the word “Mt. Lavinia” and enter the Word “Colombo” instead. Furthermore,

²⁴ SC 125/94 SCM 11.9.95

²⁵ 1982 1 SLR 368 at 378

²⁶ 2001 2 SLR 239

²⁷ CALA 55/2000 (D.C. Colombo Case No. 8975/ RE) decided on 08.09.2000

²⁸ 1995 1 SLR 225

²⁹ 2008 BLR Vol. XIV P. 237

³⁰ 39 NLR 464

³¹ 2007 1 SLR 202

in Parsons V Abdul Cader³² it was held that the court has the power to substitute the right name of a person even after the decree, in the event where a judgment has been entered under a wrong name.

No amendment to convert the cause of action or change one character to an inconsistent character

Although section 93 permits to amend the pleadings by way of addition, omission, or alteration, it does not in any event allow a party to convert an action of one character into an inconsistent character. Regarding this situation, it is important to pay attention to proviso of Section 46 (2) of the Civil Procedure Code which reads as follows.

“Provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another inconsistent character”³³

The above rule is well established in Wijewardene v. Lenora³⁴ where the court held that "An examination of the provisions of Chapter VII of the Civil Procedure Code discloses that the power conferred by section 93 is subject to one limitation. Section 46 (2) provides that before a plaint is allowed to be filed, the Court may refuse to entertain it for any of the reasons specified therein and return it for amendment provided that no amendment shall be allowed which would have the effect

of converting an action of one character into an action of another or inconsistent character. If before a plaint is allowed to be filed an amendment which would have the effect of converting an action of one character into an action of another or inconsistent character is not permitted, the power conferred on the Court by section 93 for amending the plaint after it is filed cannot be greater."

Same view had been taken by the court in Ekanayaka V Ekanayaka³⁵ and it was held that a plaint filed in an action for definition of boundaries cannot be amended so as to convert the action of declaration of title to land. Thus, one must be mindful of the bar set out in proviso to section 46 of the Civil Procedure Code against amendments which would have the effect of converting an action of one character into an action of inconsistent character.

Furthermore, Section 93 does not permit a party to convert the cause of action of the first plaint into another fresh cause of action. In Hatton National Bank V Silva and Another³⁶ where the plaintiff brought a new cause of action against both defendants for damages and alters the scope and nature of the action, the court held that the plaintiff cannot amend the plaint to include a fresh cause of action which arose after the institution of the action. The court expressed a similar view in Thirumany and another v. Kulandavelu³⁷ and Lakdawalle v. Muriyiah³⁸. In Kuruppuarachchi V Andreas³⁹ the court does not permitted the

³² 42 NLR 383

³³ Proviso to Section 46 (2) of Civil Procedure Code

³⁴ 1958 60 N.L.R. 457 at 483

³⁵ 63 NLR 188

³⁶ 1999 3 SLR 113

³⁷ 66 NLR 285

³⁸ 67 NLR 47

³⁹ 1996 2 SLR 11

defendant to take up the defense of adultery by amending the answer in the second day of trial stating that the amendments as per section 93 of the CPC does not in any event conferred the power to introduce a new cause of action instead of the original.

Further, in Uberis V Jayawardne⁴⁰ the court held that the subject matter of the case must be the same. It was further held that matter of one land cannot be change into another land by amending the plaint.

Plaint must be amended after a party added as per Section 18 (1) of the CPC

Section 18 (1) of the Civil Procedure Code permits the addition of parties whose presence is necessary for adjudication process. When a defendant is added in such manner, the provisions set out in Section 21 of the Civil Procedure Code to be read with Section 93 of the Civil Procedure Code should be applied. It states as “Where a defendant is added, the plaint shall, unless the court direct otherwise, be amended in such manner as may be necessary and a copy of amended plaint shall be served on the new defendant and on the original defendants”⁴¹

Accordingly, when a defendant is added, then the plaintiff must amend the plaint stating the reasons for such addition and, if there are any rights or interests of the added party to the subject matter, then describing such rights and interests. In requires the judge to sign all additions, omissions and alterations done in

AtalugamageHerathPrasanna Silva v John Arul Rajah⁴² the court held that, once a party is added, the next inevitable and logical step would be an amended plaint.

Section 93 (3) and 94 (4) of the CPC

Section 93 (3) Civil Procedure Code reads as “Any application for amendment of pleadings which may be allowed by the court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the court may think fit”.⁴³Hence, when an application made for amendment of pleadings, the court has power to make an order for payments of costs and for postponement of trial.

Section 93 (4) of the Civil Procedure Code states that “The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall be appended in the record of the action to the pleading amended. Every such addition, or alteration or omission shall be signed by the judge.”⁴⁴

Accordingly, the court can make the amendments after they are permitted on the plaint, answer or replication and continue the proceedings without delay. If the court is not convenient is making such immediate amendments, then the court can give a further date for filing of a copy of the pleadings as amended. The section

pleadings. However, the court should not in any event permit more than one

⁴⁰ 62 NLR 217

⁴¹Section 21 of the Civil Procedure Code

⁴² C. A. L. A. 41/ 2001- DC Colombo 17771- CA Minutes 27. 96. 2002

⁴³ Section 93 (3) of Civil Procedure Code as repealed by Act No 9 of 1991

⁴⁴ Section 93 (4) of Civil Procedure Code as repealed by Act No 9 of 1991

application for amendment of pleadings in
a case as held in *Gunasekara and another*
*V Abdul Latiff*⁴⁵

⁴⁵ 1995 1 SLR 225