

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

1. Flexport (Pvt) Limited of No. 127,
Jambugasmulla Road, Nugegoda
2. Puwak Dandawe Narayana Nandadasa
of No. 127, Jambugasmulla Road,
Nugegoda
3. Mallika Devasurendra of No. 127,
Jambugasmulla Road, Nugegoda

Defendants-Appellants-Petitioner

SC Appeal No. 03/2012
SC.HC.CA.LA No. 268/11
WP/HCCA/Mt/70/04/F
D.C. Mt. Lavinia Case No. 1032/96/M

Vs.

Commercial Bank of Ceylon Limited of No.
21, Bristol Street, Colombo 01 and having a
branch office and/or a place of business
called and known as the “Wellawatte
Branch” at No. 343, Galle Road, Mount
Lavinia.

Plaintiff-Respondent-Respondent

Before : Marsoof, PC, J
Dep, PC. J &
Marasinghe, J

Counsel : H. Withanachchi with S.N. Vijithsingh for the
Defendant-Appellant-Appellants.

S.A. Parathalingam, PC with V. Senadhira
instructed by M/s Samararatna Associates for the
Plaintiff-Respondent-Respondent.

Argued on : 26.09.2014

Decided on : 15.12.2014

Priyasath Dep, PC, J

This is an appeal against the judgment dated 07-06-2011 of the Provincial High Court of Civil Appeal of Mt Lavinia in Case No. WP/HCCA/MT/70/04/F. The High Court affirmed the order dated 17-11-2004 of District Court of Mt Lavinia in Case No.DC1032/96/M which rejected the application made under section 86 (2) of the Civil Procedure Code to set aside the ex parte judgment on the basis that it was filed out of time.

The Plaintiff-Respondent-Respondent (hereinafter called and referred to as the “Respondent”) on 6th August 1996 instituted an action against the Defendants-Appellants-Petitioners (hereinafter called and referred to as the “Appellants”) for the recovery of money based on two causes of action.

The Petitioners filed an answer with a claim in reconvention. The Respondent filed a replication in answer to the claim in reconvention. Thereafter this case was fixed for trial and subsequently proceeded to trial. The trial was postponed on numerous occasions due to various reasons.

On 24th June, 2003 when this case came up for further trial the Petitioners were absent and unrepresented and the case was fixed for ex-parte trial. An ex-parte judgment and decree was entered on the 01st July 2003 against the Petitioners as prayed for in the Plaint. The decree was served on the Petitioners on 11-10-2003.

The Petitioners on 27th October 2003 filed an Application under section 86(2) of the Civil Procedure Code to set aside the ex-parte judgment. The inquiry pertaining to the application filed by the Petitioners was taken up on 17th November 2004. When the inquiry was taken up an objection was raised by the Respondent that the Petitioners have failed to prefer the said Application within fourteen days as stipulated by Section 86(2) of the Civil Procedure Code and moved for a dismissal of the said Application.

The Additional District Judge having heard the submissions of the learned Counsel for the Respondent and the learned Counsel for the Petitioners upheld the objection and dismissed the Application of the Petitioners. Thereafter the Defendants (Appellants) preferred an appeal against the order dated 17th November 2004 of the Additional District Judge of Mount Lavinia to the Court of Appeal which was subsequently transferred to the Provincial High Court of Civil Appeal of Mount Lavinia.

The Provincial High Court having considered the written submissions as well as the oral submissions of the Counsel for the Petitioners and the Respondent, by judgment dated 07th June 2011 dismissed the Appeal of the Petitioners.

Being aggrieved by the said judgment dated 07th June 2011, the Petitioners preferred this Application for Leave to Appeal against the said Judgment to the Supreme Court. The Supreme Court granted Leave to Appeal from the said judgment on the grounds set out in sub paragraphs (i) to (iv) of paragraph 14 of the Petition dated 18th July 2011.

The Court having heard the submissions of both parties directed parties to tender written submissions . As directed by court parties tendered their written submissions.

The main question that has to be decided by this Court is whether the order dated 17th November 2004 of the Additional District Judge of Mount Lavinia in dismissing the application of the Petitioners to set aside the ex parte order and the order of the Provincial High Court of Civil Appeal dated 07th June 2011 affirming the said order of the Additional District Judge on the basis that the Petitioners have failed to prefer the said Application within the prescribed period as set out in Section 86(2) of the Civil Procedure of the District Court is correct or not.

The section 86(2) of the Civil Procedure Code read thus:

86(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 has 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”

It is not disputed that the decree was served on the Defendants on 11th October 2003 and petition and affidavit and other documents were filed by the Petitioners on 27.10.2003 to vacate the ex-parte order after the lapse of 14 days. The 14th day fell on 24th October 2003 which was declared a public holiday, on 25th Saturday the court house was closed and Sunday was a public holiday. Petitioners submit that Section 8 (1) of the Interpretation Ordinance is applicable and if these 3 days were excluded the Application is within time. It is to be observed that the learned Additional District judge and the learned High Court Judge did not consider the applicability of section 8 (1) of the Interpretation Ordinance.

The learned President’s Counsel for Respondent Bank vehemently argued that the Interpretation Ordinance has no application to Section 86(2) of the Civil Procedure Code. The learned Counsel for the Petitioners on the other hand argued that section 8 (1) of the Interpretation Ordinance applies and both the learned Additional District judge and the learned High Court judge erred in law by failing to consider the applicability of the Interpretation Ordinance.

The main question we have to decide is whether section 8 (1) of Interpretation Ordinance applies to section 86(2) of the Civil Procedure Code or not.

The section 8(1) of the Interpretation Ordinance reads thus:

“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 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 word ‘within’ in relation to the time limit occurs in section 86 (2) (application to set aside an ex-parte order), section, 754 (4) (notice of appeal) and section 755(3) (petition of appeal) in the Civil Procedure Code. Therefore judgments in relation to a particular section mention above are relevant to the other sections too.

Under section 755(3) the Petition of Appeal shall be filed within 60 days from the date of the judgment. There is no exclusion of dates. However, the Appellant has a long period of 60 days to file the Petition of Appeal

Under Section 754(4) of the Civil Procedure Code Notice of Appeal shall be preferred within 14 days from the date of the decree or order. However, the date of the decree or order and the date of filing the notice and all Public holidays are excluded. Therefore, invariably the appellant will get more than 14 days to file the Notice of Appeal.

Under Section 86(2) of the Civil Procedure Code the Applicant is required within 14 days to file the Application. Unlike in the Notice of Appeal intervenient public holidays falling within 14 day period, date of the decree or order or date of filing the application are not excluded.

The learned President Counsel for the Respondent in support of his argument that there should be a strict compliance with the time limit cited the following cases namely; the *Ceylon Brewery Ltd., v. Jax Fernando, Proprietor, Maradana Wine Stores* (2001) 1 SLR 270, *Wickremasinghe v De Silva* (1978-79)2SLR 65, *Silva v. Sankaran and others* (2002) 2 SLR 65.

In *Ceylon Brewery Ltd., v. Jax Fernando, Proprietor, Maradana Wine Stores*, Fernando, J. held that

“section 86(2) of the Civil Procedure Code confers jurisdiction on the District Court to set aside a default decree. Hence the period 14 days provided by that section to make an application to set aside a default decree is mandatory.

Per Fernando.J.

“It is settled law that provision which go to jurisdiction must be strictly complied with”.

In the above case the Petition and affidavit was filed on the 15th day and the 14th day was not a Public holiday or a day the court was closed. Hence the question of applicability of Interpretation Ordinance did not arise.

In the Judgment given by the Court of Appeal in *Wickremasinghe v De Silva* (Supra) Soza J held that:

‘ The provisions of section 753(3) of the Civil Procedure Code which requires the petition of appeal to be filed within 60 days from the date of the judgment are mandatory. Accordingly, where a petition had been filed after the period of 60 days had lapsed the learned District judge was correct in rejecting such a petition.’

Soza J in the above Judgment remarked that “ Parties should not wait till the last moment and then complain when they are caught out of time”

In the judgment of the Court of appeal in *Silva v. Sankaran and others* (Supra) the Appellant lodged the Petition of Appeal under section 754 of the Civil Procedure Code on Monday, 61st day as the 60th day fell on Sunday, a public holiday. It was held in this case:

- (1) A strict compliance is imperative and non-compliance is fatal to the appeal.
- (2) The words ‘within 60 days’ in section 755(3) restrict the right of the appellant to file the petition of appeal beyond the time frame of 60 days given.
- (3) The provisions of s.8(1) Interpretation Ordinance do not apply.

In order to emphasis the word ‘within’ the learned President Counsel for the Respondent referred to the Black’s Law Dictionary (6th Edition, pp1602-1603) which provided definitions to the word ‘within’ thus : “when used relative to time, has been defined variously as meaning anytime before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than”. (Glenn v. Garrett, Tex.Civ.App., 84 S.W. 2d 515, 516)

The learned President’s Counsel for the Respondent submits that the time period given in 86(2) of the Civil Procedure Code is mandatory and it should be strictly complied with and section 8(1) of the Interpretation Ordinance has no application .

The learned Counsel for the Defendant-Appellant Appellant submits that 14th day stipulated under section 86(2) of the Civil Procedure Code fell on 24th October 2003 which happened to be a public holiday followed by Saturday, a day the court was closed and Sunday was a public holiday, filing the application on Monday the 27th is within time in view of the section 8(1) of the Interpretation Ordinance. He relied on the following cases *State Trading Corporation V Dharmadasa* (1987) 2SLR 235, *Nirmala de Mel v. Seneviratne and others* 1982 2SRI LR 569 and *Chandrakumar v. Kirubakaran* 1989 2Sri LR (pg38) *Selenchina v. Mohomad Marikkar* (2000) 3 SRI LR (Pg. 100), and *Mendis v Mendis* (2004) BLR(pg. 35).

In *State Trading Corporation v. Dharmadasa* (Supra) Sharvananda CJ observed that:-

“Section 8(1) of the Interpretation Ordinance will not avail the appellant since the last date of presenting the notice of appeal to court was 16th June, a Friday- a day on which the court was not closed. Had the last being Saturday, the 17th,

then the notice of appeal could validly have been filed on Monday the 19th when the court was opened”.

In this case it was observed that:

“Notice of appeal was not within the time limit of fourteen days permitted by Section 754(4) of the Civil Procedure Code because allowing for the fact that the date of judgment and date of filing of notice are not counted and the 2 Sundays (4th and 11th June) had to be excluded, there was time to file the notice of appeal only until 16th June (Friday).”

In the case of *Nirmla de Mel v. Seneviratne and others* (Supra) after the granting of leave by the Court of Appeal to the Supreme Court, petition of appeal was filed one day after the due date. The Rule No. 35 of the Supreme Court Rules of 1978 was then applicable. The court applied section 8(1) of the Interpretation Ordinance and accepted the petition of appeal. It was held that :

“ On the Application of this Rule of interpretation it would appear that the Petition of Appeal filed on Monday the 16th February 1981 which was the next working day was within time.

In the case of *Selenchina v. Mohomad Marikkar and others* (2000)CLR Vol 111(pg. 100) S.N. Silva, CJ held :

“ ...the notice of appeal was presented on 20.10.1986. If that day is excluded, the period of 14 days excluding the date of judgment pronounced (i.e. 30.09.1986) and intervening Sundays and public holidays would end on 17.10.86 which was a public holiday. The next day on which the notice should have been presented was the 18th, being a Saturday, on which the office of the court was closed. The next day, the 19th was a Sunday which too had to be excluded in terms of the section. In the circumstances the notice filed on 20.10.1986 was within the period of 14 days as provided for in section 754(4) of the Civil Procedure Code”.

As stated earlier under Section 86(2) of the Civil Procedure Code, the Applicant is required within 14 days to file the Application. Unlike in the Notice of Appeal[section 754 (4)] intervenient public holidays falling within 14 day limit, the date of the decree, date of filing the application are not taken into account. Therefore applicant's time is limited to 14 days. If the 14th day falls on a public holiday or the date on which the court is closed if he is required to file on the previous day he has only 13 days. If that interpretation is given it will be disadvantageous and cause grave prejudice to the Applicant.

In this case 24th October 2003 fell on a Public holiday, Saturday was a day on which the court house was closed and Sunday a public holiday. If strict interpretation is given to section 86(2) Appellant is required to file papers on the 13th day. For the purpose of argument if we take a hypothetical case where the 14th day fell on Sunday the 26th

October 2003, the applicant has to file papers on the 23rd. In that event he has to file papers within 11 days. The section 8(1) of the Interpretation Ordinance is meant for situations like this to prevent inconvenience or injustice to the litigant.

I am inclined to follow the Supreme Court judgments in *State Trading Corporation v. Dharmadasa, supra, Nirmala de Mel v. Seneviratne and others supra, Selenchina v. Mohomad Marikkar, supra*; 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.

For the reasons stated above, I set aside the judgment of the District Court of Mount Lavinia dated 17.11.2004 and the judgment of the Provincial High Court dated 07.06.2011 which affirmed the judgment of the District Court.

In view of this order, the learned District Judge is directed to inquire into the Application filed by the Defendant-Appellant to set aside the ex-parte order and thereafter make an appropriate order.

Appeal allowed. No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.

I agree.

Judge of the Supreme Court

Rohini Marasinghe, J.

I agree.

Judge of the Supreme Court