

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

In the matter of an Appeal in terms of section 5C of the High Court of the Provinces (Special provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006 against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5A of the said Act.

SC Appeal No. 104/2017

SC (HC CA) Leave to Appeal

Application No. 94/2016

Civil Appellate High Court

Jaffna Case No. 33/2015

DC Jaffna Case No. L/157/2013

1. Arulampalam Ganeswaran,
2. And his wife Suganthini
Dutch Road,
Alaveddy West, Alaveddy.

PLAINTIFFS

Vs

1. Kasilingam Sritharan,
2. And his wife Manohari
Sithankeni Santhiyadi,
Sithankeni.

DEFENDANTS

AND THEN BETWEEN

1. Kasilingam Sritharan,
Sithankeni Santhiyadi,
Sithankeni.

1ST DEFENDANT - APPELLANT

Vs

1. Arulampalam Gnaneswaran,
2. And his wife Suganthini
Dutch Road,
Alaveddy West, Alaveddy.

PLAINTIFF - RESPONDENTS

AND NOW BETWEEN

1. Arulampalam Gnaneswaran,
2. And his wife Suganthini
Dutch Road,
Alaveddy West, Alaveddy.

**PLAINTIFF - RESPONDENT -
APPELLANTS**

Vs

1. Kasilingam Sritharan,
Sithankeni Santhiyadi,
Sithankeni.

**1ST DEFENDANT - APPELLANT -
RESPONDENT**

2. And his wife Manohari
Sithankeni Santhiyadi,
Sithankeni.

**2ND DEFENDANT-RESPONDENT-
RESPONDANT**

Before : **P. Padman Surasena, J**
Janak De Silva, J
Mahinda Samayawardhena, J

Counsel : N. R. Sivendran with Renuka Udumulla for the Plaintiff -
Respondent - Appellants
S. Kumarasingham for the 1st Defendant - Appellant -
Respondent

Argued on : 05.05.2022

Decided on : 27.06.2023

P Padman Surasena J:

The Plaintiff-Respondent-Appellants (hereinafter sometimes referred to as the Plaintiffs) instituted action relevant to this case on 14.08.2013 in the District Court of Jaffna against the 1st Defendant-Appellant-Respondent (hereinafter sometimes referred to as the 1st Defendant) and the 2nd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 2nd Defendant) seeking a declaration of title to the land described in the schedule to the plaint and the ejectment of the said Defendants from the said land.

As per the first journal entry of the District Court record, upon the Plaintiff filing the plaint along with summons, the learned District Judge had taken steps to issue summons on the Defendants returnable on 11.09.2013. Thereafter, the learned District Judge had taken further steps on several dates when the case was called in Court. This was with a view of having the summons served on the Defendants. As the 1st Defendant had not responded to summons, the learned District Judge on 20.11.2013 had fixed the case for *ex parte* trial against the 1st Defendant.

Upon the Fiscal of the District Court reporting his failure to serve summons on the 2nd Defendant on multiple occasions, the learned District Judge had ordered summons to

be served on the 2nd Defendant by way of substituted service. i.e., by pasting the summons on the door of the house where the 2nd Defendant had last resided. Consequent to the above order, the Fiscal had reported on 05.02.2014, that the summons had been served on the 2nd Defendant by way of substituted service. It is also to be noted that on the same day, i.e., on 05.02.2014, an Attorney-at-Law also had appeared on behalf of the 2nd Defendant in Court (Journal Entry No. 5) and the Court had ordered the case to be called in Court on 12.02.2014. When the case was called on 12.02.2014, neither the 2nd Defendant nor her agent had appeared in Court. The learned District Judge had then fixed the case for *ex parte* trial against the 2nd Defendant as well.

Accordingly, the *ex parte* trial against both Defendants commenced, concluded and the *ex parte* decree was entered on 26.02.2014. Thereafter, the *ex parte* decree was served on the 1st Defendant on 22.05.2014 and on the 2nd Defendant by way of substituted service on 07.05.2014. Upon the *ex parte* decree being served on the Defendants, the 1st Defendant on 28.04.2014, had filed proxy, petition and affidavit, seeking to purge his default and prayed *inter alia* that the *ex parte* decree be vacated. This was sought to be done under Section 86(2) of the Civil Procedure Code.

Subsequent to the filing of the above application, when the Court took up the matter for inquiry, the Plaintiffs had raised a preliminary objection to the maintainability of the said application on the basis that the said application was time barred. Thereafter, the parties had filed written submissions on the afore-mentioned preliminary objection. It was thereafter that the learned District judge, by his order dated 19.11.2014, had upheld the afore-stated preliminary objection raised by the Plaintiffs and proceeded to dismiss the afore-stated application of the 1st Defendant. The dismissal of the application of the 1st Defendant by the learned District Judge was on the basis that he is obliged to strictly calculate the 14 days set out in Section 86(2) of the Civil Procedure Code. The learned District Judge had adopted this course of action based on the case of The Ceylon Brewery Limited vs Jax Fernando, Proprietor, Maradana Wine Stores.¹ The learned District Judge upon that conclusion had proceeded to hold that the District Court had no jurisdiction to inquire into the

¹ (2001) 1 Sri. L. R 270.

application of the 1st Defendant as he had not complied with the provisions in Section 86(2) of the Civil Procedure Code.

Being aggrieved by the above decision of the District Court, the 1st Defendant appealed to the Provincial Appellate High Court of the Northern Province praying *inter alia* that the said order dated 19.11.2014 of the District Court be set aside.

Accordingly, the Provincial High Court of Civil Appeals after the argument of the said appeal, by its judgment dated 27.01.2016 had decided in favour of the 1st Defendant. Accordingly, the Provincial High Court of Civil appeal had set aside the order of the District Court dated 19.11.2014 which upheld the preliminary objection raised by the Plaintiffs and dismissed the application of the 1st Defendant made under section 86(2) of the Civil Procedure Code. It had also set aside the *ex parte* decree. The decision of the learned Judge of the Provincial High Court was on the basis that section 86(2) of the Civil Procedure Code does not specify a limitation on the computation of the 14-day period and therefore when calculating the said 14 days, one must exclude Sundays and public holidays as per section 754(4) of the Civil Procedure Code which applies for similar computations of time. It was on that basis that the Provincial High Court had proceeded to conclude that the application made by the 1st Defendant under section 86(2) of the Civil Procedure Code was not time barred. Accordingly, the Provincial High Court had taken the view that the District Court had the jurisdiction to consider the application of the 1st Defendant made under section 86(2) of the Civil Procedure Code.

Being aggrieved by the afore-stated judgment of the Provincial High Court of Civil Appeal, the Plaintiffs sought Leave to Appeal from this Court. After hearing counsel for both parties, this Court by its order dated 30.05.2017 had granted Leave to Appeal on the following questions of law.

(a) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that the 1st Defendant-Appellant-Respondent has not filed a valid and proper application within the time limit in terms of Section 86(2) of the Civil Procedure Code?

- (b) *Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that Sundays and Public Holidays are not to be excluded in calculating the period under Section 86(2) of the Civil Procedure Code?*
- (c) *Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that the provision of [section] 754 of the Civil Procedure Code has no application to the period specified in Section 86(2) of the Civil Procedure Code in calculating the period?*
- (d) *Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to follow the judgment of the Supreme Court in The Ceylon Brewery Limited Vs. Jax Fernando 2001 (1) SLR 270?*
- (e) *Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to give due consideration to the Written Submissions filed by the Plaintiffs-Respondents-Petitioners in the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) wherein specific reference was made to the said judgment reported in 2001 (1) SLR 270?*

A closer look at the above questions of law shows clearly that the central question that this Court must resolve in the instant appeal is as to how a judge should calculate the period of 14 days stipulated in section 86(2) of the Civil Procedure Code. For convenience of further discussion on this point, I would reproduce below, section 86(2) of the Civil Procedure Code which reads as follows:

"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies Court, that he had reasonable grounds for such default, the Court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to cost or otherwise as to the Court shall appear proper"

At the outset let me refer to the case of The Ceylon Brewery Limited vs Jax Fernando, Proprietor, Maradana Wine Stores,² in which the Supreme Court was called upon to consider exactly the same issue. In the afore-mentioned Ceylon Brewery's case, the defendant had been served with the *ex parte* decree on 03.02.1997 and the application under section 86(2) of the Civil Procedure Code to set aside the same had been filed on 18.02.1997. This meant that the application under section 86(2) of the Civil Procedure Code had been filed on the 15th day (late by one day on strict calculation of number of days within that period). Thus, the question before the Supreme Court in Ceylon Brewery's case was whether the period of 14-days provided in section 86(2) of the Civil Procedure Code for filing an application to purge the default and set aside an *ex parte* decree, must be strictly complied with. When deciding the afore-mentioned question, the Supreme Court, in that case, also addressed the question as to how the said 14-days under section 86(2) should be calculated. Indeed, that was the main issue, this Court had to address in that case, the facts of which I will briefly set out below.³

The learned Additional District Judge in the case of Ceylon Brewery had vacated the *ex parte* judgment and decree granted against the defendants in that case (due to their default in filing an answer) and had then proceeded to permit the said defendants to file an answer. This was despite the fact that the application under section 86(2) of the Civil Procedure Code was filed in that case after the lapse of 14 days. This was done by the learned Additional District Judge in that case by excluding Sundays and public holidays when calculating the period of 14-days. The Plaintiff in that case had challenged the said decision of the learned Additional District Judge in the Court of Appeal.

The Court of Appeal in the Ceylon Brewery's case having dealt with several questions, had held that the learned Additional District Judge could not have lawfully excluded Sundays and public holidays when calculating the 14-days set out in section 86(2) of the Civil Procedure Code. In arriving at this conclusion, the Court of Appeal examined the provisions of law in sections 754(4) and 757(1) of the Civil Procedure Code which

² Supra.

³ The facts of the Ceylon Brewery's case has been more fully set out in its Court of Appeal judgment which is reported in (1998) 3 Sri. L. R. 61.

also contain identical time-limit (14-day period), but had expressly excluded Sundays and public holidays (unlike section 86(2) of the Civil Procedure Code). The Court of Appeal then proceeded to hold that Sundays and public holidays should not be excluded when calculating the said period of 14 days referred to in section 86(2) of the Civil Procedure Code.

However, the Court of Appeal in the Ceylon Brewery's case held that the requirement of 14-days in section 86(2) of the Civil Procedure Code for an application to set aside a default decree was merely directory and not mandatory. It was on that basis that the Court of Appeal proceeded in its judgment to affirm the learned Additional District Judge's order allowing the defendants in that case to file an answer and proceed with an inter-parte trial despite the application under section 86(2) having been delayed by one day than the stipulated 14-day period.

Being aggrieved by the afore-stated judgment of the Court of Appeal, the Plaintiffs of the Ceylon Brewery's Case appealed to the Supreme Court. Thus, the Supreme Court in that case was called upon to consider the question whether or not the requirement under section 86(2) of the Civil Procedure Code to make such an application within 14 days is merely directory as held by the Court of Appeal. Having considered the said question, Justice Mark Fernando in that case stated as follows:

"We are of the view that Section 86(2) of the Civil Procedure Code is the provision which confers jurisdiction on the District Court to set aside a default decree. That jurisdiction depends on two conditions being satisfied. One condition is that the application should be made within 14 days of the service of the default decree on the defendant."

It is settled law that provisions which go to the jurisdiction must be strictly complied with. See Sri Lanka General Workers Union vs Samaranayake.⁴

Having stated so, Justice Mark Fernando in the above case, set aside both the judgment of the Court of Appeal and the order of the District Court and affirmed the *ex parte* decree previously entered by the Additional District Judge.

⁴ 1996 2 Sri L. R. 265.

In arriving at the decision that section 86(2) of the Civil Procedure Code is mandatory and requires strict compliance, Justice Mark Fernando proceeded to hold as follows:

"The learned District Judge entertained the application to set aside the default decree after the period of 14 days had expired, on the ground that intervening holidays had to be excluded. The Court of Appeal held, correctly, that the learned District Judge was in error, because intervening holidays cannot be excluded in computing a period exceeding six days."

Justice Mark Fernando decided the Ceylon Brewery's case in the year 1999. Then again in SC Appeal No. 153/2014 decided on 10.06.2016, Justice Anil Gooneratne also reiterated the view that the compliance of the requirement under section 86(2) of the Civil Procedure Code is mandatory as it has been the intention of the Legislature to stipulate strictly the 14-day time limit to enable the District Court to assume jurisdiction to inquire into such applications. This Court has been consistent in taking that view. Justice Anil Gooneratne in SC Appeal No. 153/2014, followed the aforementioned dicta of Justice Mark Fernando in Ceylon Brewery's case.

I observe that the learned Judge of the Civil Appeal High Court in his judgment has made a reference to the Plaintiff's written submissions⁵ and that the said written submissions had contained a specific reference to the judgement of the Ceylon Brewery's Case reported in 2001 (1) SLR 270. However, unfortunately, the learned Judge of the Civil Appeal High Court had failed to give due recognition and apply the said ratio decidendi when he decided the instant case.

Although the above analysis would sufficiently dispose of the instant case, for the sake of completeness, let me set out below the applicability of section 8(1) of the Interpretation Ordinance in respect of calculating the 14-day period referred to in section 86(2) of the Civil Procedure Code. In doing so, I would first reproduce below, section 8(1) of the Interpretation Ordinance:

"Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a

⁵ Vide paragraph 2, Part C of the Judgement dated 27.01.2016.

day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open."

The Supreme Court dealt with the question whether section 8(1) of the Interpretation Ordinance would be applicable for the calculation of 14-day period referred to in section 86(2) of the Civil Procedure Code in the case of Flexport (Pvt) Limited & two others vs. Commercial Bank of Ceylon Limited.⁶ In that Case, Priyasath Dep PC J⁷ holding that that section 8(1) of the Interpretation Ordinance is applicable when making an application to purge the default under section 86(2) of the Civil Procedure Code stated as follows:

"I am inclined to follow the Supreme Court judgments in State Trading Corporation V. Dharmadasa,⁸ Nirmala de Mel V. Seneviratne and others,⁹ Selenchina v. Mohomad Marikkar,¹⁰ which held that if the last date of filing falls on a public holiday or on a day the court house was closed, the act of filing of papers could be done or taken on the next date thereafter, the day the court or office is open. I hold that section 8(1) of the Interpretation Ordinance applies to section 86(2) of the Civil Procedure Code"

In the instant case, the *ex parte* decree was served on the 1st Defendant on 22.05.2014.¹¹ The 1st Defendant had made the application to set aside the said *ex parte* decree on 09.06.2014. The 14-day period as per section 86(2) of the Civil Procedure Code did not fall on a public holiday. Accordingly, the application of section 8(1) of the Interpretation Ordinance would not arise in the instant case. Therefore, I would not endeavour to engage in any further discussion on that aspect than what has already been mentioned above.

For the foregoing reasons, I answer all the above questions of law in respect of which this Court has granted Leave to Appeal in the affirmative. I proceed to set aside the

⁶ SC Appeal No. 03/2012 decided on 15.12.2014 [Reported in (2014-2) ABH LR 370 SC].

⁷ As he was then.

⁸ 1987 (2) Sri L. R. 235.

⁹ 1982 (2) Sri L. R. 569.

¹⁰ 2000 (3) Sri L. R. 100.

¹¹ Vide Journal Entry No.11.

judgment of the Civil Appeal High Court of the Northern Province dated 27.01.2016. I restore and affirm the order dated 19.11.2014 pronounced by the learned District judge. The petition filed on 09.06.2014 by the 1st Defendant seeking to purge his default and praying for the vacation of the *ex parte* decree filed under Section 86 (2) of the Civil Procedure Code must stand dismissed on the ground that it was not filed within the stipulated timeframe. I allow the appeal without costs.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA J

I agree,

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J

I agree,

JUDGE OF THE SUPREME COURT