AMENDMENT OF PLEADINGS-

synopsis of discussion held on 16.11.2015 at the Judges Institute

The purpose of amendment of pleadings is to facilitate the proper adjudication of the disputes. The provisions relating to amendment of pleadings are spelt out in Section 93 of the Code. Quite importantly, the original Section 93 was amended twice once by Act No. 79 of 1988 and then by Act No.9 of 1991. The liberal approach towards amendment of pleadings was restricted by the amendment. The object, the Legislature apparently aimed at achieving by introducing amendments to section 93 is to cut short delay in the disposal of civil suits. This is a warning sounded to caution the bar against negligence committed in drafting pleadings. Hence, the Lawyers must be extremely careful in the preparation of pleadings. In the light of the stringent provisions of the law now in force, it is of utmost importance that lawyers are extremely cautious attitude at the point of drafting pleadings. However, it may so happen that matters having a bearing on the case, may come to light at a subsequent stage of the proceedings or it could well be that a party might by inadvertence omit to include a material fact in the original pleadings. The primary motive in enacting Section 93 in the amended form is to cater to the needs of such instances. However, in the proper exercise of the discretion the court has to be on its guard to ensure that no prejudice is caused to a party by reason of the court having allowed an amendment.

There may not be much of a difficulty to comprehend the need to amend the pleadings before the case is first fixed for trial. In terms of subsection (1) of section 93 the court is vested with full power to allow amendments of pleadings in its discretion, by way of addition, or alteration, or of omission.

The difficulty arises only when an application is made for amendment of pleadings after the case is first fixed for trial. In such an instance, the person who seeks an amendment of pleadings will be given the green light only upon the court being satisfied, for reasons to be recorded, that grave and irremediable injustice will be caused if such amendment is not permitted and that the party so applying has not been guilty of laches. If amendments are allowed the court has a discretion to impose terms. The mode of amending pleadings is set out under subsection (4).

The discretionary power to amend pleadings must be exercised subject to the limitations set out in Section 46(2) of the said Code and that no amendment should be permitted which has the effect of converting an action one character into an action of another or inconsistent character. JAYASIRI EDIRISINGHE VS CITY PROPERTIES (PVT) LTD.., S.C.H.C.L.A. 18/08, H.C. CIVIL) 47/2006(01)

The principle by which a Court ought to be guided in deciding to alter pleadings is that the alteration will make the real issues clear. RATHWATTE V. OWEN 2 NLR 141

A bonafide amendment which does not cause prejudice to the other party should be allowed. in CASIM LEBBE V. NATCHIYA 21 NLR 205 In VIPASSI NAYAKE THERO VS. JINARATHANE THERO 66 CLW 43, it was held that there should not be an objection to a correction sought to be made facilitating the court to identify the real issue between the parties. This principle should however operate subject to the condition that no injustice is done to the opposite party.

In the case of LEBBE VS. SANDANAM 64 NLR 461 a Divisional Bench considered the rules applicable in the case of amendment of pleadings and stated that the court should not allow an amendment in the following instances:

a) If the amendment sets up a new case.
b) If the amendment converts an action of one character into an action of another character.
c) If the amendment has the effect of defeating an objection based on prescription made by the other party.
d) If the amendment adds a new cause of action.
e) An amendment prejudices the rights of the opposite party.
f) If the amendment changes the substance and the essence of the original action.

In UBERIS VS JAYAWARDENE 62 NLR 217 it was laid down that an action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings. The principle of Lawdiscussed in Abeywardene v. Euginahamy 1984 2 SLLR 231 is quite important. It is in that case emphasis was made to the age old concept that belatedness of the application for amendment is not a ground for refusing the application AS FAR AS the Amendment of the plaint does not seek to widen the scope or alter the character of the action and No new cause of action is averred. Merely seeking to elucidate the title in the original plaint BY THE AMENDMENT SHOULD BE PERMITTED

The use of the machinery to amend pleadings, should not be permitted in the conversion of an action of one character to that of another. Accordingly, a plaint filed in an action for definition of boundaries cannot be amended so as to convert the action to one of declaration of title to land. EKANAYAKE V. EKANAYAKE 63 NLR 188

In ODIRIS SILVA & SONS LTD Vs JAYAWARDENE 55 NLR 335, The plaint was filed within the period of limitation, but the defendant was wrongly named as " C. A.

Odiris Silva and Sons Oil Mills," and not " C. A. Odiris Silva and Sons, Limited. After the expiry of the period of limitation, the caption of the plaint was amended by insertion of the word "Limited " immediately after " C. A. Odiris Silva and Sons ". It is contended for the defendant company that the action against the company must be taken to have been instituted only upon the amendment of the caption of the plaint and that the plea of prescription should therefore have been upheld. The learned judge's rejection of the plea is based upon a finding that it was the defendant company, on whose behalf its manager had bought the drums from the plaintiff, that the plaintiff intended to sue, though the plaint had given the defendant a wrong description. This is a finding of fact which, it seems to me, it was open to the learned judge to reach upon the evidence, and in this view of the facts no objection can be taken to the order allowing the plaintiff to amend the caption of the plaint.

The plaintiff designated the chairman of the urban Council as the defendant and later by an amendment sought to bring in the urban Council in place of the inadvertently named defendant. It was held that the amendment is justifiable. VELUPILLAI V. THE CHAIRMAN, URBAN DISTRICT COUNCIL 1[(1936) 39N.L.R. 464].

For a different approach adopted by court not allow an amendment which defeats a plea of prescription the decision in WADUGANATHAN CHETTIAR Vs SENA ABDUL CASSIM, 54 NLR 185 may be useful. It was held in that case that A Court will refuse to allow a plaint to be amended so as to include a new cause of action if such amendment, by its relation back to the date of the original plaint, is prejudicial to a plea of prescription which may be raised by the defendant in respect of the new cause of action.

In DE ALWIS V. DE ALWIS - 76 NLR 444 it was laid down as a rule that a Court will not allow to set up a claim by an amendment of the plaint if a fresh claim would be barred by prescription at the date of the application to amend the plaint. However, where there are special and peculiar circumstances which require the amendment to be ordered in the interests of justice the provisions of section 93 of the Civil Procedure Code are wide enough to allow such an amendment.

An important decision on this matter is reported in 58 NLR 169. In that case, Plaintiff sued the defendant on the basis that the defendant, was an over holding lessee by atonement. Defendant admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land in question. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment upon the footing that his rights of ownership had been violated. The plaintiff’s attempt to amend the plaint failed as the court took

the view that the amendment would cause prejudice to the defendant's plea of prescriptive possession. – (PATHIRANA VS JAYASUNDARA 58 NLR 169)

Fernando v. Fernando (74 NLR 57) is a decision that laid down the rule that objection relating to the want of jurisdiction in a Court to hear a case may be waived by the defendant, if the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts.

After the plaintiff's case was closed and after the defendant and two witnesses had given evidence the trial Judge allowed an application made by the defendant to amend the answer in order to raise the plea that the Court had no jurisdiction to try the case as the dispute had not been referred to the Conciliation Board and no certificate from the Chairman had been annexed "to the plaint as required by section 14 (1) (a) of the Conciliation Boards Act. Having regard to the prejudice to the plaintiff and the late stage at which the amendment of the answer was sought to be made, the defendant was precluded by delay and acquiescence from raising the objection to jurisdiction and that she had in fact waived it.

SAMARASINGHE VS PANNASARA THERA 53 NLR 271 The two plaintiffs, who were Buddhist monks, sought to vindicate title to a land in their personal capacity on the footing that it was their private pudgalika property. During the trial, however, it appeared that the land in question was the Sanghika property of a Vihare. The 2nd plaintiff, thereupon, claimed to vindicate title to the land, not in his personal capacity as owner, but on behalf of the temple. It was held that it would be improper to permit the whole nature and scope of the action to be altered. In DARYANI VS EASTERN SILK EMPORIUM LTD, 64 N.L.R. 529, plaintiff sued the defendant by summary procedure to recover a certain sum of money due on a cheque. The defendant obtained leave to appear and defend unconditionally. Thereafter, the Court allowed an application made by the plaintiff to amend his plaint by pleading an alternative cause of action for goods sold and delivered for the same amount. It was held that the Court was correct in allowing the alternative cause of action to be pleaded. "An amendment seeking to add a new or alternative cause of action, which is so germane and so connected with the original cause of action, should be permitted. The real subject matter being the indebtedness, no prejudice can arise from an amendment which raises such an issue. At page 531 it was observed as follows

"There are two main rules of practice that have emerged from the decided cases regarding the principles which a Court should take into consideration when it exercises the power to amend the plaint. Firstly, the amendment should be allowed, if it is necessary for the purpose of clarifying or raising the real question or issues between the parties. This rule is based on the principle that a multiplicity of actions should be avoided. The whole purpose of pleading is to define, clarify and to limit the issues which are to be the subject of the pending contest".

As regards amendment the test is whether in order to effectively adjudicate upon the dispute between the parties amendment of the pleadings is necessary. The main considerations to be borne in mind in exercising the discretion whether to allow or refuse the amendment are (a) that the rules of procedure have no other aim than to facilitate the task of administering justice, (b) that multiplicity of suits should be avoided. As a general rule leave to amend ought not to be refused unless the applicant is acting mala fide and the blunder has resulted in injustice to the other party which cannot be compensated costs. An amendment of a clerical error or a bona fide wrong description of property should be allowed-so also an amendment clarifying the position put forward in a pleading. Amendments which do not alter the fundamental character of the action or the foundation of the suit are readily granted. But if injustice and prejudice of an irremediable character will be inflicted on the opposite party the amendment will not be allowed As a rule an amendment will not be allowed if a fresh suit on the amended claim would be barred by prescription but while this is a factor to be taken into account it does not affect the power of the court to order it if that is required in the interests of justice. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other - MACKINNON MACKENZIE & CO. GRINDLAYS BANK LTD- 1986 2 SLR 272.

However, consequent to the amendment introduced in 991, the court would adopt two different approaches in considering an application to amend pleadings. If the application is made before the first date of trial the courts would yet exercise the same liberal approach which was exercised under the original Section 93. In this context it could be stated that the statement of the law in the above case still operates as the guide for a court.

If the application for amendment is made either on the first day of trial or thereafter the courts would adopt a more strict approach in considering such an application. In such an instance, as a rule, an amendment will not be allowed unless the applicant satisfies the court that grave and irremediable injustice would be caused to him and that he is not guilty of laches. Accordingly, if an application is made in circumstances falling under Section 93(2}, the burden shifts on to the applicant to adduce material and satisfy court as to why his application should be allowed.

In COLOMBO SHIPPING CO. LTD V. CHIRAYN CLOTHING PVT LTD 1995 2 SLR 97 it was held that an amendment after the first date of trial should be allowed only in limited circumstances. In PARAMALINGAM V SENEVIRATHNE 2001 2 239 the Court of Appeal considered the concept of "laches" referred to in section 93 and stated that "laches" mean 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 guilty of laches; the doctrine is that delay defeats equities, and the second is that equity aids the vigilant and not the indolent."

It was stated in GUNASEKERA V. ABDUL LATIFF 1995 1 SLR 225 that an application for an Amendment should not be allowed unless the delay is explained. In Avudiappan v. Indian Overseas Bank Ltd 1995 2 SLR 131 the guideline suggested is that "laches" be taken to mean delay that cannot be reasonably explained. In INSURANCE CO. LTD. V. NANAYAKKARA 1999 3 SLR 50 it was held that an amendment should not be allowed unless the Court is satisfied that;

a) Grave and irremediable injustice will be caused to the party applying, and
b) That such party is not guilty of laches.

It was further held in this case that the Court must be satisfied about both reasons above and then record the reasons for its order.

In HATTON NATIONAL BANK V. SILVA 1999 3 SLR 113 the plaintiff had instituted action against the Defendants, and later sought to add a cause of action based on damages. The application was allowed by the trial Judge. However, it was held by the Court of Appeal that the Amendment should not have been allowed since it introduces a new cause of action.

In GUNASEKERA V. PUNCHIMENIKE 2002 2 SLR 43 Plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion the encroached portion was not described with reference to physical metes and Bounds or by reference to any map or sketch. The matter was fixed for ex parte trial; after ex parte trial application was made to issue a commission to survey the land and identify same. The ex parte trial did not end up in a judgment. After the return of the Commissioner, the plaint was amended, a fresh ex parte trial was thereafter held. After the decree was served, the defendant-appellant sought to purge default, which was refused.

In appeal it was held that the Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon - s. 46(2) (a) read together with s. 41, CPC and that when a plan was prepared after ex parte evidence had been partially led and recorded and an amended plaint filed, Court should have issued notice as per s. 93, CPC.

Wigneswaran,J. emphasized in this case that "A Court should not allow amendment of pleadings after an ex parte trial has been ordered. The scheme of the Code had been where the defendant is absent on the day fixed for his appearance and answer, trial ex parte should be held either immediately or as the

next step." In the case of SEYLAN BANK V. THANGAVEIL, 2004 2 SLR 101 the Bank sought to recover an overdraft facility granted to Thangavelu. In the original plaint the Defendant's name is described as Sabapathy Thangavelu - address being the same. Summons wase served on Sinnamah Thangavelu. Upon summons being served Sinniah Thangavelu appeared in court, filed proxy/answer describing himself as S. Thangavelu.

When the case was called on 05.04.2002 attorney-at-law for the defendant petitioner submitted that though he had filed proxy for the defendant's Sabapathy Thangavelu, his correct name is Sinniah Thangavelu. The trial judge directed the plaintiff to correct the mistake in the caption of the plaint. The trial court accepted the amended plaint on 10.01.2003 and granted time to the defendant to file his answer.

The defendant-petitioner having moved in revision the court of appeal ruled out the opportunity for revision and stated inter alia that the amendment effected to the caption is only the correction of a clerical error in the name of the defendant. The defendant's surname and address have been correctly given. Names are needed only to designate persons and the suit is not against names but against persons designated thereby. A false description does not harm if there is sufficient certainty as to the object, corpus or person. Further the court expressed the view that the amendment in question consists of the correction of a clerical error appearing only in the caption of the plaint. The mistake is not a mistake of the identity of the man but only his name. It does not fall within the category of the amendments contemplated under section 93.

The effect of the 1991 amendment was discussed in the case of MASEENA Vs. SAHUD 2003 3 SLR 109 where the 1st plaintiff divorced his wife the defendant and thereafter he and the 2nd plaintiff-respondent - Lessee - instituted action against the defendant-petitioner. The 1st plaintiff-respondent sought a declaration to the property in question and the eviction of the defendant-petitioner, his former wife, and also sought a declaration that the 2nd plaintiff - respondent is the Lessee. Of the issues raised by the defendant four issues were tried as preliminary issues. The trial court in answering the preliminary issue 12 - held that the action is not properly constituted and it is contrary to section 35(1) and that there is mis-joinder of parties and returned the plaint for amendment under section 46(2). The defendant-petitioner sought leave to appeal against the order.

Held:

(i) The trial Judge has failed to take into account section 93(2) of Act 9 of 1991.

(ii) The amendment has taken away the power of court to amend pleadings ex mero motu.

An amendment could be allowed only upon the application of a party when that party satisfies two conditions in section 93(2). In this case there was no such application. Per Gamini Amaratunga. J. 'The Judge has held that the action is not properly constituted and that there is a misjoinder of parties then no further amendments of the plaint should have been allowed."

The following judgment may be useful under the heading amendment of pleadings..

- HATTON NATIONAL BANK LTD. v. WHITTAL BOUSTEAD LTD. SLR 1978-79, Vol :2, Page: 257
- GORDON FRAZER & CO. LTD. v. LADY GYMARA FERNANDO SLR 1980, Vol :2, Page: 97
- ABEYWARDENA AND OTHERS v. EUGINAHAMY AND OTHERSSLR 1984, Vol :2, Page: 231
- MACKINNON MACKENZIE & CO. v. GRINDLAYS BANK LTD. SLR 1986, Vol :2, Page: 272
- WIJESINGHE v. KARUNADASA SLR 1987, Vol :2, Page: 179
- PILAPITIYA v. BUDDADASA AND ANOTHER SLR 1990, Vol :2, Page: 186
- GUNASEKERA AND ANOTHER v. ABDUL LATIFF SLR 1995, Vol :1, Page: 225
- AVUDIAPPAN v. INDIAN OVERSEAS BANK SLR 1995, Vol :2, Page: 131
- COLOMBO SHIPPING CO. LTD. v. CHIRAYU CLOTHING (PVT) LTD. SLR 1995, Vol :2, Page: 97
- KURUPPUARACHCHI v. ANDREAS SLR 1996, Vol :2, Page: 11
- JAYASINGHE v. GNANAWATHIE MENIKE SLR 1997, Vol :3, Page: 410
- SHAMMARI v. PREMIER AIRLINE AGENCIES (PVT) LTD. SLR 1998, Vol :2, Page: 162
- HATTON NATIONAL BANK v. SILVA AND ANOTHER SLR 1999, Vol :3, Page: 113
- ROHANA v. SHYAMA ATTYGALA &OTHERS SLR 1999, Vol :3, Page: 381
- CEYLON INSURANCE CO., LTD. v. NANAYAKKARA AND ANOTHER SLR 1999, Vol :3, Page: 50 PARAMALINGAM v. SIRISENA AND ANOTHER SLR 2001, Vol :2, Page: 239
- RAJASINGHAM v. SENEVIRATNE AND ANOTHER SLR 2002, Vol :1, Page: 82
- GUNASEKERA v. PUNCHIMENIKE AND OTHERS SLR 2002, Vol :2, Page: 43
- WIJESUNDARA v. WIJESUNDARA SLR 2003, Vol :1, Page: 374
- WIMALASIRI AND ANOTHER v. PREMASIRI SLR 2003, Vol :3, Page: 330
- SEYLAN BANK v THANGAVEIL SLR 2004, Vol :2, Page: 101
- RUSHANTHA PERERA VS WIJESEKERA SLR 2005, Vol :3, Page: 105
- COLOMBO DOCKYARD LTD VS JAYASIRI PERERA AND OTHERS SLR 2006, Vol :1, Page: 99
- PERERA v GEEKIYANA SLR 2007, Vol :1, Page: 202
- KARUNARATNE V ALWIS SLR 2007, Vol :1, Page: 214
- MENDIS V MENDIS SLR 2007, Vol :2, Page: 79
- KANAGARAJ VS. ALANKARA SLR 2010, Vol :1, Page: 185
- SENEVIRATNA v. CANDAPPA NLRVol :20, Page: 60
- CASSIM LEBBE v. NATCHIYA NLR Vol :21, Page: 205
- AVVA UMMAH v. CASINADER NLR Vol :24, Page: 199
- FERNANDO v. PALANIAPPA CHETTY NLR Vol :28, Page: 273

- RATWATTE v. OWEN NLR Vol :2, Page: 141
- FERNANDO v. SOYSA NLR Vol :2, Page: 40
- MUTTUMENIKA v. SUDUMENIKA NLRVol :45, Page: 58
- WADUGANATHAN CHETTIAR v. SENA ABDUL CASSIMNLR Vol :54, Page: 185
- DON ALWIS v. VILLAGE COMMITTEE OF HIRIPITIYA NLR Vol :54, Page: 225
- C. A. ODIRIS SILVA & SONS, LTD. v. JAYAWARDENE, P. NLR Vol :55, Page: 335
- LUINONA v. GUNASEKARA NLRVol :60, Page: 346
- WIJEWARDENE v. LENORA NLRVol :60, Page: 457
- AZIZ v. THONDAMAN NLRVol :61, Page: 217
- UBERIS v. JAYAWARDENE NLRVol :62, Page: 217
- EKANAYAKE v. EKANAYAKE NLRVol :63, Page: 188
- THE BANK OF CEYLON, JAFFNA v. CHELLIAHPILLAI NLR Vol :64, Page: 25
- LEBBE v. SANDANAM NLRVol :64, Page: 461
- DARYANANI v. EASTERN SILK EMPORIUM LTD. NLRVol :64, Page: 529
- THIRUMALAY v. KULANDAVELU NLRVol :66, Page: 285
- N.DALUWATTA v. M.B. SENANAYAKE NLR Vol :67, Page: 524
- E.VELUPILLAI v. C. SIVASITHAMPARAM NLR Vol :67, Page: 80
- WALLES v. HECTOR SILVA NLRVol :70, Page: 308
- MARTIN v. THENUWARA NLR Vol :70, Page: 332
- MUNICIPAL COUNCIL OF JAFFNA v. DODWELL & Co. LTD. NLR Vol :74, Page: 25
- FERNANDO v. RONALD NLRVol :75, Page: 231
- DE ALWIS v. DE ALWIS NLRVol :76, Page: 444
- DINORIS APPUHAMY v. SOPHIE NONA NLR Vol :77, Page: 188
- SHERMAN DE SILVA & Co., LTD. v. DE SILVA NLR Vol :77, Page: 275

Justice A W A Salam