

**SUMANAWATHIE KARUNARATNE AND OTHERS
VS
ARIYARATNE**

COURT OF APPEAL
SOMAWANSA, J.
MS. EKANAYAKE, J.
CALA 380/2000
D. C. AVISSAWELLA 20258/L,
DECEMBER 3, 2004.

*Civil Procedure Code - Section 146 - Section 146(2)- Amendment 9 of 1991-
Section 93(2) - Must Issues be restricted to Pleadings?- Discretion of Court to
permit fresh Issues after case has commenced? - Raising of Issues on a fresh
cause of action that had not been pleaded - Is it permissible?*

HELD-

- (i) The framing of Issues is not necessary restricted to the pleadings.

Per Somawansa J.,

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

- (ii) The grievance of the Plaintiff Petitioner was that the Defendant Respondent had encroached upon his land and prayed for ejection of the Defendant Respondent therefrom, but the superimposition establishes that the Defendant Respondent had not encroached but it is the Plaintiff Petitioner who had encroached upon a portion of land owned by the Defendant Respondent.
- (iii) The Plaintiff by the fresh issues, is seeking to claim title to another portion of the land owned by the Defendant Respondent- in such an instance the Issues if allowed would cause material prejudice to the defendant Respondent.
- (iv) No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet.

Application for Leave to Appeal from an order of the District Court of Avissawella.

Cases referred to :

1. *Aymil Kareeza vs Jayasinghe* - 1986 1 CALR 109
2. *Liyanage vs Seneviratne* - 1986 1 CALR 306
3. *Bank of Ceylon vs Chelliahpillai* - 64 NLR 25
4. *Silva vs Obeysekera* 24 NLR 97
5. *Duraya vs Siripina* - 1908 4 ACR 125
6. *Fernando vs Soysa* - (1899) 2 NLR 40
7. *Attorney General vs Smith* (1906) 8 NLR 229
8. *Seneviratne vs Kandappa* (1917) 20 NLR 60
9. *Jayawickrema vs Amarasuriya* - 1918 - NLR 289
10. *Velupillai vs The Chairman, Urban District Council* 39 NLR 464 at 465

11. *Wickrematilake vs Marikkar et al* - 2 NLR 9 at 12.
12. *In Re Chenwell* CH. D. 9506
13. *Colombo Shipping Co. Ltd., vs Chirau Clothing (Pvt) Ltd.*, 1995 2 Sri LR 9
14. *W. M. R. Candappa vs Madirampillai Ponnambelampillai* - SC 32/89 CAM 19.03.1993 - DC 13964/L

P. A. D. Samarasekera, P. C., with *Upali de Almeida* for Plaintiff Respondents
Gamini Marapona P. C., with *Navin Marapona* and *Ms. Nishanthi Mendis* for
Defendant Respondents.

cur.adv.vult.

December 3, 2004.

Andrew Somawansa, J.

This application has been filed by the plaintiff - petitioner seeking to canvas an order of the learned Additional District Judge of Avissawella dated 24.11.2000 marked X10 wherein the learned Additional District Judge rejected issue Nos. 2, 3, 4, 5, 7, 8, 10, 11 and 12 raised by the plaintiff-petitioner.

The main objection taken by the defendant - respondent to these issues was that the plaintiff - petitioner was seeking to raise issues on a fresh cause of action that had not been pleaded in the plaint and that he was in effect trying to circumvent the effect of an earlier order of the learned Additional District Judge dated 20.06.2000 marked X6 wherein he had rejected a replication filed by the petitioner. The plaintiff - petitioner being aggrieved by the aforesaid order dated 24.11.2000 sought to have it set aside by his application dated 11.12.2000 made to the Court of Appeal. His application for leave to appeal was entertained and was taken up for inquiry on 12.02.2002. After oral submissions were concluded both counsel tendered written submissions. The order was finally delivered on 12.11.2002 wherein the Court observed that the application filed on behalf of the deceased plaintiff- appellant did not include a specific prayer for the grant of leave to appeal from the order of the District Court and that the failure to comply with this fundamental requirement precluded the Court of Appeal

from considering the validity of the impugned order and therefore the application was dismissed in limine with costs.

The appellants were granted special leave to appeal from the order of the Court of Appeal on a question of law. The Supreme Court by its decision dated 25.11.2003 allowed the appeal and the judgment of the Court of Appeal was set aside. Directions were also given for another Bench to hear the application on its merits after permitting the appellant to amend the prayer by adding the form of the relief claimed.

Accordingly when this application was taken up for hearing both parties informed Court that they have already tendered written submissions on this matter and moved that order be made on the written submissions already tendered.

The relevant facts are the original plaintiff instituted the instant action in the District Court of Avissawella seeking a declaration of title in respect of land and premises depicted as lot 5C in Plan No. 1148/5 dated 26.12.1885 prepared by Loganathan, Licensed Surveyor morefully described in the second schedule to the plaint containing an extent of 7.5 perches, ejection of the defendant- respondent and those under him therefrom. He also prayed for an enjoining order, interim and permanent injunction preventing the defendant- respondent from carrying on any activity on the land. The original plaint averred that the defendant - respondent who is said to be the reputed owner of the land adjacent to the aforesaid land in suit and acting in violation of his rights and has encroached upon his land.

The defendant - respondent while denying the aforesaid averments denied having encroached upon the plaintiff - petitioner's land and claimed title to lot 06 in the aforesaid Plan No. 1148 in extent 5.25 Perches. In paragraph 8 of the plaint the original plaintiff has admitted this fact.

The defendant - respondent upon a commission obtained from Court had spa Plan No. 151 dated 16.09.1997 prepared by M. D. P. Jayalath Kumara, Licensed Surveyor marked X4. On this plan lot 5C claimed by the plaintiff - petitioner and lot 06 belonging to the defendant - respondent in Plan No. 1148 were superimposed. The superimposition shows that lot 5C in plan no. 1148 consist only of lot 1 in Plan no. 151 marked X and that lots 2, 3, 4, 5, 6, and 7 in the said plan no. 151 fell within lot 06 in plan no.

1148. Thus the superimposition establishes the fact that the defendant - respondent had not encroached on the land claimed by the plaintiff petitioner but that it was the plaintiff - petitioner who had in fact encroached on the land claimed by the defendant - respondent viz : lots 2, 3 and 4 of Plan No. 151 marked X.

The defendant - respondent filed an amended answer seeking for an interim injunction restraining the plaintiff - petitioner from building on the aforesaid encroached portions depicted as lots 2, 3 and 4 in Plan No. 151 marked X4 and after due inquiry the said injunction was granted against the plaintiff petitioner on 03.04.1998. Thereafter on 09.03.2000 the plaintiff - petitioner filed a replication but the defendant - respondent objected to the same and the learned District Judge by his order dated 14.06.2000 rejected the replication of the plaintiff - petitioner.

When issues were framed on 25.07.2000 on behalf of the plaintiff petitioner issues based on Plan No. 151 marked X4 were raised both in relation to the land described in the second schedule to the plaint and also upon prescriptive possession. These issues were objected to on the basis that they do not arise upon the plaint and that the said issues are based upon the rejected replication. After submissions by both parties the learned District Judge by his order dated 24.11.2000 rejected issues 2, 3, 4, 5, 7, 8, 10, 11 and 12 objected to on behalf of the defendant - respondent. It is this order that the plaintiff - petitioner is seeking to canvas now.

It is submitted by the President's Counsel appearing for the plaintiff - petitioner that although the original plaintiff claimed rights into and upon the allotment of land and premises morefully described in the second schedule to the plaint yet the fact remains as shown in plan 151 marked X4 that he is in possession of lots 1 to 4 in the said Plan No. 151 until the date of the plaint without any objection from any person whomsoever and more particularly from the defendant - respondent. In the circumstances he submits that it is apt to consider Section 146 of the Civil Procedure Code which deals with the framing of issues which reads as follows :

146. (1) "On the day fixed for the hearing of the action, or on any other day to which the hearing is adjourned, if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue and the court shall proceed to determine the same."

- (2) "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".

He further submits that it is manifest that :

"In the instant case Plan No. 151 and the Report annexed thereto would reveal, Lots 1-4 are in possession of the original plaintiff. The main question for consideration by the Original court was whether the original plaintiff is entitled to claim Lots 1-4 in the said Plan. A perusal of the issues proposed on behalf of the original plaintiff shows that they were framed with a view to ascertaining this position."

In this respect he has cited a number of decisions to which I would refer briefly :

In the case of *Aymil Kareeza vs. Jayasinghe*⁽¹⁾ it was held :

"The framing of issues is not necessarily restricted by the pleadings. Again in the case of *Liyanage vs. Seneviratne*⁽²⁾ was held that issues are not confined to matters specifically pleaded.

In the case of *Bank of Ceylon Vs. Chelliahpillai*⁽³⁾ the rule was to the effect that a case must be tried upon the issues on which the right decision appears to the Court to depend and it is well settled that the framing of such issues is not restricted by pleadings.

No express provision is made in our Code for salutary machinery of "summons for directions" as in England or for pre-trial proceedings as in America. Nevertheless, and indeed for this very reason, Section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which could arise when precise nature of the dispute is not clarified before the evidence is recorded. The defendant's pleadings were defective, and the plaintiff (let it be conceded) has not been as vigilant as she should have been to protect herself against surprise. But it was still the Judge's

duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge has ascertained for himself "The proposition of fact or of law" upon which the parties were at variance. This was especially necessary where the administratrix of an estate was confronted with serious allegations against a person who had never had an opportunity, when alive, to answer personally to the charges.

The discretion of the judge to permit fresh issues to be formulated after the case has commenced was judicially recognized in the case of *Silva vs. Obeysekera*⁽²⁾ at 107.

Counsel for the plaintiff raised the objections that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken the learned District Judge disallowed the issues. Here the learned Judge was certainly led into a mistake. No doubt it is a matter with 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 interest of justice, and it is certainly not a valid objection to such course being taken that they do not arise on the pleadings. See *Duraya vs. Siripina*⁽³⁾, *Fernando vs. Soyza*, *Attorney General v. Smith*⁴ *Seneviratne vs. Kandappa*⁽⁷⁾ see also *Jayawickrama vs. Amarasuniya*⁽⁸⁾. It would undoubtedly have been better had the learned judge added these issues in such terms as he thought just.

The case of *Velupillai vs. The Chairman, Urban District Council*⁽¹⁰⁾. A reference which has been used extensively to drive home the necessity to take a liberal rather than a narrow and constricted view of the role of Courts. "It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure, and the congestion in the Courts have all combined to deprive him of his cause of action and I for one refuse to be a party to such an outrage upon justice. This is a Court of Justice, it is not an Academy of Law"

Finally in the case of *Wickrematileke vs. Marikar et al*⁽¹¹⁾ at 12.

"I commend to his attention, as to that of all other Judges of first instance, the observation of Jessel, M. R. in re *Chenwell*⁽¹²⁾, "It is not the duty of the Judge to throw technical difficulties in the way of the

administration of justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise".

I have no reason to disagree with the Presidents Counsel that the judgments quoted above and the passages referred to therein no doubt establish in full measure that the District Court was not only empowered but also duty bound to raise issues that arose for consideration. However, I am unable to agree with the learned President's Counsel that the judgments quoted above or the passages referred to would have any bearing on the issue at hand. For as submitted by the learned President's Counsel for the defendant - respondent that there are other provisions of the Civil Procedure Code also relevant and applicable to the issue at hand.

The main objection taken by the learned President's Counsel for the defendant- respondent was that the plaintiff - petitioner was trying to raise issues on a fresh cause of action that had not been pleaded in the plaint and that the plaintiff - appellant was in effect trying to circumvent the effect of an earlier order of the learned District Judge rejecting a replication filed by the plaintiff- petitioner. I think there is force in this argument. It is to be noted that the plaintiff - petitioner came to Court claiming a declaration of title and ejection of the defendant - respondent from the land depicted as lot 5C in plan No. 1148 in extent 7.5 perches. The defendant - respondent having denied that he encroached upon the plaintiff - petitioner's land claimed title to lot 06 depicted in the aforesaid plan 1148 in extent 5.25 perches. It is admitted in the plaint that the defendant respondent was in fact the owner of the said lot 06. On a commissions issued by Court plan No. 151 marked X4 was prepared and on that plan lot 5C claimed by the plaintiff - petitioner and lot 06 belonging to the defendant - respondent as depicted in plan no. 1148 was superimposed. As stated above the superimposition shows very clearly that lot 5C in plan 1148 consists only of lot 01 in plan no. 151 marked X4 and that lots 2, 3, 4, 5, 6 in plan no. 151 clearly fell within lot 06 in plan no. 1148. In short, superimposition establishes the fact that the defendant - respondent had not encroached on the land claimed by the plaintiff- petitioner but that the plaintiff - petitioner has in fact encroached upon a portion of the defendant- respondent's land viz. lots 2, 3 and 4 in plan no. 151 marked X4. On a perusal of the record, it is to be see the defendant-respondent filed his amended answer wherein

he moved Court for the issue of an interim injunction against the plaintiff-petitioner restraining him from building on the encroached portion depicted as lots 2, 3 and 4 in plan no. 151 marked X. After due inquiry by order dated 03.04.1998 the Court granted an interim injunction as prayed for by the defendant - respondent. Thereafter, no steps were taken by the plaintiff - petitioner to amend his pleadings so as to claim any portion of the encroachment depicted as lots 2, 3 and 4, in plan no. 151 which clearly fell outside the land described in the schedule to the plaint. However, in a replication filed by the plaintiff - petitioner on 09.03.2000 sought to claim the aforesaid lots 2, 3, and 4 in plan no. 151 marked X which was 1.24 Perches in extent not claimed in the plaint. The defendant - respondent objected to the said replication being accepted and the learned Additional District Judge by his order dated 14.06.2000 upheld the objections and rejected the replication filed by the plaintiff - petitioner. The plaintiff - petitioner did not seek to canvas the aforesaid order of the learned Additional District Judge.

At the trial, the plaintiff - petitioner once again attempted to make a claim to the aforesaid lots 2, 3 and 4 in plan no. 151 marked X4 by raising issues 2, 3, 4, 5, 7, 8, 10, 11 and 12. The defendant - respondent objected to the aforesaid issues on the basis that if these issues were permitted to stand it would permit the plaintiff - petitioner to set up a claim outside the scope of his original action in as much as the schedule to the plaint confined itself to lot 5C in plan no. 1148 in extent 7.5 perches only. It appears to me that the Additional District Judge by his order dated 24.11.2000 quite correctly rejected the aforesaid issues for if the plaintiff - petitioner was allowed to raise the aforesaid issue, it would be allowing him to raise issues on an unpleaded cause of action.

It is contended by the counsel for the defendant - respondent that prior to Act No. 09 of 1991 which repealed the original Section 93 of the Civil Procedure Code, Courts were very willing in most cases to allow issues that did not arise from the pleadings, for the reason that they had a very wide discretion to allow parties to subsequently amend the pleadings to incorporate those matters referred to in the issues and that all these changed in the light of the amendment of Section 93 of the Civil Procedure Code. In support of this submission counsel has cited the case of *Colombo Shipping Co. Ltd., vs. Chirayu Clothing (pvt) Ltd.*,⁽¹³⁾ where it was held that "Amendments on or before the first date of trial can now be allowed only in

a very limited circumstances, namely when the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party is not guilty of laches". I would say this is sound reasoning.

As stated above, it was submitted by counsel for the plaintiff - petitioner that it is manifest from Section 146(2) quoted above that the Court is entitled to determine issues not only upon the allegations in the plaint or in answer to interrogatories delivered in the action but also upon the contents of documents produced by either party and after such examination of the parties as may appear necessary. The purpose of this section evidently is to ascertain upon what material propositions of fact or of law the parties are at variance. The intention of the legislature was to empower the Court to proceed to record the issues on which the right decision of the case appears to the Court to depend. He further submits that in the instant case as plan no. 151 and the report annexed thereto would reveal lots 1 to 4 are in the possession of the original plaintiff. The main question for consideration by the original Court was whether the original plaintiff is entitled to claim Lots 1 to 4 in the said plan A perusal of the issues proposed on behalf of the original plaintiff shows that they were framed with a view to ascertain this position. I am unable to agree with this submission for the reason that the case enunciated by a party must reasonably accord with its pleadings. No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet as was held in *W. M. R. Candappa vs. Madirampillai Ponnambalampillai*²⁴. I have no hesitation to agree with the above principle laid down in that case by G. P. S. de Silva, C. J. and in any event, I am bound to follow the aforesaid principle.

Applying the aforesaid principle to the instant action, it is to be seen the plaint confined itself to lot 5C in plan no. 1148 in extent 7.5 Perches only as described in the schedule to the plaint. The prayer for the plaint reads as follows. :

එහෙයින් මැමිණිලිකරු හරු අධිකරණයෙන් ඉල්ලා පිටිනුයේ.

- (අ) මමිහි සහක දෙවන උපලේඛනයෙහි සවිස්තරව දැන්වෙන දේපල පමිතව මිමි බවට ප්‍රකාශපත් ද.
- (ආ) මමිහි අධිකරණයෙන් ලබාගත් කොමිසමින් පෙන්නුම් කොකරන දුටුතු දැනු මැමිමි වලින් වින්විකරු සහ මහු යටතේ පිටින යේවකයින්, නියෝජිතයින්, සහ අනෙකුත්

- සියරම් අය තොරතුරු එහි තොටපිටල කැනීම සහ ඉදිකිරීම් ඉවත් කරන නියෝගයක් දානය කරන ලෙසද.
- (ඇ) මෙහි පහත දෙවන උපලේඛනයෙහි දැක්වෙන දේපලෙහි කැනීම්, ඉදිකිරීම්, කැපීම් සහ ඉවත් කිරීම් වලක්වාලන ස්ථිර කහනම් නියෝගයක් ද.
 - (ඈ) ඉහත (ඇ) හි සඳහන් ස්ථිර කහනම් නියෝගය නිකුත් කරන තෙක් මෙහි පහත දෙවන උපලේඛනයෙහි සවිස්තරව දැක්වෙන දේපලෙහි කැනීම්, ඉදිකිරීම්, කැපීම් සහ ඉවත් කිරීම් වලක්වාලන අතුරු කහනම් නියෝගයක් ද.
 - (ඉ) ඉහත (ඈ) හි සඳහන් අතුරු කහනම් නියෝගය නිකුත් කරන තෙක් මෙහි පහත දෙවන උපලේඛනයෙහි සවිස්තරව දැක්වෙන දේපලෙහි කැනීම්, ඉදි කිරීම්, කැපීම්, සහ ඉවත් කිරීම් වලක්වාලන වාරතා නියෝගයක් නිකුත් කරන ලෙස ද
 - (උ) නඩු භාජන, සහ
 - (ඌ) හරු අවිසරණයට අනෙකුත් අයිතීන් සහනයක් ද සඳහා විත්තිකරුවා විරුද්ධව නඩු කීර්ගුවක් වේ."

The Second schedule to the plaint reads as follows :

දෙවන උපලේඛනය

ඉහත කී අවස්ථාවේලේ, අවස්ථාවේලේ පළාත් ආණ්ඩු සහ සීමාව තුළ කොළඹ පාරේ, පිහිටි වර්පහම් අංක 3 දරන තොටතොට වත්ත නැමැති ඉඩමේ එස්. ලෝකනාදන් ඒතින්දේරු මහතා පැය 1148/5 හා 26.121963 දින දරන සැලැස්ම ප්‍රකාර බෙදා වෙන් කළ අංක 6 ඒ දරන කැබැල්ලට මායිම් : උතුරු නැගෙනහිරට : කොළඹ පාර ද, දකුණු නැගෙනහිරට : ලොව් 6, 6 ඒ සහ 3 ඒ දරන කැබැල්ලි ද දකුණු බස්නාහිරට : පාරද, උතුරු බස්නාහිරට : ලොව් රජ් ද, යන මායිම් තුල පිහිටි පර්චස් කැපී දහම් සහ (අක්. 0, රු. 0, පර්. 7.5) විශාල ඉඩමේ පිම් සහ එම අයිති සියළු දේද වේ.

Having prayed for the aforesaid relief can he also set up a claim in respect of portion of the land owned by the defendant - respondent depicted as lot 06 in plan no. 1148 in respect of which there was no claim whatsoever in the pleadings of the plaintiff - petitioner. In fact grievance of the plaintiff-petitioner was that the defendant - respondent had encroached upon his land depicted as lot 5C in extent 7.5 perches and prayed for ejectment of the defendant - respondent therefrom, but the superimposition established otherwise that the defendant-respondent had not encroached on the plaintiff-petitioner's land but it is the plaintiff-petitioner who had encroached upon a portion of the land owned by the defendant-respondent. It appears that now in addition to lot 5C in extent 7.5 perches the plaintiff respondent is seeking to claim title to 1.24 perches and of the Land owned by the defendant respondent by means of raising the aforesaid issues 2, 3, 4, 5,

7, 8, 10, 11 and 12 which claim is a new cause of action not pleaded in the plaint. In other words, having come to Court on the basis that the defendant-respondent has encroached on his land the plaintiff-petitioner now claims that he has encroached on the defendant-respondent's land and thus is attempting to set up a claim in respect of portions of the defendant-respondent's land which if allowed I would say would cause material prejudice to the defendant-respondent.

For the above reasons, I am of the view that the plaintiff-petitioner cannot succeed in his application and accordingly this application will stand dismissed with costs fixed at Rs. 10,000.

MS. EKANAYAKE, J.—I agree.

Application dismissed.
