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

In an application for special leave to appeal under Article 128 of the constitution of the Democratic Socialist Republic of Sri Lanka.

SC/Appeal No. 59A/2006
SC/SLA/115/2006
CALA/71/2004
DC Colombo 29769/MR

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff

Vs.

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,
Colombo 10.

Defendant

AND BETWEEN

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,

Colombo 10.

Defendant – Petitioner

Vs.

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff – Respondent

AND BETWEEN

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff – Respondent – Petitioner

Vs.

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,
Colombo 10.

Defendant – Petitioner – Respondent

AND NOW BETWEEN

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,
Colombo 10.

Defendant – Petitioner – Respondent – Petitioner

Vs.

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff – Respondent – Petitioner – Respondent

Before : Sisira J. de Abrew J
Murdu N.B. Fernando, PC, J And
E.A.G.R. Amarasekara J

Cousel : Manohara de Silva, PC for the Defendant – Petitioner – Respondent – Petitioner.
Romesh de Silva, PC with Sugath Caldera for the Plaintiff – Respondent – Petitioner – Respondent.

Argued on : 16.05.2019

Decided on : 29.07.2020

E.A.G.R. Amarasekara, J.

The Plaintiff –Respondent – Petitioner- Respondent (hereinafter sometimes referred to as the Plaintiff Respondent) instituted proceedings in the District Court of Colombo against the Defendant- Petitioner- Respondent - Petitioner (hereinafter sometimes referred to as the Defendant Petitioner) claiming a sum of Five Hundred Million (Rs.500, 000,000/-) on an allegation of defamation. The Defendant Petitioner filed his answer and thereafter made an application to amend the said answer. The Plaintiff Respondents filed objections and accordingly, the learned District Judge fixed the matter for inquiry by way of written submissions. The date given was 06.01.2003. Yet the Counsel for the Defendant Petitioner has allegedly heard the date as 06.02.2003 as opposed to 06.01.2003 and it is said that the instructing Attorney-at-Law for the Petitioner had made arrangements to file written submissions on 06.02.2003. Consequently, when the case was called on 06.01.2003 for inquiry as agreed by way of written submissions, the Defendant Petitioner was absent and unrepresented. Thus, no written submissions were tendered in support of the application to amend the answer.

By the order made on the same date, namely 06.01.2003, the learned District Judge rejected the amended answer on the basis of the Defendant-Petitioner's default and fixed the case for trial on the original answer. Being aggrieved by the said order, the Defendant-Petitioner filed a leave to appeal application to the Court of Appeal. The said application to the Court of Appeal was originally dismissed due to the default of the Defendant-Petitioner but when it was re-listed, dismissed again stating that the matter had become academic.

However, the Defendant-Petitioner also preferred an application to the District Court to vacate and set aside the said order dated 06.01.2003 on the ground that the default was due to the mistake of the Counsel in taking down the correct date. This application being objected by the Plaintiff-Respondent, the learned District Judge, with the consent of the parties, fixed the matter for inquiry by way of written submissions. By order dated 09.02.2004 the learned District Judge set aside his own order dated 06.01.2003 and re-fixed the matter for inquiry. (This might be the reason for the Court of Appeal to dismiss the aforesaid leave to

appeal application on the ground of being academic). It appears from the said order of the learned District Judge that he had acted under Section 839 of the Civil Procedure Code in making the impugned order. Being aggrieved by the said order dated 09.02.2004 the Plaintiff-Respondents preferred an application to the Court of Appeal and its judgment dated 17.03.2006 allowed the application of the Plaintiff-Respondent and set aside and vacated the order dated 09.02.2004 made by the learned District Judge.

The Court of Appeal appears to have based its decision on the grounds mentioned below;

- The District Court has jurisdiction to set aside its own order only in specific and limited instances which are countenanced by the law either in terms of specific provisions of the Civil Procedure Code or if the said order is *per incuriam.* There is no provision in the Civil Procedure Code for the learned District judge to vacate the impugned order and the impugned order cannot be considered as an order made per incuriam.
- Even though the learned District Judge had taken the view that he has jurisdiction to vacate the said order in terms of Section 839 of the Civil Procedure Code, in view of the established Judicial authority, Section 839 of the Civil Procedure Code does not contemplate overriding an express provision of the Civil Procedure Code or being used as a source of new jurisdiction to vacate his own orders. Since there are express provisions providing for the vacation of its own orders, expressio unius est exclusio alterius rule applies and Section 839 cannot be used to provide an additional situation of vacating its own orders. Section 839 must be complimentary to the Code and not detract from it.
- However, Section 839 can be invoked in instances where the court is desirous in redressing a wrong done to a party by its own act. But the Petitioner does not come within this ambit for in the instant action the Petitioner failed to appear on the due date due to his own doing. It was the Petitioner and his lawyers who had taken down the wrong date due to negligence or an alleged lapse on his part or his lawyers for which no other could be blamed.
- If the Defendant Petitioner wanted to demonstrate that the default in appearance on the date of inquiry was not due to negligence but was a

bona fide genuine mistake, the burden is on the Defendant Petitioner to satisfy the court either by oral evidence or in the least by evidence in the form of a proper and valid affidavit. However, no oral evidence was led and the three affidavits filed were bad in law as the jurat attested by the Justice of Peace does not state that he either administered an oath or that the affidavit was affirmed to by the affirmant. Thus, no proper evidence to prove their contention.

- The Defendant Petitioner had submitted only the page of the lawyer's diary relevant to 06.02.2003 which, as per his stance, was the date erroneously noted down but the page relevant to 06.01.2003 which was the date the inquiry was actually fixed for was not produced. If that page in the lawyer's diary was produced and if it was blank then it would have established his bona fides. However, that was not the case in this instance.
- The cases referred to by the Defendant Petitioner deal with situations where the District Court has been specifically conferred with the power in terms of the Civil Procedure Code to purge the default and vacate its own order. Thus, the cases cited by the Defendant Petitioner, to indicate that to vacate an ex parte order the better procedure is to apply first to the court of first instances which made the order, were quoted out of context and has no application to the issue at hand.

Being aggrieved by the said judgment, the Defendant Petitioner preferred an application before this court for special leave to appeal and was granted leave on the questions of law arising from the propositions appearing on paragraph 13 of the Petition. The said questions of law are reproduced at the end of this judgment.

There are certain provisions in the Civil Procedure Code that permit the District Court to vacate its own orders or judgments on certain occasions. For example, applications to vacate ex parte judgments and ex parte dismissals of plaintiffs' actions can be entertained in terms of Sections 86(2) and 87(3) of the Civil Procedure Code and similarly an interim injunction or enjoining order made can be set aside on an application made in terms of Section 666 of the Civil Procedure Code. The reasons given by the Court of Appeal indicate that when such

provisions are available expresio unius est exclusio alterius principle applies and thus, on other occasions District Court cannot vacate its orders even in terms of Section 839 of the Civil Procedure Code. It is trite law that when there is an express provision to remedy a situation, one cannot seek relief in terms of Section 839 of the Civil Procedure Code- vide **Leechman & Company Ltd. V Rangalla Consolidated Limited (1981) 2 S L R 373 at 389. Victor de Silva V Jinadasa de Silva (1964) 68 NLR 45,48.** This is understood because when there is a provision, the court need not use its inherent powers in terms of Section 839. If an aggrieved party does not use the provisions available for his redress, it is his own doing and the court need not interfere.

However, the aforesaid position which appears to have been taken by the Court of Appeal, if correct, further diminish the application of Section 839 since, as per the said position, if a provision is made to remedy certain situations (for e.g. vacation of certain ex parte orders for which provisions are made in the Code), other similar situations not provided with a specific remedy (for e.g. vacation of other incidental ex parte orders for which provisions are not made in the Code to vacate it) cannot be remedied through an order made under Section 839 of the Civil Procedure Code due to the application of aforesaid rule expressio unius. At this juncture it is necessary to look at Section 839 which is reproduced below;

"*Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court*."

The plain reading of the words "*Nothing in this ordinance shall be deemed to limit or otherwise affect ....*" clearly indicates that what is expressed through various provisions of the code cannot limit or affect the inherent power of the court to make orders necessary for the ends of justice and to prevent abuse of process of the court. Thus, the terminology used in the section itself questions the position taken by the Court of Appeal with regard to the application of expressio unius rule in relation to the matter at hand, since what is expressed in the ordinance cannot limit the power to make necessary orders for the ends of justice and prevent abuse of process of the court. What is paramount is the need to meet the ends of justice and prevent abuse of process of the court. However, before coming to a conclusion it is worthwhile to see how our courts have applied inherent powers or

Section 839 of the Civil Procedure Code to meet the ends of justice and to prevent abuse of process of the court, with special attention to the decisions made in relation to ex parte orders.

In **Ramasamy Pulle V De Silva 12 NLR 298**, overruling **Mohideen Vs Carder (1893) 3 C.L.R.13** which held that a court has an inherent right to vacate an order or decree into which it has been surprised by fraud, collusion, or mistake of fact, it was held that a court has no jurisdiction to vacate or alter an order after it has been passed, other than the amendments allowed by section 189 of the Civil Procedure Code. Bench of two judges of the Supreme Court including the then Chief Justice came to the conclusion that there is no such inherent power to vacate its own order. However, this decision does not contemplate a situation where the order has been made ex parte. In **Deonis Vs Samarasinghe 15NLR 39** also, where there was an omission to mention costs in relation to the lower court proceedings, a bench of two judges held that even the Supreme Court has no inherent powers to amend its decree to supply an omission after the decree had passed the seal. However, the aforesaid judgments do not refer to or discuss a similar provision to the present Section 839 and it appears Section 839 was brought in through an amendment made later in 1921. This also does not consider a situation where the order was given ex parte.

However, in **Caldera Vs Santiagopillai 22NLR 155**, the service of summons was not in order. After the decree, the Defendant came to know the decree and applied to set aside the decree which was granted by the District Court on the ground that there had been no effective service of summons. In appeal, with regard to the argument that the substituted service must be taken as good unless it is set aside, and the judge who made it and his successors were not competent to set it aside, the then Supreme Court held "*the order was made ex parte behind the back of the defendant. And a person seeking to set aside such an order must first apply to the court which made it, which is always competent to set aside an ex parte order of this description*." Thus, inherent powers to remedy its own mistake by the same court appears to have been admitted though there is no reference to a provision similar to Section 839 in the judgment. This was a partition action and it does not indicate that the original application to vacate the decree and the order for substituted service of summons was in terms of any express provisions in that regard in the Civil Procedure Code or any other Law.

It was held in **Sayadoo Mohamado V Maula Abubakkar 28 NLR 58** that an order made ex parte, granting leave to defend may be vacated by the court making the order. Even as far back as 1895 in **Muttiah V Muttusamy 1 NLR 25,** against an apparent argument that the District Court has no power to vacate its own ex parte sequestration order since there is no provision for dissolution on defendant showing good cause**,** it was decided that the District Judge can, on good cause shown by the party aggrieved, vacate an ex parte order of sequestration. Lawrie A.C.J. has stated "*There is as a rule no appeal against an ex parte order. The proper course is to apply to the court which made the order to vacate it on notice to the party who holds the order, and showing good grounds that the order had been made on insufficient materials, or was otherwise wrong.*". Even in **Gargial Vs Somasundaram Chetty 9 NLR 26** Layard C.J. has expressed that a party aggrieved by an ex parte order should not appeal, but should move the Court which passed the order to vacate it and it is the practice of the Court. **Lokumenika Vs Selenduhamy** reported in **48 NLR 353** is another case that held where an order is made ex parte, the proper procedure to be adopted by the person against whom that order has been made is to move the Court which made the order to set it aside and such an application would not be in terms of the Civil Procedure Code but in accordance with a rule of practice which has become deeply ingrained in the legal system of Ceylon. In **Andradie v Jayasekara Perera (1985) 2 Sri L R 204** Siva Selliah, J. in agreement with G. P. S de Silva, J. (as he then was), refers to this practice and held that this established procedure and practice which had taken deep root, should not be lightly disturbed.

The Court of Appeal in **Galigamuwa V Air Lanka Ltd**. **(1993)1 Sri L R 411**, dismissed the appeal made against an ex parte order where no application was made to vacate it before the Labour Tribunal in the first instance. Senanayake, J. stated "*I am of the view the Appellate Court had the power and right to intervene but not in all ex parte orders. The Applicant-Appellant was aware of the date of inquiry and if he was ill it was his duty to communicate the fact and submit the relevant medical certificate to the tribunal. The tribunal was in a better position to examine the documents and his petition and affidavit and make suitable order. The Tribunal has the inherent right to set aside its own orders if the order was made per incuriam or non-service of notice or summons on the parties or any good cause being shown by the defaulting party for the absence on the date of inquiry. In my view Applicant- Appellant should have made his petition to the original*

Tribunal. This court has expressed this view earlier and I do not see any reason to take different view on this matter with all due respect to the decisions cited by the Learned counsel."

De Fonseka V Dharmawardena (1994) 3 Sri LR 49 was a case where the learned District Judge vacated his own order refusing to give a date to call the Fiscal Officer as a witness and, directed the Fiscal to be called. In appeal to the Court of Appeal, Sarath N Silva J as he then was and Ranaraja J agreeing, held "*since the order relates to a matter of procedure and does not affect the substantive rights of the parties we are of the view that there is no error in the subsequent order of the learned judge which is consistent with the principles of natural justice and the requirement of fairness in the conduct of proceedings at the inquiry. Section 839 of the Civil Procedure Code recognizes the inherent power of the Court to make an order as may be necessary for the ends of justice."* In this occasion the order vacated appears to have been made when the other party was present.

Senaviratne V Francis Fonseka Abeykoon reported in **(1986) 2 Sri LR 1** is a case where the Plaintiff took law into his hands and forcibly evicted the Defendants. It was held by the Supreme Court that the Court could, in the interest of justice resort to its inherent powers saved under Section 839 of the Civil Procedure Code and make order of restoration of possession for the Fiscal to execute even though the Civil Procedure Code Provided for such restoration to possession only on a decree to that end entered under Section 217(C) of the Civil Procedure Code. In this occasion when there were express provisions for the restoration of possession under a decree, restoration of possession without a decree for the interest of justice using inherent powers was approved by the apex court. Thus, in a new situation not contemplated by the provisions of the Civil Procedure Code, restoration of possession was done through the inherent powers of the Court. In this occasion, what was remedied was not a harm or injury caused by the Court but by a party to the action which took the law into its hand. However, harm was caused by the opposite party and not a harm or injury caused by aggrieved party's own doing. Furthermore, when there are express provisions in relation to restoration of possession under different circumstances, inherent powers were used to meet the ends of justice and expressio unius rule appears to have not been considered as having any application to stop the use of the inherent powers. **Sirinivaso Thero Vs Sudassi Thero 63 N L R 31** is a case where it was held that a

Court has inherent powers to repair the injury done to a party by its act. **Ittepana V Hemawathie (1981) 1 Sri L R 476** is a case where decree nisi was made absolute but since it was found that no summons had been served on the Defendant, the original Court set aside its decree nisi and decree absolute. In this case it was held that since the proceedings being void, the person affected by it can apply to have them set aside using inherent powers saved by Section 839.

With regard to the application of Section 839 of the Code, following excerpts from the judgment of Soza, J. in the Court of Appeal case **Leechman & Company Ltd. V Rangalla Consolidated Limited (1981) 2 S L R 373 at 388 and 389** looks very relevant.

" Section 839 as has been pointed out in more than one decided case does not create new powers but merely saves the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuses of the process of the court- see the case of ***Paulusz v Perera (1933) 34 NLR 438****.*

A. Woodroffe, J. laid down in the case of ***Hukum Chand Boid V Kamalanand Singh (1905) 33 Cal.927*** *the Civil Procedure Code binds all Courts so far as it goes but not exhaustive. The legislature cannot anticipate and make provision to cover all possible contingencies. The power and duty of the Court in cases where no specific rule exists to act according to equity, justice and good conscience remain unaffected. In the exercise of its inherent powers the Court must be careful to see that its decision is based on sound general principles and is not in conflict or inconsistent with them or the intention of the legislature. Howard C.J. adopted Woodroffe J.'s enunciation in the case of* ***Karunaratne V Mohideen (1941) 43 NLR 102****. In the case of* ***Victor de Silva V Jinadasa de Silva (1964) 68 NLR 45,48*** *Manickavasagar, J. explained these principles as follows;*

> *'...our Code is not exhaustive on all matters; one cannot expect a Code to provide for every situation and contingency; if there is no provision, it is the duty of the judge, and it lies within its inherent power to make such order as the justice of the case requires.'*

The inherent powers of the court were preserved in section 151 of the Indian Code of Civil Procedure 1908 and our section 839 is a verbatim reproduction of it brought in by an amendment in 1921. The inherent powers are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure. On

any point specially dealt with by the Code the Court cannot disregard the letter of the enactment according to its true construction."

The aforementioned **Leechman & Company** case was a case where the learned District Judge had made orders, contrary to Civil Procedure, to hold an inquiry, which was something similar to trial within a trial with regard to the other debtors revealed by the garnishee's statement, without jurisdiction to hold such an inquiry in the same action. Thus, it was correctly held that Section 839 does not create new powers. However, what is quoted above indicates that the Legislature cannot foresee all the contingencies and make provisions for them and as such the Civil Procedure Code is not exhaustive and cannot be expected as providing for every situation and contingency. Further, it clearly points out that when there are express provisions one cannot resort to inherent powers and when there is no provision it is the duty of the judge, and within the inherent powers to do what is necessary, to meet the ends of justice or to prevent abuse of process of the Court.

The **Paulusz v Perera** referred to above in the case of **Leechman & Company** sturdily express the view that District Court cannot vary its own order. However, the issue involved in that case was the vacation of the previous dismissal of the action. Hence the order relevant to that case was an order that has the effect of a final judgment which makes the judge functus officio after the dismissal. On the other hand, it was a partition action and the vacation of the dismissal might have affected the rights of third parties who gain rights after the dismissal.

In **Kamala V Andris 41 NLR 71** where an application was made to vacate the previous abatement order, the learned Judge ordered the abatement to stand but gave leave to the plaintiff to file a fresh action in contrary to the statutory bar in Section 403 of the Civil Procedure Code. It was held "*Section 839 of the Civil Procedure Code is not intended to authorize a court to override the express provisions of the Civil Procedure Code".*

Even in the case of **Jeyaraj Fernandopulle V Premachandra de Silva (1996) 1 Sri. L R 70**, an application to review or revise an order of the Supreme Court by a fuller bench of the same court was refused. At page 101 of the said reported judgment referring to **Hettiarachchi V Senaviratne and others (1994) 3 Sri L R 293**, **Wijesinghe et al. V Uluwita (1933) 34 N L R 362**, it is stated " *Although as a general rule, no court or judge has power to rehear, review, alter or vary any*

judgment or order after it has been entered, either in an application made in the original action or matter or in a fresh action brought to review the judgment or order, yet the rule is subject to certain exceptions. All courts have inherent jurisdiction to vary their orders in certain circumstances." In the discourse of his judgment Amarasinghe, J. though not an exhaustive list, refers to certain instances where inherent powers could be used to set aside a previous order made by the same Court. Among others a judgment entered in default under certain circumstances or an order made on wrong facts given to the prejudice of a party is recognized as occasions where inherent powers can be used by a Court to vacate its own orders. However, His Lordship has emphasized that two questions must be asked by the Court in invoking inherent jurisdiction, namely;

1. Is it a case which comes within the scope of the inherent powers of the Court?
2. Is it one which those powers should be exercised?

Moreover, it further appears from His Lordship's judgment of the aforesaid case that when there is no express provision to remedy a situation, attainment of justice is what is expected from invoking Section 839.

Even the impugned judgment of the Court of Appeal admits a Court can vary or vacate its own order when it was made per incuriam or where an act of the Court has caused harm to a party. Thus, a Court has inherent powers to vacate an order made per incuriam or to rectify a harm caused by the Court itself. As such, the notion one would get by going through the impugned judgment of the Court of Appeal that a Court cannot vacate its own order under section 839 of the Civil Procedure Code;

- unless the said Code expressly provides for or
- owing to the expressio unius rule when the Code provides for similar situation but not for the same situation,

is qualified as the Court of Appeal itself states that it can do so when it is per incuriam or to rectify a harm caused by the court itself. Furthermore, the cases cited above indicate that there are other exceptions to the general rule that, a Court cannot vary or set aside its own order- vide **Jeyaraj Fernandopulle Vs Premachandra** (supra).

However, in certain cases per incuriam concept has been used in a restricted sense as defined by Lord Chief Justice Goddard in **Huddersfield Police Authority V Watson (1947) 1 All E R 193.** [see **Alasupillai V Yavetpillai (1948) 39 C L W 107, All Ceylon Commercial and Industrial Workers Union (1995) 2 Sri L R 295, Hettiarachchi V Senaviratne (1994) 3 Sri L R 209**]. As per the said restricted view a decision is made per incuriam when it is made in ignorance or forgetfulness of an existing statute or a binding decision. It appears that the dictionary meaning of the latin term 'per incuriam' connotes something similar to 'through lack of care.' {for broader meanings of 'per incuriam' see **Gunasena V Bandarathilake (2000) Sri L R 292 at 301 and 302**}. If one adopts the extreme wider meaning represented by the said dictionary meaning it may be a hindrance to reach a finality in a litigation, since lack of care may even appear in evaluation of evidential material after every party is given a chance to present their evidence and positions. Anyhow, our courts on certain occasions, where mistake was so obvious, have used 'per incuriam' concept in a much wider meaning than that of Lord Goddard's interpretation as demonstrated by following decisions. In **The King v Baron Silva (1926) 4 Times of Ceylon Reports 3**, a conviction given under a section which was not in force at the time of alleged commission was vacated. In **The Police officer of Mawalla V Galapatha (1915) 1 C W R 197**, an order of dismissing an appeal on a misunderstanding that the prosecution was properly sanctioned by placing the signature of the proper authority was vacated. In **V.A. Ranmenika V B. A. S. Tissera 65 N L R 214** the Supreme Court rejected an appeal on the ground that notice of appeal had not been duly served but when the court found notice had been duly served on the guardian -ad-litem, it set aside its own order. **Kariyawasam V Priyadarshani (2004) 1 Sri L R 189** is also an example for the use of wider interpretation of 'Per Incuriam" to vacate a decree of the Court of Appeal by the Court of Appeal itself, since the previous order was made as a result of Court of Appeal's attention not being drawn to the 2nd page of the final decree of the lower court where a certain person was allotted shares. The case of **Gunasena V Bandarathilake (2000) 1 Sri L R 292** is another example for our Courts applying per incuriam concepts in its wider interpretation. In this case the Court of Appeal set aside its own judgment since the Court of Appeal mistakenly thought that the District Judge had entered judgment for the Plaintiff and the appeal was by the Plaintiff. Thereafter, the Court of Appeal re-fixed the matter for argument and delivered a second judgment. This Court held that the Court of

Appeal had the inherent powers to do that and the procedure adopted by the Court of Appeal was what it considered most appropriate in the circumstances and there was nothing objectionable in that procedure.

The law as discussed in the above decisions does not negate the general rule that a Court cannot vacate or re consider its own order but it is clear that with the passage of time, law has recognized several exceptional situations where a Court can reconsider or vacate its own order. Ex parte orders and per incuriam orders are among the exceptions recognized by our courts. Furthermore, it is clear from some of the decisions quoted above, including some of the decisions made in the early part of the previous century, that a practice has been developed over the years, for the aggrieved party to make an application in the first instance to the original Court which made the ex parte order. When there are express provisions one has to make his or her application as per the said provisions and Courts need not have developed a practice in such situations. The aforesaid decisions refer to a practice since that practice covers the situations not provided by any section or provision of law. However, a Court cannot confer jurisdiction on itself as conferring jurisdiction on a Court is a matter for the legislature. As such, it is my view that the practice developed over the years as aforesaid has to be used as an adjunct to the existing jurisdiction and not to create a new jurisdiction, as such it has to be practiced within the limits of inherent powers recognized by Section 839.

No provision in the Civil Procedure Code or any statute has been brought to the notice of this Court that debars the holding of an inquiry where the aggrieved party alleges that the default on his part was due to an excusable reason or that there are good reasons to adduce for his default. This Court cannot find such restriction imposed by a statutory provision. Moreover, there is no express provision providing a remedy from the same Court for a default on an inquiry date as happened in the case at hand. If one argues that every order on such defaults has to be challenged by leave to appeal applications or by revision applications, superior courts will be inundated with such applications contributing to the law's delays. On the other hand, original court is in a better position to evaluate the factual situations related to a default. These may be among the reason for the development of a long-standing practice recognized by the afore quoted judgments. Thus, when a need arise to meet the ends of justice or to prevent the

abuse of process of the Court due to a per incuriam order, ex parte order, or by an order that cause harm or injury to a party which is not at fault etc., the court may use its inherent power.

As discussed above the Legislature cannot foresee all the contingencies and make provisions and the Civil Procedure Code is not exhaustive. The phraseology used in Section 839 itself and the practice of our Courts indicates that expressio unius rule does not apply in the manner submitted by the Plaintiff Respondent. Thus, I do not see that the application made or the inquiry held by the learned District Judge overrides any express provision of law. Furthermore, the learned District Judge when holding the inquiry was not functus officio with regard to the main cause of action and he was only reviewing an incidental order in relation to an application for amended answer since the Defendant Petitioner alleged that his default was excusable as human beings are prone to make mistakes. Thus, I do not see that the learned District Judge was using a new power but was making incidental orders and holding an inquiry to see whether he could act in terms of Section 839 to remedy the alleged injustice. In my view the learned District Judge was acting within the main Jurisdiction in relation to the cause of action placed before it by the Plaint and was not creating a new power which should have been considered in a different forum or a different action. The District Judge had powers to see whether his order was per incuriam in its wider sense as the order was made without the Petitioner having a chance to place factual situation in relation to his default or to see whether the Court had caused harm to the Petitioner by making the order without his presence, which denied his opportunity to place his side of the story.

Thus, the notion one gets from reading the impugned Court of Appeal Judgment that, the District Court can vacate ex parte orders only when there are express provisions in that regard in the Civil Procedure Code or any other law as well as the notion that expressio unius rule applies since there are some provisions that enable the vacation of certain ex parte orders by the same court are flawed. Those notions only express the general situations but there appears to be exceptions other than those referred to in the Court of Appeal Judgment. It is the long-standing practice to invoke Section 839 to vacate other ex parte orders to repair abuse of process of the court and meet the ends of justice when there are reasonable grounds for such invocation and where there is no express provision

to remedy the injustice, the Learned District Judge appears to have had entertained the application in terms of Section 839 and held the inquiry.

On the other hand, default of a party to appear and/or to proceed with the task or inquiry fixed for on the given date may take place, inter alia, on following situations;

- Due to a factor where fault can be attributed to the defaulting party (For e.g.; Negligence or lack of interest of the party)
- Due to a factor where fault cannot be attributed to the defaulting party (For e.g.; A Sickness, an accident, a god's act or natural disaster like landslides or an intervention of a superior force like a regional curfew, that hinders the presence of the party)

In the first category of situations a judge may not intervene as the outcome is a result of the relevant party's own doing but with regard to the 2nd category the original Court is in a better position than an appellate court to inquire into the matter; if necessary to examine the witnesses orally and see whether the applicant is in fact not at fault and, if so, had the Court known the correct factual situation whether it would have made the ex parte order. In other words, original Court is in a better position to decide whether the factual situation warrant the invocation of Section 839 of the Civil Procedure Code. Thus, learned District Judge cannot be found fault with for holding an inquiry to see whether he should use Section 839 to redress the Petitioner when it was alleged that the default was due to a mistake or human error.

For the foregoing reasons I am of the view that the Court of Appeal misstated in expressing a view to indicate that the District Court has no jurisdiction to vacate an ex parte order in terms of Section 839 of the Civil Procedure Code;

- where there is no provision made for such vacation of ex parte orders or
- due to expressio unius rule, when there are express provisions to similar situations but not to the alleged situation.

Further, the Court of Appeal in its judgment itself, as mentioned before, has recognized two exceptions to the general rule which states that a court cannot set aside its own order, and the judgments cited above indicate that there are other exceptions to this general rule. (See **Jeyaraj Fernandopulle case** supra).

As this was an inquiry in terms of Section 839, one cannot say that it must be held in terms of Section 86 or 87 of the Civil Procedure Code as those are for specific situations. However, the District Court has to follow some procedure similar to said provision or that adheres to rules of natural justice. The learned District Judge has given an opportunity to file objections to the Defendant Petitioner's application and parties have agreed to hold the inquiry by way of written submissions. Thus, sufficient compliance of rules of natural justice can be observed. However, the issue is whether the Defendant Petitioner submitted adequate and legally acceptable evidence before the Learned District Judge.

Another ground set out in the impugned judgment of the Court of Appeal for the setting aside of the District Court order is that the three affidavits tendered on behalf of the Defendant Petitioner are invalid, and therefore, there was no evidence at all to prove his stance that the default was due to a mistake. In fact, this was one of the objections taken by the Plaintiff Respondent even in the District Court to the application (Petition) of the Defendant Petitioner that prayed to vacate the order made ex parte on 06.01.2003. The brief does not reveal that the Defendant Petitioner moved Court to tender fresh affidavits. With this objection standing against his application, the Defendant Petitioner and his Lawyers agreed to hold the inquiry by way of written submissions which created a situation if affidavits were flawed his application also should fail. The objections to the affidavits was founded on the fact that jurat of each affidavit does not indicate whether it was affirmed before the Commissioner of Oaths.

In **De Silva V L.B. Finance Ltd. (1993) 1 Sri L R 371**, the affidavit stated that deponents affirmed and in the body of the affidavit the deponents described themselves as affirmants. In the jurat there was a statement that the affidavit was read over and explained to the within named affirmants, it was held by this Court that the affidavit was valid despite the fact that the jurat did not contain the fact of affirmation. However, in my view, when the Commissioner of Oaths describes the declarants as affirmants in the jurat there is an implication that the declarants affirmed before him.

In **Clifford Ratwatte v Thilanga Sumathipala (2001) 2 Sri L R 55** where the deponent stated that he was a Christian and made oath and the jurat clause at the end stated that the deponent had affirmed, the Court of Appeal held the

affidavit was invalid. It appears that due to the said contradictory statements in the body of the affidavit and jurat, the court could not come to the conclusion that it was in fact affirmed or sworn before the Justice of the Peace and the Court was of the view that the Justice of the Peace blindly signed it. Even in **Pan Asia Bank V Kandy Multipurpose Co-operative Society and Others (2005) 2 Sri L R 211**, where the deponent in the affidavit had stated that he being a Roman Catholic made oath but the attestation clause stated otherwise, namely that he affirmed to, the Court of Appeal held that the affidavit was bad in law.

In **Multi-Purpose Co-operative Society, Madawachchiya V Kirimudiyanse and Others (2011) 1 Sri L R 135** where the contention was that the deponent being a Buddhist had not affirmed to either in the head or recital of the affidavit or in the jurat, the Court of Appeal held that the words 'solemnly sincerely and truly' connote that the deponent was publicly admitting the truth of the contents in the most responsible manner. It further held that the absence of a particular word 'affirm' referred to in the statute cannot and should not be allowed to stand in the way of justice and the words must be given a purposive and meaningful construction instead of trying to split hairs on technicalities. It appears that the Court of Appeal did not follow the decisions in **Chandrawathie V Dharmaratne and others 2001 BLR, Cliffered Ratwatte V Thilanga Sumathipala** (supra), **Inaya V Orix Leasing Co. Ltd. (1993) 3 Sri L R 197**. In **Chandrawathie V Dharmaratne** the Supreme Court held that if the affirmation is not in the head of the affidavit or in the jurat clause it is defective and fatal, and, in **Inaya V Orix leasing Co. Ltd**., the deponents being Muslims had failed to solemnly, sincerely, and truly declare and affirm the specific averments set out in the affidavit. The recital merely stated that they make declaration and in the jurat there was no reference as to whether the purported affidavit was sworn or affirmed to. As such the affidavit appears to have been considered not valid as it contained unsworn testimony. Also, in **Facy V Sanoon and Others (2003) 3 Sri L R 8,** the Court of Appeal held a Muslim who elected to make oath and swear at the beginning could not have affirmed before the Justice of Peace and the affidavit was flawed. However, in **Mohomad v Jayaratne and Others (2002) 3 Sri L R 181** the Court of Appeal had held that the words used by the Petitioner in the opening part of his affidavit manifest his intention to make a solemn and formal declaration and the words used show his consciousness of his fundamental obligation to tell the truth. The use of the word

“affirm” in the opening part of the affidavit and the word swear in the jurat cannot militate against the manifested intention of the Petitioner to make a formal declaration in the discharge of his fundamental obligation to tell the truth.

In **Kumarasiri and Others V Rajapaksha (2006) 1Sri L R 359**, the jurat of the affidavit was confusing, incorrectly worded and did not state where the affidavit was affirmed. The Court of Appeal considered the jurat as flesh and blood of the affidavit and held that the affidavit was invalid. The Court of Appeal in **Weeraman V Sadacharan (2002) 3 Sri L R 222,** where in the body of the affidavit and as well as in the jurat, the deponent was not referred to as an affirmant but only as a declarant and no administration of an affirmation as required by law was visible, held that affidavit is fatally flawed. **Mark Rajendran V First Capital Ltd (2010) 1Sri L R 60** was a case where the purported deponent averred in the affidavit that he was a Christian and had made oath but as per the jurat he had affirmed to the averments before the Justice of Peace. The Supreme Court while referring to **Cliffered Ratwatte v Thilanga Sumathipala** (Supra) and **Kumarasiri and Others V Rajapaksha** (Supra) held that the affidavit cannot be accepted as valid.

The above decisions indicate that on some occasions where there was a defect in the jurat, our courts have acted somewhat strictly, and on other occasions more liberally. In some instances, our courts have expressed that even though technicalities should not be allowed to stand in the way of justice, the basic requirements of the law must be fulfilled; and in some cases the rationale behind making an oath or affirmation appears to have been considered and if it is visible from the affidavit as a whole that it is a responsible statement admitting the truth with regard to what is contained in the affidavit, it has been considered as valid. Thus, a mere declaration or statement of facts have been rejected. When there were contradictions between the contents of the affidavit and its jurat, in certain instances affidavit was not given the legal recognition, perhaps due to the doubt that the signing of the affidavit would have taken place blindly and not in a responsible manner. In some cases, even if there were contradictory statements as to whether it was affirmed or sworn, or when the jurat was silent as to whether it was affirmed or sworn or when the contents indicated that either it was affirmed or sworn as required by law or when it was a responsible statement to vouch for the truth, the relevant affidavit was considered as valid.

Section 5 of the Oaths and Affirmation Ordinance states that where the person required by law to make oath is a Buddhist, Hindu, or Muslim or of some other religion according to which oaths are not of binding force; or has a conscientious objection to make an oath, he may, instead of making an oath, make an affirmation. Section 168 of the Civil Procedure Code, which comes under the chapter XIX named 'Of Trials', stipulates that Christian and Jew witnesses, who do not object on religious tenets or on other grounds to the taking of oath, shall be examined under oath and others to be examined on affirmation. This rule in the said Section 168 also applies to affidavits. Section 437 of the Civil Procedure Code enables the preparation of affidavit evidence to be used as evidence in a judicial proceeding. Section 438 of the said Code states that the affidavit shall be signed by the declarant before the Court, Justice of Peace or Commissioner of Oath before whom it is affirmed or sworn. As per Section 439 of the same Code affidavit has to be read over and interpreted to the declarant in declarant's own language if the declarant is subject to any disability such as blindness, illiteracy, inability to understand English language etc. In such occasions, the jurat must express that it was read over, interpreted and the declarant understood it.

It may be helpful if the fact of affirmation or making of the oath is expressly stated in the jurat but as stated in **De Silva V L.B. Finance Ltd** (Supra), Civil Procedure Code does not require that should be expressly stated in the jurat.

After perusing the aforementioned decisions of our superior courts and the relevant provisions it is my view that what is necessary is whether the deponent made an oath or affirmed , as the case may be, as to the truthfulness of the contents of the affidavit, before the Justice of Peace or the Commissioner of oath. This has to be ascertained not only by looking at what is stated in the jurat but taking the affidavit as a whole.

The jurats of the purported affidavits tendered by the Petitioner do not say whether the deponents affirmed before the Commissioner of Oaths. The relevant jurat in each affidavit contains a statement to say that on the date mentioned there in the jurat, it was read over and explained to the declarant mentioned therein. Thus, each of the affidavits in its jurat refers to the deponent as 'declarant' (ඉහත සඳහන් සිද්ධි ප්‍රකාශය ප්‍රකාශකට කියවා තේරුම් කර දීමෙන්). In each affidavit, the first averment states that the deponent is the

declarant named therein (මෙහි සඳහන් සිද්ධි ප්‍රකාශක මම වෙමි).Even though the deponent has been referred as the declarant in those places, in the recital or at the beginning of each affidavit each declarant has stated that he honestly and truly affirms and states the contents therein. (අවන්කවත්, සත්‍යවාදීවත් ,ගාම්භීරතා පූර්වකවත් ප්‍රතිඥා දී ප්‍රකාශ කර සිටින වගනම්). Thus, when the Commissioner of Oath states that it was read over and explained, the deponent signs with the understanding that he affirms to the truth of the contents of the document read over to him. Hence there were sufficient materials before the learned District Judge as well as the Court of Appeal to consider the relevant affidavits as valid affidavits. In my view, the Court of Appeal erred in treating the said affidavits as invalid.

However, what is discussed above is not adequate to declare that the final conclusion of the impugned judgment of the Court of Appeal is invalid and the learned District Judge's decision to act in terms of Section 839 to vacate ex parte order is correct. To overturn the final conclusion of the Court of Appeal it is pertinent to see whether the Court of Appeal's finding that the evaluation of facts by the learned District Judge in relation to the default of the Defendant Petitioner was erroneous and cannot stand. Thus, whether facts revealed in the inquiry before the learned District Judge were sufficient to use the powers in terms of Section 839 to rectify the alleged injustice is still to be considered.

The application to vacate the order made ex parte refusing the amended answer and fixing the trial on the original answer was presented on the basis that the Counsel for the Defendant Petitioner had failed to note down the correct date of inquiry. It appears that the position of the Defendant Petitioner in the original court was that the default was not intentional or due to negligence or lack of care but due to a genuine human error. As per the petition dated 21.01.2003, filed in the District Court, praying to vacate the order dated 06.01.2003, the Defendant Petitioner had averred that on the instructions of his Registered Attorney, one Counsel appeared on 29.10.2002 and he mistakenly noted down the inquiry date, which was to be held by way of written submissions, as 06.02.2003. It is further averred that the said Counsel conveyed the said date to the Defendant Petitioner and the said Registered Attorney who noted down the inquiry date as 06.02.2003 when, as per the journal entries, the date given for the said inquiry was

06.01.2003. In support of this the Defendant Petitioner had tendered three purported affidavits; one under his name and the other two from the said Registered Attorney and the Counsel respectively. He had also tendered to the District Court a photo copy of the entries of the diary of the said Registered Attorney pertaining to the date 06.02.2003. Anyway, he had not submitted any document to prove the date noted down by the Counsel as averred in the petition or the entries relevant to the correct date, namely 06.01.2003 either in the said Counsel's or the Registered Attorney's Diary. The Plaintiff Respondent has objected to this application and among others he had challenged the reliability of the contents of the Petition and the validity of the affidavits tendered by the Defendant Petitioner. It appears parties agreed for the holding of the inquiry by way of written submissions -vide journal entry dated 24.07.2003. As referred to above the learned District Judge by his order dated 04.02.2004, purportedly acting in terms of Section 839 of the Civil Procedure Code accepted the Defendant Petitioner's version submitted through the purported affidavits mentioned above. The said order was set aside by the impugned order of the Court of Appeal.

If the default on the relevant date was a genuine mistake it was within the exclusive knowledge of the Defendant Petitioner and/or his lawyers. Thus, the Court of Appeal correctly held the burden of proving the genuine mistake was on the Defendant Petitioner. The Court of Appeal further observed that the Defendant Petitioner had produced the diary entries of his lawyer only in respect of the purported date erroneously noted down but had failed to produce diary entries in respect of the correct date 06.01.2003. As such, the Court of Appeal, in my view, correctly held that the Petitioner failed to discharge his onus of demonstrating to Court that nonappearance on the due date was a mistake and not negligence. To prove that it was a mistake, the Defendant Petitioner should have submitted the entries noted down by his Lawyers in relation to the correct date, namely 06.01.2003. If the correct case number was not entered in the diary on the correct date, and it is entered only on the date said to be erroneously entered, it becomes substantial evidence to decide that the Lawyer/s made a mistake. By producing the entries relating to the latter date he only proves that there is an entry made in relation to that date. One can make such entry even after the correct date lapsed. Thus, not producing the diary entries relating to the correct date or the note relevant to the date noted down at the first instance by

the Counsel as averred in his Petition has to be weighed against the Defendant Petitioner since these are matters within the exclusive knowledge of the Defendant Petitioner. Hence it is clear that learned District Judge did not consider the relevant facts in coming to his decision but the Court of Appeal considered them and came to a correct finding which stand against in acting in terms of Section 839.

It appears from the impugned judgment of the Court of Appeal that it rejected the contention of the Defendant Petitioner that the default of the Attorney- at-Law can be excused. The decision of **Fernando V Ceylon Breweries Ltd. (1998) 3 Sri L R 61** cited by the Defendant Petitioner in that regard has not been followed as the said decision was set aside by the Supreme Court- vide **The Ceylon Breweries Ltd. V Jax Fernando (2001) 1 Sri L R 270.** However, setting aside of the said Court of Appeal decision by the latter decision of the Supreme Court was done on different grounds. Thus, the two decisions **Punchihamy V Rambukpotha 16 Times Law Reports 119** and **Kathiresu V Sinnaiah 71 NLR 450** can still be cited to say that a mistake of a lawyer with regard to mistakenly taking down a wrong date can be excused. However, the mistake has to be proved and as elaborated elsewhere in this judgment, the defendant Petitioner has failed in proving that it was due to a genuine mistake.

Even if the Court thinks that a genuine mistake can be considered to give relief to meet the ends of justice, what could have been avoided by due diligence cannot be considered as a mistake as it falls within the ambit of one's negligence. A lawyer being a human being, he/she may err in many aspects including what he heard as the next date of inquiry. The Registered Attorney who was in charge of the Defendant Petitioner's brief must foresee such shortcomings that may take place. He is not a mere intermediary between his client and the Court to file documents and appear in court. He is a professional who can gain access to the case record through the registry and who can get the next date verified through the office of the court. The inquiry date given by the learned District Judge on 29.10.2002 was 06.01.2003. There was a time gap of more than two months in between. If the inquiry was fixed for the next day or the following day, one may say that there was no sufficient time to get the date verified. I do not think one can say that the Registered Attorney in the case at hand acted with due diligence, among others, with regard to the date fixed for the inquiry on the amended

answer. In **Pakir Mohideen V Mohammadu Casim 4 N L R 299** it was held that it is the duty of the proctor to inform the client of the proper date of trial and have asked for instructions. Thus, it is not sufficient for a Registered Attorney to state that he noted down the date given by the Counsel he instructed and the Counsel's mistake caused the default on the inquiry date. He must also show that he acted with due diligence and care to get the date verified by other means available.

With regard to the due diligence of the Registered Attorney, following excerpts from the **"Professional Ethics and Responsibilities of Lawyers"** By **A.R.B. Amarasinghe, 5th Print 2018, published by Stamford Lake (Pvt) Ltd**., will be relevant.

"*There is a heavy duty on a registered attorney to ensure that all things that are expected of him by the law and in terms of the standards of the profession are done diligently, promptly, conscientiously, with reasonable competence. The registered attorney performs functions previously performed by proctors in employing and instructing counsel, carrying out his advice and organizing the case behind the lines*" – vide page 303

"*It is no excuse for a registered attorney in a contentious civil matter to say that he failed to appear in any court because he usually acts, as a matter of personal preference, only as an 'instructing attorney' and never did advocacy and did not ordinarily appear in court or that he did not usually appear in that type of court*" – Vide page 304.

However, it further appears at page 306 of the aforesaid book that when the Registered Attorney has made all arrangements for the Counsel, if Counsel agrees to dispense with the appearance of the Registered Attorney, it is not necessary that Registered Attorney should ordinarily be in attendance at the proceedings. However, in the case at hand, it appears that the Registered Attorney was not present in court on 29.10.2002 when the inquiry date was given. There is no clear evidence in the purported affidavits that there was an agreement with the Counsel to dispense with the presence of the Registered Attorney on the said date and other dates to be given by the court. Rule 16 of the Supreme Court (Conduct of Etiquette for Attorney at Law) Rules of 1988 prescribes professional obligation on the lawyer retained in any proceedings to appear at such proceedings unless prevented by any circumstances beyond his control. As such, it is my view that even if there was such an agreement with the Counsel to

dispense with the Registered Attorney's appearance in Court, it is the duty of the Registered Attorney to personally keep a track on the dates of the case since he is obliged to represent the Defendant Petitioner till the proxy is valid, as opposed to the Counsel whose obligation to appear depends on the instructions he gets from the proxy holder . There is no evidence to show that the Registered Attorney acted promptly and diligently to get the next date verified specially when he did not appear in court on 29.10.2002. In **Daniel V Chandradeva (1994) 2 Sri L R 1**, it was held *"If a registered attorney has not appointed another Attorney to act as Counsel, or having appointed Counsel, he has not agreed with Counsel that the attendance in Court of such Registered Attorney may be dispensed with, then such Registered Attorney must personally keep a track of the dates of hearing, having regard to the usual way in which dates of hearing are fixed and notice is given in the Court or Tribunal, and appear when the case comes on for hearing or other purpose decided or ordered by the Court or Tribunal."* As said before, the Registered Attorney was not present on 29.10.2002 when the date of inquiry was given. No evidence was placed to show that there was an agreement with the Counsel to dispense with his appearance on the dates so given by the court and the Registered Attorney took steps to keep a track of the dates of hearing other than relying on what is purportedly conveyed by the Counsel who appeared on 29.10.2002. Thus, the failure to appear on the correct date of hearing is not an unavoidable result of a genuine mistake. The said default is tainted with lack of due diligence and fault of the Registered Attorney.

In **Rankira V Silindu 10 N L R 376** Middleton, J. stated that if a lawyer makes an error, it is to all intents and purposes the error of his client which that client must be responsible for**. Julius V Hodgson 11 N L R 25** was a case where the Appellant's Counsel urged that failure was due to accident but no explanation was given why the proctor, when he left Badulla, did not leave someone in charge of his office who could have attended to kind of a matters that was in issue in that case. Sir. Joseph Hutchinson, C. J. with Middleton, J. agreeing held that in his opinion, the failure in that case to file petition of appeal in time was due to the default of the proctor at Badulla, and the Appellant must suffer for it. Even in **Pakir Mohideen V Mohammadu Casim** (Supra) Boncer, C. J., held that client must suffer for the fault of his proctor. **Sanjeewa and Another V Piyatissa And Another (2006) 1 Sri L R 241** is a case where it was held that a mistake or oversight on the part of the registered Attorney -at- Law is not a cause which is not within the control of his

client to entertain an appeal notwithstanding lapse of time. In the case of **Packiyanathan V Singarajah (1991) 2 Sri L R 205** it was held that relief may not be granted;

- Where the default has resulted from the negligence of the client or both the client and his Attorney-at-Law
- Where the default has resulted from the negligence of the Attorney-at-Law in which event the principle is that the negligence of the Attorney-at-Law is the negligence of the client and the client must suffer for it.

The above cases clearly indicate that when the Attorney at Law was at fault his client has to face the adverse consequences. Thus, it is also clear that the learned District Judge did not properly evaluate the available facts and the stance taken by the Defendant Petitioner which was demonstrative of the lack of due diligence and care by his Registered Attorney.

A.R.B. Amarasinghe in his aforementioned book states;

"*The Court may, upon application set aside an order or judgment given in the absence of the attorney and order a new hearing if there were reasonable grounds for his absence.*

However, if he had no reasonable excuse, the court would not reinstate the matter. The earlier practice it seems was more harsh and did not permit a restoration." (Sic)

I do not consider a statement by the Registered Attorney, who was not present in court when the date was given, to the effect that he noted down the date conveyed by the Counsel, when he had time and access to get the date verified but failed to get it verified, is a reasonable excuse. Furthermore, I do not think when the Registered Attorney does not submit the entries of his diary in relation to the correct date given by the Court or when the Counsel does not submit what is noted down by him when the Court gave the date, one can say that the alleged mistake is proved.

In my view, Section 839 of the Civil Procedure Code is not there to remedy harm caused by one's own action or inaction which could have been averted with due diligence and care. As elaborated above, the Defendant Petitioner failed in proving that the default was a genuine mistake. It could have been avoided if the

Registered Attorney paid due attention to his duty with due care and diligence. Hence, the learned District Judge erred in applying Section 839 and granting relief for the Defendant Petitioner and the final conclusion of the Court of Appeal to set aside the District Court's order was correct.

Thus, with regard to the evaluation of facts in relation to the default, the learned District Judge erred in coming to the conclusion that the default was a result of a bona fide mistake. In my view, in that aspect, the Court of Appeal was correct as the situation does not warrant the invocation of Section 839 of the Civil Procedure Code to grant relief. The Defendant Petitioner failed in proving that the default was a result of a bona fide mistake due to the non production of the relevant entries, and even if it is assumed that the Counsel made a mistake in noting down the correct date, the Registered Attorney's due vigilance could have easily avoided the outcome.

Inquiry in the District Court where the default was made was for the amended answer. Whether the amendment shall be allowed or not is subject to the discretion of Court when Section 93 (1) of the Civil Procedure Code applies and furthermore, subject to the conditions in Section 93(2) when that section applies. Therefore, when an inquiry is fixed, the default of the applicant matters as it is his/her burden to satisfy the Court's discretion or satisfy the District Judge as to the existence of the conditions stipulated in Section 93(2), as the case may be. Thus, the Defendant Petitioner cannot argue that the learned District Judge could have made an order on the acceptance of the amended answer irrespective of his default. If it is his position, he should have asked an order on the application itself without getting it fixed for inquiry by the Court.

For the foregoing reasons I answer the questions of law contemplated in paragraph 13 of the Petition and allowed by this Court as follows;

Question (a).

Whether the said order is contrary to law and against the material placed before Court.

Answer;

No. Even though, there appears to be misstatements in the Court of Appeal Judgment with regard to the invocation and application of District Court's power in terms of Section 839 of the Civil Procedure Code to vacate its own orders made ex parte as well as the Court of Appeal erred in rejecting the affidavits tendered on behalf of the petitioner, the final conclusion of the said judgment is correct.

Question (b).

Whether the Court of appeal erred in making the aforementioned order on the basis that the learned District Judge cannot vacate its own order made upon default of a party if the Civil Procedure Code is silent on the procedure which ought to be adopted in such a matter

Answer;

Yes, there appears to be a such misstatement but the final conclusion is correct and valid in law.

Question (c).

Whether the Court of Appeal erred in holding that the same procedure spelt out in Sections 86 and 87 of the Civil Procedure Code cannot be applied in respect of the other defaults and or default inquiries conducted in the District Court

Answer;

No, those provisions are for the specific occasions referred to in those sections and related sections, but in other occasions of default where there is no specific procedure provided for the vacation of orders, there is no bar to adopt similar procedure in adherence to rules of natural justice. What is necessary is adherence to rules of natural justice.

Question (d).

Whether the Court of Appeal erred in holding that when the Court makes an order on a default of a party in any proceeding before the District Court other than in trial the aggrieved party has no redress whatsoever and has to suffer the consequences of his negligence

Answer;

No, if it is the negligence of the party, it has to suffer the consequences but in other occasions, even if it is not a default with regard to a trial and the party is not at fault or has excusable reasons, a party may have redress under Section 839 if the circumstances demands the ends of justice and prevention of abuse of process of the court.

Question (e).

Whether the Court of Appeal erred in making the said order without appreciating the scope of the power given by the legislature to the District Court under Section 839 of the Civil Procedure Code.

Answer;

Yes, there seems to be a misapprehension of the powers of District Court under Section 839 but, as elaborated above, the final conclusion of the Court of Appeal is correct and valid in law.

Question (f).

Whether the Court of Appeal erred in failing to appreciate that even if the Petitioner defaulted on the day the matter was fixed for written submissions the District Court ought to have considered the amendment suggested by the Petitioner in the light of Section 93 of the Civil Procedure Code and ought not have summarily dismissed the Petitioner's amended answer and as such the said act of Court injured the Petitioner and thus the said injury could have been cured by Court under Section 839 of the Civil Procedure Code.

Answer;

No. The default of the Defendant Petitioner matters and he should have taken part in the inquiry and satisfied the discretion of court to allow the amendments. The default of the Defendant Petitioner is tainted with lack of due diligence of his lawyers and alleged mistake is not proved.

Question (g).

Whether the Court of Appeal erred in holding that the authorities which dealt with a default of a lawyer at a trial has no application to the instant matter as the

proceedings relates to an inquiry in respect of the acceptance of an amended answer.

Answer;

It appears this proposition of law has been raised out of context since the Court of Appeal has not held in that manner. Thus, answering the said question does not arise.

The Court of Appeal has held "*…….an examination of the aforesaid cases one could see most significantly that they deal with situations where District Court has been specifically conferred with the power in terms of the Civil Procedure Code to purge default and vacate its own order. As such aforesaid excerpt has been quoted out of context and has no applications to the issue at hand*." This comment by the Court of Appeal was in respect of the argument of the Plaintiff Respondent, which was based on an excerpt taken from **Loku Menika Vs Selenduhamy 48 NLR 353**, which states that it is the deeply ingrained practice of the court to entertain applications to vacate ex parte orders and therefore the District Court had power to vacate the order made ex parte in this case. Before making the aforementioned comment the Court of Appeal has referred to the aforesaid case and some cases referred in the decision of the said case, which have been cited by the Plaintiff Respondents. Thus, the relevant comment by the Court of Appeal is not directly related to the authorities cited in relation to the defaults of lawyers at trial. However, the Court of Appeal appears to have been misdirected in making the aforesaid comment as some of the cases cited just prior to the said comment do not refer to purging default under any express provision of the Civil Procedure Code but to a practice of Court. Even some of the cases cited before in this judgment confirm the existence of this practice and they need not refer to a practice if it only applies to situation where a specific provision is available for that specific situation. However, in my view, to grant relief under this practice, the situation must fall within the ambit of Section 839, in other words it should come under general inherent powers adjunct to existing jurisdiction but not as a new jurisdiction. Furthermore, the cases cited above in relation to defaults made by lawyers are not limited to defaults made at the trial and they indicate that the client has to suffer when the Attorney-at- Law is at fault. Nevertheless, The Court of Appeal was correct in coming to the conclusion that no mistake was proved and the Defendant Petitioner must face the consequences of his lawyer's fault.

Question (h).

Whether the Court of Appeal erred in holding that the affidavits filed in support of the Defendant Petitioner's petition to purge default are bad in law and cannot be accepted when the said affidavits clearly manifests the intention of the affirmant to affirm to the contents thereof and when a statement in the jurat affirmation to the facts is not a prerequisite under the law.

Answer;

Yes, but the final conclusion of the Court of Appeal is correct and valid in law.

Hence the appeal is dismissed with costs.

……

Judge of the Supreme Court

Sisira J de Abrew, J.

I agree

……

Judge of the Supreme Court

Murdu N. B. Fernando, PC J,

I agree

……

Judge of the Supreme Court