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

In the matter of an application for Leave to Appeal against the Judgement of the Provincial High Court of the Central Province holden in Kandy dated 22.07.2016. in case No. CP/HCCA/KA/N/02/2015.

Colombo Buddhist Theosophical Society,
No. 203, Olcott Mawatha,
Colombo 11.

Plaintiff

SC Appeal No. 92/2018
HCCA Case No. CP/HCCA/Kandy/02/15(RA)
DC Gampola Case No. 51/2006 Land

-Vs-

Meringahage Mangala Pushpakumara Fernando,
No. 113, Kandy Road,
Gampola.

Defendant

AND THEN BETWEEN

Meringahage Mangala Pushpakumara Fernando,
No. 113, Kandy Road,
Gampola.

Defendant-Petitioner

-Vs-

Colombo Buddhist Theosophical Society,
No. 203, Olcott Mawatha,
Colombo 11.

Plaintiff-Respondent

AND NOW BETWEEN

Meringahage Mangala Pushpakumara Fernando,
No. 113, Kandy Road,
Gampola.

Defendant-Petitioner-Appellant

-Vs-

Colombo Buddhist Theosophical Society,
No. 203, Olcott Mawatha,
Colombo 11.

Plaintiff-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, P.C, J.
Kumudini Wickremasinghe, J.
Janak De Silva, J.

COUNSEL: Petitioner appeared in person.
Dr. Sunil Abeyratne with Sheron Wanigasooriya for Respondent instructed by Ms. Buddhika Alagiyawanna.

ARGUED ON: 23.02.2023

WRITTEN SUBMISSIONS: On 24.01.2019 for the Plaintiff-Respondent-Respondent.
On 20.07.2018 & 24.04.2023 by the Defendant-

Petitioner-Appellant

DECIDED ON: 14.11.2023

Judgement

Aluwihare, P.C., J,

This is an appeal against the Judgement of the Civil Appellate High Court of the Kandy dated 22.07.2022. The Defendant-Petitioner-Appellant (hereinafter referred to as the 'Defendant') failed to file an Answer before the District Court of Gampola in an action filed against him for declaration of title by the Plaintiff-Respondent-Respondent (hereinafter referred to as the 'Plaintiff'). An exposition of the factual narrative relating to this case is necessary to comprehend the questions of law upon which leave to appeal was granted.

Factual Background

The Plaintiff instituted a land case in the District Court bearing case No. L51/2006 against the Defendant for declaration of title. The subject matter is the property originally owned by 'Parama Vingartha Buddhist Society' [Buddhist Theosophical Society] started by Col. Henry Olcott. The building was used to run the Olcott Buddhist School in Gampola which was vested by the government in 1961. In the year 2005, however, after the school was shifted to a new building, the property was re-vested with the Society by virtue of a Gazette notice and the President of the Society had taken over possession of the building in 2006. Subsequently a dispute had arisen between the Society officials and the Defendant which had been settled with the intervention of the Police. Both parties had agreed to keep the premises under lock and key. Subsequently, however, the Plaintiff alleges that the Defendant had forcibly entered into the premises and had taken over possession of the building. The Action before the District Court was filed by the Society to recover possession of the property in addition to a declaration of title.

Summons were served and the case was fixed for filing of an Answer of the Defendant

for 23.04.2007. On the said date, the Defendant failed to appear, no Proxy or Answer was filed either. The learned District Judge therefore fixed the case for ex- parte hearing on the same day and the Plaintiff was heard. At the conclusion of the ex-parte trial, on 15.05.2007 the learned District Judge delivered the ex parte judgement (marked 'A4') in favour of the Plaintiff. It must be noted that the Defendant had made no appearance in, or representation on his behalf before the District Court.

Thereafter, subsequent to being served notice of the ex parte judgement, the Defendant had filed papers to purge the ex parte judgement, and an inquiry was held on the same. The learned District Judge who conducted the inquiry affirmed the ex parte judgement referred to above by his Order dated 13.01.2015.

Aggrieved by the said Order, the Defendant moved by way of revision to the High Court of Civil Appeal pleading *inter alia* for the vacation of the said Order. The learned Judges of the High Court of Civil Appeal dismissed the revision application by its order dated 22.07.2016 (marked 'A2').
Aggrieved by the said order of the High Court of Civil Appeal, the Defendant moved this court by way of an application for leave to appeal and this Court granted leave on the following questions.

i) Had the learned District Court Judge erred in fixing the case instituted by the Plaintiff for an ex parte hearing?
ii) Is the Judgement of the Civil Appellate High Court of Kandy dated 22.07.2016 bad in law?

Having heard the Defendant -Appellant (who appeared in person), and the learned Counsel for the Plaintiff- Respondent, this Court directed both parties to file further written submissions on the following issues.

1. Whether the High Court of Civil Appeal, having requested the parties to file written submissions in relation to the preliminary objections raised by the Respondent, without considering the preliminary objection, delivered the order with regard to the substantive relief prayed in the revision application.
2. Whether the Appellant could have moved the High Court of Civil Appeal by way of revision to set aside the judgement of the District Court without first having canvassed the adverse order made against the Appellant in refusing the

application to purge default.

Having possessed the set of facts and circumstances, as well as the legal issues relating to this appeal in greater detail, I am of the opinion that the aforementioned questions could be answered once the following questions are addressed.

1. On what basis may a case be fixed for ex-parte hearing and an ex-parte judgement be delivered when a Defendant fails to file Answer?
2. What are the steps to be taken in order to purge default? Has the Appellant taken such steps and been successful in that endeavour?
3. Where a person fails to purge default and set aside an adverse ex-parte judgement, does an appeal or application for revision lie from any Order affirming an adverse ex-parte judgement?
4. Does any Court exercising Revisionary jurisdiction possess the competence to determine the process of adjudication of the matter?

1. **On what basis may a case be fixed for ex-parte hearing and an ex-parte judgement be delivered?**

Section 84 of the Civil Procedure Code states as follows.

"**If 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 (or 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].

That the Defendant failed to file his Answer on the day fixed for filing of Answer is admitted. The Defendant and the Plaintiff are in agreement that filing of the Answer was fixed for 23.04.2007 and that the Defendant failed to file his Answer, appear or make any representation to Court on the said date. Regarding the serving of summons, the Defendant claimed that he was served summons in open Court

on 29.01.2007 by the learned District Judge when he was in court in connection with some other case [*vide* evidence of the Defendant on 20.03.2012 before the DC]. The Defendant further claimed that the District Judge did so upon being notified by Counsel for the Plaintiff (now Respondent) that the Defendant was present in Court. Therefore, there can be no doubt that the present case falls within the ambit of Section 84.

Nothing prevents the Court from fixing a date for trial on the day of default itself and the in the present instance, the learned District Judge considered it expeditious to do so as the Defendant was neither present nor had there been any representation on his behalf indicating his intention to contest the Plaint. By his judgement dated 15.05.2007 (at p. 165 of the Original Court Record marked 'A4'), the learned District Judge entered judgement in favour of the Plaintiff and stated that such judgment is entered upon the merit of evidence led by the Plaintiff, and that the Defendant may vacate the ex-parte judgment within 14 days. Therefore, although the learned District Judge makes no reference to Section 84 in his judgement, there can be no question of illegality regarding the conduct of an ex-parte trial or the delivery of ex-parte judgement where the Defendant fails to file Answer and/or appear.

2. **What are the steps to be taken in order to purge default? Has the Defendant taken such steps and been successful in that endeavour?**

Section 86 of the Civil Procedure Code details how default may be purged or how a judgement entered in default may be set aside. I have reproduced the Section below for convenience.

"(2) 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.

(2A) **At any time prior to the entering of judgment against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant** and permit him 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 fit." [emphasis added].

The Defendant had made an application under Section 86(2) to have the ex-parte judgement vacated. The Order of the learned District Judge dated 13.01.2015 (at pg. 225 of the Original Court Record marked 'A4') states that an inquiry into the matter was conducted and written submissions were submitted by both parties. This Order too observes that the Defendant had been served summons in open court, that 23.04.2007 had been fixed for filing of answer and that on the said date, he had failed to file such answer. The Order also states that the Defendant contended that the reason he could not file Answer on the said date is due sustained illness, resulting in his hospitalization from 02.04.2007 to 10.04.2007 and subsequent time to recuperate till 02.05.2007. Having noted that per the Defendant's submissions, the he was ill from 28.03.2007, that the medical report obtained on 10.04.2007 recommends a period of rest till 24.04.2007, and that consequently, the Appellant would have been cognizant of the impending difficulty to appear in Court or file his Answer by 23.04.2007, the learned District Court Judge concluded that the Appellant could have made the Court aware of this difficulty by way of Counsel, agent or relation. Based on the aforementioned reasoning, the learned District Court Judge concluded that the Defendant had not satisfied Court that he had "reasonable grounds for such default" per Section 86(2) to vacate the ex-parte judgement. The Appellant's application under Section 86(2) was refused and affirmed the ex-parte judgement dated 15.05.2007. It would be pertinent to note that 'Dr Doluweera' who issued the medical certificate to the Defendant, had noted under 'Medical Officer's opinion' that the Defendant was 'moderately ill', and the Defendants' ailment was a backpain.

Accordingly, it is evident that although the Appellant had sought the vacation of the ex-parte judgement via the appropriate statutory remedy, he had not been successful and therefore, the ex-parte judgement was affirmed at the end of the inquiry.

3. **Where a person fails to purge default and set aside an adverse ex-parte judgement, does an appeal or an application for revision lie from any Order affirming an adverse ex-parte judgement?**

This question relates to the second question upon which parties were directed to tender written submissions. In my opinion, Section 88 of the Civil Procedure Code read in conjunction with the scope and extent of the Revisionary Jurisdiction exercised by the High Court of Civil Appeals comprehensively addresses this question.

Sections 88(1) and 88(2) are as follows:

"(1) **No appeal shall lie against any judgment entered upon default**.

(2) **The order** setting aside or **refusing to set aside the judgment entered upon default** shall accompany the facts upon which it is adjudicated and specify the grounds upon which it is made, and **shall be liable to an appeal to the relevant High Court established by Article 154P of the Constitution, with leave first had and obtained from such High Court**." [emphasis added]

Accordingly, per Section 88(2), the Defendant could have sought to leave to appeal from the High Court Civil Appeal against the Order of the learned District Court Judge dated 13.01.2015 (at pg. 225 of the Original Court Record marked 'A4'). The Defendant avers, in his Petition to this Court that he filed an application seeking leave to appeal in terms of Section 88(2), as well as an application seeking revision of the Order of the learned District Court Judge dated 13.01.2015 in the High Court of Civil Appeal. However, no mention is made of any progress or result of the application which sought leave to appeal. Nevertheless, the High Court of Civil Appeal entertained the Appellant's Revision application, and it is the resultant order of the High Court of Civil Appeal on the Revision application that is being canvassed against before this Court.

In any case, the application which sought leave to appeal could have had no effect

on the maintainability of the Revision application as it is well settled that the powers of revision bestowed on Appellate Courts are discretionary, and very wide in that they may be exercised regardless of whether an appeal has been taken against the impugned Order of the Original Court [*vide* ***Rustom Vs. Hapangama & Co.*** **[1978/79] 2 SLR 225;** ***Attorney General v. Podisingho*** **[1950] 51 NLR 385; Wijesiri Gunawardene & Others Vs. Chandrasena Muthukumarana & Others, SC Appeal No. 111/2015 with SC Appeal No. 113/2015 and SC Appeal No. 114/2015, S.C Minutes 27.05.2020**]. For these reasons, I am of the opinion that the Appellant could have moved the High Court of Civil Appeal by way of revision to set aside the order of the District Court even if he had not first sought to appeal against the adverse order made against the Defendant when the District Court, by Order dated13.01.2015 refused to vacate the ex-parte judgement.

4. **Does any Court exercising Revisionary jurisdiction possess the competence to determine the procedure of adjudication?**

This question relates to the first question upon which parties were directed to tender written submissions. I must begin addressing this question by setting out the parameters, scope and appropriate fora in which the Revisionary jurisdiction may be invoked in this Island.

Article 138 of the Constitution bestows the Court of Appeal the power to revise any judgement, decree or order of any Original Court where any error, defect or irregularity in such judgement, decree or order of any Original Court has prejudiced the substantial rights of parties or has occasioned a failure of justice. Article 154P(3)(b) of the Constitution read with Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 0f 1990 provide that any High Court established by Article 154P of the Constitution for a Province, shall have and exercise revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court within such Province, where any error, defect or irregularity in such judgement, decree or order of any Original Court has prejudiced the substantial rights of parties or has occasioned a failure of justice. Accordingly, the High Court of Civil Appeal of Kandy was well-possessed of the jurisdiction to hear and determine the Defendant's Revision Application.

The Defendant's central grievance over the order of the High Court of Civil Appeal dated 22.07.2016 is that the order is conclusive of the merits of the Defendant's revision application and dismisses the application despite the Defendant not being granted a hearing for substantive submissions on the merits of the application. The Defendant contended that at the point at which the order was given, both parties had only addressed a preliminary objection regarding the application. Explaining his argument, the Defendant contended that consideration of the preliminary objection alone cannot be grounds for adjudication of the merits of his application, and that a final order cannot be given when the parties had only argued on a preliminary objection.

At this point, I find it prudent to advert to the Judgement and Proceedings of the High Court of Civil Appeal dated 22.07.2016 (marked 'A1'). I observe the following:

- Having supported his application for revision, the Defendant raised a preliminary objection regarding the standing of the Plaintiff before the High Court. Court allowed parties to tender written submissions on the objection [vide proceedings dated 07.09.2015].
- The aforesaid Preliminary Objection was that the Proxy tendered on behalf of the Plaintiff was defective in that it did not bear the signature of the Secretary of the Respondent Society and that it did not bear the Common Seal [vide p. 4 of the A1].
- On 17.11.2015 the Defendant filed written submissions [vide proceedings dated 17.11.2015].
- On 10.12.2015 the Plaintiff filed written submissions [vide proceedings dated 14.12.2015].
- On 22.07.2016. the Order was delivered in open courts, the Preliminary Objection was overruled, and the Revision application was dismissed without costs." [vide proceedings dated 22.07.2016].

Therefore, it is evident that no dedicated submissions on the merits of the revision application were made. The question which warrants determination is therefore whether the learned Judges of the High Court erred in only permitting

submissions to be made on the preliminary objection before delivering its order on the entire application.

The Revisionary Jurisdiction is fundamentally a discretionary one. The essence of this statement is that it is exercised purely at the discretion of the learned Appellate Judges while paying due regard to immutable principles of natural justice and legislation. This court has, on several occasions, deemed it fit to lay out the scope of the revisionary power of our appellate courts and note how it may be exercised.

To reach the crucial element of this question in this appeal, I will refer to the judgement in ***Rasheed Ali Vs. Mohamed Ali and Others*** **[1981] 1 SLR 262** where His Lordship Justice R.S. Wanasundera (with Justice Weeraratne agreeing) held that the powers of revision vested in the Court of Appeal, flowing from Article 138 of the Constitution, are very wide and the Court can in a fit case, exercise that power whether or not an appeal lies, **but it should do so only in exceptional circumstances**. The learned Counsel for the Plaintiff as well as the Defendant himself referred to this judgement to substantiate their arguments. Relying on the aforementioned judgement, the Defendant contended that his case was one that warranted revision due to a set of circumstances which he believed to be exceptional, due to alleged errors in fact and law in the Order of the learned District Court Judge. Learned Counsel for the Plaintiff contended that the learned Judges of the High Court rightly concluded that the revision application presented no exceptional circumstances, or any errors, omissions or irregularities which occasioned a failure of justice.

Regarding the manner in which the revisionary jurisdiction may be exercised, five Justices of this Court observed in ***Attorney General Vs. Gunawardena*** **[1996] 2 SLR 149** that "*in exercising the powers of Revision this Court is not trammelled by technical rules of pleading and procedure*" [at p. 150]. Although the jurisprudence of this Court has now advanced to the point where it is settled that this Court does not have an inherent power of revision, it is my view that the above holding would apply without derogation to the revisionary jurisdiction exercised by the Court of Appeal, or a High Court established by Article 154P of the Constitution. From the aforementioned observation, it could also be

established that the High Court of Civil Appeal would not have been bound to entertain the revision application any further than the learned Judges felt it necessary.

Regarding the preliminary objection raised by the Defendant, the Order of the High Court notes [at pages 4 and 5] that the alleged defect is a mere technical objection which could be readily remedied and that such objection cannot in any circumstances be grounds for quashing an Order of the District Court or setting aside the ex-parte judgement. The Appellant contended before this Court that the learned Judges of the High Court have not paid consideration to material facts and circumstances relating to the Revision application before dismissing it. However, in my opinion, the Petition and affidavit of the Defendant presented to the High Court provide a comprehensive narration of the facts and circumstances of his application. It is evident in the order of the High Court that the learned Judges were well-possessed of the facts and circumstances of the application as correct references are made to the documents tendered, as well as the original case record of the District Court.

Upon further observation, I note that the learned Judges of the High Court have paid ample consideration to the grievance averred to by the Defendant. Having done so, the learned Judges have found no credible elements constituting 'exceptional circumstances' to exist in the Defendant's application for the court to exercise its revisionary powers. The order of the High Court states [at pages 6 and 7] that it is evident that the Defendant was in derogation of Section 86(2) and Section 753 of the Civil Procedure Code in seeking revision of the Order of the learned District Court Judge as the Defendant had failed to provide any grounds which justified his default or served to indicate an error of law or fact committed by the learned District Court Judge, and that the lack of such elements constitute sufficient reason for the dismissal of the Appellant's Application for Revision. Having considered the facts and circumstances of this case and the matters urged before the High Court of Civil Appeal, I am of the view that the learned judges of the High Court of Civil Appeal could not have arrived at any other conclusion and as such I hold that the decision of the learned Hogh Court Judges cannot be faulted.

For the reasons mentioned above, I answer the questions of law upon which leave to appeal was granted as follows.

i) Had the learned District Court Judge erred in fixing the case instituted by the Plaintiff for an ex parte hearing?
Answer: No.

ii) Is the Judgement of the Civil Appellate High Court of Kandy dated 22.07.2016 bad in law?
Answer: No.

The parties may bear the respective costs of this case.
Appeal dismissed.

Judge of the Supreme Court

Kumudini Wickremasinghe, J
I agree.

Judge of the Supreme Court

Janak De Silva, J
I agree.

Judge of the Supreme Court