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

SC CHC Appeal No. 04/2017
SC HCCA LA: 174/2005 and 175/2005
HC/ JAFFNA CASE NO:
NP/ HCCA/ JAFFNA/ 02/2014/LA
DC KILLINOCHCHI CASE NO: L 325/13

John Devakumar Wilson,
No. 173/B,
Model Farm Road,
Colombo 08.

Plaintiff

Vs.

1. Rajendra Wasanthikumari

2. Sinnadurai Rajendran

   Both

   A9 Road, Paravipanchan,
   Killinochchi.

3. Masilaman Sivarasa,
   Anandapuram,
   Killinochchi.

4. Sellaiya Sendiban,
   Pungawana Junction,
   Mulativu Road,
   Killinochchi.

5. Siva Johnson,

A9 Road, Paravipanchan,
Killinochchi.

6. Suppaiya Selvendran,
No. 336, YMCA Junction,
Bharathipuram,
Killinochchi.

7. Veluraja Sekaran,
No. 414 02/02, Thirungar South,
Killinochchi.

Defendants

And now between

In the matter of an application, inter alia, under section 757 of the Civil Procedure Code and section 5A(1) and 5A(2) of the High Court of the provinces (Special Provisions) (Amendment Act No. 54 of 2006 for leave to Appeal from the Order made by the District Court of Killinochchi in case No. L/325 on 10. 03. 2014)

John Devakumar Wilson,
No. 173/B,

Model Farm Road,
Colombo 08.

Plaintiff-Petitioner

Vs.

1. Rajendra Wasanthikumari

2. Sinnadurai Rajendran

   Both

   A9 Road, Paravipanchan,
   Killinochchi.

3. Masilaman Sivarasa,
   Anandapuram,
   Killinochchi.

4. Sellaiya Sendiban,
   Pungawana Junction,
   Mulativu Road,
   Killinochchi.

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   A9 Road, Paravipanchan,
   Killinochchi.

6. Suppaiya Selvendran,

No. 336, YMCA Junction,
Bharathipuram,
Killinochchi.

7. Veluraja Sekaran,
No. 414 02/02, Thirungar South,
Killinochchi.

Defendant-Respondents

Now

In the matter of an Application for Leave to Appeal in terms of Section 5(C) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 127 of the Constitution.

1. Rajendra Wasanthikumari

2. Sinnadurai Rajendran

Both

A9 Road, Paravipanchan,
Killinochchi.

3. Masilaman Sivarasa,
Anandapuram,

Killinochchi.

4. Sellaiya Sendiban,
Pungawana Junction,
Mulativu Road,
Killinochchi.

5. Siva Johnson,
A9 Road, Paravipanchan,
Killinochchi.

1, 2, 3 & 5th Defendants-Respondents-Petitioners

Vs.

John Devakumar Wilson,
No. 173/B,
Model Farm Road,
Colombo 08.

Plaintiff-Petitioner-Respondent

Before: S. E. Wanasundera, PC, J

Buwaneka Aluwihare, PC., J

Vijith K. Malalgoda PC., J.

Counsel:	V. Puvitharan, PC with Jude Dinesh and Anuja Rasanyakkham for the 1st, 2nd, 3rd and 5th Defendants-Respondents-Petitioners
	Mahinda Nanayakkara with Aruna Jayathilaka for the Plaintiff-Petitioner-Respondent
Argued on:	26. 07. 2017
Decided on:	21. 11. 2018

Aluwihare PC. J.,

The Plaintiff-Petitioner-Respondent (hereinafter the "Plaintiff") filed action bearing No. L/ 325 in the Distract Court of Killinochchi by the plaint dated 02nd December 2013 against the seven Defendants-Respondent-Petitioners (Hereinafter the "Defendants"). The matter was supported for enjoining order on 09. 12. 2013. The learned District Judge issued the enjoining order, notice of interim injunction and summons returnable on 8th January 2014. When the case was called on 08th January 2014, the Court was informed that summons had not been served on the Defendants and fresh summons were issued returnable on 28th February 2014.

It is worth underlining that the Killinochchi Court was re-established around 2010 after the civil conflict. The legal practice was only gradually returning to normalcy and they were grappling with a scarcity of lawyers who regularly practice in that Court. Legal practitioners had been forced to resort to *ad hoc* arrangements in order to keep the system functioning and to address the scarcity of resources. This

factual reality savours of peculiarity. I consider it important to pay due attention to these circumstances as they are certainly not factors that can be ignored from the perspective of demand for Justice.

The Defendants received notices and summons on 24th February 2018 and appointed Mr. T. Kangatharan as their Attorney at Law. The proxy was filed on 25th February 2018—three days before the next court date. As it transpired, Mr. Kangatharan was unable to attend the Killinochchi District Court on 28th February 2018 as he had to appear in District Court of Mulaithvu for a trial. He therefore requested Mr. Sivabalasubramanium Attorney at law, who was one of the few permanent practitioners in the Killinochchi Court to appear for the Defendants and move for a date to file the statement of objections and Answers.

In a very peculiar turn of events, however, the Permanent District Judge had to take leave on 28th February 2018 and he nominated Mr. Sivabalasubramanium to be the acting District Judge for that day. This left the Defendants with no legal representation on the 28th February 2014. Nevertheless, the 1st, 2nd and 7th Defendants had been present in Court and when the case was called, Mr. Sivabalasubramanium—who was supposed to represent the Defendants on that day but had to later take up the functions of the Acting Judge—requested one Ms. Aboobucker present in the Court to make the application on behalf of the Defendants to move for a date to file statements of objections and Answer. But for unexplained reasons, the fact that such an application was made is not reflected in the Journal entry.

On the said day, the Counsel for the Plaintiff wanted to move for an *ex-parte* trial against the Defendants **who were not present on that day; namely the 3rd to 6th Defendants.**

The Acting District Judge declined to make an order fixing the case for ex-parte. Instead, he informed that the Plaintiff should make the application before the Permanent District Judge and fixed the **case for 27th March 2014.**

Soon after, on 05th March 2014, the Plaintiff filed a motion and had the case called on the same day to support for interim relief. No notice was issued to the 1st, 2nd and 7th Defendants who were present in Court on the previous day; *i.e.* 28th February 2014. The Counsel for the plaintiff, *inter alia*, also moved the Court to support an application for the *ex-parte* trial. On the said day, the learned District Judge (who was not the presiding judge on 28. 02. 2014) allowed interim relief and ordered that the case should proceed *ex-parte* against all defendants.

Upon learning of the new development, the 1st, 2nd and 7th Defendants filed a motion on 10th March 2014 to vacate the *ex-parte* order and interim relief. It was also brought to the attention of the learned District Judge that on the 28th February 2014, the Counsel for the plaintiff only sought to proceed *ex-parte* against the absent defendants, and that the Counsel for the plaintiff ought to have given notice to the 1st, 2nd and 7th Defendants before supporting it for an *ex-parte* order on 5th March 2014. The Defendants also contended that the order on the 5th of March 2014 had been made without hearing the other party, and was made *per incuriam*. After considering the submission, the learned District Judge vacated the order he made on the 5th March 2014, allowing interim relief and fixing the matter *ex-parte*.

On 27th March 2014, the day on which the case was originally fixed to be called, the Plaintiff sought permission to move the High Court of Civil Appeal by way of leave to appeal against the order. However, it was revealed that even at that point, the plaintiff had already filed the petition of appeal in the High Court. On 31st March 2015 the High Court allowed the appeal and overturned the order of the learned District Judge vacating the *ex-parte* trial on 10th March 2014.

The parties have come before this Court impugning the said High Court order.

Leave to proceed has been granted on the following questions of law;

i. Did the District Court without jurisdiction, in violation of the principles of natural justice and without considering the longstanding legal principles established by the Judgments of the Superior Courts, decide to proceed *ex-parte* against the Defendants and issued interim injunction against all the Defendants

ii. Was the Order dated 05. 03. 2014, made in breach of the principles of natural justice, without notice to the other party and without considering the Judgments of the Superior Courts and hence, the said Order is *per incuriam* order.

iii. When the *per incuriam* nature of the Order dated 05. 03. 2014 was brought to the notice of the Learned District Judge on 10. 03. 2014, did the Learned District Judge correctly reverse the said order.

Both in the High Court and in the hearing before this Court, the Plaintiff submitted that the Defendants' remedy against an *ex-parte* order lied in Section 86 (2) of the Civil Procedure Code and that the District Judge was in error when he vacated the order invoking the Court's inherent powers under Section 839 of the Civil Procedure Code. It was further submitted that the Defendant had failed to make an application under the said Section 86 (2) and that in terms of Section 86 (2A), where the *ex-parte* decree has not yet been served on the defaulting party, the Court cannot set aside the *ex-parte* order without the consent of the plaintiff.

The Plaintiff placed great reliance on the Court of Appeal decision in **Wijesekara v Wijesekara 2005 1 SLR 58,** where it has been held;

(i) Under section 86(2A) it is only if the plaintiff consents and not otherwise the court can set aside an order made fixing a case for ex-parte hearing against a defendant.

(ii) An ex-parte order made in default of appearance of a party cannot be vacated until he makes an application under section 86(2) and purges the default.

(iii) A court cannot override the express provisions of the Code.

(iv) It is only in cases where no specific rule exists the court has the power to act according to equity, justice and good conscience.

On the other hand, the defendants alleged that the order fixing the trial to be heard *ex-parte* was made *per incuriam*. They contend that on 28th February, the 1st, 2nd and 7th Defendants were present in Court and represented by Ms. Aboobakar who made an application to move for time to file answer and objections. On that day, it was only agreed that the Plaintiff would move for an *ex-parte* trial against the absent defendants, and that in any event, no Order was made by the Acting District Judge in that regard. Therefore, on 5th March 2014, when the Counsel for the plaintiff filed a motion and supported the case for interim relief and the application for an *ex-parte* trial, he ought to have given notices to the three Defendants. They further submitted that the order fixing an *ex-parte* trial against all defendants was palpably wrong as the 1st, 2nd and 7th Defendants were clearly present in Court on the said day.

In their Order, the learned High Court Judges have taken up the position that,

"However, the case record bears no evidence in proof of appearance of any attorney at law for the defendants or any application being made for the defendants to file the answer. Unfortunately, the journal entry of 28th February 2015 does not show any minute about filing of proxy in advance. These are facts which have to be elicited at a formal inquiry in order to rule out that there had not been any default on the part of defendant in terms of section 84 of the civil procedure code. Until and unless a formal inquiry is held in pursuant to an application under section 86 (2) at the appropriate forum, it cannot be prejudged on the strength of mere submissions made by Counsel for parties, whether there was in fact a default on the part of the defendants or an error was committed by the learned district judge […]"

We have before us a translation of the Journal entry for 28th February 2014. I reproduce in verbatim the said journal entry for the sake of clarity;

" *28. 02. 2014*

Plaintiff's Attorney	*Mr. Gratien Ab*
Plaintiffs	***John Deva Kumar Wilson Pt***
Defendants	***1. Rajendran Wasanthakumari Pt***
	2. Sinnadurai Ranjendiram Pt
	3. Masilaamani Sivarasa Ab
	4. Sellaih Sendeepan Ab

5. Siva Johnsen Ab

6. Suppaiya Selvendiran Ab

7. Veluraja Sekaran Pt

Attorney at Law Sunthareswara Sharma with Attorney at Law Mahinda Nanayakkara instructed by Attorney at Law M. Gratien appeared for the plaintiff. The Counsel for the Plaintiff inform the Court, ***they wish to make an application for an Ex-parte trial against the Defendants who are absent and an interim injunction before the permanent judge.***

To be called on: 27. 03. 2014

Signature

District Judge

28-02 "

Accordingly, it is clear that on 28.02.2014, three of the seven Defendants were present in Court. There is however no trace of any application being made by an attorney on behalf of the defendants. However, the journal entry also indicates that the counsel for the plaintiff has intended to make an application for an *ex-parte* trial against the "Defendants who are absent". And the case was to be called on 27th March 2014.

Two factors emanate from this journal entry:

1. The plaintiff disclosed in Court, the intention to file an *ex-parte* application only against the defendants who were absent.
2. the case was called on that day to file the Defendants' answer; *i.e.* 27th March 2014.

These two factors are important to determine the validity of the learned District Judge's order made on 05th March 2014 and 10th March 2014.

The translation of the application made by the Counsel for the plaintiff on 5th March 2014 and the order made by the learned District Judge is before us. And it appears that in his submission, the learned Counsel for the plaintiff has informed the Court that on the last occasion, the case was fixed for filing of the Defendants' answer and that summons have been served accordingly. However, in the same application, the counsel has stated "*Nevertheless, the one to seven Defendants had not made any attempt to appear before the Court when the case was called again on 28. 02. 2014 in order to make objection and to file the answer*"

It hardly needs to be stated that the above statement was palpably false. The journal entry clearly bears out that the 1st , 2nd and 7th Defendants were present on that day. And it was in their presence that the Counsel for the plaintiff informed the Court that he wished to file an *ex-parte* application against defendants who were absent on that day. In any event, no Order was made by the Acting Judge and a further one-month-time was given. The 1st, 2nd and 7th Defendants left the Court house that day on the assurance that an *ex-parte* application would not be made till the 27th of March 2014.

However, it must be noted that the learned District Judge allowed the application on 5th march 2014 made by the Plaintiff not on the basis of default of appearance of the Defendants but the failure to file the Answer and Objections. He has also

noted that contrary to what was stated by the Counsel for the Plaintiff, the 1st, 2nd and 7th Defendants had been present in Court on that day.

"*But it was reported in the proceeding that when the case was taken on 28. 02. 2014, the 1st, 2nd and 7th Defendants were present. In addition, the Court considers that all Defendants had appointed the Attorney by Attorney Appointment dated 25. 02. 2014. As well as it is mentioned in the proceedings that the 1st, 2nd and 7th Defendants were present, and 3rd, 4th , 5th and 6th Defendants were absent and no attorneys appeared on behalf of them. The plaintiff's attorney further made the application that neither the 1st, 2nd and 7th Defendants nor their Attorney made any application on behalf of them, and 3rd, 5th , 6th Defendants were absent.*"

Thus, the learned District Judge has allowed the application for an *ex-parte* trial on the basis of failure to file the answer and objection of the Defendants. He had observed that an Attorney at Law had been appointed by the Defendants and that no representation had been made on that day to get further time.

I pause at this point to state that the learned District Judge was too quick to draw an adverse inference against the Defendants who were present on that day. The proxy for the appointment of an Attorney at Law was only filed on the 25th of February 2014—three days before the summons returnable date. Barring the peculiar events that took place on the 28th February 2014, the Defendants would not have had adequate time to file statement of objections and their Answer.

In any event, under section 84 of the Civil Procedure Code, the Judge has the discretion to grant further time, to file answers.

In **Dharmasena and another v The People's Bank (2003) 1 SLR 122** the Supreme Court held that;

> "*The Code must be interpreted, as far as possible, in consonance with the principles of natural justice, and the court can only be*

satisfied that summons has been "duly" served where the Defendant has been given a fair opportunity of presenting his case in his answer. If not, the court has the power to give further time for answer even if the Defendant does not ask.."

It is quite clear that no order was made in respect of the *ex-parte* application on 28th February 2018. If, as contended by the Plaintiff, there was a clear failure on the part of the Defendants to file the answer, the acting District Judge would not have had any difficulty in making that order on the same day. Instead, he decided to call the case on 27th March 2018, in a months-time. Reasons for this are unknown-it could have been that the acting District Judge being privy to the peculiar circumstances granted further time; or it could be that he did not personally wish to make that order and thought it best left to the Permanent Judge. Whatever be the reasons that suggested to the acting judge, there was an order sanctioned by the court to call the case on 27th March 2017. In those circumstances, the plaintiff had the obligation to inform the 1st, 2nd and 7th Defendants when he filed the motion on 05th March 2017 and move for an *ex-parte* trial. A counsel cannot whimsically change the undertakings he gives in court for his benefit.

In ***ABN-Amro Bank v CONMIX (private) Limited (1996) 1 SLR 08*** a five judge bench determined that;

> "*section 84 requires the Court "to hear the case ex parte forthwith, or on such other day as the Court may fix". Obviously, a decision to hear the case on same day, must be taken the same day. But a decision to hear the case on some other day is not required to be taken the same day; the phrase "as the Court may fix" is not qualified by "forthwith" or other similar words. Accordingly, I am of the view that the date for ex parte trial may be fixed by the Court either on the day*

of the default, or on another day; and with respect, that Ameen v. Raji must be overruled on that point.

There are practical considerations which confirm this interpretation. On the summons returnable date it may not be known- for good reasons, such as illness or absence abroad, when the plaintiff, his Counsel or an essensial witness would be available, and the Court may therefore fix a calling date. Again, Ameen v. Raji shows that a case may come up in the roll Court and, upon the defendant's default, be sent immediately to the appropriate Court dealing with trials of that kind, to enable a trial date to be fixed; and it may happen that when the record reaches that Court, it has already adjourned for the day. Similar problems may arise when there is an impending change in the territorial jurisdiction of a Court, or a re-allocation of its work; or when a Judge is on leave or is due to go on transfer soon; or when on the day of the defendant's default, the matter comes up before a Judge who does not wish to deal with it for personal reasons."

As I remarked, the Counsel who had been retained by the Defendants had to attend another Court on the same day, and Mr. Sivabalasubramanium who was supposed to make the application on behalf of his clients, had to function as the acting District Judge for that day which left the Defendants unattended. Being apprised of the situation and after giving an undertaking that an application will only be moved against the absentees, the learned Counsel for the Plaintiff had a duty to inform the Defendants when he filed the motion on the 5th of March 2014, and supported the *ex-parte* application.

On the 5th march 2014, it was not the acting judge but the permanent judge who was presiding and save and except for the scanty journal entry, he was not personally privy to the incidents and circumstances that prevailed on 28th March 2014. Therefore, there was greater onus on the part of the plaintiff to apprise the Court of the true circumstances that transpired on the earlier day. Had the Plaintiff issued notice on the 1st, 2nd and 7th Defendants, I am certain, that the Judge would not have penalized the Defendants for purportedly failing to file the Answers as they could have brought to the attention of the learned District Judge the factors that prevented them from filing the Answer and the Objections.

This Court has in a series of cases consistently upheld that failure to observe natural justice goes to the root of the Court's jurisdiction and renders the proceedings a nullity.

In **Lokumenike v Sinduhamy 34 CLW 102** it was held;

> "*that where an ex-parte order had been made behind the back of a party by any court, such court has jurisdiction to entertain and determine an application by the party affected to vacate such order*"

In **Ittepana v Hemawathie (1981) 1 SLR 476** the Court held that;

> "*Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it; upon one who is not a party to the suit ..... upon a defendant who has never been notified of the proceedings. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non judice. A judgment*

entered by such Court is void and a mere nullity. (Black on Judgments - P.261)"

A similar line of thinking has been adopted in **Siththi Maleeha and another v Nihal Ignatius Perera and Others (1994) 3 SLR 270: (Court of Appeal) , The Ceylon Ceramics Corporation v Premadasa (1984) 2 SLR 250: (Court of Appeal).**

The principle is clear; -a fair opportunity must be given to a party before an order is given by the Court. The fair opportunity could entail a myriad of factors and in each case, it is up to the Court to decide whether any irregularity prejudicing natural justice has taken place.

In the present instance, the counsel for the Plaintiff has at first attempted to mislead the Court by stating that all defendants were absent and thereafter had reiterated that no application was made on behalf of the defendants on 28. o3. 2014. On the 5th March 2014, the counsel for the plaintiff made the particular application without notice to 1st, 2nd and 7th Defendants despite agreeing on 28th February that he will only proceed against the absentees. Had he informed the defendants present on that day, they would have been able to adduce reasons for the purported failure to move for further time to file the answers.

Accordingly, I answer the 1st and 2nd questions of law in the affirmative.

The next question for determination is whether the learned district judge erred when he vacated the *ex-parte* order invoking the inherent powers of the Court, as oppose to insisting on the procedure under section 86 (2) of the Civil Procedure Code.

The plaintiff-Respondent strenuously argued that the Defendants ought to have invoked the jurisdiction under section 86 (2) to vacate the order and that the learned District Judge erred when he vacated the order resorting to section 839 when the law has provided for a distinct procedure for that purpose.

In response, the defendants submitted that the procedure under section 86 (2) could be invoked when there is a 'default' and that there was no such 'default' by the defendants in the present instance as the Plaintiff surreptitiously obtained the *ex-parte* order. They have also cited several authorities wherein it has been stated that the Court has the inherent jurisdiction to remedy a violation of natural justice.

In **Carolis Appuhamy v Singho Appu 5 NLR 75,** the Court held that;

> "*As a rule, he has power to open or rescind his own orders made, not inter partes but ex parte. on being satisfied that the order was made to the prejudice of a party who was unable to attend in consequence of illness or other circumstances over which he had no control.*
>
> *Such power doubtless must be exercised with caution, and only on sufficient materials and within a reasonable time after the ex parte decree or order was made*"

Similarly, **Albert v Veeriahpillai (1981) 1 SLR 110** elucidates that;

> "*The authority to vacate an earlier order is attributable to the inherent jurisdiction of the Tribunal to set aside such order if it had been made without jurisdiction in as much as the breach of principles of natural justice goes to jurisdiction and renders an order or determination made in proceedings of which the person against whom the order or determination was made has had no notice, void.*"

It must be stated that in the aforesaid cases, the question about procedure did not arise. In contrast, in the present case, the plaintiff's first line of argument is that

the proper procedure for vacation of an *ex-parte* order is in section 86 (2) and that the Court could not have resorted to its inherent powers when the law provides for a procedure.

There is merit in this argument. Section 86 (2) clearly provides a remedy for Defendants to canvas against an *ex-parte* order. The wording of section 86 (2) does not specify that the procedure for vacation excludes certain types of orders— be it made in violation of natural justice or otherwise. There are no different genres of *ex-parte* orders.

> *"2) Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper"*

This was quite clearly explained by Justice Fernando in ***ABN-Amro Bank v CONMIX (private) Limited (1996) 1 SLR 08*** ;

> "*If there has been no due service of summons (or due notice), but the Court nevertheless mistakenly orders an ex-parte trial, then for that breach of natural justice, section 86 (2) provides a remedy: a defendant's default can be excused if it is established that there were reasonable grounds for such default, and one such ground would be the failure to serve summons. The consequence of non-compliance with natural justice is not that non-appearance ceases to be a "default", only that, although that lapse is a "default", yet it is a default for which there are reasonable grounds, and which therefore can be excused. I am therefore of the view that the need to comply with natural justice and "default" are*

two distinct matters; that while the audi alteram partem rule does not modify or restrict the meaning of "default", breach of that rule affords an excuse for "default"'"

Stripped to essentials, this means that there is only once procedure for vacation of *ex-parte* orders—that is to proceed under section 86 (2). This mechanism does not distinguish between orders given based on different reasons.

Section 839 provides;

"*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 the process of the court.*"

However, this does not mean that a District Judge can disregard the procedure he is bound to follow. If the time period for the invocation of section 86 (2) procedure has lapsed or there is a defect not catered to by law, a judge may always invoke the powers under section 839 to remedy the injustice it may cause to parties. But a Judge must always be prudent not to flout the procedure he is bound to follow.

Nevertheless, the fact that the present application contains unusual circumstances cannot be overlooked. Even if the learned District Judge made an error in not insisting on the procedure, I do not believe that it resulted in any substantial prejudice or occasioned a failure of justice. The facts are clear: the initial order allowing the *ex-parte* trial should not have been made on the 5th March 2014. In those circumstances, I respectfully disagree with the learned High Court Judges decision that "***Rightly or wrongly the matter has now been fixed for ex-parte trial.*** *Correctness of the order fixing for ex-parte trial has to be decided at an inquiry to be held if an application is made at the appropriate stage.*"

The appeal before them was one that classically called for the application of the proviso to section 5A of the High Court of the Provinces (Special Provisions) Act as amended which reads;

> "*Provided that no judgment or decree of a District Court or of a Family Court, as the case may be, shall be reversed or varied by the High Court on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice*"

This principles has been approved by Superior courts in several cases; ***Sunil Jayarathna v. Attorney General*** 2011 2 Sri LR 91; ***Rev. Minuwangoda Dhammika Thero v. Rev. Galle Saradha Thero*** 2003 3 Sri LR 247; ***Madilin Nona And Others v. Ranasinghe And Others*** 2012 1 Sri LR 155; ***Vernon Boteju v. Public Trustee*** 2001 2 Sri LR 124.

Thus, only in light of the facts and circumstances of the present case, I am of the view that the learned District Judge did not occasion any failure of justice by vacating the *ex-parte* order on 10th March 2014, invoking the inherent jurisdiction of the Court.

I answer the third question of law in the affirmative.

Considering the above I set aside the order made by the High Court of Civil Appeals dated 31st March 2015. The order made by the learned District Judge on 10th March 2014, vacating the order he made on 5th March 2014 in fixing the matter *ex parte,* is hereby restored.

Before I conclude, I place on record the dissatisfaction with which I regard the conduct of the Counsel who represented the Plaintiff before the District Court. It was no less an effrontery on his part to have misled the Court—to which he owes an absolute overarching duty. By concealing facts and reneging on his

undertaking, he trampled on the rights of the other party and showed a cussed disregard for professionalism. This Court severely admonishes him for his reprehensible conduct and strongly advises that he conducts himself more ethically and responsibly in the future.

Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA PC.

I agree

JUDGE OF THE SUPREME COURT