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

In the matter of an Appeal

Ranepura Hewage Kusumawathi
No. 33 Sobitha Mawatha
Wadduwa.

Plaintiff

SC Appeal 121/2016
SC/HCCA/LA App.No. 383/2014
WP/HCCA/COL/33/2012 Rev.
DC Colombo Case No. 6693/SPL

Vs-

1. Bartleet Financial Services Ltd.
   2nd Floor, Bartleet House
   Colombo 2.

Defendant

BETWEEN

Bartleet Finance PLC (formally known as
Bartleet Financial Services Ltd.)
2nd Floor, Bartleet House
Colombo 2.

Defendant-Petitiner

Vs

Ranepura Hewage Kusumawathi

No. 33 Sobitha Mawatha
Wadduwa.

Plaintiff-Respondent

PRESENTLY BETWEEN

Bartleet Finance PLC (formally known as
Bartleet Financial Services Ltd.)
2nd Floor, Bartleet House
Colombo 2.

Defendant-Petitioner-Appellant

Vs

Ranepura Hewage Kusumawathi
No. 33 Sobitha Mawatha
Wadduwa.

Plaintiff-Respondent-Respondent.

Before: Sisira J. de Abrew, J
Murdu Fernando PC, J &
S. Thurairaja PC, J

Counsel: Romesh de Silva PC with Kaushalya Nawaratne , Mokshini Jayamanna
and Dakshitha Devapura for the Defendant-Petitioner-Appellant
Mano Devasagayam with Sujeewa Dhanayake for the
Plaintiff-Respondent-Respondent

Argued on : 9.7.2019

Written submission
tendered on : 9.8.2016 by the Defendant-Petitioner-Appellant
6.8.2017 by the Plaintiff-Respondent-Respondent

Decided on: 8.8.2019

Sisira J. de Abrew, J
This is an appeal against the judgment of the Civil Appellate High Court dated 1.7.2014 wherein the learned Judges of the Civil Appellate High Court affirmed the order of the District Judge of Colombo dated 28.1.204 wherein he fixed the matter for ex-parte trial. Being aggrieved by the said judgment of the Civil Appellate High Court the Defendant-Petitioner-Appellant has appealed to the court. This court by its order dated 14.6.2016 granted leave to appeal on questions of law set out in paragraphs 41(a),(b),(c) and (e) of the Petition of Appeal dated 11.8.2014 which are set out below.

1. 41 (a)(i) - Has the learned trial Judge made a grave procedural error in fixing DC Colombo Case No.6693/Spl for ex-parte trial on 28.1.2004?

2. 41(a)(ii) – In any event, did the learned trial Judge not have jurisdiction to fix DC Colombo Case No.6693/Spl for ex-parte trial on 28.1.2004?

3. 41(a)(iiI) – If so, are the proceedings in Case No.6693/Spl subsequent to 28.1.2004, a nullity?

4. 41(b)(i) – Are the circumstances pleaded in the Petition of the Petitioner filed in WP/HCCA/COL/33/2012/RA constitute special and/or extraordinary circumstances shocking the conscience of court warranting

the exercise of revisionary jurisdiction by Their Lordships of the High Court of Civil Appeal in favour of the Petitioner?

5. 41(b)(ii) – Do the circumstances pleaded in the Petition ex facie establish that a positive miscarriage of justice has been caused to the Petitioner due to fundamental procedural error caused due to the Order of the learned trial Judge in fixing the DC Colombo Case No.6693/Spl for ex-parte trial on 28.1.2004?

6. 41(b)(iii) – If so, have Their Lordships of the High Court of Civil Appeal erred in law in holding that the Petitioner is not entitled to exercise revisionary jurisdiction due to the alleged delay on the part of the Petitioner?

7. 41(c) – Was the Respondent bound and obliged in law to establish the case against the Petitioner on a balance of probability, even in an ex-parte trial?

8. 41(e) – Is the judgment of Their Lordships of the High Court of Civil Appeal dated 1.7.2014, contrary to well established legal principles?

Facts of this case may be briefly summarized as follows.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed a case in the District Court of Colombo moving court to issue an interim injunction and an enjoining order preventing the Defendant-Petitioner-Appellant (hereinafter referred to as the Defendant-Petitioner) selling the bus bearing Registration Number 62-4959. The learned District Judge by order dated 3.10.2003 refused to grant an interim injunction and fixed

the matter for answer on 3.12.2003. On 2.12.2003 the Plaintiff-Respondent filed a motion requesting permission of court to file an amended plaint on 3.12.2003. The learned District Judge on 2.12.2003 made an order to file the motion and mention on 3.12.2003. It has to be stated here that no amended plaint was filed on 2.12.2003. The journal entry dated 3.12.2003 carried the following matters. *"Amended plaint is being filed. Objections (if any) and answer on 28.1.2004."* According to the above journal entry the answer should be filed on 28.1.2004. On 28.1.2004, the learned District Judge accepted the amended plaint and fixed the case for ex-parte trial. The journal entry dated 28.1.2004 carries the following material. *"Objection and answer – No (not filed). The defendant is absent. No legal representation for the defendant. Amended plaint is accepted. Case is fixed for ex-parte trial. Ex-parte trial is fixed for 5.3.2004."* There is nothing to indicate that the amended plaint was accepted on 3.12.2003. According to the above journal entry the amended plaint was accepted only on 28.1.2004. What is the basis on which that the learned District Judge on 28.1.2004 fixed the case for ex-parte trial? If the answer had been filed when the case was called on 28.1.2004, the learned District Judge could not have fixed the case ex-parte trial even if the Defendant-Petitioner was absent and unrepresented. If the answer had been filed when the case was called on 28.1.2004, it would have been the duty of the learned District Judge to fix the case for trial even if the Defendant-Petitioner was absent and unrepresented. Then what was the basis on which the case was fixed for ex-parte trial when it was called on 28.1.2004? It appears that the basis was the failure to file the answer. Could the Defendant-Petitioner have filed the answer on 28.1.2004? Since the amended plaint has been accepted by

court on 28.1.2004, the Defendant-Petitioner could not have filed an answer on the amended plaint on 28.1.2004. Since the court has accepted the amended plaint on 28.1.2004, it was the duty of court to have given an opportunity to the Defendant-Petitioner to file an answer on the amended plaint. But the learned District Judge did not give this opportunity to the Defendant-Petitioner and fixed the case for ex-parte trial. Therefore it is seen from the above material that the answer on the amended plaint was not due on 28.1.2004. The learned District Judge on 28.1.2004 could not have fixed the case for ex-parte trial even on the basis that the Defendant-Petitioner was absent and unrepresented because the acceptance of the amended plaint has taken place only on 28.1.2004. When the amended plaint is accepted, the original plaint does not exist. Then it becomes the duty of court to act under Section 55 of the Civil Procedure Code and serve summons on the defendant if the defendant is absent in court. If the defendant is present in court, the court should give him an opportunity to file his answer on the amended plaint. The learned District Judge has not taken the above steps. Therefore it is seen from the above material that the District Court has not fixed a date to file answer on the amended plaint. The learned District Judge on the day that the amended plaint was accepted without fixing a date to file an answer, has fixed the case for ex-parte trial which is wrong. At this stage it is relevant to consider section 84 of the Civil Procedure Code which reads as follows.

> If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed (or the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the

> answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix.

Under Section 84 of the Civil Procedure Code, the court is empowered to fix a case for ex-parte trial if the defendant fails to file his answer on or before the day fixed for the filling of the answer or on or before the day fixed for the subsequent filing of the answer. This is one of the grounds discussed in Section 84 of the Civil Procedure Code. After the amended plaint was accepted, did the court fix a date for filing of the answer? The answer is clearly in the negative. It has to be noted here that after accepting the amended plaint on 28.1.2004, the court without fixing a date to file the answer, fixed the case for ex-parte trial. There was no opportunity for the Defendant-Petitioner to file his answer on the amended plaint since the court has failed to fix a date for the answer on the amended plaint. Therefore the argument that the Defendant-Petitioner has failed to file his answer on or before the day fixed for filing of the answer or on or before the day fixed for the subsequent filing of the answer cannot be accepted. For the above reasons I hold that the Defendant-Petitioner has not violated Section 84 of the Civil Procedure Code; that the learned District Judge on 28.1.2004 could not have fixed the case for ex-parte trial; and that the order made by the learned District Judge on 28.1.2004 fixing the case for ex-parte trial without giving an opportunity for the defendant to file his answer is wrong, a nullity and has violated a fundamental rule. Failure by the District Court to give an opportunity for the Defendant-Petitioner to file his answer upon acceptance of the amended plaint is a violation of a fundamental rule.

For the benefit of the trial Judges and legal practitioners of this country I would like to set down here the following guidelines.

1. When an amended plaint is accepted by court, the court cannot on the same day fix the case for ex-parte trial on the basis that the defendant is absent or he did not file the answer.

2. When an amended plaint is accepted by court, the court must give an opportunity for the defendant to file his answer.

3. When an amended plaint is accepted by court, it becomes the duty of court to summon the defendant if he is absent in court because the amended plaint has to be considered as a new plaint.

Learned President's Counsel for the Defendant-Petitioner admitted in court that the application filed by the Defendant-Petitioner to purge the default under Section 86(2) of the Civil Procedure Code has been rejected by the District Court. For the aforementioned reasons, I hold that the order made by the District Court on 28.1.2004 fixing the case for ex-parte trial is wrong and a nullity.

The learned District Judge took up the ex-parte trial and delivered the judgment dated 20.4.2004 giving relief prayed for in paragraph (a) of the amended plaint. Then the learned District Judge by the said judgment ordered the Defendant-Petitioner to pay a sum of Rs.1,344,192/- and Rs.3000/- per day from 4.12.2003 until vehicle bearing registration No.62-4959 is returned to the Plaintiff-Respondent. The learned District Judge by the said Judgment dated 20.4.2004 has not granted the other reliefs claimed by the Plaintiff-Respondent.

The reliefs claimed by the Plaintiff-Respondent that he (the Plaintiff-Respondent) is the registered owner of the vehicle bearing registration No. 62-4959 and that the order compelling the Defendant-Petitioner to hand over the said vehicle to the Plaintiff-Respondent were not granted.

It is undisputed that the Plaintiff-Respondent purchased the vehicle on a hire purchase agreement signed with the Defendant-Petitioner and that the Defendant-Petitioner seized the said vehicle from the possession of the Plaintiff-Respondent as he failed to pay the monthly installments. This has been admitted by the Plaintiff-Respondent in her evidence. The interim injunction claimed by the Plaintiff-Respondent in her original plaint directing the Defendant-Petitioner not to sell the above vehicle was rejected by the learned District Judge by his order dated 3.10.2003. Learned President's Counsel for the Defendant-Petitioner submitted that the Defendant-Petitioner sold the vehicle since the above relief claimed by the Plaintiff-Respondent had been rejected by court and as such the said vehicle is not in the possession of the Defendant-Petitioner. Learned President's Counsel for the Defendant-Petitioner submitted that in terms of the ex-parte judgment of the District Court, the Defendant-Petitioner has to give Rs.3000/- per day to the Plaintiff-Respondent until the vehicle is returned to the Plaintiff-Respondent but the Defendant-Petitioner is not in a position to hand over the vehicle since it has been sold. Thus it is seen that if the ex-parte judgment of the District Court dated 20.4.2004 is affirmed, the Defendant-Petitioner has to pay Rs.3000/- per day to the Plaintiff-Respondent without any terminal date. This ex-parte judgment of the District Court dated 20.4.2004 has been delivered as a result of the order of the District Court dated 28.1.2004 fixing the case for ex-parte trial.

I have to ask the question whether the order dated 28.1.2004 and the ex-parte judgment dated 20.4.2004 shock the conscience of court. I have to answer this question in the affirmative. If an order or a judgment of the trial court shocks the conscience of court, the appellate court should, in revision, interfere with such an order or judgment. This view is supported by the following judicial decisions.

Bank of Ceylon Vs Kaleel and Others [2004] 1 SLR 284 at page 287(CA) it was held as follows.

> *"In any event, for this Court to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words the order complained of is of such a nature which would have shocked the conscience of Court."*

Vanik Incorporation Ltd Vs Jayasekara [1997] 2 SLR 365 (CA) Justice Edussuriya held as follows.

> *"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

The learned Judges of the Civil Appellate High Court have concluded that failure on the part of the learned District Judge to give an opportunity for the Defendant-Petitioner to file an answer has caused a grave injustice but refused to intervene with the order of the learned District Judge on the ground of delay on the part of the Defendant-Petitioner. I note that the revision application has been filed in the Civil Appellate High Court after eight years of the order fixing

the case for ex-parte trial. As I pointed out earlier, the Defendant-Petitioner, in terms of the ex-parte judgment, has to pay Rs.3000/- per day to the Plaintiff-Respondent without any terminal date. As a result of a judgment or an order in the lower court if a party in a case has to make payments without a terminal date, delay in seeking revisionary jurisdiction of the Appellate Court should not operate as a bar for the Appellate Court to exercise its revisionary jurisdiction. This view is supported by the judgment of the GPS de Silva CJ in the case of Gnanapantithen and Another Vs Balanayagam and Another [1998] I SLR 391 wherein His Lordship held as follows.

> "*There was a total want of investigation of title. The circumstances were strongly indicative of a collusive action. In the result, there was a miscarriage of justice in the case, and the appellants were entitled to a revision of the judgment of the District Judge notwithstanding delay in seeking relief.*
>
> *The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and. exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal."*

I have earlier held that the order of the learned District Judge fixing the case for ex-parte trial is a nullity. If an order of lower court is a nullity, the Appellate Court should interfere with such an order in the exercise of its revisionary jurisdiction. In the present case the Civil Appellate High Court having observed the fact that failure on the part of the learned District Judge to give an opportunity for the Defendant-Petitioner to file his answer has caused grave injustice to the Defendant-Petitioner refused to intervene on the ground

of delay. When I consider all the aforementioned matters, I hold that the learned Judges of the Civil Appellate High Court were wrong when they refused to interfere with the order of the learned District Judge dated 28.1.2004. For the above reasons, I hold that the judgment of the Civil Appellate High Court dated 1.7.2014 is wrong and should be set aside.

For the aforementioned reasons, I exercising the appellate powers of this court, set aside the order of the learned District Judge dated 28.1.2004 fixing the case for ex-parte trial. Since I set aside the said order of the learned District Judge, the ex-parte judgment of the District Court dated 20.4.2004 should also be set aside and is hereby set aside. Since the order dated 28.1.2004 of the learned District Judge fixing the case for ex-parte trial is set aside, the judgment of the Civil Appellate High Court dated 1.7.2014 which has the effect of affirming the said order of the District Court is also set aside.

I direct the learned District Judge to give an opportunity to the Defendant-Petitioner to file his answer on the amended plaint and proceed with the trial without delay.

The Defendant-Petitioner in his petition of appeal filed in this court has moved for an order to return the money that the he has paid to the Plaintiff-Respondent in terms of the ex-parte judgment dated 20.4.2004. Since we set aside the ex-parte judgment dated 20.4.2004 the payments made in terms of said judgment should also be returned by the Plaintiff-Respondent to the Defendant-Petitioner. We are unable to determine the amount paid by the Defendant-Petitioner to the Plaintiff-Respondent as the relevant material has not been attached to the petition of appeal. Therefore we cannot state the amount in this

judgment. The Defendant-Petitioner is entitled to recover the amount he had paid to the Plaintiff-Respondent in terms of the ex-parte judgment. The learned District Judge at the end of the main trial is directed to calculate this amount on the evidence led before the District Court and make an appropriate order. I would like to state here that this judgment should not be considered as a licence to cure defects in cases where there is delay in seeking revisionary jurisdiction of the Appellate Court because each case must be considered on its own merit.

In view of the conclusion reached above, I answer the above questions of law as follows.

The questions of law set out in paragraph 41(a) (i) and (ii) of the petition of appeal are answered in the affirmative.

The questions of law set out in paragraph 41(a)(iii) of the petition of appeal are answered as follows. "The orders of the learned District Judge dated 28.1.2004 and 20.4.2004 are wrong."

The questions of law set out in paragraph 41(b)(i) are answered as follows. "The orders of the learned District Judge dated 28.1.2004 and 20.4.2004 shock conscience of court."

The questions of law set out in paragraph 41(b)(ii) and (iii) are answered in the affirmative.

The question of law set out in paragraph 41(c) does not arise for consideration.

The question of law set out in paragraph 41(e) is answered as follows. The judgment of the Civil Appellate High Court dated 1.7.2004 is wrong.

The order of the learned District Judge dated 28.1.2004 fixing the case for ex-parte trial is set aside.

The ex-parte judgment of the District Court dated 20.4.2004 is set aside.

The judgment of the Civil Appellate High Court dated 1.7.2014 is set aside.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

S. Thurairaja PC J

I agree.

Judge of the Supreme Court.