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

In the matter of an application for Leave to Appeal in terms of Section 5(c)(1) of the High Court of the Provinces (Special Provisions) Amendment No 54 of 2006

SC Appeal 47/2018

SC (HC) CALA 98/2017

WP/HCCA/COL/49/2016 (LA)

D.C. Colombo DLM 49/08

Karunahaluge Lal Sumithkumara
Presently at
No. 72, Elton Avenue,
Wembley, Middlesex HAO 3AU,
United Kingdom.

Appearing by his Power of Attorney
Kalubandanage Sunil
Manajjawa,
Ambalantota.

PLAINTIFF

Vs.

1. Karunahaluge Sarath Kumara Deepawansa
   No. 55/11A, Heenatikumbura,
   Thalangama North,
   Thalangama,
   Battaramulla.

2. Mohamed Ashpak Amardeen
   No. 64, Ambalanwatte,
   Heenatikumbura,
   Battaramulla.

DEFENDANTS

And Between

Karunahaluge Lal Sumithkumara
Presently at
No. 72, Elton Avenue,
Wembley, Middlesex HAO 3AU,
United Kingdom.

Appearing by his Power of Attorney
Kalubandanage Sunil
Manajjawa,
Ambalantota.

PLAINTIFF-APPELLANT

Vs.

1. Karunahaluge Sarath Kumara
   Deepawansa
   No. 55/11A, Heenatikumbura,
   Thalangama North,
   Thalangama,
   Battaramulla.

2. Mohamed Ashpak Amardeen
   No. 64, Ambalanwatte,
   Heenatikumbura,
   Battaramulla.

DEFENDANT-RESPONDENTS

And now between

Karunahaluge Lal Sumithkumara
Presently at
No. 72, Elton Avenue,
Wembley, Middlesex HAO 3AU,
United Kingdom.

Appearing by his Power of Attorney
Kalubandanage Sunil
Manajjawa,
Ambalantota

PLAINTIFF-APPELLANT-APPELLANT

Vs.

1. Karunahaluge Sarath Kumara
   Deepawansa
   No. 55/11A, Heenatikumbura
   Thalangama North,
   Thalangama, Battaramulla

2. Mohamed Ashpak Amardeen
   No. 64, Ambalanwatte,
   Heenatikumbura
   Battaramulla

DEFENDANT-RESPONDENT-RESPONDENTS

Before: **Justice A.L. Shiran Gooneratne**
Justice Menaka Wijesundera
Justice Sampath K. B. Wijeratne

Counsel: Rohan Sahabandu, PC with Ms. Chathurika Elvitigala, Ms. Sachini Senanayake and Ms. Pubudu Weerasuriya instructed by Ms. Asha Rathnayake for the **Plaintiff-Appellant- Appellant.**

Sanjeewa Dassanayaka with Asanka Lowe instructed by Ms. K.K. Nilushani for the **2nd Defendant-Respondent -Respondent.**

Argued on: 16/03/2026

Decided on: 21/05/2026

A.L. Shiran Gooneratne J.

By Plaint dated 21/02/2008, the Plaintiff-Appellant-Appellant (hereinafter referred to as the "Plaintiff-Appellant") filed this action No. D.C. Colombo DLM/00049/08 against the Defendant-Respondent-Respondent [the 1st Defendant-Respondent-Respondent in the Petition filed before this Court, hereinafter referred to as the "1st Defendant-Respondent"] and sought inter alia, a declaration that the Plaintiff-Appellant is the owner of the land in extent 0.A 0.R 15P, described in the schedule of the Plaint, a declaration that Deed No. 25 dated 04/01/2007, is a fraudulent document, to eject the 1st Defendant-Respondent from the land and for damages.

By Answer dated 11/02/2009, the 1st Defendant-Respondent denied that the impugned Deed was fraudulently prepared and moved that the Plaintiff's action be dismissed and further made a claim in reconvention for damages.

In paragraphs 2 and 4 of the Petition to this court dated 06/03/2017, the Plaintiff-Appellant states that, in or about March 2010, the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the '2nd Defendant-Respondent') was added as a party. However, no application was made under section 21 of the Civil Procedure Code (CPC) to effect the necessary amendment to the plaint. Nevertheless, upon the 2nd Defendant's failure to appear on summons, the court fixed the case for *ex-parte* trial against the 2nd Defendant.

In Paragraph 5 of the aforesaid Petition the Plaintiff-Appellant states that parties raised issues on 16/09/2011, and when the case came up for further trial on 17/09/2012, the 1st Defendant-Respondent failed to appear in court,

his Attorney conveyed to court that he had no instructions. The case was then fixed for *ex-parte* trial against the 1st Defendant as well.

At the conclusion of the *ex-parte* trial, judgment was delivered on 25/10/2013 against both Defendants, and *ex-parte* decree was entered accordingly.

Both Defendant-Respondents filed applications to purge default under section 86 of the CPC. On or about 20/03/2015, the Plaintiff consented to vacate the *ex-parte* judgment against the 2nd Defendant, and accordingly, the court permitted the 2nd Defendant to proceed with the trial. On or about 28/05/2015, the Plaintiff-Appellant moved court to amend the Plaint by incorporating the necessary averments and reliefs against the 2nd Defendant. This application was made under section 93(1) of the CPC. The 2nd Defendant-Respondent objected to the said application.

By order dated 16/05/2016, the learned Judge of the District Court refused the said application to amend the Plaint, and the learned Judges of the Civil Appeal High Court, by their Judgment dated 25/01/2017, refused leave to appeal against the said order.

By Order dated 12/02/2018, this Court granted leave to appeal on the following questions of law;

1. *Have the Hon. High Court Judges and the learned Trial Judge err in law by failing to consider and or disregarding the effect of the provisions contained in section 21 read together with section 93(1) of the Civil Procedure Code in arriving at their respective conclusions?*
2. *In any event should the proposed amendment to the plaint be permitted even under the Provisions of Section 93(2) of the Civil Procedure Code*

Before proceeding to address the aforesaid questions of law, it is pertinent to observe that the original plaint, together with the reliefs sought therein,

was against the 1st Defendant. When it was later revealed that the 1st Defendant is said to have transferred the property to one Chamari by Deed No. 5227 dated 05/10/2007, and the said Chamari is thereafter said to have transferred the property to the 2nd Defendant by Deed No. 1287 dated 01/08/2008, the Plaintiff filed an application dated 08/10/2009 under section 18 of the CPC to add the 2nd Defendant-Respondent as a party Defendant. However, it is noted that the Plaintiff did not file an application under section 21 of the CPC to amend the Pleadings.

The omission to amend the Plaint after the addition of the 2nd Defendant persisted for over five years. The position of the Plaintiff-Appellant, however, is that both the learned trial Judge and the appellate court erred in law in applying section 93(2) of the CPC when refusing the application to amend the Plaint.

It was brought to the notice of this Court that the inquiry to vacate the *ex-parte* judgment entered against the 1st Defendant is in progress.

It is contended that the circumstances of the case attracted the operation of section 93(1), and not section 93(2). In particular, it is urged that, upon the vacation of the *ex-parte* order against the 2nd Defendant, the court did not proceed to fix the matter for trial, and consequently, the stage contemplated by section 93(2) had not arisen. Accordingly, the Plaintiff-Appellant maintains that the applicable provision was section 93(1), under which the proposed amendment should have been considered.

The learned President's Counsel for the Plaintiff-Appellant further submits that this position is further supported by the fact that the *ex-parte* judgment entered against the 2nd Defendant has been vacated, and that it necessarily follows that the trial against the 2nd Defendant must now commence.

Section 93(1) and (2) of the CPC as amended by Act No. 9 of 1991 reads as follows;

"(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."

It is observed that when this matter was taken up on 16/09/2011, the Plaintiff-Appellant raised issues against the 1st and 2nd Defendants and proceeded to trial *inter-parte* against the 1st Defendant, and *ex parte* against the 2nd Defendant. Accordingly, there can be no doubt that the trial, as against both Defendants, commenced on that date.

When the case was next called on 17/09/2012 for further trial, the 1st Defendant was absent, and for the reasons recorded by court, the trial against the 1st Defendant was also fixed *ex-parte*, thereby proceeding *ex-parte* against both Defendants. Thereafter, on 09/05/2013, the Plaintiff led evidence, marked documents P1 to P8, and closed its case. Subsequently, on 25/10/2013, the learned trial Judge entered judgment in favour of the Plaintiff, and accordingly, the decree was entered against both Defendants.

If the Plaintiff-Appellant's position, that such an application falls within the purview of section 93(1), is to be accepted in the present case, it would, in effect, recognise a fresh date for the commencement of trial against the 2nd

Defendant, well after the original date fixed for trial of the action. Such a proposition is untenable since it would amount to recognising different dates of commencement of trial for different Defendants in the same action. This may, in turn, introduce a state of uncertainty into the process of litigation, and may give rise to inconsistent procedural consequences, including the possibility of different judgments or decrees being entered in the same action on different pleadings. Such a result would undermine procedural fairness and finality in the orderly conduct of trials.

Section 93(1) of the CPC contemplates a situation in which an application is made to amend pleadings before the date first fixed for the trial of an action. In the present case, however, the Plaintiff's application to amend the Plaint was made on or about 28/05/2015, long after the action had passed that stage. The subsequent vacation of the *ex-parte* judgment against the 2nd Defendant did not alter the date first fixed for trial of the action. The learned Judge of the Civil Appeal High Court, was therefore correct to observe that *"if the amendment is to be permitted there will be two plaints in the case one for the 1st Defendant and another for the 2nd Defendant."*

Therefore, for all the aforesaid reasons, I am of the view that the application to amend the pleadings was made after the date first fixed for trial of the action, and that both the District Court and the Civil Appeal High Court were correct in deciding that section 93(2) of the CPC applies in the facts and circumstances of this case.

The learned Judge of the Civil Appeal High Court has drawn attention to ***Nimalraj v. Tharmarajah (2005) 3 SLR 309***, where the Court of Appeal was called upon to decide on matters similar to those of the present case. Andrew Somawansa, J. (P/CA) inter alia, held that;

"The application to amend the plaint was clearly a belated application made after three trial dates - section 93 (2) would become operative and applicable. (2) There are two limbs in section 93 (2) and the two ingredients are separate and distinct requirements and a party seeking to amend the pleadings after the first date of trial should establish the existence of both ingredients. (3) In the instant action the plaintiff-respondents are clearly guilty of laches. The proposed amended plaint was filed nearly 2 years after the 3rd defendant-petitioner was added as a party."

The Plaintiff-Appellant, having relied on Section 93(1) to pursue his application, has also contended that when the *ex-parte* judgment is vacated, a fresh trial against the 2nd Defendant has to take place, and in a situation where the court has not fixed a date of trial against the 2nd Defendant, Section 80 of the Civil Procedure Code comes into operation.

However, the contention of the Plaintiff-Appellant that the vacation of the *ex-parte* judgment necessitates a fresh trial against the 2nd Defendant based on section 93(1) is, in my view, wholly misconceived. This position was authoritatively laid down by Weerasuriya J. in ***Ceylon Insurance Co. Ltd. v. Nanayakkara*** **(1999) 3 SLR 50,** wherein it was held that;

"The discretion vested in the judge either to continue with the trial or to commence proceedings afresh does not affect the nature of the order made under section 80 of the Civil Procedure Code relating to the fixing of the first trial date. The order made fixing the date of trial in terms of section 80 becomes the day first fixed for trial within the meaning of section 93(2) of the Civil Procedure Code."

A similar issue arose in ***Bastian Koralalage Camillus Sunny Rodrigo v. Bastian Koralalage Kingsley Rodrigo*****, SC Appeal No. 24/2020,** decided on **08/11/2021**. In that case, the Plaintiff had instituted action in

2008 and later sought to add further Defendants under section 18 of the Civil Procedure Code. Although the additional Defendants were permitted to be added by order dated 24/09/2012, the Plaintiff filed the amended plaint only on 21/02/2018. The case had already been fixed for trial on 30/04/2015, but was thereafter taken out of the trial roll for further steps. The Plaintiff contended that the amendment fell within section 93(1), as the case had not proceeded to trial on the earlier date.

This Court rejected that contention and held that the relevant consideration is the date first fixed for trial of the action. It was observed that, "In an action, the appointed date for the trial of the action and/or the first date fixed for trial can be one and the same." The Court further held that, since the amendments were moved after the day first fixed for trial, "it is imperative that Section 93(2) should apply."

The principle in the said decision is applicable to the present case. The fact that the *ex-parte* judgment against the 2nd Defendant was later vacated does not alter the date first fixed for trial of the action. The Plaintiff-Appellant's application to amend the Plaint was therefore one made after the date first fixed for trial and was properly governed by section 93(2), and not section 93(1), of the Civil Procedure Code.

The Plaintiff-Appellant did not prefer the application before the District Court or the Civil Appeal High Court on the basis of section 93(2) of the CPC. However, a question of law has now been raised before this Court as to whether the proposed amendment ought to be permitted even under section 93(2). Therefore, this Court would be required to consider whether that grave and irremediable injustice would be caused if the amendment is not permitted, and that the party applying has not been guilty of laches.

In ***Nimalraj v. Tharmarajah (Supra)*****,** where a defendant had been added under section 18 of the CPC and no steps had been taken under section 21 to amend the plaint, Somawansa J. observed that, "the plaintiffs-respondents totally failed to take steps in terms of mandatory provisions contained in section 21 of the Civil Procedure Code." His Lordship held that the application to amend the plaint, made nearly two years after the added defendant was brought into the action, was *"clearly a belated application"* and that *"Undoubtedly the plaintiffs-respondents are guilty of laches in prosecuting this action and the said laches cannot be condoned or excused by any means."*

In the present case, the 2nd Defendant was added as a party in or about March 2010. The Plaintiff-Appellant was therefore aware, from that point, that the Plaint required amendment if any relief was to be sought against the 2nd Defendant. However, no amended Plaint was tendered at that stage. Instead, the Plaintiff-Appellant proceeded on the original Plaint, allowed the matter to proceed *ex-parte* against the 2nd Defendant, led evidence, obtained *ex-parte* judgment against both Defendants, and moved to amend the Plaint only on or about 28/05/2015, after the *ex-parte* judgment against the 2nd Defendant was vacated. No satisfactory explanation has been placed before this Court for this delay of over five years. The need to amend did not arise unexpectedly. It arose directly from the addition of the 2nd Defendant. The failure to take the necessary steps under section 21 for such a prolonged period therefore amounts to a lack of due diligence.

In ***Sumanasekera and others v. Mohammed Tuwan Mohommed Meezam*** **(2012) 2 SLR 373**, this Court held that the learned District Judge erred by relying on section 18 alone, without taking into account the principles relating to section 93 of the CPC. In that case, the Court answered the question on laches and *inter alia* held that "the laches on the part of the Plaintiff disentitled him from getting an order in his favour."

Accordingly, even if the application is considered under section 93(2), the Plaintiff-Appellant has failed to satisfy the requirement that he is not guilty of laches. For that reason too, the proposed amendment cannot be permitted.

In the foregoing circumstances, I am of the view that the questions on which leave to appeal was granted should be answered in the negative.

For these reasons, the judgment dated 25/01/2017 of the Civil Appellate High Court is affirmed. The learned District Judge is directed to proceed to trial against the 2nd Defendant-Respondent on the original plaint filed by the Plaintiff-Appellant.

The appeal is dismissed. The 2nd Defendant-Respondent is entitled to costs fixed at Rs. 150,000.

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree.

Judge of the Supreme Court

Sampath K. B. Wijeratne, J.

I agree.

Judge of the Supreme Court