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

In the matter of an appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 63/2014
SC HC CA LA No: 92/2013
HC CA No: WP/HCCA/MT 89/2010
DC Moratuwa Case: 787/M

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando
   Both of No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS

vs.

1. Mabima Vitharanage Sunil Wickremasinghe,
   No. 394, Radawana, Pugoda.

2. D.P. Tillekeratne,
   No. 95/3, Kirillawala, Weboda, Kadawatha.

DEFENDANTS

And

D.P. Tillekeratne,
No. 95/3, Kirillawela, Weboda, Kadawatha.

2ND DEFENDANT – PETITIONER

vs.

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando
   Both of No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS – RESPONDENTS

And between

Dodampe Gamage Tillekeratne,
No. 95/3, Kirillawala, Weboda, Kadawatha.

2ND DEFENDANT – PETITIONER – APPELLANT

vs.

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando
   Both of No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS – RESPONDENTS – RESPONDENTS

And now between

Dodampe Gamage Tillekeratne,
No. 95/3, Kirillawala, Weboda, Kadawatha.

vs.

2ND DEFENDANT – PETITIONER – APPELLANT – APPELLANT

1. Amarasinghe Arachchige Somawathie
2. Muthuthanthrige Irene Fernando.
   No. 146/15, Kaldemulla, Moratuwa.

PLAINTIFFS – RESPONDENTS – RESPONDENTS – RESPONDENTS

Amarasinghe Arachchige Somawathie.
No. 146/15, Kaldemulla, Moratuwa.

SUBSTITUTED 2ND PLAINTIFF – RESPONDENT – RESPONDENT-RESPONDENT

Before: **Vijith K. Malalgoda, PC, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Thilina Liyanage for the 2nd Defendant – Petitioner – Appellant – Appellant

Pradeep Fernando for the 1st Plaintiff – Respondent – Respondent – Respondent and the 2nd Substituted Plaintiff – Respondent – Respondent – Respondent

Argued on: 16th November 2021

Written Submissions: Tendered on behalf of the 2nd Defendant – Petitioner – Appellant – Appellant on 21st July 2014 and 7th December 2021

Tendered on behalf of the 1st Plaintiff – Respondent – Respondent – Respondent and the 2nd Substituted Plaintiff – Respondent – Respondent – Respondent on 4th December 2015 and 7th May 2019

Decided on: 23rd September 2022

Obeyesekere, J

The two questions of law raised in this appeal gives rise to four issues. The first is whether a defendant is entitled to receive notice of an application to amend a plaint made after the trial has been fixed *ex parte* against him/her on the original plaint. The second is whether a defendant against whom trial has already been fixed *ex parte* and who does not appear in Court in spite of being served with notice of an application to amend the plaint, is entitled to be issued with summons of the amended plaint, once the amended plaint has been accepted by Court in his absence. The third and fourth issues are dependent on the first two issues being answered in the affirmative, and are as follows:

(a) the consequences of such failure to serve notice, and summons;

(b) whether a defendant can make an application to set aside the *ex parte* judgment once steps are taken to execute the decree.

Action in the District Court

On 9th April 1999, a container carrier bearing registration number 26 Sri 3150 driven by Sunil Wickremasinghe had knocked down Amarasinghe Arachchige Gunewardena and caused his death. Gunewardena's daughter, Amarasinghe Arachchige Somawathie, the 1st Plaintiff – Respondent – Respondent – Respondent [*the 1st Plaintiff*], and his wife, Muthuthanthrige Irene Fernando, the 2nd Plaintiff – Respondent – Respondent – Respondent [*the 2nd Plaintiff*], had instituted Case No. 787/M in the District Court of Moratuwa on 23rd October 2000 seeking a sum of Rs. 500,000 as damages arising out of the death of Gunewardena. The 1st Plaintiff had been substituted in place of the 2nd Plaintiff upon the death of the 2nd Plaintiff while this appeal was pending.

The following three persons had been named as Defendants in the original plaint filed on 23rd October 2000:

1st Defendant: Sunil Wickremasinghe – driver of the said vehicle;

2nd Defendant: M.J.M. Razeek – the owner of the said vehicle;

3rd Defendant: D.P. Tillekeratne – the person in possession of the said vehicle at the time of the said accident.

Fixing for *ex parte* trial

While the 2nd Defendant, M.J.M. Razeek, had responded to the summons served on him and filed an answer, neither the 1st Defendant nor the 3rd Defendant, who is the present Appellant [*the Appellant*] had responded to the summons said to have been served on them. I must observe that even though according to the Fiscal's Report, summons is said to have been personally served on the Appellant on 11th April 2001 at the address given in the plaint, No. 95/3, Kirillawala, Weboda, summons had subsequently been re-issued on the Appellant on 9th March 2002 and 17th September 2004.

On 8th October 2004, the District Court, having been *satisfied* that summons had been served on the 1st Defendant and on the Appellant on 17th September 2004, had fixed the matter for *inter partes* trial against the 2nd Defendant and *ex parte* trial against the 1st Defendant and the Appellant, for 4th January 2005. On this date, the *ex parte* trial was not taken up as the Attorney-at-Law for the Plaintiffs had moved for a postponement. The *ex parte* trial was accordingly re-fixed for 30th March 2005.

<u>Application to amend the plaint</u>

On 10th February 2005, the Attorney-at-Law for the Plaintiffs had filed a motion, together with an amended plaint, seeking permission to amend the plaint in the following manner:

(1) Remove the 2nd Defendant as a party, in view of the averments in the answer of the 2nd Defendant;

(2) Re-name the 3rd Defendant (i.e. the Appellant) as the 2nd Defendant;

(3) Change the date of the accident from 8th April 1999 to 9th April 1999.

Arising from the above amendments, the averment in the plaint that the vehicle was in the possession of the *3rd Defendant* on the date of the accident was also sought to be amended by deleting the reference to the *3rd Defendant* and substituting that with a reference to the *2nd Defendant*, who is the present Appellant. It must be stressed at this point that a copy of this motion to amend the plaint had not been served on any of the three Defendants named in the plaint.

The said motion had been supported in open court on 21st February 2005, where the Attorney-at-Law for the Plaintiffs had made the following application:

> "මෙම නඩුවේ 2 වන විත්තිකරු සහ 3 වන විත්තිකරු මෙම නඩුවට අදාල අංක 26 ශ්‍රී 3150 දරණ ලොරියේ අයිතිකරුවන් වී සිටි අතර, වර්තමාන අයිතිකරු 3 වන විත්තිකරු බව 2 විත්තිකරු විසින් ඉදිරිපත් කරන ලද උත්තරය අනුව පැහැදිළි වන හෙයින් සහ 2 විත්තිකරු එම නිසා මෙම නඩුවට සම්බන්ධතාවයක් නොමැති හෙයින් සිවිල් නඩු විධාන සංග්‍රහයේ 18(1) වගන්තිය යටතේ 2 විත්තිකරු මෙම නඩුවෙන් ඉවත් කිරීමට ගරු අධිකරණයෙන් නියෝගයක් ලබා දෙන මෙන්ද සිරස සහ පැමිණිල්ල සංශෝධනය කරන ලෙස ඉල්ලා සිටිනවා. ඒ අනුව වැඩිදුරටත් ඉල්ලා සිටින්නේ පැමිණිල්ලේ ශිර්ෂයේ

2 විත්තිකරු ඉවත් කර 3 විත්තිකරු ඒ වෙනුවෙන් ඇතුලත් කිරීමෙන් සහ පැමිණිල්ලේ 2 වන ජේදයේ 1999.04.08 දින වෙනුවට 1999.04.09 දින ඇතුළත් කිරීමෙන් සහ පැමිණිල්ලේ දේහයද සංශෝධනය කරන ලෙසටයි.

මෙම ඉල්ලීමට 2 විත්තිකරු වෙනුවෙන් පෙනී සිටින නීතිඥ රංජිත් ගුණවර්ධන මහතා විරුද්ධ නොවේ."

The proceedings of 21st February 2005 do not indicate that the learned District Judge considered it necessary that notice of the above application should be served on the 1st Defendant and the Appellant. Instead, the learned District Judge had made order allowing:

(a) the deletion of the name of the then 2nd Defendant [*M.J.M. Razeek*] from the caption;

(b) the filing of an amended plaint,

and directed that the matter be called on 7th March 2005.

The above order of the District Court reads as follows:

"<u>නියෝගය</u>:

2 වන විත්තිකරුගේ නම සිරසින් කපා හැරීමට නියම කරමි. සංශෝධිත පැමිණිල්ලක් ඉදිරිපත් කිරීමට අවසර දෙමි. සංශෝධිත පැමිණිල්ල සඳහා කැඳවන්න 2005.03.07."

<u>Continuation of the trial in spite of the amendment of plaint</u>

The amended plaint having been filed on 1st March 2005, the case had been called on 7th March 2005. The proceedings of that date are re-produced below:

"සංශෝධිත පැමිණිල්ලක් පැමිණිල්ල විසින් ගොනු කර ඇත. එකී සංශෝධිත පැමිණිල්ල අනුව මුල් පැමිණිල්ලේ 1, 3 විත්තිකරුවන් 1, 2 ලෙසට සඳහන් කර ඇත. **එකී මුල් පැමිණිල්ලේ 1, 3 විත්තිකරුවන්ට එරෙහිව මෙම නඩුව ඒකපාර්ශ්වික විභාගයට නියම කර ඇති** බවට කාර්ය සටහන් වලට අනුකූලව පෙනී යයි. එසේ හෙයින් **නැවත වරක් 1, 2 විත්තිකරුවන්ට සිතාසි නිකුත් කිරීමට අවශ්‍ය නොවන අතර** 1, 2 වන විත්තිකරුවන්ට එරෙහිව ඒක පාර්ශ්වික විභාගයේ දිවුරුම් ප්‍රකාශ ඉදිරිපත් කිරීමට නියම කරමි" [emphasis added].

The proceedings of 7th March 2005 do not contain an order by the learned District Judge accepting the amended plaint. What the proceedings do contain, however, is a specific decision by the learned District Judge that the necessity to issue summons on the amended plaint to the 1st Defendant and the Appellant does not arise, as the trial has already been fixed *ex parte* against them.

Pursuant to the evidence of the 2nd Plaintiff being tendered by way of an affidavit, the District Court, by its judgment dated 16th May 2005, delivered judgment in favour of the Plaintiffs, and decree has been entered accordingly.

Application to set aside the *ex parte* decree

Section 85(4) of the Civil Procedure Code [*Code*] provides *inter alia* that a copy of the decree shall be served on the defendant in the manner prescribed for the service of summons. Accordingly, the *ex parte* decree is said to have been served on the Appellant on 28th March 2006 at premises No. 95/3, Kirillawala, Weboda. Although in terms of Section 86(2), an application to vacate the said decree could be made within 14 days of its service, no such application had been made by the Appellant. In October 2007, the Plaintiffs having sought a writ to execute the decree against the Appellant and the Sri Lanka Insurance Corporation, the insurer of the said vehicle, the District Court had directed that notice be served on the Appellant, the 1st Defendant and the insurer.

On 21st January 2008, the Appellant filed a petition in the District Court seeking *inter alia* to set aside the *ex parte* judgment and decree entered against him. In the said petition, the Appellant had stated as follows:

(1) He does not reside at the address given in the caption to the plaint, namely No. 95/3, Kirillawala, Weboda;

(2) He has not been served with any summons, notices or decree relating to the said case, other than the notice relating to the application for a writ which was handed over to him at his residence, **No. 191/5**, Kirillawala, Weboda in October 2007;

(3) He became aware of the action in the District Court for the first time when the above notice relating to the application for a writ was served on him;

(4) Having examined the case record through his Attorney-at-Law, he became aware that the case had been fixed *ex parte*;

(5) The report of the Fiscal that summons and decree had been served on him personally is incorrect.

While the above was the factual position pleaded by the Appellant, a legal objection was taken on his behalf that as *notice of the application to amend the plaint*, and *summons on the amended plaint* had not been served on the Appellant, all proceedings taken thereafter are a nullity. It is this legal objection that has culminated in the first two issues that I have referred to at the outset.

Inquiry by the District Court

The District Court had proceeded to formally inquire into the above application of the Appellant, with the primary position of the Appellant being that neither the summons nor the *ex parte* decree had been served on him, as claimed in the reports of the Fiscal. The Appellant had admitted that he had resided at No. 95/3, Kirillawala, Weboda, the residence of his parents, until 1996. He had shifted residence to premises No. 191/5, Kirillawala, Weboda in 1997, at which address he claimed he continued to reside, even at the time he gave evidence. In support of this position, he had led the evidence of the Grama Niladhari who had produced the electoral register for the years 1999, 2000 and 2002 - 2007, confirming that the Appellant was registered as a voter at premises No. 191/5, Kirillawala, Weboda. According to the electoral register produced through an Officer of the Department of Elections, the Appellant had been registered as an elector from the said premises No. 191/5, Kirillawala, Weboda during the period 1999 – 2008.

Therefore, it was the position of the Appellant that from the time the accident occurred in 1999, he had been registered as a voter at premises No. 191/5, Kirillawala, Weboda. It is admitted that the address given in the caption to the plaint has been taken from the

statement made to the Police by the driver of the vehicle, the 1st Defendant. Even though the electoral registers had been tendered to support the position of the Appellant, there are two matters that must be noted. The first is that the Appellant, who operates a container carrier at the Colombo Port, has not produced any other documents, such as utility bills, bank statements etc., to confirm that he was resident at premises No. 191/5, Kirillawala, Weboda. The second is that according to the electoral registers, the parents of the Appellant continued to reside at the address given in the plaint, namely No. 95/3, Kirillawala, Weboda. It must also be noted that the Plaintiffs did not lead the evidence of the Fiscal/s who had served the summons and the *ex parte* decree on the Appellant.

Order of the District Court

By an order delivered on 14th June 2010, the District Court had rejected the application of the Appellant to set aside the *ex parte* judgment and decree entered against him. While the order has exhaustively dealt with the facts, there are two important matters that the learned District Judge has failed to consider. The first is the aforementioned legal objection of the Appellant that notice of the application to amend the plaint had not been served on him. Although in her order, the learned District Judge has referred to the fact that this objection was raised, she has neither considered the said objection nor arrived at any finding in that regard. The second is that the learned District Judge has not considered the fact that even if summons on the original plaint had been served, summons on the amended plaint had not been served on the Appellant, with the decision not to do so having being taken by the learned District Judge who presided on that date. To my mind, these were two critical issues that had to be decided by the District Court.

The learned District Judge had instead proceeded to consider if summons on the original plaint had been served on the Appellant, which, as would be seen later, was not the issue before her and was therefore irrelevant. Here too, the learned District Judge has committed two mistakes. The first is, as noted earlier, although summons were said to have been served on 11th April 2001 and 9th March 2002, the District Court had re-issued summons on the Appellant in September 2004. The *ex parte* trial had been fixed on 8th October 2004 as the District Court was satisfied that summons had been served on 17th September 2004. The learned District Judge has however pointed out in her order that

although *ex parte* trial had been fixed on the basis that summons was served on 17th September 2004, the record does not contain an affidavit of the Fiscal confirming that summons was in fact served on the Appellant on that date. Hence, the learned District Judge has disregarded the said service of summons, as well as the summons served on 11th April 2001 for the same reason, and acted upon the summons that had been served on the Appellant on 9th March 2002, even though the District Court at that time was of the view that the said service of summons on 9th March 2002 was inadequate. In my view, if the issuance of summons on the strength of which trial was fixed *ex parte* was defective, that alone was sufficient for the learned District Judge to have allowed the application of the Appellant.

The second is that in spite of the above finding, the learned District Judge had arrived at the finding that the Appellant had not discharged the burden cast on him to prove that summons and the decree had not been served on him. The basis for this finding was that since it was the Appellant who was claiming that he did not receive summons and the *ex parte* decree and was therefore challenging the evidence of the Fiscal who had reported under oath that service had been effected personally, it was the duty of the Appellant to have summoned the Fiscal, which the Appellant had failed to do.

Independent of the above, the learned District Judge has also concluded that there is no provision in law to make an application to set aside the *ex parte* decree at the point of execution of decree. It is this finding, which has been affirmed by the High Court that forms the basis for the second question of law raised in this appeal.

<u>Judgment of the High Court</u>

Aggrieved by the said order, the Appellant had filed an appeal with the Civil Appellate High Court of the Western Province holden in Mount Lavinia. I have examined the petition of appeal and the written submissions filed on behalf of the Appellant and find that although the objection that the District Court had failed to issue notice of the amended plaint, and hence there was a procedural error had been raised before the High Court, it had failed to consider the said objection in its judgment. The High Court had instead only considered whether the Appellant, not having made an application to set aside the *ex*

parte decree within 14 days as required by Section 86(2) of the Code, could make an application to set aside the said *ex parte* order once a writ is sought to execute the said decree. Having answered the said question in the negative, the High Court had dismissed the appeal.

Questions of law

The Appellant thereafter invoked the jurisdiction of this Court under Article 128 of the Constitution and obtained leave to appeal on the following two questions of law:

(1) Have the learned High Court Judges erred in law by not taking into consideration that the Appellant had not been re-issued summons with a copy of the amended plaint upon an application being made by the Respondents to amend the plaint?

(2) Have the learned High Court Judges erred in law in arriving at the conclusion that the Appellant had no legal right and/or provision to make an application to vacate the *ex parte* judgment in view of the circumstances of this case?

A consideration of the above two questions of law would require me to examine three important concepts relating to the procedure followed by our Courts in civil actions, namely, the amendment of pleadings, the issuance of summons and the fixing of a case to be heard *ex parte*.

I shall assume, for the purposes of determining the first question of law, that (a) summons on the original plaint was in fact served on the Appellant on 17th September 2004, and (b) fixing the case for *ex parte* trial on the original plaint on 8th October 2004 is in order, even though the learned District Judge found in her order dated 14th June 2010 that the record does not contain an affidavit of the Fiscal confirming that summons was in fact served on 17th September 2004, which as noted above means that the decision of the District Court on 8th October 2004 fixing the case for *ex parte* trial was without any legal basis.

Amendment of pleadings

Section 84 of the Code provides that where "***the defendant fails to file his answer on or before the day fixed for the filing of the answer****, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action,* ***and if the court is satisfied that the defendant has been duly served with summons****, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears,* ***then the court shall proceed to hear the case ex parte forthwith****, or on such other day as the court may fix*" [emphasis added].

Therefore, in terms of Section 84, once one of the three situations set out therein arises and the plaintiff appears, "*the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix*." This would mean that with the *ex parte* trial having been fixed for 4th January 2005, the Plaintiffs ought to have proceeded with the trial on that date on the plaint already accepted by Court. That did not however happen as the Plaintiffs made an application to amend the plaint, instead of proceeding to trial on the original plaint.

Chapter XV of the Code consists of Section 93 only and deals with the amendment of pleadings. Section 93 initially read as follows:

> "*At any hearing of the action, or any time* ***in the presence of, or after reasonable notice to, all the parties to the action*** *before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended and every such amendment or alteration shall be initialled by the Judge*" [emphasis added].

Section 93 was amended for the first time by the Civil Procedure Code (Amendment) Act No. 79 of 1988, by repealing the existing provision and substituting same with Section 93(1) – (3). Section 93(1) reads as follows:

> "*The court may, in exceptional circumstances and for reasons to be recorded, at any hearing of the action, or at any time* ***in the presence of, or after reasonable notice to all the parties to the action****, before final judgment, amend all pleadings and processes in the action by way of addition, or of alteration or of omission*" [emphasis added].

Civil Procedure Code (Amendment) Act No. 9 of 1991

The above Section introduced in 1988 was again repealed by the Civil Procedure Code (Amendment) Act No. 9 of 1991 and substituted with Section 93(1) – (4). Section 93(1) and (2), which are the provisions that prevailed at the time the plaint in this appeal was sought to be amended in March 2005, are re-produced below:

> "*(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 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*" [emphasis added].

It must be noted that Section 93 has been amended by the Civil Procedure Code (Amendment) Act No. 8 of 2017 to reflect the introduction of provisions relating to pre-trial proceedings.

Entitlement of a defendant to receive notice of an application to amend a plaint

It is therefore clear that right from its inception in 1889, Section 93 of the Code required that an amendment of pleadings must be carried out in the presence of, or after reasonable notice to, all the parties to the action. While I shall discuss later if that requirement has been dispensed with, albeit partially, by the amendment introduced in 1991, it was the position of the learned Counsel for the Appellant that any amendment of pleadings can only take place with notice of such amendment to the other party.

In support of this position, he relied on the judgment of the Court of Appeal in **Rajasingham v Seneviratne and Another** [(2002) 1 Sri LR 82], which considered the provisions of Section 93, as amended by Act No. 78 of 1988. In that case, the respondent had filed action on 22nd February 1985 against the Commissioner of National Housing and the appellant [*referred to as the 2nd defendant in the judgment*] seeking a declaration that the respondent was entitled to the use of lot 2 in Plan No. 2058, as part and parcel of a road reservation which the respondent claimed as her access, and a declaration that the Commissioner of National Housing had no right to convey the dominium in lot 2 or any part of the road reservations to the appellant absolutely. The appellant by answer dated 04th September 1985 stated that as the substantive relief has been sought against the Commissioner of National Housing, she would abide by any order made by Court, thus demonstrating that the appellant was not interested in contesting the plaint since the reliefs prayed for did not affect her.

On 23rd January 1990, a date was obtained for an amended plaint to be filed, followed by a motion containing the proposed amendments, comprising *inter alia* an additional prayer which sought an order on the appellant to demolish and remove the structures constructed by her. Although a copy of this motion had been sent directly by the respondent to the appellant by registered post, notice of the motion was not issued through Court. The application to amend the plaint had been allowed by the District Court in the absence of the Appellant and the case had subsequently been fixed for *ex parte* trial and judgment delivered accordingly.

Having considered the provisions of Section 93, it was held by Wigneswaran, J at page 89 that:

> "*On the face of it, the amendment to the plaint took place without conforming to the provisions of section 93 of the Civil Procedure Code. Under that section it was the Court which should have given notice to the 2nd defendant. It should have gathered all parties together before it on its own volition. In this instance it was absolutely essential that this was done due to the type of answer filed by the 2nd defendant …*
>
> ***When an application was suddenly made on 08. 02. 1990 to amend plaint, immediately the Court should have noticed the 2nd defendant** irrespective of whether the plaintiff had sent a copy of motion to amend or a copy of draft amended plaint to 2nd defendant by registered post*" [emphasis added].

At page 90, it was held that:

> "***Any change in course should have had the attention of the 2nd defendant**, specially when such change was going to affect her adversely. **Any such change in course should have been undertaken after notice to all parties by Court…***" [emphasis added].

Although in the above case, the defendant was still before Court when the motion seeking to amend the plaint was made, and the case was fixed *ex parte* only thereafter, I am of the view that the finding that any change in course should have the attention of the defendant would apply with equal force to the situation that has arisen in this appeal, where the trial has been fixed *ex parte* prior to the application to amend the plaint.

This position is reflected in the judgment of the Court of Appeal in **Gunasekera v Punchimenike and Others** [(2002) 2 Sri LR 43] which too considered Section 93(1) introduced in 1988. In this case, an application to amend the plaint was allowed after the action had been fixed for *ex parte* trial, with the District Court determining that since the amendment was being made to reflect a plan prepared during the course of the *ex parte* trial, and the defendants were not before Court as at that date, notice was not necessary. In that case, Wigneswaran, J held as follows:

"*If an ex parte is to be held against a party on a plaint which is innocuous and harmless, that party may keep away knowing fully well that nothing serious was going to take place. It is akin to an accused person not leading any evidence on his behalf and keeping mum in Court when he is certain that the prosecution cannot prove a prima facie case against him. But, after obtaining an order for ex parte trial if a plaintiff would take steps to include into the original ineffective plaint matters which may adversely affect and prejudice the defendants, the Court would be duty bound to give notice of any such amendment*..." [page 49].

"***Any attempt to change or amend the pleadings must necessarily be preceded by notice to all parties to the action.*** *At least those parties who would be affected by the decree that shall be passed on such amended pleadings, must necessarily be given notice whether they are before Court or 'deliberately and contumaciously kept away from the judicial proceedings and who had shown scant respect for the due process of law'…*" [page 50; emphasis added].

"***After all an amended plaint would be a fresh plaint on which the case would be continued, abandoning the earlier plaint.*** *The defendants were, therefore, entitled to notice. … Since such notice was not given,* ***at least at the stage of inquiry into the application to purge default, the denial of notice to the defendants, should have been taken into consideration and order made accordingly...***" [page 50; emphasis added].

"***Therefore, we find that the allowing of amendment of the plaint after the case was fixed for ex parte trial without notices to all parties who would have been affected by such amendment was tainted with illegality. A Court cannot allow amendment of pleadings without notice to all parties who shall be affected by such amendment***" [page 51; emphasis added].

I am of the view that the above two judgments of the Court of Appeal correctly reflect the provisions of Section 93(1) as it stood at the relevant time. A defendant may have multiple reasons to not respond to the summons and keep away from Court on the summons returnable date. That is a calculated risk that he takes and must therefore face

the adverse consequences flowing from his actions. If, however, the plaintiff moves to amend the plaint once the matter has been fixed for *ex parte* trial, I am of the view that it is mandatory that notice of the application to amend be served on the defendant.

Entitlement to notice of an application to amend a plaint – Section 93(2)

As I have already noted, Section 93, both prior to and after the amendment in 1988, required that the amendment of pleadings shall be done "*in the presence of, or after reasonable notice to, all the parties to the action*." Thus, if the amendment in this appeal was sought to be made prior to the introduction of Act No. 9 of 1991, the position would be that any amendment of the pleadings can only be carried out in the presence of, or after notice has been issued by Court to all parties in the action.

However, in this appeal, the law that was in existence in 2005 when the application to amend the plaint was made, was the amendment introduced by Act No. 9 of 1991. The thrust of the said amendment was twofold. The first is that a distinction has been drawn between an amendment that is sought to be made "*before the day first fixed for trial of the action*" [Section 93(1)], and "*after the day first fixed for trial of the action*" [Section 93(2)]. The second is that the criteria that should be applied in determining whether an amendment should be allowed in each of the said two situations had also been set out.

Thus, while prior to 1988, *the court shall have full power of amending in its discretion … all pleadings*, and after 1988, *the court may, in exceptional circumstances and for reasons to be recorded … amend all pleadings*, after 1991, the power of Court to allow the amendment of pleadings in its full discretion was limited to applications made before the day first fixed for trial. In respect of applications made after the day first fixed for trial, an amendment can only be allowed where the Court is satisfied 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.

As observed by Chief Justice G.P.S. De Silva in **Kuruppuarachchi v Andreas** [(1996) 2 Sri LR 11 at page 13]:

> "*The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the 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 the trial of the action.' … 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 subsection*."

Section 93(1) introduced by Act No. 9 of 1991 also specified that the amendment to pleadings must be made "*in the presence of, or after reasonable notice to, all the parties to the action."* However, Section 93(2), under which Section the amendment made in this appeal should be considered, as the trial had already been fixed when the motion seeking the amendment of the plaint was made, does not contain such a requirement, thereby giving rise to the question whether an amendment made after the date first fixed for trial should also be "*in the presence of, or after reasonable notice to, all the parties to the action*."

In my view, the answer to the said question must be in the affirmative, although Section 93(2) is silent in this regard, for the reason that any application, whatever its nature may be, made in the course of any proceeding of an action filed under the Civil Procedure Code must be with notice to the adverse party, thereby ensuring that the principles of natural justice are adhered to, unless the Code itself permits an application to be made without notice to the other party.

As held by the Court of Appeal in **<u>Gunasekera and Another v Abdul Latiff</u>** [(1995) 1 Sri LR 225 at page 234],

> "*The petitioners have to clear two hurdles. They have to satisfy court firstly that, (1) grave and irremediable injustice will be caused to them if the amendment is not permitted, (2) there has been no laches on their part in making the application. Once this hurdle is overcome, they are further required to satisfy court the 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 (see Mackinnons v Grindlays Bank (1986) 2 Sri LR 272). An obvious example of prejudice being caused to the opposing side is when the amendment if allowed, would deprive that party pleading prescription of the cause of action. Besides these considerations, there is also the general bar set out in the proviso to section 46 of the Civil Procedure Code, against permitting amendments which would have the effect of converting an action of one character into an action of inconsistent character."

In other words, where an amendment to the pleadings is sought after the date first fixed for trial, and even if the party seeking the amendment is successful in satisfying Court of the two matters set out in Section 93(2), whether Court should permit the amendment is still at the discretion of the learned District Judge, as stipulated in Section 93(1). What is important is that prior to exercising that discretion, the Court must hear the opposing party, which means that the opposing party is entitled to notice of the amendment of pleadings, whether the amendment is made under Section 93(1) or (2).

It is clear from the motion dated 10th February 2005 filed by the Attorney-at-Law for the Plaintiffs that notice of the application to amend the plaint was not served on any of the Defendants. As a result, when the said motion and the application was supported on 21st February 2005, only Razeek who was the 2nd Defendant at that time and who had filed an answer, was present in Court. I am of the view that at that point, the District Court was under a duty to direct that notice of the application to amend the plaint be served on those defendants against whom *ex parte* trial had already been fixed. This, the District Court has failed to do, thus depriving the Appellant an opportunity of objecting to the application to amend the plaint. What has taken place thereafter is a nullity, unless the Appellant has subsequently acquiesced to what had taken place.

<u>Entitlement of a defendant to be served with summons</u>

Having permitted the application to amend the plaint, the District Court directed (a) the Plaintiffs to file the amended plaint, and (b) that the matter be called on 7th March 2005 for that purpose. On that date, having observed that pursuant to Court granting permission, an amended plaint has been filed, the District Court held that as *ex parte* trial

has already been fixed, the necessity to order the issuance of summons does not arise. The issue that I have to consider in order to answer the first question of law raised by the Appellant is whether the Appellant was entitled in law to be served with summons on the amended plaint, once it was accepted by Court.

Chapter VII of the Code, which contains Sections 39 – 54, is titled '*Of the mode of institution of action*' and contain provisions with regard to the filing of plaint, the requisites of a plaint, the rejection of a plaint etc. Section 39, while specifying that "*Every action of regular procedure shall be instituted by presenting a duly stamped written plaint to the Court, or to such officer as the Court shall appoint in that behalf*," specifies further that, "… ***the plaint shall be accompanied by such number of summonses*** *in Form No. 16 in the First Schedule as there are defendants, and a precept in Form No. 17 of the said Schedule*" [emphasis added].

Chapter VIII of the Code is titled '*Of the issue and service of summons*' and comprises of Sections 55 – 71. Section 55(1) reads as follows:

> "*Upon the plaint being filed and the copies of concise statements required by section 49 presented,* ***the Court shall order summons*** *in the Form No. 16 in the First Schedule to issue, signed by the Registrar of the Court, requiring the defendant to answer the plaint on or before a day to be specified in the summons, such day, being a day not later than three months from the date of the institution of the action in Court*" [emphasis added].

Thus, the Code has made it mandatory for a plaintiff to tender together with the plaint, summons to be served on a defendant. Once the plaint is accepted by Court, summons shall be served on the defendant together with a copy of the plaint, with the summons specifying the date prior to which the answer must be filed. Upon receipt of the summons, the defendant is required to answer the plaint on or before the date specified in the said summons, although the practice that is followed is for the defendant to appear in Court through an Attorney-at-Law, file proxy and move for an adjournment to file the answer. Singular importance has thus been placed by the above provisions of the Code on the requirement to issue summons, as it serves as the notice given to a defendant that an

action has been filed against him, that he must file an answer in response to the said plaint, and that failure to do so would result in the action being proceeded with and heard *ex parte*.

The critical importance of summons was considered in **Ittepana v Hemawathie** [(1981) 1 Sri LR 476]. In that case, the plaintiff sued his wife for a divorce on the ground of malicious desertion. Summons was reported to have been served on the defendant and a proxy was filed on her behalf. At the trial, although the defendant was absent, she was represented by a lawyer. Decree nisi was entered and later made absolute. A few months later, when the defendant appeared in Court in connection with her maintenance case, the plaintiff had produced the said decree absolute. The defendant claimed that she had not been served with summons and denied having filed proxy. She thereafter made an application in the District Court to have the decree annulled on the ground of non-service of summons. The District Judge inquired into the said application and held with the defendant and vacated the decree.

In an appeal by the husband, Sharvananda, J (as he then was) drew a nexus between the issuance of summons, the rules of natural justice and the assumption of jurisdiction by a court when he held as follows:

> "*Principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant*..." [page 479].
>
> *"'Jurisdiction' may be defined to [be] the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.*

> "*Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide.* ***It cannot act upon persons who are not legally before it****, upon one who is not a party to the suit …* ***upon a defendant who has never been notified of the proceedings.*** *If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non judice. A judgment entered by such Court is void and a mere nullity*" (Black on Judgments – P. 261)" [page 483; emphasis added].

"*Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity …*" [page 484].

A similar situation arose in **Beatrice Perera v The Commissioner of National Housing and Others** [77 NLR 361]. Perera, who was the landlady of premises No. 108, Galle Road, Wellawatte, had instituted action in the Court of Requests on 13th August 1969 praying that the defendant, Saraswathi Narayanan, who was occupying and running a business there as a tenant of Perera, be ejected from the premises on the ground that she had caused wilful damage and wanton destruction to the premises. In the return to the summons, the Fiscal's Officer made a report supported by an affidavit to the effect that Saraswathi was evading summons. The Court having ordered substituted service of summons on her, and the Fiscal reporting that such service has been effected, the case was fixed for *ex parte* hearing as Saraswathi did not appear on the date fixed in the summons for her appearance. After *ex parte* trial, judgment and decree were entered in favour of Perera and decree had been executed on 10th July 1970. On 14th July, Saraswathi filed a petition and affidavit in the Court of Requests and prayed that the judgment and decree entered *ex parte* against her be vacated as neither summons nor substituted service has been effected.

After inquiry, the Commissioner of Requests found the Fiscal's Officer who gave evidence of his efforts to serve summons and of the substituted service on Saraswathi to be totally unworthy of credit. Having held that summons had not been served and that substituted service had not been effected, the Court made order vacating the default judgment and decree and granted the defendant an opportunity to file answer and defend the action.

On appeal, Chief Justice Tennekoon stated at page 366 that:

> "*Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a "defectus jurisdictionis" and the second a 'latent' or 'contingent' want of jurisdiction or a "defectus triationis." Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction …*"

In **Leelawathie v Jayaneris and Others** [(2001) 2 Sri LR 231 at pages 236-237], the Court of Appeal held as follows:

> "*Unless summons in the Form No. 16 in the 1st Schedule to the Civil Procedure Code issues, signed by the Registrar requiring the Defendant to answer the plaint on or before a day specified in the summons and is duly served on the Defendant there cannot be due service of summons. In this case the original summons with attached copies of plaint and affidavit tendered with the original plaint dated 05.10.1988 to be issued against the 1st – 3rd Defendants are still in the Record unsigned by the Registrar (vide pages 179 to 209). They had been duly tendered on 05.10.1988 with the original plaint as per Court Seal of that date. What had been served on 1st – 3rd Defendant were notices that issued under the hand of the Registrar on 07.10.1988. Hence there had been no service of summons on the 1st – 3rd Defendants.* ***Unless summons were served on them, all the consequences of default in appearance would not apply to them.*** *There is no question of implying or presuming that the Defendants were aware of the case filed, since statutory provisions apply to service of summons and unless the summons are duly served the other statutory consequences for non-appearance on serving of summons, would not apply to Defendants*" [emphasis added].

The legal position therefore is very clear. It is by service of summons on the defendant that a Court gets jurisdiction over the defendant. The failure to serve summons is a failure which goes to the root of the jurisdiction of Court to hear and determine the action against the defendant. If a defendant is not served with summons, the judgment entered against him in those circumstances would be a nullity.

Entitlement of a defendant to be served with summons on the amended plaint

The learned District Judge was invited by the Appellant to declare that the *ex parte* decree was void not only because summons on the original plaint had not been served but also because summons on the amended plaint was not served, with the latter arising from a specific order of the District Court. I shall now consider whether the necessity to re-issue

summons arises once the Court accepts an amended plaint, and if so, the consequences of not complying with that requirement.

This Court in **Bartleet Finance PLC v Ranepura Hewage Kusumawathi** [SC Appeal No. 121/2016; SC minutes of 8th August 2019] dealt with a situation where the District Court failed to issue summons to a defendant on an amended plaint. In that case, the plaintiff sought *inter alia* an enjoining order and an interim injunction preventing the defendant from selling the vehicle bearing registration number 62 – 4959. The interim injunction had been refused on 3rd October 2003 and the case had been fixed for answer for 3rd December 2003. The plaintiff had filed a motion the day before, seeking to amend the plaint. Even though an amended plaint had not been filed on that date, the journal entry of 3rd December 2003 provided that, "*Amended plaint is being filed. Objections (if any) and answer on 28.1.2004*." The amended plaint had however been accepted by Court only on 28th January 2004 and the journal entry of that date recorded that, "*Objection and answer – No (not filed). The defendant is absent. No legal representation for the defendant.* ***Amended plaint is accepted.*** *Case is fixed for ex parte trial. Ex parte trial is fixed for 5.3.2004*" [emphasis added].

Having considered whether the District Court made a grave procedural error in fixing the case for *ex parte* trial on 28th January, 2004, this Court held as follows:

> "*Since the court has accepted the amended plaint on 28.1.2004, it was the duty of court to have given an opportunity to the Defendant-Petitioner to file an answer on the amended plaint. But the learned District Judge did not give this opportunity to the Defendant-Petitioner and fixed the case for ex parte trial. … The learned District Judge on 28.1.2004 could not have fixed the case for ex parte trial even on the basis that the Defendant-Petitioner was absent and unrepresented because the acceptance of the amended plaint has taken place only on 28.1.2004.* ***When the amended plaint is accepted****, the original plaint does not exist.* ***Then it becomes the duty of court to act under Section 55 of the Civil Procedure Code and serve summons on the defendant*** *if the defendant is absent in court. If the defendant is present in court, the court should give him an opportunity to file his answer on the amended plaint. The learned District Judge has not taken the above steps. Therefore*

it is seen from the above material that the District Court has not fixed a date to file answer on the amended plaint. The learned District Judge on the day that the amended plaint was accepted without fixing a date to file an answer, has fixed the case for ex parte trial which is wrong" [emphasis added].

I am of the view that the moment the amended plaint was accepted by the District Court, the original plaint ceased to exist, and the provisions of Section 55(1) would once again be triggered, thereby necessitating the service of summons on the Appellant to answer the amended plaint. The order made by the District Court on 7th March 2005 confirms that Court was of the view that summons on the amended plaint need not be served. Everything that followed thereafter is a nullity.

<u>The District Court could not have proceeded with the *ex parte* trial</u>

The above conclusion brings to the fore two specific aspects of Section 84, which I shall now advert to, for the sake of completeness.

Section 84 of the Code provides for three distinct situations in which a trial can be fixed *ex* parte. It is the first situation that is relevant in this appeal and which is set out below:

"*If the defendant fails to file his answer on or before the day fixed for the filing of the answer … and if the Court is satisfied that the defendant has been duly served with summons … and if, on the occasion of such default of the defendant, the plaintiff appears, then the Court shall proceed to hear the case ex parte forthwith, or on such other day as the Court may fix*."

The fixing of a trial to be heard *ex parte* due to the failure of a defendant to file his answer on or before the day fixed for the filing of the answer, is conditional upon the defendant being issued summons with a copy of the plaint. It is only if the defendant is served with summons and he does not appear on the date specified in the summons or having appeared, does not file an answer or does not seek time to file answer, that the case can be fixed for *ex parte* trial. In other words, due service of summons on the defendant is a condition precedent that must be satisfied in order to fix the trial *ex parte*.

The first aspect that I wish to advert to is that in this appeal, the moment the amendment of the plaint was allowed, the District Court was required to re-calibrate the procedure and to have issued summons on the amended plaint. In the absence of doing so, the District Court could not have proceeded to hear the case *ex parte* based on the order made on 8th October 2004.

The second aspect that I wish to advert to, was discussed in **Bartleet Finance PLC v Ranepura Hewage Kusumawathi** [supra], where Sisira de Abrew, J having considered the provisions of Section 84, stated as follows:

> "*Under Section 84 of the Civil Procedure Code, the court is empowered to fix a case for ex parte trial if the defendant fails to file his answer on or before the day fixed for the filling of the answer or on or before the day fixed for the subsequent filing of the answer. This is one of the grounds discussed in Section 84 of the Civil Procedure Code. After the amended plaint was accepted, did the court fix a date for filing of the answer? The answer is clearly in the negative. It has to be noted here that after accepting the amended plaint on 28.1.2004, the court without fixing a date to file the answer, fixed the case for ex parte trial. There was no opportunity for the Defendant-Petitioner to file his answer on the amended plaint since the court has failed to fix a date for the answer on the amended plaint. Therefore the argument that the Defendant-Petitioner has failed to file his answer on or before the day fixed for filing of the answer or on or before the day fixed for the subsequent filing of the answer cannot be accepted. For the above reasons I hold that the Defendant-Petitioner has not violated Section 84 of the Civil Procedure Code; that the learned District Judge on 28.1.2004 could not have fixed the case for ex parte trial; and that the order made by the learned District Judge on 28.1.2004 fixing the case for ex parte trial without giving an opportunity for the defendant to file his answer is wrong, a nullity and has violated a fundamental rule. Failure by the District Court to give an opportunity for the Defendant-Petitioner to file his answer upon acceptance of the amended plaint is a violation of a fundamental rule.*

For the benefit of the trial Judges and legal practitioners of this country I would like to set down here the following guidelines.

1. *When an amended plaint is accepted by court, the court cannot on the same day fix the case for ex parte trial on the basis that the defendant is absent or he did not file the answer.*

2. *When an amended plaint is accepted by court, the court must give an opportunity for the defendant to file his answer.*

3. *When an amended plaint is accepted by court, it becomes the duty of court to summon the defendant if he is absent in court because the amended plaint has to be considered as a new plaint*."

The resultant position is that a defendant, even though absent on the date the Court accepts the amended plaint in spite of the notice to amend having been served on him/her, is entitled to be issued summons on the amended plaint and granted an opportunity to file an answer to the said amended plaint. The failure by Court to do so would render all proceedings that take place thereafter a nullity.

<u>Conclusion on the first question of law</u>

This brings me back to the order of the learned District Judge delivered on 14th June 2010 refusing to vacate the *ex parte* judgment. In the said order, the learned District Judge has failed to appreciate that (a) even if one accepts the position that summons has been served on the Appellant, that that was on the original plaint, and (b) the case was fixed for *ex parte* trial on the strength of the said original summons having been served on the Appellant, which as I have discussed earlier is rendered nugatory the moment Court accepts an amended plaint. The High Court too has not given its mind to either of the said issues.

Furthermore, the learned District Judge and the High Court have failed to appreciate that the moment an application was made to amend the plaint, the District Court was required to adopt a three-tiered approach. The first should have been to direct that notice of the

application to amend be served on the Appellant, thereby ensuring compliance with the provisions of Section 93 of the Code. The second is, irrespective of whether the Appellant responded to the said notice and presented himself in Court, the learned District Judge was required to consider if the amendments could be allowed in the light of the provisions of Section 93. The third is, if the amendments are allowed and the amended plaint is accepted but the Appellant is yet not before Court, to direct that summons on the amended plaint be served on the Appellant, thereby affording the Appellant an opportunity of filing an answer on the amended plaint. It is only where Court is satisfied that such summons has been served that an order could be made in terms of Section 84 by fixing the case for *ex parte* trial on the amended plaint.

As the facts of this appeal reveal, it is admitted that neither the notice seeking to amend the plaint nor the summons on the amended plaint have been issued on the Appellant. Therefore, what followed thereafter is a nullity.

I would accordingly answer the first question of law, namely "Have the learned High Court Judges erred in law by not taking into consideration that the Petitioner had not been re-issued summons with a copy of the amended plaint upon an application being made by the Respondents to amend the plaint?" as follows: Yes. The District Court and the High Court have also erred in law in not taking into consideration the fact that notice of the application to amend the plaint has not been served on the Appellant.

Could the Appellant have made an application to set aside the *ex parte* decree?

I shall now consider the second question of law raised by the Appellant, which is, "Have the learned High Court Judges erred in law in arriving at the conclusion that the Petitioner had no legal right and/or provision to make an application to vacate the *ex parte* judgment in view of the circumstances of this case?"

The District Court as well as the High Court have held that there is no provision in law to make an application to set aside an *ex parte* decree at the point where its execution is sought by the judgment creditor. I would have concurred with this conclusion had it been established that:

(a) Court had directed that summons on the amended plaint be issued on the Appellant and such summons had in fact been served on the Appellant;

(b) the case was fixed for *ex parte* trial only thereafter;

(c) the *ex parte* decree too had been served on the Appellant, and yet, the Appellant failed to come before the District Court within 14 days and make an application to set aside the decree.

The Order of the District Court made on 7th March 2005 makes it abundantly clear that summons on the amended plaint has not been served on the Appellant. What proceeded thereafter – i.e., the *ex parte* trial and the decree based on the *ex parte* judgment – are void. The earliest opportunity that the Appellant had of coming to Court was when the said decree was served on him. The Appellant has denied receiving the said decree and in the absence of any evidence being led to contradict his position, the conclusion of the learned District Judge that even though the Appellant was no longer resident at No. 95/3, Kirillawela, Webada, she is satisfied that the decree was served on the Appellant is not tenable.

In these circumstances:

(a) I have no other alternative except to accept the version of the Appellant that the *ex parte* decree was not served on him;

(b) I am of the view that when a writ is sought to be executed to seize his property, the Appellant had a right to come before the District Court and seek to have the *ex parte* decree set aside on the basis of non-service of summons and the *ex parte* decree.

In **<u>Ittepana v Hemawathie</u>** [supra] this Court, having arrived at the conclusion that where a defendant is not served with summons or is otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity, went on to hold as follows:

"*And when the Court is made aware of this defect in its jurisdiction, the question of rescinding or otherwise altering the judgment by the Court does not arise since the judgment concerned is a nullity. … The proceedings being void, the person affected by them can apply to have them set aside ex debito justitiae in the exercise of the inherent jurisdiction of the Court…*" [page 484].

"*Every Court, in the absence of express provision in the Civil Procedure Code for that purpose, possesses, as inherent in its very constitution, all such powers as are necessary to undo a wrong in the course of the administration of justice.*

Section 839 of the Code preserves the inherent power of the Court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." This section embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. The inherent power is exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist" [page 485].

Sharvananda, J (as he then was) thereafter cited **Rodger v Comptoir d'Escompte de Paris** [(1871) LR 3 PC 465 at page 475] where the Privy Council stated the following:

"*One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is a duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.*"

The Court then held:

> "*Thus, when a complaint is made to Court that injustice has been caused by the default of the Court in not serving summons, it is the duty of the Court to institute a judicial inquiry into the complaint and ascertain whether summons had been served or not, even going outside the record and admitting extrinsic evidence, and if it finds that summons had not been served, it should declare its ex parte order null and void and vacate it*" [page 485].

In **<u>Beatrice Perera v The Commissioner of National Housing and Others</u>** [supra; at page 369], this Court held that:

> "*… where summons has not been served at all, an ex parte judgment against the defendant is void and the defendant can challenge its validity at any time when the judgment so obtained is sought to be used against him either in the same proceedings or collaterally, provided always that he has not by subsequent conduct estopped himself*."

In **<u>Rajasingham v Seneviratne and another</u>** [supra; at page 91], the Court of Appeal, referring to the submission of the respondent that, whether notice was given of the amendment of plaint to the appellant or not is irrelevant in an application to set aside the *ex parte* decree, held that:

> "*This is an astounding submission. If this submission is accepted what it would mean is, that a plaintiff has a right to do anything he or she likes and obtain an ex parte decree in whatsoever manner he or she wishes and the only relief that a defendant who had defaulted in appearance but adversely affected by the decree has, is to make out a proper case for his absence. If not, the ex parte decree could be executed, come what may. The serious flaw in this argument lies in making the Court a party to all the machinations of a plaintiff.*

… A Court of law should not be an apathetic bystander under these conditions. ***If notice of amendment of pleadings is not given in terms of the law to the party affected****, if the Court does not consider (whether the affected party is before Court or not) the feasibility of the amendment prayed for and act in terms of the law,* ***all proceedings thereafter would become tainted with illegality****, whatever the shortcomings in the defendant's conduct might be*" [emphasis added].

Given the circumstances peculiar to this appeal, I am of the view that the Appellant was entitled to make the application to set aside the *ex parte* decree and I would therefore answer the second question of law in the affirmative.

Conclusion

Taking into consideration all of the above circumstances, I set aside the following orders/judgments and allow this appeal:

(a) The order made on 8th October 2004 fixing the case *ex parte* against the Appellant and the 1st Defendant;

(b) The order dated 21st February 2005 made by the learned District Judge, Moratuwa, permitting the amendment of the plaint;

(c) The order dated 7th March 2005 made by the learned District Judge, Moratuwa, that summons on the amended plaint need not be served on the Appellant;

(d) The judgment dated 16th May 2005 delivered by the learned District Judge, Moratuwa;

(e) The order dated 14th June 2010 by which the District Court refused to set aside the *ex parte* decree; and

(f) The judgment of the High Court dated 5th February 2013 dismissing the appeal of the Appellant.

The District Court is directed to issue notice of the application of the Plaintiffs to amend the plaint to the Appellant and the 1st Defendant, consider the said application to amend in the light of the provisions of Section 93 and thereafter proceed to trial according to law, expeditiously. I make no order with regard to costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT