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

Uduruwangala Gedarage Charaka
Pathum Galagedara,
No. 151, Punagala Road,
Dulgolla, Bandarawela.
Plaintiff

SC APPEAL NO: SC/APPEAL/78/2021
SC LA NO: SC/HCCA/LA/123/2021
HCCA BADULLA NO: UVA/HCCA/BDL/25/20(F)
DC BANDARAWELA NO: MB/630

Vs.

1. Geethika Sudhirani Samaraweera,
   No. 153, Pungala Road,
   Bandarawela.
2. Janaka Sampath Samaraweera,
   Lining Tex, No. 144/4,
   Keysar Street, Colombo 11.

Defendants

AND BETWEEN

Uduruwangala Gedarage Charaka
Pathum Galagedara,
No. 151, Punagala Road,

Dulgolla, Bandarawela.
Plaintiff-Appellant

Vs.

1. Geethika Sudhirani Samaraweera,
   No. 153, Pungala Road,
   Bandarawela.
2. Janaka Sampath Samaraweera,
   Lining Tex, No. 144/4,
   Keysar Street, Colombo 11.

Defendant-Respondents

AND NOW BETWEEN

Geethika Sudhirani Samaraweera,
No. 153, Pungala Road,
Bandarawela.
1st Defendant-Respondent-Appellant

Vs.

1. Uduruwangala Gedarage Charaka
   Pathum Galagedara,
   No. 151, Punagala Road,
   Dulgolla, Bandarawela.
   Plaintiff-Appellant-Respondent
2. Janaka Sampath Samaraweera,
   Lining Tex, No. 144/4, Keysar Street,
   Colombo 11.
   2nd Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Ruvendra Weerasinghe for the 1st Defendant-Respondent-Appellant.

Chandrasiri Wanigapura for the Plaintiff-Appellant-Respondent.

Argued on: 12.01.2022

Written submissions:

by the 1st Defendant-Respondent-Appellant on 23.02.2022.
by the Plaintiff-Appellant-Respondent on 02.03.2022.

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the two defendants in the District Court of Bandarawela seeking to recover a sum of Rs. 200,000.00 with interest lent to the mother of the defendants on a Mortgage Bond given as security. Although summons was duly served on the defendants, on their failure to file answer, the District Court fixed the case for *ex parte* trial in terms of section 84 of the Civil Procedure Code. A few days later, an oral application was made to the District Court seeking that the answer be accepted in terms of section 839 of the Civil Procedure Code. This has rightly been refused by the District Court as there is a clear provision under section 86 of the Civil Procedure Code to cater to this situation. *Ex parte* trial was concluded by affidavit evidence and, having considered the evidence, the District Court dismissed the plaintiff's action. The plaintiff appealed to the High Court of Civil Appeal of Badulla against the

judgment. The 1st defendant appeared in person before the High Court. By judgment dated 16.12.2020 the High Court set aside the judgment of the District Court and directed the District Court to enter judgment for the plaintiff. It is against this judgment of the High Court that the 1st defendant has filed this leave to appeal application.

Learned counsel for the plaintiff takes up a preliminary objection to the maintainability of this application on the basis that without the 1st defendant first purging her default in the District Court under section 86(2) of the Civil Procedure Code she cannot come before this Court against the judgment of the High Court.

Learned counsel for the 1st defendant referring to section 88(1) of the Civil Procedure Code, which states that an appeal does not lie against any judgment entered upon default, contends that once the District Court dismisses the plaintiff's action, the judgment ceases to be a judgment as contemplated under section 88(1) and the question of purging default does not arise and therefore the 1st defendant can prefer an appeal to this Court against the judgment of the High Court. Learned counsel further contends that in any event section 86(2), which allows a window of opportunity for a defendant to purge default, cannot be availed of by the 1st defendant in view of section 59 of the Mortgage Act No. 6 of 1949 since that provision is inapplicable to a defendant in a hypothecary action. Hence it is submitted that this Court shall entertain this leave to appeal application under section 839 of the Civil Procedure Code or by application of the rules of natural justice.

In terms of section 84 of the Civil Procedure Code, the District Court can fix *ex parte* trial against a defendant on two occasions: (a) failure to file the answer; and (b) failure to appear on the date of the hearing of the action. The defendant need not appear in person on the trial date and can be represented by an Attorney-at-Law, which is sufficient compliance with

section 84. In this case the 1st defendant's failure to file answer triggered the application of this section. Section 84 reads 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 for 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.*"

How a defendant may purge default is set out in section 86 of the Civil Procedure Code. Two opportunities are available to the defendant: (a) before entering the judgment, the Court can purge the default with the consent of the plaintiff; and (b) after entering the judgment, the defendant can make an application to Court to purge the default within 14 days of service of the *ex parte* decree. Section 86(2) 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.*" Section 86(2A) states "*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.*" According to section 86(3) "*Every application under this section shall be made by petition supported by affidavit.*"

In terms of section 87(1) of the Civil Procedure Code, the failure on the part of the plaintiff to appear before Court on the trial date warrants dismissal of the plaintiff's action. This does not mean that the plaintiff shall be physically present on the trial date. He can be represented by an Attorney-at-Law and that is sufficient compliance with section 87(1).

If the Court dismisses the plaintiff's action in terms of section 87(1) when the defendant is present and there is a claim in reconvention in the answer, the defendant can move to fix the case for *ex parte* trial against the plaintiff on such cross claim, as such cross claim has the same effect as the plaint in an action in terms of section 75(e).

Section 87(1) of the Civil Procedure Code reads as follows: "*Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action.*"

How a plaintiff may purge default is set out in section 87(3) of the Civil Procedure Code. In terms of section 87(3), the plaintiff can make an application to the District Court to purge default within a reasonable time from the date of the dismissal of the plaintiff's action. Section 87(3) reads: "*The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.*"

In terms of section 88(1) "*No appeal shall lie against any judgment entered upon default.*" This means a final appeal cannot be filed from an *ex parte*

judgment entered against a defendant for failure to file answer or for want of appearance of the defendant on the trial date. A final appeal also cannot be filed from a judgment entered against a plaintiff for want of appearance on the trial date. In such a situation, if the defaulter is the defendant an application under section 86(2) or if the defaulter is the plaintiff an application under section 87(3) shall first be made to purge the default before contesting the case of the opposite party on the merits.

In terms of section 88(2) as it stands now (after its amendment by the Civil Procedure Code (Amendment) Act No. 5 of 2022), the order made after such inquiry to purge default is appealable by the dissatisfied party with the leave of the High Court first had and obtained. Section 88(2) as it stands now reads: "*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.*"

However, section 88(1) has no application when the plaintiff's action is dismissed on the merits (as in the instant case), not on the default of the plaintiff as contemplated in section 87(1). The contention of learned counsel for the 1st defendant that when the plaintiff's action is dismissed after the *ex parte* trial, the judgment ceases to be a judgment in terms of section 88(1) or that the defendants cease to be in default because the judgment is then in favour of the defendants, has no merit. The default will continue until it is purged. The further contention of learned counsel for the 1st defendant that in such circumstances this Court can grant relief under section 839 of the Civil Procedure Code or on the principles of natural justice also has no merit. This Court cannot grant relief to the 1st defendant under section 839 of the Civil Procedure Code. That section is applicable to the District Court, not to this Court. In any event, section

839 cannot be invoked when there are express provisions in the Civil Procedure Code to deal with the situation. There is no necessity to desperately look for ways to invoke the jurisdiction of the District Court or this Court to grant relief to the 1st defendant. Section 86(2) is very clear. The High Court has now directed the District Court to enter judgment for the plaintiff. Once the *ex parte* judgment is entered and the decree is served on the defendants, they can within fourteen days of service of the decree make an application by petition and affidavit to purge the default in terms of section 86(2) of the Civil Procedure Code. If they succeed, the *ex parte* judgment will automatically be rendered nugatory regardless of its merits or demerits and the defendants will get the opportunity to file answer and contest the plaintiff's case on the merits. If the defendants are unsuccessful in their application to purge the default, in terms of section 88(2) they can file a leave to appeal application against that order to the High Court. The 1st defendant is not without a remedy. There is no necessity to invoke the inherent powers of the Court or the principles of natural justice.

In terms of section 88(1), the 1st defendant could not have filed an appeal before the High Court if the *ex parte* judgment was entered against her by the District Court. If appeal does not lie against an *ex parte* judgment, no leave to appeal lies, since in the event leave is granted, the application becomes an appeal. What cannot be done directly cannot be done indirectly: *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*

Upon taking up the case *ex parte* against the defendant, if the District Court dismisses the plaintiff's action on the merits, the plaintiff can file an appeal to the High Court against that judgment. As I stated previously, in such an eventuality, section 88(1) has no application as the judgment was not entered against the plaintiff on his default. It is true that the defendant (defaulter) is made a party to such appeal. Once the defendant

is made a party, is the defendant entitled as of right to a hearing? The answer is in the negative. The defendant is made a party to be given notice that an appeal has been filed against the judgment of the District Court dismissing the plaintiff's action. The defendant, if he wishes, can appear before the High Court and be a passive observer or silent spectator to the proceedings. The defendant has no right of audience but the High Court in the exercise of its inherent powers may get any matters clarified through the defendant to come to a just conclusion. In any event, the defendant will not get the opportunity to fully present his case before the High Court because the High Court of Civil Appeal is not a trial Court but an appellate Court. *Vide Arumugam v. Kumaraswamy* [2000] BLR 55.

Under section 88(1) there is a statutory bar to filing an appeal against an *ex parte* judgment. What about other instances whereby Courts make numerous *ex parte* orders, not judgments? When an *ex parte* order is made, can the affected party straightaway go before the appellate Court against that order? The answer is in the negative. *Vide Jana Shakthi Insurance v. Dasanayake* [2005] 1 Sri LR 299 at 303, *Penchi v. Sirisena* [2012] 1 Sri LR 402 at 408. In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd* [1987] 1 Sri LR 5, the Supreme Court, citing several authorities (*Loku Menika v. Selenduhamy* (1947) 48 NLR 353, *Habibu Lebbe v. Punchi Etana* (1894) 3 CLR 85, *Caldera v. Santiagopulle* (1920) 22 NLR 155 at 158, *Weeratne v. Secretary, D.C. Badulla* (1920) 2 CLR 180, *Dingirihamy v. Don Bastian* (1962) 65 NLR 549, *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd* (1962) 66 NLR 472, *Nagappan v. Lankabarana Estates Ltd* (1971) 75 NLR 488), held "*A party seeking to canvass an order entered ex parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.*" This time-tested rule is applicable not only when an *ex parte* order is made by a Court of law but also by any tribunal, administrative or quasi-judicial body.

However, in an exceptional situation, the High Court can exercise revisionary jurisdiction to set aside an *ex parte* judgment or order made by the original Court provided it is palpably wrong, perverse and results in a manifest failure of justice (*Mrs. Sirimavo Bandaranayake v. Times of Ceylon Limited* [1995] 1 Sri LR 22). The judgment in *Mrs. Sirimavo Bandaranayake*'s case shall not be misinterpreted to argue that as a general rule the law provides for the invocation of the revisionary jurisdiction of the High Court to canvass *ex parte* judgments or orders on the merits. This is what M.D.H. Fernando J. stated at 40:

> *I hold that an ex parte default judgment cannot be entered without a hearing and an adjudication. I further hold that having regard to the facts and circumstances of this case, there has been no adjudication at all; it was not a mere error in exercising a judicial discretion, or in assessing the credibility of a witness, or the weight of evidence; judgment in favour of the Plaintiff was unreasonable and perverse insofar as it was based on the assumption that the Defendant had published the impugned statements; the Plaintiff's lawyers failed in their duty to the Court; the substantial rights of the Defendant were prejudiced, and there has been a manifest failure of justice. The exercise of the revisionary jurisdiction of the Court of Appeal was both lawful and proper.* (emphasis mine)

The revisionary jurisdiction of the High Court cannot be invoked citing *Mrs. Sirimavo Bandaranayake*'s case to thwart the express provisions of section 88(1) of the Civil Procedure Code. The rule is that before an *ex parte* judgment or order is challenged on the merits, the default shall be purged.

It appears that the main reason for the 1st defendant to come before this Court against the judgment of the High Court without purging default is, according to learned counsel for the 1st defendant, that there is a statutory

bar to the 1st defendant making an application to purge default under section 86(2) because section 59 of the Mortgage Act debars the 1st defendant from making an application under section 87(3) of the Civil Procedure Code when the *ex parte* judgment has been entered in a hypothecary action.

Section 59 of the Mortgage Act as it appears in the 1980 (unofficial) revised edition of the Legislative Enactments reads as follows: "*Where a hypothecary action is heard ex parte under section 84 and 85 of the Civil Procedure Code, the decree entered thereunder shall not be set aside under the provisions of section 86 of that Code, and the judgement entered thereunder shall not be deemed to be a judgement entered upon default for the purpose of section 88 of that Code*." It is stated by way of an explanation in the revised edition that "*This section has been recast as reference to "decree nisi" and "decree absolute" in section 84 and 85 of the Civil Procedure Code have been omitted by a 1977 amendment of that Code*." It is this formulation of section 59 of the Mortgage Act that has been relied upon by learned counsel for the 1st defendant. According to the 1956 (official) edition of the Legislative Enactments, section 59 of the Mortgage Act reads as follows: "*Where a hypothecary action is heard ex parte under section 85 of the Civil Procedure Code, the decree shall be a decree absolute and not a decree nisi*."

As clearly explained in *Sitthi Maleena and Another v. Nihal Ignatius Perera and Others* [1994] 3 Sri LR 270, the change made to section 59 of the Mortgage Act by the learned authors of the 1980 (unofficial) edition of the Legislative Enactments does not represent the correct position of the law and therefore need not be adopted. Although the Civil Procedure Code, by the Civil Procedure Code (Amendment) Act No. 20 of 1977, underwent radical changes including the repeal and replacement of Chapter XII which provides for proceedings in the event of default in appearance, section 59

of the Mortgage Act which makes reference to the original section 85 of the Civil Procedure Code was not amended in line with the Civil Procedure Code amendment. The original section 85 of the Civil Procedure Code specifically referred to hypothecary actions and stated that if the defaulter was a defendant in a hypothecary action, instead of decree *nisi*, decree absolute should be entered straightaway. However the original section 87 of the Civil Procedure Code further provided that when decree absolute was so entered, the defendant could apply to the District Court within a reasonable time to have it vacated, thus providing the defaulter an opportunity to challenge the decree. By Act No. 20 of 1977 *inter alia* references to decree *nisi* and decree absolute were removed and the common word decree was used instead. These changes are not reflected in section 59 of the Mortgage Act as it presently stands.

Section 16(1) of the Interpretation Ordinance No. 6 of 1949 states "*Where in any written law or document reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof*." Hence the default of a defendant in a hypothecary action is governed by the present provisions of Chapter XII of the Civil Procedure Code and therefore the contention of learned counsel for the 1st defendant that section 86(2) of the Civil Procedure Code cannot be availed of by the 1st defendant is misconceived in law. Once the *ex parte* decree is served on the defendants they can make an application to purge default in terms of section 86(2) of the Civil Procedure Code and take further steps in accordance with the law. It is unfortunate that judges and lawyers still rely on section 59 of the Mortgage Act as it incorrectly appears in the 1980 (unofficial) edition of the Legislative Enactments (e.g. *Australanka Exporters Pvt Ltd v. Indian Bank* [2001] 2 Sri LR 156) and this must be stopped.

For the aforesaid reasons, I uphold the preliminary objection raised by learned counsel for the plaintiff and dismiss the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court