

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

In the matter of an appeal against the judgment of the
Civil Appellate High Court of Mt. Lavinia

1. Shelton Upali Paul
**1st Plaintiff-Respondent-Respondent-
Respondent-Petitioner-Appellant**

2. KKPS Silva
(Deceased)

Neelawathura Walawe Premawathi

**Party substituted for the deceased 2nd Plaintiff-
Respondent-Respondent-Respondent-
Petitioner-Appellant**

SC Appeal 5/2011
SC/HCCA/LA 196/2010
WP/HCCA/Mt/90/08/RA
DC Mt. Lavinia Case No.2667/M

Vs

EG Dayananda
**Defendant-Petitioner-Petitioner-
Petitioner-Respondent-Respondent**

Before : Saleem Marsoof PC, J
Priyasath Dep PC, J
Sisira J De Abrew J

Counsel : Athula Bandara Herath with Mrs. Shashika de Silva
 for the Plaintiff-Respondent-
 Respondent-Respondent-Petitioner-Appellants
 JP Gamage for the Defendant-Petitioner-
 Petitioner-Petitioner-Respondent-Respondent

Argued on : 14.10.2014

Decided on : 12.12.2014

Sisira J De Abrew J.

The 1st and the 2nd Plaintiff-Respondent-Respondent-Respondent-Petitioner-Appellants (hereinafter referred to as the Plaintiff-Appellants) instituted action in the District Court of Mount Lavinia claiming Rs.3,000,000/- as damages for the alleged cause of action set out in the plaint. The Defendant-Petitioner-Petitioner-Petitioner-Respondent-Respondent (hereinafter referred to as the Defenadant-Respondent) filed an answer moving for dismissal of action. The trial commenced on 9.7.2004. After several adjournments, the case was fixed for further trial on 14.12.2005. On 14.12.2005 around 12.45p.m, when the case was taken for further trial the Defendant-Respondent was absent and unrepresented and the case was fixed for ex-parte trial. However around 1.10 p.m. on the same day, learned counsel for the Defendant-Respondent apparently having obtained permission from court to mention the case, explained reasons for his failure to appear in court around 12.45 p.m. According to his explanation, around 12.45 p.m. he was held up in the other court (court No.1). He therefore made an application to vacate the ex-parte order. The learned District Judge made an order to have the case mentioned on the next date (27.1.2006). However Attorney-at-law for the Defendant-Respondent probably to be on safe side filed petition and affidavit dated

19.12.2005 and moved the order dated 14.12.2005 fixing the case for ex-parte be vacated. The learned District Judge made an order to have the case mentioned on 27.1.2006.

When the case was taken up on 27.1.2006, despite the petition and affidavit dated 19.12.2005 filed by the Defendant-Respondent, the case was taken up for ex-parte trial. Although the case was taken up for ex-parte trial, the learned District Judge failed to make an order either rejecting or accepting the petition dated 19.12.2005.

After ex-parte trial, the learned District Judge on 21.4.2006 delivered the judgment in favour of the Plaintiff-Appellants. Upon the ex-parte decree being served, the Defendant-Respondent made an application by petition dated 8.3.2007 (page 213 of the brief) to have the said ex-parte judgment and the decree set aside. This application was made under Section 86(2) of the Civil Procedure Code (CPC). The learned District Judge, on 9.3.2007 (Journal Entry No.42), made an order to have the case mentioned on the next date (27.4.2007). The said application made under Section 86(2) of the CPC was not fixed for support or inquiry on 27.4.2007. On 27.4.2007 too the Defendant-Respondent was absent. There is nothing to indicate that the Defendant-Respondent was not represented by his Attorney-at-Law on 27.4.2007. However, if the Defendant-Respondent was represented by an Attorney-at law, in my view, it would have been recorded. The learned District Judge, on 27.4.2007, made an order dismissing the said application of the Defendant-Respondent.

The Defendant-Respondent thereafter, by petition dated 13.9.2007 (page 226 of the brief), made an application under and in terms of Section 839 of the CPC, inter alia, to have the order dated 27.4.2007 set aside and to hold an inquiry on his application made under Section 86(2) of the CPC. After an inter parte

inquiry, the learned District Judge by his order dated 2.10.2008 refused this application.

Being aggrieved by the said order of the learned District Judge dated 2.10.2008, the Defendant-Respondent filed a revision application in the Civil Appellate High Court of Mount Lavinia (hereinafter referred to as the High Court) to have the said order of the learned District Judge dated 2.10.2008 revised. The High Court, by its order dated 17.5.2010, set aside the order of the learned District Judge dated 2.10.2008. The High Court in fact granted all the relief sought by the Defendant-Respondent in his petition. The Defendant-Respondent, in his petition filed in the High Court sought the following relief.

1. To issue notice on the Respondents.
2. To revise and set aside the order of the learned District Judge dated 2.10.2008.
3. To set aside the order of the learned District Judge rejecting the petition of the Petitioner (the Defendant-Respondent) made under Section 86(2) of the CPC.
4. To make an order directing the District Court to re-inquire petition filed under Section 86(2) of the CPC.
5. To make an order staying the execution of the decree and all other steps.
6. Costs.
7. Grant such other and further reliefs that the court shall seem meet.

The High Court, by its order dated 17.5.2010, granted the above reliefs. It is important to note that the Defendant-Respondent in the above revision application has not moved the High Court to set aside the ex-parte judgment. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellants have filed the

present appeal. This Court by its order dated 24.1.2011 granted leave to appeal on the following questions of law.

1. Should the party who makes an application under Section 86(2) of the CPC exercise due diligence and prosecute and satisfy court that such party had reasonable grounds for the default?
2. Is the Court obliged to grant another date to support a petition filed in terms of Section 86(2) of the CPC?
3. Can the Court hold an inquiry in terms of Section 86(2) of the CPC after execution of writ?
4. Can the Court exercise the discretionary power in terms of Section 839 of the CPC when there is specific section governing the question involved?

The most important question that must be decided in this case is whether the order made by the learned District Judge on 27.4.2007 rejecting the application of the Defendant Respondent made under Section 86(2) of the CPC without it being fixed for support or inquiry is correct or not. I now advert to this question. In order to find an answer to this question I must consider Section 86(2) of the CPC which reads as follows.

“Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper.”

According to this section, if the defendant satisfies court that he had reasonable grounds for his default, the District Court will have to vacate his ex-parte judgment and permit the defendant to proceed with his defence. For the defendant to satisfy court that he had reasonable grounds for his default, he must be given an opportunity to adduce evidence. To implement this task he should know that his application has been fixed for inquiry. Who gives a date for the inquiry? It is the District Judge. The defendant cannot perform this task as he has no control over judicial proceedings. It is the Judge who has the control over judicial proceedings. Therefore when an application is made under Section 86(2) of the CPC, it becomes the duty of the District Judge to fix the matter for inquiry. He cannot refuse or reject such an application without it being fixed for inquiry. The interest of justice demands to notify the defendant of the date of inquiry.

The learned District Judge in the present case without fixing the application made by the Defendant-Respondent in his petition dated 8.3.2007 for inquiry, has, by order dated 27.4.2007, rejected it. This order, in my view, is wrong and should be set aside.

Learned counsel for the Plaintiff-Appellant contended that the Defendant-Respondent could not have invoked the revisionary jurisdiction of the High Court when he has a right of appeal under Section 88(2) of the CPC. It is a well established principle that a litigant who has a right of appeal cannot invoke the revisionary jurisdiction of the Superior Court unless there are exceptional circumstances. Are there exceptional circumstances in the present case? I now advert to this question. I have earlier pointed out that the order made by the learned District Judge on 27.4.2007 rejecting the application of the Defendant-Respondent made under section 86(2) of the CPC was wrong. A wrong order made by a court cannot be permitted to stand. In my view existence and/or operation of a wrong

order of a lower court can be considered as an exceptional ground to exercise the revisionary jurisdiction of Superior Court. For these reasons, I hold that the Defendant-Respondent was entitled to invoke the revisionary jurisdiction of the High Court and the High Court was right when it exercised its revisionary jurisdiction. For the above reasons, I reject the above contention of learned counsel for the Plaintiff-Appellant.

I now advert to the question of law raised by the Plaintiff-Appellant. They are as follows.

1. Should the party who makes an application under Section 86(2) of the CPC exercise due diligence and prosecute and satisfy court that such party had reasonable grounds for the default?

This question is answered in the affirmative. But I would like to state here that in order to satisfy court that the defendant had reasonable grounds for the default, the court must fix the application for inquiry.

2. Is the Court obliged to grant another date to support a petition filed in terms of Section 86(2) of the CPC?

The District Court has not given any date for the inquiry or to support the application made under Section 86(2) of the CPC. Therefore this question does not arise.

3. Can the Court hold an inquiry in terms of Section 86(2) of the CPC after execution of writ?

If the order made by the learned District Judge rejecting the application to purge default made under Section 86(2) is set aside, he will have to hold a fresh inquiry under Section 86(2) of the CPC whether the application to purge the default should or should not be allowed. If the defendant satisfies court that he had reasonable

grounds for such default, the District Court will have to set aside the ex-parte judgment. By this time if the writ has been executed, the execution of the writ has to be recalled or stayed. Therefore the execution of a writ cannot operate as a bar to hold an inquiry under Section 86(2) of the CPC. Therefore the above question of law is answered in the affirmative.

4. Can the Court exercise the discretionary power in terms of Section 839 of the CPC when there is specific section governing the question involved?

Revisionary jurisdiction of the Higher court is exercised in the discretion of the court. When the lower court makes a wrong order, the Higher court, in the exercise of its revisionary jurisdiction, can set aside such order. The applicant need not even state the section under which the application is made. I therefore answer the above question of law in the affirmative.

For the above reasons, I hold that High Court was correct when it allowed the revision application of the Defendant-Respondent.

I have earlier held that the order of the District Judge dated 27.4.2007 rejecting the application of the Defendant-Respondent made by his petition dated 8.3.2007 without it being fixed for inquiry was wrong and should be set aside. I hold that the High Court was right when it set aside the order of the District Judge dated 27.4.2007. I direct the learned District Judge to hold an inquiry on the said petition dated 8.3.2007 after informing the date of inquiry to the Defendant-Respondent. The High Court, by its order dated 17.6.2010, has set aside the order of the District Judge dated 2.10.2008.

For the above reasons, I upholding the judgment of the High Court dated 17.5.2010, dismiss the appeal of the Plaintiff-Respondent with costs fixed at Rs.25,000/-

Appeal dismissed.

Judge of the Supreme Court.

Saleem Marsoof PC, J

I agree.

Judge of the Supreme Court.

Priyasath Dep.

I agree.

Judge of the Supreme Court.