

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

***In the matter of an application for Leave to
Appeal under and in terms of Section 5 of
the High Court of the Provinces (Special
Provisions) Act No. 10 of 1996.***

SC Appeal 05/2024 & 06/2024

Leave to Appeal No.
SC/HC/LA/91/2020

High Court Case No.
CHC/26/2014/CO

1. Saparamdu Wickramasingha Arachchige
Anura Devapriya
129, Dutugemunu Street,
Kohuwala, Dehiwala.

2. Saparamdu Wickramasingha Arachchige
Kassapa Devamitta
250/7, Highlevel Road,
Kirulapona, Colombo 6.

3. Saparamdu Wickramasingha Arachchige
Upulnayani Rajapathirana (*nee*
Saparamadu)
9, Papiliyana Mawatha,
Papiliyana, Nugegoda.

PETITIONERS

-Vs-

1. Tisara Investments (Pvt) Ltd
129, Dutugemunu Street,
Kohuwala, Dehiwala.

2. Saparamdu Wickramasingha Arachchige
Don Sanathkumara Devapriya (*now
deseased*)

11, Papiliyana Mawatha,
Papiliyana, Nugegoda.

3. Saparamdu Rupa Malathi (*now deceased*)

11, Papiliyana Mawatha,
Papiliyana, Nugegoda.

4. Saparamdu Wickramasingha Arachchige

Mohan Sanathkumara

71/2, Horton Place,

Colombo 7

*(The 4th Respondents and the Guardian ad
litem of the 6th Respondent Minor)*

5. Desano Investments (Pvt) Ltd

129, Dutugemunu Street,

Kohuwala, Dehiwala.

6. Saveen Saparamadu

71/2, Horton Place,

Colombo 7.

7. Kaveen Saparamadu

71/2, Horton Place,

Colombo 7.

8. Senura Rajapathirana
9, Papiliyana Mawatha,
Papiliyana, Nugegoda.
9. Vijeni Rajapathirana
9, Papiliyana Mawatha,
Papiliyana, Nugegoda.
10.
 - a. Saparamdu Wickramasingha Arachchige
Don Sanathkumara Devapriya
11, Papiliyana Mawatha,
Papiliyana, Nugegoda.
 - b. Saparamdu Rupa Malathi
11, Papiliyana Mawatha,
Papiliyana, Nugegoda.
 - c. Saparamdu Wickramasingha
Arachchige Mohan Sanathkumara
71/2, Horton Place,
Colombo 7.
 - d. Kshenuka Saparamdu
71/2, Horton Place,
Colombo 7.
 - e. Lalitha Boteju
12/2, Puranavihara Road,
Balapokuna,
Colombo 6.

- f. Nihal Illeperuma
56/12, Circula Road,
Udumulla Road,
Battaramulla.
- g. Marja Van Leeuwan
Stitching Weesshuis,
Meer En Bosalaan 106, 2554 GA
Den Haag, the Netherlands.
- h. S.J Pahud de Mortanges-Kroes
Stitching Weesshuis,
Meer En Bosalaan 106, 2554 GA
Den Haag, the Netherlands
- The trustees of Somawathi Saparamadu
Trust.*

11. Dr. Uditha Rajapathirana
9, Papiliyana Mawatha
Papiliyana, Nugegoda.
*(Guardian ad litem of the 8th and 9th
Respondent Minors)*

RESPONDENTS

AND NOW

7. Kaveen Saparamdu
71/2, Horton Place,
Colombo 7.

7th RESPONDENT-APPELLANT

-Vs-

1. Saparamdu Wickramasingha Arachchige
Anura Devapriya
129, Dutugemunu Street,
Kohuwala, Dehiwala.
2. Saparamdu Wickramasingha Arachchige
Kassapa Devamitta
250/7, Highlevel Road,
Kirulapona, Colombo 6.
3. Saparamdu Wickramasingha Arachchige
Upulnayani Rajapathirana (nee
Saparamadu)
9, Papiliyana Mawatha,
Papiliyana, Nugegoda.

PETITIONER-RESPONDENTS

1. Tisara Investments (Pvt) Ltd
129, Dutugemunu Street,
Kohuwala, Dehiwala.
2. Saparamdu Wickramasingha Arachchige
Don Sanathkumara Devapriya (*now
deceased*)
11, Papiliyana Mawatha,
Papiliyana, Nugegoda.

3. Saparamdu Rupa Malathi (*now deceased*)
11, Papiliyana Mawatha,
Papiliyana, Nugegoda.

4. Saparamdu Wickramasingha Arachchige
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Papiliyana Mawatha,
Papiliyana, Nugegoda.

9. Vijeni Rajapathirana
Papiliyana Mawatha,
Papiliyana, Nugegoda.

10.

a. Saparamdu Wickramasingha Arachchige

Don Sanathkumara Devapriya
11, Papiliyana Mawatha,
Papiliyana, Nugegoda.

b. Saparamdu Rupa Malathi
11, Papiliyana Mawatha,
Papiliyana, Nugegoda.

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f. Nihal Illeperuma
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g. Marja Van Leeuwan
Stitching Weeshuis,

Meer En Bosalaan 106, 2554 GA
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- h. S.J Pahud de Mortanges-Kroes
Stitching Weeshuis,
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Den Haag,
The Netherlands.

*The trustees of Somawathi Saparamadu
Trust*

11. Dr. Uditha Rajapathirana
9, Papiliyana Mawatha,
Papiliyana, Nugegoda.
*(Guardian ad litem of the 8th and 9th
Respondents Minors)*

RESPONDENT-RESPONDENTS

BEFORE: **S. THURAIRAJA, PC, J.**
KUMUDINI WICKREMASINGHE, J. AND
MENAKA WIJESUNDERA, J.

COUNSEL: Faiszer Musthapha, PC with Pulasthi Rupasinha, Kavin Hettiarachchi
instructed by Danushika Priyadarshani for the 7th Respondent-
Appellant.

Kuvera De zoysa, PC with Sajana de Zoysa instructed by Nithi
Murugesu & Associates for the 1st Respondent-Respondent.

Chandaka Jayasundere, PC with Suzie Beiling instructed by Nithi Murugesu & Associates for the 5th Respondent-Respondent.

7th Respondent- Appellant on 24th June 2024

WRITTEN 1st and 2nd Petitioner-Respondents on 18th July 2024

SUBMISSIONS: 1st Respondent-Respondent 23rd July 2024

5th Respondent-Respondent on 23th July 2024

ARGUED ON: 23rd June 2025

DECIDED ON: 10th March 2026

S. THURAIRAJA, PC, J.

1. The appeal arises from the order of the Commercial High Court dated 18th September 2020 on the application made under Section 393 of the *Civil Procedure Code* to continue the main proceedings against the surviving Respondents before the Commercial High Court, following the death of the 3rd Respondent-Respondent. The maintainability of this application was challenged and the issues formulated by the Commercial High Court on 16th June 2020 were confined to the statutory requirements of Section 393 of the *Civil Procedure Code* and the consequences of a delay in filing the relevant application.
2. In order to avoid any doubt regarding the proper identification of the parties to these proceedings, it is noted at the outset that this Court has corrected the caption to accurately reflect the designation of the Appellant parties. This correction was made notwithstanding the Registered Attorney's failure to amend the caption, upon obtaining leave to appeal, so as to properly reflect the party's designation at this stage of the proceedings.

FACTUAL MATRIX

3. The Petitioner-Respondents have instituted the original action at the Commercial High Court on 8th July 2014, alleging corporate mismanagement and that the affairs of the 1st Respondent-Respondent company were being conducted in a manner oppressive to the rights of the Petitioner-Respondents as shareholders.
4. At the time of institution, the 7th Respondent-Appellant, who was a minor represented by a guardian *ad litem*, has since attained majority to pursue this appeal in his own right.
5. Following the death of the 2nd Respondent-Respondent on 11th August 2016, [the father of the Petitioner-Respondents & 4th Respondent-Respondent, objecting to the Petitioner-Respondents' Application], the Petitioner-Respondents have filed an application under Section 393 of the *Civil Procedure Code* on 19th May 2017, to proceed against the surviving Respondents. The Commercial High Court has allowed this application on 11th August 2017.
6. Subsequently, the 3rd Respondent-Respondent [the mother of the Petitioner-Respondents & 4th Respondent-Respondent as well as the Petitioner-Respondents' first witness] had passed away on the 8th April 2018, before the conclusion of her cross-examination. Although the same has been informed to the Court on 14th May 2018,¹ the Petitioner-Respondents have not immediately filed an application under Section 393. Record indicates that they have instead, moved to tender an Affidavit for a new witness and proceeded with other interim matters, including an inquiry into the withdrawal of the 3rd Petitioner-Respondent, which has seen its conclusion on 14th October 2019.
7. Consequently, the 7th Respondent-Appellant and the 1st and 5th Respondent-

¹ CHC Journal Entry dated 14th May 2018.

Respondents have raised a preliminary objection regarding the maintainability of the action, arguing that the 2 ½ year delay and the failure to comply with Section 393 were fatal to the proceedings, and requested Court to dismiss the Petition *in limine*. The Petitioner-Respondents have initially resisted this objection, asserting that no such application was necessary and intimating further that a motion would be filed to proceed without substitution. However, in a change of position, the Petitioner-Respondents have subsequently filed a formal Section 393 application by way of a Petition, on 13th May 2020, though this Petition was dated 16th March 2020.

8. In response, the 7th Respondent- Appellant and the 1st and 5th Respondent-Respondents have filed a Motion dated 9th June 2020 objecting to the Section 393 Petition on the ground that it was “*an afterthought after abandoning and disclaiming the right to make such an application,*” and contended that the Petitioner-Respondents’ application dated 16th March 2020 was therefore liable to be dismissed *in limine*, By way of such motion, they have also sought the dismissal of the action itself.

ISSUES IN THE COMMERCIAL HIGH COURT

9. In resolving the maintainability of the challenged Section 393 application, the following issues have been formulated before the Commercial High Court for determination, upon which the parties have agreed to file their written submissions:²
 - A. *Whether the main application could be continued without making an application under Section 393 of the Civil Procedure Code and/or without effecting substitution in place of the deceased 3rd Respondent.*
 - B. *Whether the Petitioner is entitled to make an application for substitution in place*

² CHC Journal Entry dated 16th July 2020.

of the deceased 3rd Respondent and/or to make an application under Section 393 of the Civil Procedure Code, after 2 ½ years from the death of the 3rd Respondent.

C. *Whether there is a proper application before this Court in terms of Section 393 of the Civil Procedure Code for the continuation of this case.*

10. The Commercial High Court has found the Petitioner-Respondents' application under Section 393 of the *Civil Procedure Code* to be valid and sufficient to permit the continuation of the main action against the surviving Respondents before the Commercial High Court, notwithstanding the death of the 3rd Respondent-Respondent. Accordingly, the learned High Court Judge by Order dated 18th September 2020 *inter alia* has allowed the Petitioner-Respondents to proceed with the action against the surviving Respondents before the Commercial High Court, and ordered the Petitioner-Respondents to pay costs of Rs.50,000/- each to the 7th Respondent-Appellant and the 1st and 5th Respondent-Respondents.
11. In the said Order learned Judge reasons that, although Section 393 of the *Civil Procedure Code* uses mandatory language ("the court 'shall' make an order"), making an order a prerequisite in ordinary cases, the proceedings here had already continued against the survivors without objection from any party since the 3rd Respondent-Respondent's death. This, according to the learned Judge, made the lack of a formal order a mere procedural irregularity that caused no prejudice to the Respondents before the Commercial High Court.
12. Moreover, having observed that Section 393 imposes no fixed time limit for such an application the learned Judge has declined to read in any limitation period, stating that courts cannot add such requirements when interpreting statutes. While recognizing a significant delay by the Petitioner-Respondents, the learned Judge has found it partly justified by the parallel proceedings on the 3rd Petitioner-Respondent's withdrawal

application (spanning over a year). He has further noted that the Respondents before the Commercial High Court, themselves did not object to the continuation for 2½ years, describing their objection as belated. Since all heirs of the deceased 3rd Respondent-Respondent were already parties to the action, learned Judge has seen no prejudice against any of the parties, rendering the 7th Respondent-Appellant and the 1st and 5th Respondent-Respondents' challenge meritless.

13. Accordingly, the learned Judge has found that the Petitioner-Respondents' application under Section 393 met the requirements under Chapter XXIV (Sections 373–374). The learned Judge has further rejected the arguments that it was defective for lacking an order *nisi* or interlocutory relief under Section 377, on the basis that technical defects do not bar relief in the absence of prejudice, and courts should not allow formalities to obstruct justice.
14. Aggrieved by the said order of the High Court, the 7th Respondent-Appellant preferred an appeal before this Court challenging the same.

QUESTIONS OF LAW BEFORE US

15. Leave to appeal was granted by this Court, on 7th December 2023, on the following questions of law:

(b) Is the Order of the Learned Judge of the Commercial High Court contrary to Section 393 of the Civil Procedure Code?

(d) Has the Learned Judge of the Commercial High Court erred in Law by not coming to the finding that the Petitioner-Respondents are not entitled to make an Application in terms of Section 393 of the Civil Procedure Code after refusing to make such an Application and/or after failing to make such an Application?

- (e) *Has the Learned Judge of the Commercial High Court erred in Law by not coming to the finding that the Petitioner-Respondents are not entitled to make an Application in terms of Section 393 of the Civil Procedure Code consequent to an objection being taken with regard to the Petitioner-Respondents' failure to make such an Application?*
- (f) *Has the Learned Judge of the Commercial High Court erred in Law by not coming to the finding that the Petitioner-Respondents have contradicted their own stance by filing an Application in terms of Section 393 of the Civil Procedure Code?*
- (l) *Has the Learned Judge of the Commercial High Court erred in Law by not coming to the finding that the Petitioner-Respondents have tendered a purported Application in terms of Section 393 of the Civil Procedure Code as an afterthought after abandoning and disclaiming the right to make such an Application?*

ANALYSIS

16. The paramount question for determination before this Court is not merely the procedural validity of a belated application under Section 393 of the *Civil Procedure Code*, but extends to considering whether the fundamental jurisdictional requirements for maintaining a challenge before an appellate court are satisfied. The Appellant seeks to impugn the Order of the Commercial High Court dated 18th September 2020 primarily on the basis that the Petitioner-Respondents were legally precluded from filing a belated petition for they have initially disclaimed the necessity of an application under Section 393 and subsequently reprobated that stance by filing such petition.
17. In the exercise of appellate jurisdiction, we are to be mindful of its foundational purpose. It is a process for the correction of errors committed by the lower court in respect of the

matters it was called upon to adjudicate.

18. The issues formulated by the Commercial High Court on 16th June 2020 are strictly confined to the statutory requirements of Section 393 and the effect of the 2 ½ year delay (laches). While the learned Judge has conceded that the Petitioner-Respondents' later application ran "quite contrary"³ to their earlier oral submissions, he has not treated this contradiction as fatal. In fact, he has not been called to consider the same as neither party has framed a question of law addressing whether the Petitioner-Respondents could shift position after having initially disclaimed the need to file an application under Section 393.
19. Instead, the focus of the learned High Court Judge's determination has been on the fact that Section 393 prescribes no time limit and that a "proper application" was pending before the Court at the time of the order. The learned Judge has reached a finding that the application was "proper as at now".⁴
20. Essentially, the learned Judge of the Commercial High Court was never invited to decide, so he did not decide, on the question as to whether the Petitioner-Respondents were precluded by their prior conduct from filing such an application. However, in the present appeal, the Appellant is inviting this Court to rule on a question of law that was never the subject of a finding in the court below.
21. To allow the Appellant to seek a ruling on a new set of questions of law, on such points of law or fact which were never canvassed before the trial judge, would be to bypass the trial court and invite this Court to try such question as if it is a court of first instance.
22. The barrier is even more pronounced when the new ground involves a mixed question

³ High Court Order, at p. 9.

⁴ High Court Order, at p. 18.

of law and fact⁵ rather than a pure question of law that can be resolved purely on legal principles without any factual inquiry.

23. The decision in ***The Tasmania [1890]***,⁶ which has consistently formed the basis of our law, stipulates that an appellate court should only entertain a new ground if it is satisfied beyond doubt that it has all the facts bearing upon the contention as completely as if it had arisen at trial. Furthermore, it must be clear that no satisfactory explanation could have been offered by the party whose conduct is impugned if given an opportunity in the witness box.
24. The decision in ***The Tasmania [1890]***⁷ was followed in ***Appuhamy v. Nona [1912]***,⁸ in deciding whether it could be allowed to raise a point in appeal for the first time. Pereira, J., held that,

*“Under our procedure all the contentious matter between the parties to a civil suit is, so as to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other and **I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below** under someone or other of the issues framed and when such a ground that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the Tasmania may well be observed.*

⁵ *Associated Newspapers of Ceylon Ltd v. Pitumana Liyanage Shantha Chandraguptha Amarasinghe* SC CHC APP NO. 30/2003; *Sri Lanka Transport Board et al. v. A. Arunthavam et al.* SC APPEAL 46/2019; *Jayanickrama v. Silva* 76 NLR 427; (1997) 2 Sri L R 109; [2010] 01 Sri LR 309.

⁶ *The Tasmania* [1890] 15 A.C. 223.

⁷ *ibid.*

⁸ *Appuhamy v. Nona* (1912) 15 N.L.R. 311, at p. 321.

25. In **Sirimewan Maha Mudalige Kalyani Sirimewan v. Herath Mudiyansele Gunarath Menike [2024]**,⁹ Samayawardhena, J held as follows:

*“The plaintiff cannot take up a new position for the first time before the Supreme Court, which is not a question of law but a question of fact. A party to an action is bound by specific constraints regarding the presentation of his case. Firstly, a party cannot, by way of issues, present a case different from what was pleaded in his pleadings. Secondly, once issues are raised and accepted by the Court, a party cannot present a different case at the trial from what was already raised by way of issues. Thirdly, once the judgment is pronounced by the trial Court, the losing party cannot present a different case before the appellate Court from what was presented in the lower Courts, unless the new ground is on a pure question of law and not on a question of fact or on a mixed question of fact and law.”*¹⁰

“The cumulative effect of these two leading decisions (i.e. The Tasmania and Appuhamy v Nona) is that a question of fact can be raised for the first time in appeal if:

- (a) *“it might have been put forward in the Court below under some one or other of the issues framed”; and*
- (b) *“if it is satisfied beyond doubt” that*
 - (i) *“it [the appellate Court] has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial”; and*
 - (ii) *“no satisfactory explanation could have been offered by those whose*

⁹ SC Appeal 47/2017, SC Minutes of 10th May 2024.

¹⁰ *Ibid*, at p. 6.

*conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box”.*¹¹

26. Turning to the questions of law individually, question of law under paragraph (b) invites this Court to examine whether the Order of the learned Judge of the Commercial High Court is contrary to Section 393 of the *Civil Procedure Code*. Having examined the impugned Order, this Court is satisfied that the learned High Court Judge has correctly interpreted and applied Section 393. The Judge has duly considered that the provision mandates an application by way of summary procedure, noting that the word "shall" implies that without such an order, the action cannot proceed. The Judge has further found, correctly, that there is no strict time limit prescribed in the section for making the application, and that any delay must be assessed in the context of laches—defined not as deliberate delay but as delay which cannot be reasonably explained.
27. Questions in paragraphs (d), (e), (f) and (l), pertain to whether the learned High Court Judge erred in not finding that the Petitioner-Respondents were disentitled from making the application under Section 393 of the *Civil Procedure Code* on the grounds that they had initially refused or failed to make such an application, and later had taken a contradictory stance by filling it, or had submitted it as an afterthought after disclaiming any right to do so.
28. However, this contention was neither raised nor determined before the High Court, and therefore constitutes a new matter that is not suitable for consideration on appeal. Such a contention involves mixed questions of fact and law, requiring an examination of evidence and context not fully ventilated in the High Court. I am not privy to the context or the spirit in which the learned Counsel made the assertion that a Section 393 application is not required. He may well have expressed that as an opinion of law, which

¹¹ *Ibid*, at p. 9-10.

he himself later realised to be a mistaken one. I am not satisfied beyond doubt, from what is available on record, that this Court has '*before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial*'. I am also not convinced that no explanation could have been given if the opportunity had been afforded to the Petitioner-Respondents.

29. Upon careful consideration, including the proceedings before the Commercial High Court and the three issues formulated before the said Court (as set out in paragraph 9 above), it is evident that the questions of law upon which leave was granted in this appeal were not raised or canvassed before the High Court. I am of the view that what is available on record do not contain all such facts bearing upon this new contention raised by the Appellant in order for this Court to consider the same as completely as the trial court could have, had it been called to do so. As such, I am not inclined to delve into this fresh question. Further, question (b) relating to the alleged inconsistency with Section 393 is without merit. As already observed, the learned High Court Judge has correctly interpreted and applied Section 393.
30. In the circumstances, as all questions of law upon which leave was granted are answered in the negative, this appeal must be dismissed.
31. Accordingly, the impugned order of the Commercial High Court dated 18th September 2020 is affirmed, and the Commercial High Court shall resume the proceedings before it forthwith in terms of the applicable procedure.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

MENAKA WIJESUNDERA, J.

I agree.

JUDGE OF THE SUPREME COURT