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

In the matter of an Appeal from the Civil Appellate High Court of Colombo.

Menikdiwela Senevirathnage Chandrasiri Sisira Kumara,
No. 35/5, Rosmead Place,
Colombo 07.

Plaintiff

Vs

SC APPEAL 147/16
SC/HCCA/LA No. 78/16
WP/HCCA/COL/277/2008(F)
D.C.Colombo Case No. 20652/L

1. Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda, Kelaniya.

2. Seylan Securities and Finance (Pvt.) Ltd., Galle Road, Colombo 03.

3. Registrar, Land Registry, Colombo 07.

Defendants

THEN BETWEEN

Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda,Kelaniya.

1st Defendant Appellant.

Vs

Menikdiwela Senevirathnage
Chandrasiri Sisira Kumara,
No. 35/5, Rosmead Place,
Colombo 07.
Plaintiff Respondent

2. . Seylan Securities and
Finance (Pvt.) Ltd.,
Galle Road, Colombo 03.

3. Registrar, Land Registry,
Colombo 07

2nd and 3rd Defendants
Respondents

AND NOW BETWEEN

Menikdiwela Senevirathnage
Chandrasiri Sisira Kumara,
No. 35/5, Rosmead Place,
Colombo 07.

Plaintiff Respondent Appellant

Vs

Hapuarachchige Jayaratne
Perera, No. 279/1, Hospital
Road, Kiribathgoda,Kelaniya.

1ST Defendant Appellant Respondent

2. Seylan Securities and
Finance (Pvt.) Ltd.,
Galle Road, Colombo 03.

3. Registrar, Land Registry,
Colombo 07

2nd and 3rd Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.,**
H.N.J. PERERA J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Jagath Wickremanayake with Aruna Jayathilaka for the Plaintiff Respondent Appellant.
S.N.Vijithsingh for the 1st Defendant Appellant Respondent.

ARGUED ON : 27.09.2017.

DECIDED ON : 24.11.2017.

S. EVA WANASUNDERA PCJ.

On 21.07.2016, Leave to Appeal was granted to the Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) on the questions of law enumerated in Paragraph 18(ii) and (iii) of the Petition dated 23.02.2016. The said questions are as follows:-

Has the learned High Court Judge of the Civil Appellate High Court,

1. gravely erred in failing to consider the Sections 84, 85, 86 and 144 of the Civil Procedure Code?
2. gravely erred in law by having allowed the Appeal of the Respondent when in fact his Lordship had reached the finding that, " … Therefore , there is nothing irregular in the court fixing the case for ex parte trial or hearing ex parte evidence on a subsequent date and the ex parte decree is not invalid on that basis."?

The facts of the case in summary are that the Plaintiff M.S.C. Sisira Kumara, filed action in the District Court against the Defendant H. Jayaratne Perera for specific performance on an Agreement to Sell bearing No. 751 dated 28.08.2003. Sisira Kumara had paid Rs. 9,44000/- as an advance and the purchase price agreed was Rs.3,500,000/-. The document was notarially executed. The extent of the land was 18 Perches situated in Thalawathuhenpita, Hospital Road, Kiribathgoda in the Gampaha District. Since Jayaratne Perera failed to act according to the said Agreement, Sisira Kumara filed action in the District Court in 2005. Thereafter answer had been filed and the trial had commenced with the issues of the parties.

The 2nd Defendant had filed a caveat some time ago, at a time the property was under a mortgage to the 2nd Defendant by the 1st Defendant. Later on the 2nd Defendant had withdrawn the caveat and the said company was discharged from the proceedings of the case.

The Plaintiff had given evidence and the **trial continued.**

On 25.08.2006, the **1st Defendant** who was the only Defendant remaining other than the 3rd Defendant, (the Registrar of the Land

Registry), **was absent** and his Attorney at Law had informed court from the bar table that he had **no instructions** from his client and **thus he does not appear any longer for the 1st Defendant**. The District Judge had then fixed the case for **ex parte trial**. Ex parte judgment was entered against the 1st Defendant on 14.12.2006.

According the court record **Ex parte decree** was **served** on the Defendant on 14.02.2007.

The 1st Defendant had filed an application to **set aside the ex parte decree on 13.06.2007** , i.e. after the prescribed period in law to do so, meaning within 14 days from the date of filing of the ex parte decree. The time period to make an application to set aside the ex parte decree had obviously lapsed. The Plaintiff filed objections. Then the inquiry commenced on 03.08.2007 in respect of **the Defendant's application to purge the default**. At the end of the inquiry on 07.11.2008 the Additional District **Judge refused to vacate the ex parte decree** and ordered further that the Plaintiff should file **an amended decree**.

The Defendant appealed from that order to the Civil Appellate High Court and **the High Court delivered judgment dated 13.01.2016 reversing the order of the District Court and allowing the application of the Defendant to purge the default.** The Plaintiff has now preferred this Appeal to the Supreme Court and leave to appeal was granted on the questions of law as enumerated above.

Section 84 of the Civil Procedure Code reads:
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 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 **ex parte forthwith, or on such other day as the court may fix.**

I would now consider the second question of law on which leave to appeal was granted. On **page 10 of the Judgment** of the Civil Appellate High Court, there is a short paragraph as the second paragraph on that page. It reads as " **Therefore**, there is nothing irregular in the court fixing the case for ex parte trial or hearing ex parte evidence on a subsequent date and the ex parte decree is not invalid on that basis." I observe that this sentence commences with the word "therefore" and due to that reason the **paragraph above that also should be taken into account** along with this short paragraph. The paragraph above that, reads as

"Despite Section 84 stating, ' then the Court shall proceed to hear the case ex parte forthwith', on which the 1st Defendant **had contended** that the court should have proceeded to hear the case then and there, the section further provides, ' or on such other day as the court may fix'."

In this context I am of the opinion that the learned High Court Judge had only **thrown light in a general way** regarding the meaning of Section 84 to explain that any case can be fixed for ex parte trial on another date as well as on the very same date whichever the court thinks fit at that time. He had only brought that matter up, due to the **contention** of the 1st Defendant that it is not so but otherwise. As such only on the contents of this paragraph it cannot be held to mean that the ex parte decree entered in this particular case is valid in law or not. It is a general comment made by the Judge regarding Section 84 of the CPC.

It is stressed by me herein that counsel who argue any matter in appeal should not try to take a portion of the judgment impugned and argue that , the judge having mentioned and /or stated at one point of the judgment in one way has come to the conclusion at the end of the case in another way **unless** it is quite obvious or blatantly seen that the final finding is not on the rationale the judge has been writing the judgment to arrive at that conclusion. While judges continue to write judgements they are entitled to place their response to any matter which is even slightly connected to the matter on focus. They should have that freedom while they write the judgments and it is only then that a judgment can be, not only read easily, but also understood easily and felt properly by those who read the judgments.

Even if the High Court Judge has held that the ex parte decree in the case in hand was valid in law, the second question of law raised cannot be answered in the affirmative simply because the decision of the High Court that the ex parte order is valid does not have, by itself alone, a bearing on the decision of the High Court allowing the said Appeal. The High Court has allowed the Appeal on another ground, i.e. specifically **because the ex parte decree had not been served to the 1st Defendant according to law**.

I firstly answer the second question of law in the negative and I hold that the High Court has not erred in law in having allowed the Appeal.

I will now consider the other matters raised in the first question of law. The said question refers to Sections 84, 85, 86 and 114 of the Civil Procedure Code.

Section 85 of the Civil Procedure Code reads:-

(1)The Plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court , if satisfied that the plaintiff is entitled to the relief

claimed by him, either in its entirety or subject to modification, may enter such judgement in favour of the plaintiff as to it shall seem proper, and enter decree accordingly.

(2) Where the court is of opinion that the entirety of the relief claimed by the plaintiff cannot be granted, the court shall hear the plaintiff before modifying the relief claimed.

(3) Where there are several defendants of whom one or more file answer and another or others of whom fail to file answer, the plaintiff may move for judgement against such of the defendants as may be in default without prejudice to his right to proceed with the action against such of the defendants as may have filed answer. The provisions of this sub section shall apply notwithstanding that the defendants are jointly liable upon a bill of exchange, promissory note or cheque.

(4) The court shall cause a copy of the decree entered under this section to be served on the defendant in the manner prescribed for the service of summons. Such copy of the **decree** shall bear an endorsement that **any application to set aside the decree under sub section (2) of section 86 shall be made** to court **within fourteen days of such service.**

Section 86 of the Civil Procedure Code reads:

(1) Repealed by Act No. 53 of 1980.

(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 cout shall appear fit.

(3)Every application under this section shall be made by petition supported by affidavit.

Section 144 of the Civil Procedure Code reads:
If on any day to which the hearing of the action is **adjourned,** the parties or **any of them fail to appear**, the court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII **or make such other order as it thinks fit.**

The learned High Court Judges have concluded in the case in hand that, " the learned Attorney at Law who appeared for the 1st Defendant on 25.08.2006 had clearly said that he does not appear. Therefore the 1st Defendant was neither present nor represented on that occasion which being the date for hearing , the court had every right to fix the matter ex parte against him." I agree with that finding of the High Court which has come to that conclusion after having considered the two judgments in the cases of **Andiappa Chettiyar Vs Shanmugam Chettiyar 33 NLR 217 and Isek Fernando Vs Rita Fernando and Others 1999 3 SLR 29.**

The next step being that of filing the decree and sending notice of the decree, it was contested by **the 1st Defendant** that he **never received** the **ex parte decree at any time**. He had submitted that when he came to know that the case had proceeded ex parte against him, his lawyer's advice was to await the filing of the decree and so he did. When he did not get served with the decree from court, after some time , he had got the record perused to find that the fiscal had mentioned that the decree was served on him, which was **false and incorrect on the record**.

The 1st Defendant's position was that he got delayed beyond 14 days as allowed in law to purge the default due to the **reason that he never received the decree.**

The 1st Defendant's application to vacate the decree was made after about 4 months from the date of the alleged service of the same on him. The main contention in the case in hand is that the **decree was not served on him.** On the date that the decree was supposed to have been served on him by the fiscal's process server, the 1st Defendant had not been at home from 5.30 a.m. to 8.30 p.m. and nobody else either had been at home. He had given evidence and stated the same because he had been employed as a private bus driver on a bus which ran between Colombo and Kadawatha. His evidence was corroborated by the employer K.S.D. Ariyarathne. The Plaintiff contested this evidence and stated that the employer was not proven to be the owner of the bus. Anyway two people before court had given evidence to confirm that the 1st Defendant had been driving a bus the whole day time of the day when the decree was supposed to have been served.

The **fiscal's process server gave evidence**. He admitted that he was assigned at that time to serve summons in addresses within Colombo 5 and Colombo 6. The address of the 1st Defendant is in Kiribathgoda. He had purported to serve the decree **outside the usual routine**. When cross examined, having stated that he had served the decree to the 1st Defendant on the orders of a superior officer, he was unable to mention the superior officer's name. **He was unable to show any documentary evidence to that effect despite his claim** that a register was maintained when fiscal's process servers are allocated such out of the routine duties. Thus the process server's evidence has created a **serious doubt** about whether the fiscal's process server had served the decree to the 1st Defendant.

Section 85(4) of the Civil Procedure Code provides that the court should cause a copy of the decree entered under this provision to be served on the defendant in the **manner prescribed for the service of summons**. Summons is **ordinarily served by registered post first** and **then by fiscal's process server.** According to the journal entries of the case record, the decree had been served, **only by personal service and not by registered post.**

The learned High Court Judges had considered the evidence before the District Court in detail and had **arrived at the conclusion that the service of the decree on the 1st Defendant had not occurred.** Due to that reason, the High Court has held that the **fiscal's process server's report is false.** The High Court Judges have further come to the conclusion that this is an instance in which there was false representation to court that the decree was served and the court acted on those incorrect representations to the detriment of the 1st Defendant.

In fact the Defendant had filed answer, the list of witnesses and documents etc. and the Plaintiff also had filed the list of documents. The pleadings were complete and after the issues were raised, the Plaintiff's case had commenced by his evidence. At this particular time when the 1st Defendant failed to be in court, his attorney at law had submitted in open court that he did not have instructions and that he was not appearing on that day for the Defendant.

I find it difficult to believe that any Defendant in a case would negligently or purposely have decided not to appear on a day when the trial was getting continued. It ought to be due to some unfortunate reason, some mishap or the other which would have resulted in the 1st Defendant not being present and the Attorney at Law having said that he had no instructions from his client.

The decree had not been served by the fiscal even though the fiscal came before court and gave evidence that he served the decree. Having analyzed the evidence before the trial court , I am of the opinion that a serious doubt arises as to whether the decree was served or not. I agree with the findings of the High Court Judges in that regard as stated above.

It was held in **De Fonseka Vs Dharmawardena 1994, 3 SLR 2,** that
" An inquiry on an application to set aside an ex parte decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness. Sec. 839 of the Civil Procedure Code recognize the inherent power of the Court to make an order as may be necessary for the ends of justice. "

In the case of **Ariyananda Vs Premachandra (1998) 2000, 2 SLR 218** also it was held that the provisions of Sec.839 should be used in such a situation for the ends of justice or to prevent any abuse of the process of court.

It is therefore correct to state that in the case in hand, the 1st Defendant should be granted an opportunity to purge the default in appearance.

At the purge default inquiry, the 1st Defendant has given evidence and was cross examined. His evidence is contained from page 299 to page 324. It is a lengthy explanation of how he met with an accident on 15.08.2006 and therefore he could not attend courts on 25.08.2006. He had informed his lawyer a few days before the 25th. He was treated by a doctor. He had produced a medical certificate but had not been able to get down the doctor because he had not deposited the money payable to the doctor even though summons to the doctor had been sent, on the final date given by court for calling the doctor when the

Plaintiff had objected for granting a further date. The court had not granted another date. Then, in those circumstances, now it is not just and equitable for the Plaintiff to allege that the Medical Certificate was not proved. Anyway the learned judges of the High Court have held that the reasons adduced for not having attended to Court is satisfactory. I am also of the view that, despite the doctor who treated him not having been called to testify, the 1st Defendant's evidence that on 15.08.2006 he had met with an accident and that he had informed the lawyer about his difficulty in attending court on 25.08.2006 is acceptable.

I hold that acting on the pertinent provisions of law contained in the Civil Procedure Code, the Judges of the Civil Appellate High Court had quite correctly granted relief to the 1st Defendant as prayed for by having set aside the ex parte judgment dated 14.12.2006 and the ex parte decree thereon.

I quite agree with the conclusions arrived at by the Civil Appellate High Court. I answer the first and the second questions of law in the negative, against the Plaintiff Respondent Appellant and in favour of the Defendant Appellant Respondent. I affirm the judgment of the Civil Appellate High Court dated 13.01.2016.

Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court