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

In the matter of an Appeal

Geekiyanage Viyantha Vijithweera
No.156, Kandy Road,
Nuwaraeliya.

Plaintiff

SC Appeal 74/2008
SC/HCCA/LA 52/2008
CP/HC/CA/Kandy/290/2002
DC Nuwaraeliya Case No. L/717

Vs-

1. Mohamed Thuwan
   No.4, Old Bazar.
   Nuwaraeliya

Defendant

AND

Mohamed Thuwan
No.4, Old Bazar.
Nuwaraeliya

Defendant-Appellant

Vs

Geekiyanage Viyantha Vijithweera
No.156, Kandy Road,
Nuwaraeliya.

Plaintiff-Respondent

AND NOW BETWEEN

Geekiyanage Viyantha Vijithweera
No.156, Kandy Road,
Nuwaraeliya.

Plaintiff-Respondent-Petitioner-Appellant

Vs

Mohamed Thuwan
No.4, Old Bazar.
Nuwaraeliya

Defendant-Appellant-Respondent-Respondent

Before: Sisira J de Abrew J
Priyantha Jayawardena PC J &
Murdu Fernando PC J

Counsel: Rasika Dissanayake for
the Plaintiff-Respondent-Petitioner-Appellant
Saman Galappaththi for
the Defendant-Appellant-Respondent-Respondent

Written submission
tendered on : 9.12.2019 by the Plaintiff-Respondent-Petitioner-Appellant
9.12.2019 by the Defendant-Appellant-Respondent-Respondent
Argued on : 2.12.2019

Decided on: 26.2.2020

Sisira J. de Abrew, J

In this case the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) did not respond to the summons issued by the District Court and the learned District Judge by his order dated 22.5.2000 fixed the case for exparte trial. The exparte trial was taken up on 13.7.2000 and the learned District Judge by his judgment dated 13.7.2000 gave judgment in favour of the Plaintiff. According to the Fiscal Report the decree was served on the Defendant-Respondent on 8.8.2000. However, the Defendant-Respondent takes up the position that he received the decree only on 19.8.2000. The learned District Judge disbelieved the Defendant- Respondent and held that the decree was served on the Defendant-Respondent on 8.8.2000. The Defendant-Respondent, on 30.8.2000, filed an application to purge the default. The learned District Judge after inquiry by his order dated 3.4.2002 refused the said application to purge the default. Being aggrieved by the said order of the learned District Judge dated 3.4.2002, the Defendant- Respondent appealed to the Civil Appellate High Court and the learned Judges of the Civil Appellate High Court by their judgment dated 8.5.2008 set aside the order of the learned District Judge dated 3.4.2002 and allowed the Defendant-Respondent to file the answer. The learned Judges of the Civil Appellate High Court in their said judgment further directed the learned District Judge to conduct trial and deliver judgment after taking steps in terms of Civil Procedure Code. In effect the learned Judges of the Civil Appellate High Court in their said judgment have set aside the ex parte judgment of the learned District Judge dated 13.7.2000. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) has appealed to this court. This court by its

order dated 5.9.2008 granted leave to appeal on questions of law set out in paragraphs 25(g) of the Petition of Appeal dated 11.6.2008. Learned counsel for the Plaintiff-Appellant at the hearing of this appeal confined himself to the question of law set out in paragraph 25(g) of the said Petition of Appeal which reads as follows.

"In all the circumstances of the case whether the judgment of the Central Provincial High Court of Appeal of Kandy dated 8.5.2008 is liable to be set aside by Your Lordships' Court."

At the inquiry before the learned District Judge relating to the application to purge the default, the Defendant-Respondent stated in evidence that the decree was served on him only on 19.8.2000. But Modara Archchige Wilbert who is the Process Server stated in evidence that he served the decree on the Defendant-Respondent on 8.8.2000. When the learned District Judge by his order dated 3.4.2002 refused the application to purge the default, the Defendant-Respondent filed a petition of appeal in the Civil Appellate High Court against the said order dated 3.4.2002 but not against the exparte judgment of the learned District Judge dated 13.7.2000. It has to be noted here that there was no appeal before the Civil Appellate High Court seeking to set aside the ex parte judgment of the learned District Judge dated 13.7.2000. In fact, the notice of appeal filed by the Defendant-Respondent dated 10.4.2002 in the Civil Appellate High Court states that the Defendant-Respondent seeks to set aside the order of the learned District Judge dated 3.4.2002. In the Petition of Appeal filed in the Civil Appellate High Court by the Defendant-Respondent dated 30.5.2002, the Defendant-Respondent seeks to set aside order of the learned District Judge dated 4.4.2002 (this date appears to be a typographical mistake- it should be 3.4.2002). The Defendant-Respondent in the said Petition of Appeal does not seek to set aside the exparte judgment of the

learned District Judge dated 13.7.2000. But the learned Judges of the Civil Appellate High Court have set aside the ex parte judgment of the learned District Judge dated 13.7.2000.

Learned counsel for the Plaintiff-Appellant submitted that learned Judges of the Civil Appellate High Court did not have power to set aside the exparte judgment of the learned District Judge dated 13.7.2000 especially when the Defendant-Respondent had not sought such a relief. He further submitted that under Section 88(1) of the Civil Procedure Code, there could not be an appeal against any judgment entered upon default.

Section 88(1) of the Civil Procedure Code reads as follows.

"No appeal shall lie against any judgment entered upon any default."

Learned counsel for the Defendant-Respondent submitted that the Judges of the Civil Appellate High Court have the power to set aside the judgment of the learned District Judge dated 13.7.2000 in terms of Section 753 and 839 of the Civil Procedure Code even though there is no appeal. The most important question that must be decided in this case is whether the Civil Appellate High Court had the power to set aside the exparte judgment of the learned District Judge dated 13.7.2000 when the Defendant-Respondent filed an appeal against the order of the learned District Judge refusing the application to purge the default and when there was no appeal against the exparte judgment of the learned District Judge. I now advert to this question. In this connection it is relevant to consider the judgment in the case of Sirimavo Bandaranayake Vs Times of Ceylon [1995] 1 SLR 22. In the said case this court observed the following facts.

> *"The Times of Ceylon Limited (defendant-respondent) published several newspapers including the Times of Ceylon. On 2.8.1977 the business*

undertaking of the defendant having its registered office, 3 Bristol Street, Fort, was vested in the Government under and in terms of the Business Undertakings (Acquisition) Act, No. 35 of 1971 and a Competent Authority was appointed under that Act to administer the business undertaking. The Sunday Times of 4.12.77 reported that Mr. E. L. Senanayake then Minister Agriculture and Lands had stated that the plaintiff respondent (the plaintiff) had revalued her lands in order to obtain enhanced compensation from the Land Reform Commission.

On 18.9.1978 the plaintiff filed action in the District Court of Colombo against the defendant alleging that this and a related statement were defamatory of her, The Government takeover was not disclosed. The defendant did not appear on the summons returnable date (17.11.78) and ex parte trial was fixed for 10. 1.79. On 10.1.79 witness Dr. K. L. V. Alagiyawanna gave evidence and produced the Sunday Times of 4.12.77 but neither did he say that the defendant published nor did he mention that the Government had taken over the defendant's undertaking. The name of the printer and publisher was stated in newspaper marked in evidence as "printed and published by the Competent Authority, Republic of Sri Lanka successor to the business undertaking of Times of Ceylon Ltd..." However the trial judge entered judgment against the defendant on 29.1.79. On 17.4.79 the draft decree was tendered to the District Court and signed. There was no journal entry that the copy of the decree was served on the defendant. On 29.12.80 the plaintiff applied for execution. The Court ordered notice on the defendant and the Fiscal reported on 13.2.81 there was no such establishment. Notice was re-issued and a copy was sent to the

Competent Authority. The Fiscal reported on 17.3.81 that notice was pasted on the front door of the building of Times of Ceylon Ltd. and also served on the defendant at No. 9, Castle Street, Borella. The defendant filed objections stating that no summons or decree was served and praying that proceedings be set aside and that permission to file answer and defend the action be allowed. On 12.3.82 the Court upheld the objections and set aside the ex parte judgment and decree and ordered summons to re-issue on the defendant. This order was affirmed by the Court of Appeal on 13.8.82. On appeal to the Supreme Court, the Supreme Court allowed the appeal and set aside the orders of the District Court and Court of Appeal by the judgment reported in (1984) 1 Sri LR 178. Thereupon on 18.4.84 the defendant applied to the Court for revision of the ex parte judgment. The Court of Appeal by its judgment delivered on 11.12.90 held that the defendant had nothing to do with the impugned publication and there had been a failure of justice and set aside the judgment and dismissed plaintiff's action. In the meantime plaintiff had recovered the sum of Rs. 750,000/- from the defendant. The Court of Appeal ordered the plaintiff to repay this sum to the defendant but refused defendant's claim for interest. Leave to appeal to the Supreme Court was granted on the following questions.

1. Whether the remedy of revision is available in law to the (defendant) having regard to all the facts and circumstances of this case?

2. Whether the Court of Appeal had jurisdiction to revise the order of the learned District Judge entering judgment ex parte in favour of the plaintiff, which order (it is claimed) had been restored by the Supreme Court and had become res adjudicata between the parties?"

This court held as follows

1. *Judgment had been entered when there was not a scrap of evidence that defendant was responsible for the defamatory publication and no finding had been made on the question of publication.*
2. *The plaintiff's lawyers, unfortunately, failed to tell the trial judge that the defendant was not responsible for the impugned publication, despite their duty to court (now stated in Rule 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988) not to mislead or deceive or permit a client to mislead or deceive in any way the Court before which they appear.*
3. *The decision of the Supreme Court of 1.2.84 had the effect of restoring the ex parte judgment, but the Supreme Court did not expressly affirm or approve the judgment. None of the Courts considered the legality or propriety of the judgment.*
4. *Even in an ex parte trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An ex parte judgment cannot be entered without a hearing and an adjudication.*
5. *The revisionary jurisdiction of the Court of Appeal in Article 138 of the Constitution extends to reversing or varying an ex parte judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on the merits, in the Court of Appeal in revision, though not in appeal and not in the District Court itself.*
6. *The judgment of the Supreme Court holding that the defendant had failed to purge its default does not amount to an affirmation of such ex parte*

judgment, so as to preclude the exercise by the Court of Appeal of its revisionary jurisdiction.

7. Section 85(1) requires that the trial judge should be 'satisfied' that the plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the Judge's opinion is that the entirety of the relief claimed cannot be granted. Further, sections 84, 86 and 87 all refer to the judge being 'satisfied' on a variety of matters in every instance; such satisfaction is after adjudication upon evidence.

8. Section 88 must be read with section 753 of the CPC. The fact that. section 88(1) bars an appeal against an ex parte default judgment restricts the right of appeal conferred by section 754 of the CPC but does not affect the revisionary jurisdiction by section 753, if anything it confirms that jurisdiction. From the fact that section 88(2) confers a right of appeal, one cannot, possibly infer am exclusion of revisionary jurisdiction on the same matter.

9. Insofar as a remedy in the District Court is concerned the general rule is that judge is functus officio and cannot review its own judgment However, section 86 makes an exception, by conferring jurisdiction on the District Court to set aside a default judgment if it was flawed in procedural respects - but not on the merits. The necessary implication of the grant of that jurisdiction is that the District Court is not competent to review a default judgment on the merits. There are two distinct issues. The first is whether the ex parte default judgment was procedurally proper and this depends on whether a condition precedent had been satisfied namely whether a proper

order for ex parte trial had been made and whether the defendant had failed to purge his default. The second is whether, apart from that default, the ex parte default judgment was on the merits i.e. in respect of its substance, vitiated by lack of jurisdiction, error and the like."

It is therefore seen that in the above case that the Defendant filed objection stating that no summons was served on him and prayed that the proceedings be set aside; that the District Court upheld the objection which was affirmed by the Court of Appeal; that this court set aside both orders of the District Court and the Court of Appeal; that thereafter the defendant applied to this court for a revision of the ex parte judgment; and that it is in the said revision application that court made the above decision. But in the present case there is no appeal or revision application filed against the ex parte judgment of the learned District Judge. Therefore, it is wrong for the learned Judges of the Civil Appellate High Court to base their judgment on the judgment in the case of Sirimavo Bandaranayake Vs Times of Ceylon (supra) and set aside the ex parte judgment of the learned District Judge dated 13.7.2000. I note that in the present case, there is no appeal or revision application filed in the Civil Appellate High Court challenging the legality of the exparte judgment of the learned District Judge dated 13.7.2000.

In my view, the Defendant-Respondent was not successful in his application to purge the default since the Defendant-Respondent has failed to come to the District Court to purge the default within 14 days of the service of the decree. If the judgment of the Civil Appellate High Court is accepted as correct, it would help the defaulting party (Defendant-Respondent) to set aside the ex parte judgment against which he has not appealed. When I consider the aforementioned matters, I am unable to accept the contention of learned counsel for the Defendant-

Respondent that the court has power to intervene in this case under Section 753 and 839 of the Civil Procedure Code.

A party cannot be permitted to succeed in a matter where there is no appeal or application to revise an ex parte judgment. Considering all the above matters, I hold that the Civil Appellate High Court has no power to set aside an ex parte judgment of the District Court in an appeal filed against an order of District Court refusing the application to purge the default.

I would like to state that in an ex parte trial the plaintiff is not always entitled to the judgment in his favour on the basis that the defendant is absent. In an ex parte trial too, plaintiff must prove his case on a balance of probability. It is the duty of the trial Judge to consider whether the plaintiff has proved his case even in an ex parte trial and if he fails to do so, it is the duty of the trial Judge to dismiss the plaintiff's case. Considering all the aforementioned matters, I answer the above question of law in the affirmative. Accordingly, I set aside the judgment of the Civil Appellate High Court dated 8.5.2008 and affirm the order of the learned District Judge dated 3.4.2002.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.