

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

In the matter of an appeal in terms of section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against an order pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

S C Appeal No. 171/2015

SC/HC/LA Application No. 45/14

High Court case No. HC (Civil) 737/2010 MR

Sri Lanka Savings Bank Ltd,
No. 265,
Ward Place,
Colombo 07.

PLAINTIFF - APPELLANT

1. Global Tea Lanka (Pvt) Ltd,
No. 56/1/2A,

Gemunu Mawatha,
Hunupitiya,
Wattala.

2. Narayana Mudiyanseelage Manjula Narayana,
No. 18/B,
Alfred Place,
Colombo 03.

3. Narayana Mudiyanseelage Indra Padmakanthi,
No. 18/B,
Alfred Place,
Colombo 03.

DEFENDANT - RESPONDENTS

Before: SISIRA J. DE ABREW J

VIJITH K. MALALGODA PC J

P. PADMAN SURASENA J

Counsel: M U M Ali Sabry PC with Shehani Alwis for the Plaintiff - Appellant.

S A Parathalingam PC with Riad Ameen for the Defendant -
Respondent

Argued on: 2019 - 02 – 21

Decided on: 2019 – 06 - 12

P Padman Surasena J

The Plaintiff - Appellant (hereinafter sometimes referred to as the Plaintiff) filed in the Provincial High Court of Western Province holden in Colombo, a plaint seeking to recover a sum of money mentioned in the said plaint from the Defendant - Respondents (hereinafter sometimes referred to as the Defendants).

The Defendants filed their answer on 01-11-2011. Thereafter, the case was fixed for 18-01-2012 for the Plaintiff to file its replication. However, the Court on that date granted the Plaintiff further one week for the filing of its replication with notice to the Defendants and fixed the case for trial for 08-05-2012. The Appellant complying with the said order had filed the replication together with a motion on 03-02-2012. In the said motion, an application was made to court to have the already fixed trial date changed due to a personal difficulty of the counsel for the Appellant.

The case was called in open court on 24-02-2012 to enable the learned counsel for the Appellant to support the said motion. Thereafter, the Court

with the concurrence of the parties ordered the case to stand out of the list of trials scheduled for 08-05-2012 and re fixed the trial of the case for 08-06-2012.

The appellant filed its list of witnesses on 22-05-2012 and also filed two additional lists of witnesses on 28-05-2012 and 04-07-2012.

When the case was taken up for trial on 08-06-2012, the Court had ordered the parties to file written issues within four weeks and postponed the trial for 20-09-2012.

Subsequently, when the case was taken up on 20-09-2012 parties had moved for a postponement to explore the possibility of a settlement. The Court had then granted the requested postponement. However, as the parties had not been able to arrive at a settlement the court had thereafter fixed the case for trial for 29-07-2013.

When this case was taken up for trial on 29-07-2013, the Defendants had raised an objection to the production of the documents annexed to the affidavit dated 25-11-2012. The Plaintiff was seeking to file the said affidavit along with documents as his evidence in chief. The objection raised by the Defendants was on the premise that the Plaintiff has failed to comply with

the provisions in section 121 of the Civil Procedure Code. It was the position of the Defendants that the Plaintiff had failed to file the list of witnesses fifteen days prior to the first date of trial.

Learned High Court Judge having considered the matter had delivered his order dated 11-07-2014 upholding the said objection raised by the Defendants. It is the said order that the Plaintiff seeks to canvass before this Court in this appeal.

This Court by its order dated 09-10-2015 has granted leave to appeal in respect of the following questions of law;

- I. Is the order dated 11-07-2014 pronounced by the learned Provincial High Court Judge (produced marked "**P-11**") contrary to the legal provisions contained in section 121 of the Civil Procedure Code?
- II. Has the learned Provincial High Court Judge failed to consider the fact that the Court had taken the case off the list of trials scheduled for 08.05.2012 and re-fixed the trial for 08.06.2012?
- III. Has the learned Provincial High Court Judge misdirected himself in law when he considered the date 08.05.2012 as the first date fixed for trial despite the learned High Court Judge had taken the case out of the list

of trials scheduled for that date and re-fixed the trial date to be 08.06.2012?

Since the objection raised by the Defendant is based on an alleged non-compliance by the Plaintiff with the provisions in section 121 of the Civil Procedure Code, it would be prudent for this Court to reproduce below the said section in preparation of evaluation of the arguments advanced by parties.

Section 121

- 1) The parties may, after the summons has been delivered for service on the Defendant, obtain, on application to the Court or to such officer as the court appoints in that behalf, before the day fixed for the hearing, summonses to persons whose attendance is required either to give evidence or to produce documents.*
- 2) Every party to an action shall, not less than fifteen days before the date fixed for the trial of an action, file or cause to be filed in court after notice to the opposite party –*
 - a) a list of witnesses to be called by such party at the trial, and*

b) a list of the documents relied upon by such party and to be produced at the trial.

The Defendant's position is that the date of trial first fixed in this case is 08-05-2012. However, the Plaintiff argues that the date of trial first fixed in this instance must be taken as 08-06-2012. It is therefore the position of the Plaintiff that it has duly filed its list of witnesses fifteen days before that date (i.e. 08-06-2012). It is on that basis that the Plaintiff argues that he has complied with section 121 of the Civil Procedure Code.

At the outset, it must be noted that the above section does not refer to any "date of trial first fixed" or "first date of trial" but only refer to "the date fixed for the trial of an action". Thus, the task of this Court in this case would be to decide whether 'the date fixed for the trial of this action' in the light of the aforesaid circumstances is 08-05-2012 or 08-06-2012 for the purpose of calculating fifteen days referred to in section 121(2) of the Civil Procedure Code.

Section 121(1) is a provision made available to enable the parties to obtain summonses to persons whose attendance is required either to give evidence

or to produce documents at the hearing. If a list of witnesses or a list of documents were not filed in Court then no party would be able to invoke the provision in section 121(1). Hence, it is necessary to specify a time limit for filing any list of witnesses or any list of documents in Court. That is what section 121(2) of the Civil Procedure Code has done.

Thus, the sole purpose of this section is to provide for a framework upon which the Court will be able to commence the trial on the previously fixed date without any hindrance. Therefore, if the Court is in a position to proceed with the trial without any hindrance when it takes up the case for the trial on 'the date fixed for the trial of the action' with the list of witnesses or a list of documents being filed in Court fifteen days before the said 'date fixed for the trial of the action' then the purpose of section 121(2) is achieved.

It would be useful to consider the provisions in section 80 of the Civil Procedure Code at this stage to see under what circumstances a Court could fix the date of trial. The said section, which is reproduced below, requires the completion of the preliminary steps before a case could be fixed for trial.

Section 80

"On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, the court shall appoint a date for the trial of the action, and shall give notice thereof, in writing by registered post to all parties who have furnished a registered address and tendered the cost of service of such notice, as provided by sub section (2) of section 55."

Thus, it can be seen that no specified trial date could exist before the Court appoints a date for the trial of the action in terms of section 80. Therefore, it is clear that a party will have to necessarily take steps to comply with section 121(2) after the Court completes appointing a date for the trial of the action as per section 80.

Compliance of section 121(2) has been made mandatory for obvious reasons. That is because (as has been already mentioned before) no party would be able to proceed with the trial in the absence of any witnesses or documents as the case may be, filed in advance. Thus, what must be complied with, in the eyes of the law, is the fact of filing after notice to the opposite party not less than fifteen days before the date fixed for the trial of an action, the list of witnesses and the list of the documents relied upon by

parties. Then the trial of the action could smoothly take off the ground on the previously appointed trial date.

Moreover, it is important to observe that the date fixed for the Plaintiff to file its replication was 18-01-2012. Thereafter, the Court having granted the Plaintiff further one week for the filing of its replication with notice to the Defendants, had proceeded at the same time to appoint the date 08-05-2012 for the trial of the action. Thus, it is obvious that neither party was in a position to invoke the provisions of section 121(1) until the filing of the replication by the Plaintiff.

The Plaintiff as per the above order indeed filed its replication together with a motion on 03-02-2012. It was in the said motion, that the Plaintiff had moved court to have the already fixed trial date (08-05-2012) changed due to a personal difficulty of the counsel for the Appellant. Thus, it is clear that neither party could have reasonably thought that the already appointed trial date (08-05-2012) would continue to be the date appointed for the trial of the action.

It is also relevant to note as to what happened after the above-mentioned motion was filed in Court on 03-02-2012. The Court had thereafter taken

steps to have the case called in open court on 24-02-2012 to enable the learned counsel for the Appellant to support the said motion. When the said motion was supported the Court with the concurrence of the parties changed the date appointed for the trial of the action to be 08-06-2012. Thus, the date 08-05-2012 could not have been any longer the date appointed for the trial of this action. This is particularly so after 24-02-2012 since the Court on that date altered the date appointed for the trial of the action to be 08-06-2012. It is a fact that the trial of this case as at 24-02-2012 was not scheduled in the list of trials for 08-05-2012. This is a necessary consequence of the order made by Court on 24-02-2012. Therefore, the date appointed for the trial of the action shall for all purposes as at 24-02-2012 must stand to be 08-06-2012.

On the other hand, the Plaintiff cannot be expected to take 08-05-2012 as the date appointed for the trial of the action after the Court had struck this case off the list of trials scheduled for 08-05-2012. Treating that date (08-05-2012) still as the date appointed for the trial of the action after the Court had struck this case off the trial roll scheduled for 08-05-2012 would to say the least is absurd.

As mentioned before, the appellant had filed its list of witnesses on 22-05-2012 and also filed two additional lists of witnesses on 28-05-2012 and 04-07-2012. Thus, the Appellant had clearly filed them not less than fifteen days before the date appointed for the trial of the action i.e. 08-06-2012. Therefore, there is absolutely no basis to hold that the Appellant had violated the time limits specified in section 121(2) of the Civil Procedure Code.

In these circumstances and for the foregoing reasons, this Court holds that the learned Provincial High Court Judge has erred when he had decided to uphold the objection raised by the Defendants. Therefore, this Court answers in the affirmative all three questions of law in respect of which this Court had granted leave to appeal.

This Court directs;

- I. that the order dated 11.07.2014 pronounced in the case bearing No. HC (Civil) 737/2010 MR (marked and produced as "**P-11**") by the learned High Court Judge of the Provincial High Court of the Western Province (holden in Colombo) exercising its civil jurisdiction, be set aside,

II. the Provincial High Court of the Western Province (holden in Colombo) exercising its civil jurisdiction to reject the objection raised by the Defendants,

III. the Provincial High Court of the Western Province (holden in Colombo) exercising its civil jurisdiction to proceed with the trial of the action according to law.

This Court makes no order for costs.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW J

I agree,

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA PC J

I agree,

JUDGE OF THE SUPREME COURT

CHECK LIST

DRAFT No. 05

AS AT 2019-05-10

MATERIAL REQUIRED;

CASE NO; S C Appeal No. 171 / 15

DATE OF JUDGMENT; 2019 - 0 - 0

FOLLOWINGS HAVE BEEN ATTENDED TO;

1. Caption has been checked with the docket. (2018-04-10)
2. Appearances have been checked with the Docket. (2018-04-10)
3. Date argued has been checked with the docket. (2018-04-10)
4. Date decided has been checked with the docket. (2018-0-0)
5. Check the Quotations referred to in the judgment. (2018-05-07)
6. Structure of the draft judgment has been completed. (2018-04-10)

7. Quotations referred to in the judgment have been compared with their original sources. (2018-05-07)
8. Alterations done on the Draft No. 03 have been entered in the Lap Top. (2018-04-10)
9. Spelling check has been done and draft was perused from the start to end for any highlighted mistakes which were then corrected. (2018-05-10)
10. Page set up also has been checked & done. (2018-05-10)
11. This draft is the final approved draft. (2018-05-10)
12. It is not necessary to go through it again. (2018-0-0)
13. Send it to the other Judge for his perusal. (2018-05-10)
14. Sign it & send it to the other Judge.
- 15.

FOLLOWINGS TO BE ATTENDED TO;

1. Obtain a print out.

2. Compare it with **Draft No. 02** to see whether alterations therein have been properly entered.