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

In the matter of an Appeal from the judgment dated 25th July 2012 of the Provincial High Court of the Western Province holden in Colombo exercising Civil (Appellate) Jurisdiction under and in terms of the High Court of the Provinces Special Provisions Act No. 54 of 2006 read together with Article 127 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**SC. Appeal 192/2012**

**SC.H.C.CA. LA. 368/12**
**WP/HCCA/COL/99/11 LA**
**D.C. Colombo No. 23/2010 DRE**

Mapatunage Roland Perera,
4/62A, 4th Lane, Thalakotuwawatta,
Polhengoda, Colombo 05.

**Plaintiff**

**Vs.**

Sunder Ayyar Rajagopalan,
No. 44/83, St. Anthony's Mawatha,
Colombo 13.

**Defendants**

**And Between**

Sunder Ayyar Rajagopalan,
No. 44/83, St. Anthony's Mawatha,
Colombo 13.

**Defendant-Petitioner**

**Vs.**

Mapatunage Roland Perera,
4/62A, 4th Lane, Thalakotuwawatta,
Polhengoda, Colombo 05.

**Plaintiff-Respondent**

**And Now Between**

Mapatunage Roland Perera,
4/62A, $4^{th}$ Lane, Thalakotuwawatta,
Polhengoda, Colombo 05.

**Plaintiff-Respondent-Appellant**

**Vs.**

Sunder Ayyar Rajagopalan,
No. 44/83, St. Anthony's Mawatha,
Colombo 13.

**Defendant-Appellant-Respondent**

* * * * *

**BEFORE** : **S. Eva Wanasundera, PC. J.**
**Priyantha Jayawardena, PC. J.**
**Upaly Abeyrathne, J.**

**COUNSEL** : Saman Liyanage with Thilina Sooriyaarachchi for the Plaintiff-Respondent-Appellant.

Sulari Gamage for the Defendant-Appellant-Respondent.

**ARGUED ON** : **11.05.2015**

**DECIDED ON** : **05.08.2015**

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**S. Eva Wanasundera, PC.J.**

In this appeal, this Court has granted leave on 30.10.2012 on the following questions of law contained in paragraph 9 (a), (b) (c) and (d) of the Petition dated 03.09.2012.

9(a) Is the judgment of the Civil Appellate High Court of Colombo contrary to law and against the established legal precedents?

(b) Is the said judgment misconceived in law and/or against the weight of the evidence of the said case?

(c) Have the Civil Appellate High Court Judges erred and/or misdirected themselves by holding that grave and irremediable injustice would be caused to the Respondent unless he is permitted to file his amended answer?

(d) Has the Civil Appellate High Court of Colombo failed to consider the scope of Section 93(2) of the Civil Procedure Code by holding that even on or after the first date of the trial of the action that the Respondent is entitled to amend his answer?

The subject matter of this case is a house built on less than two perches, i.e. 1.08 perches of land in St. Anthony's Road, Colombo 13. The Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court of Colombo under case No. DRE 23/10 on 07.05.2010. The plaint was amended on 07.06.2010. The Defendant-Appellant-Respondent (hereinafter referred to as the Defendant) filed answer to the amended plaint on 29.09.2010. The Plaintiff filed replication on 01.11.2010. The case was called to fix for trial on 01.11.2010. Then it was fixed for trial on 07.02.2011.

On 07.02.2011, the Defendant moved to amend his answer and the Plaintiff objected to the same. Court permitted the Defendant to file a 'draft amended answer' subject to the objection of the Plaintiff. Plaintiff filed objection on 21.04.2011 and after considering the written submissions of both parties, Court delivered judgment on 26.08.2011 in favour of the Plaintiff by not allowing the proposed amendment to the answer. The Defendant appealed to the Civil Appellate High Court of Colombo from the judgment of the District Court. On 25.07.2012 the Civil Appellate High Court delivered judgment in favour of the Defendant, setting aside the District Court judgment dated 26.08.2011. In summary the Civil Appellate

High Court allowed the amended answer which was filed on the first date of the trial.

This Court has to decide whether the decision of the Civil Appellate High Court which allows the amended answer is in accordance with Section 93(2) of the Civil Procedure Code.

Section 93(2) of the Civil Procedure Code as amended by Act No. 9 of 1991 reads as follows:-

> "On or after the day first fixed for trial of the action and before the final judgment, no application for the amendments 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."

I observe that the application for the amendment of answer was made by the Defendant on the day the case was first fixed for trial of the action, i.e. on 07.02.2011. Therefore the application for amendment comes within the scope of Section 93(2) of the Civil Procedure Code. According to the section, the party applying for the amendment should satisfy Court on two grounds, i.e. **grave and irremediable injustice will be caused if the amendment is not allowed and that the said party applying for the amendment is not guilty of laches.**

The answer filed by the Defendant in the first instance is dated 29.09.2010 and **it contains a claim in reconvention of Rs.1.8 million rupees for improvements done to the house.** The plaint contains in the 'Schedule to the plaint', the boundaries and extent of the land on which this house is situated and the fact that the said house was taken on a lease by the Defendant is admitted by the Defendant in his answer. The Plaintiff had filed replication on 01.11.2010. The amendment to the answer was sought on 07.02.2011, i.e. after 3 months from the date of the replication and after

4 months from the date of the answer first filed. This time lapse has not been explained even in the written submissions filed in the District Court by the Defendant for the District Judge to make an order whether the amendment should be allowed or not. I observe that there is no explanation given by the Defendant as to how and in what circumstances "grave and irremediable injustice would be caused if the amendment is not allowed". Instead, it is given in the written submissions that the proposed amendment is something which could not be included in the answer by "mistake" (අතපසුවීමකින්). I believe that it amounts to 'laches' on the part of the Defendant, admittedly.

Anyway the two amendments sought amount to including the same Schedule regarding the boundaries and extent of the land (which is already in the plaint) into the answer and adding a prayer to the effect that the **Plaintiff should pay back Rs.1.8 million to the Defendant and interest thereon as of right before the Defendant leaves the premises.** I find that the answer already filed on 29.09.2010 contains a prayer praying Court for a decree for Rs.1.8 million due and owing to the Defendant from the Plaintiff. I view the two amendments suggested by the Defendant as clauses which cannot in anyway be categorised under "grave and irremediable injustice would be caused, if not allowed". Moreover the Defendant has not even tried to prove that it would cause grave and irremediable injustice. No reasons were given as expected to come under Section 93(2) of the Civil Procedure Code as amended.

The Defendant's only argument in the lower Courts had been, that "the amendments would not cause any prejudice to the Plaintiff". I fail to see how that argument can be brought forward instead of showing 'good reasons' according to Section 93(2) of the Civil Procedure Code.

The Civil Appellate High Court has gone wrong in interpreting the law, taking up the aforementioned argument of "not causing any prejudice to

the Plaintiff" and also coming to a finding that "irreparable loss and damages would be caused to the Defendant if he is unable to recover this money." The Civil Appellate High Court has not seen or considered the answer already filed which contained the relief claimed already in different words and furthermore it has failed to see the other amendments sought is something which **is highly unnecessary** since the Schedule of the land and house is accepted as in the plaint by the Defendant and that amendments requested to be included in the answer are quite an unnecessary move by the Defendant. It is my observation that the Defendant has suggested these amendments to prolong the Court proceedings, taking advantage of or misusing the provisions of law contained in the Civil Procedure Code. Very sadly, and very unfortunately he has succeeded in prolonging the action filed against him from 2010 to 2015 by misusing the process of law.

In *Gunasekera Vs. Abdul Latiff 1995*, 1 SLR 225, the amendment to the Civil Procedure Code, No. 9 of 1991 was very much discussed. The Supreme Court thus expressed its views. "The amendment act No. 9 of 1991 has for the first time taken away the power of Court *ex-mero motu* to amend the pleadings. An amendment could be allowed only upon the application of a party. If the application was made before the first date of the trial, the Court once again enjoyed the full power of amendment at its discretion. However, if the application for amendment of pleadings was made on or after the first date of trial the Court powers were severely curtailed.

Further, in the said case, the Supreme Court stated thus; "The Petitioners have to clear two hurdles. They have to satisfy the Court 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. This hurdle is overcome; they are further required to satisfy Court the circumstances that warrant an amendment to pleadings under

Section 93(1) also exists."

This judgment was confirmed in *Colombo Shipping Company Ltd. Vs. Chiragu Clothing (Pvt) Ltd. 1995, 2 SLR 97*, *Nanayakkara Vs. Attygalla* Bar *Journal 1998 Vol.2 Part 2 Pg. 333* and *Ceylinco Insurance Co. Ltd. Vs. Nanayakkara 1999 3 SLR 50.*

In the present case, the District Court should proceed to hold the trial on pleadings filed already without the proposed amendments and decide on the issues drawn from the pleadings which are already before Court. What is contained in the amendments are substantially contained already in the answer which is filed of record.

I hold that the Defendant-Appellant-Respondent has failed to satisfy Court on both legal requirements contained in Section 93(1) of the Civil Procedure Code as amended by Act No. 9 of 1991.

I hereby set aside the judgment of the Civil Appellate High Court of Colombo dated 25.07.2012 and affirm the order of the District Court of Colombo dated 26.08.2011. Appeal is allowed. I order costs of Rs.10,000/- to be paid by the Defendant-Appellant-Respondent to the Plaintiff-Respondent-Appellant.

**Judge of the Supreme Court**

**<u>Priyantha Jayawardena,J., PC.</u>**

**I agree.**

**Judge of the Supreme Court**

**<u>Upaly Abeyrathne, J</u>.**

**I agree.**

**Judge of the Supreme Court**