

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

S.C. Appeal No. 153/2014
S.C/Spl./LA/122/2014
C.A. No. 1194/00(F)
D.C. Gampaha No. 24537/L

In the matter of an application made for Special Leave to Appeal against the Judgment of the Court of Appeal dated 11.06.2014 under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohammed Ali Abdul Wadood of
Ovitigama,
Pugoda.

PLAINTIFF (DECEASED)

- 1A. Mohammed Ashraff Mohammed Aswer
- 2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

SUBSTITUTED-PLAINTIFFS

Vs.

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

- 1A. Ahamed Lebbe Abuhaneefa
- 2B. Ahamed Lebbe Sithithi Thamna
- 3C. Ahamed Lebbe Farida
- 4D. Mohammed Ali Puwuda Umma

SUBSTITUTED –DEFENDANTS

AND

A.L.A. Ahamed Lebbe of
Ovitigama, Pugoda.

DEFENDANT-DECEASED

- 1A. Ahamed Lebbe Abuhaneefa of
Ovitigama, Pugoda.

SUBSTITUTED 1A DEFENDANT-PETITIONER

Vs.

Mohammed Ali Abdul Wadood of
Ovitigama, Pugoda.

PLAINTIFF (DECEASED)

- 1A. Mohammed Ashraff Mohammed Aswer
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SUBSTITUTED-PLAINTIFFS-RESPONDENTS

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

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- 2B. Ahamed Lebbe Sithithi Thamna
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All of Ovitigama, Pugoda.

SUBSTITUTED-DEFENDANTS-RESPONDENTS

AND NOW

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

- 1A. Ahamed Lebbe Abuhaneefa of
Ovitigama, Pugoda.

**SUBSTITUTED 1A DEFENDANT-PETITIONER-
APPELLANT**

Vs.

Mohammed Ali Abdul Wadood of
Ovitigama, Pugoda.

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- 1A. Mohammed Ashraff Mohammed Aswer
2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

**SUBSTITUTED-PLAINTIFFS-RESPONDENTS-
RESPONDENTS**

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

- 2B. Ahamed Lebbe Sithithi Thamna
3C. Ahamed Lebbe Farida
4D. Mohammed Ali Puwuda Umma

All of Ovitigama, Pugoda.

**SUBSTITUTED-DEFENDANTS-RESPONDENTS-
RESPONDENTS**

AND NOW BETWEEN

- 1A. Ahamed Lebbe Abuhaneefa of
Ovitigama, Pugoda.

**SUBSTITUTED 1A DEFENDANT-PETITIONER-
APPELLANT-PETITIONER**

- 1A. Mohammed Ashraff Mohammed Aswer
2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

**SUBSTITUTED-PLAINTIFFS-RESPONDENTS-
RESPONDENTS-RESPONDENTS**

- 2B. Ahamed Lebbe Sithithi Thamna
3C. Ahamed Lebbe Farida
4D. Mohammed Ali Puwuda Umma

All of Ovitigama, Pugoda.

**SUBSTITUTED-DEFENDANTS-RESPONDENTS-
RESPONDENTS-RESPONDENTS**

BEFORE: K. Sripavan C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Ikram Mohamed P.C. with M.S.A. Wadood, Nadeeka
Galhena and Charitha Jayawickrema for the Substituted 1A
Defendant-Petitioner-Appellant-Petitioner

Rasika Dissanayake for Substituted Plaintiff-Respondent-
Respondent-Respondents

ARGUED ON: 16.12.2015

DECIDED ON: 10.06.2016

GOONERATNE J.

This is an appeal to this court by the Substituted 1A Defendant-Petitioner-Appellant-Petitioner (hereinafter referred to as Defendant-Petitioner) to set aside the Judgment of the Court of Appeal delivered on 11.06.2014 ('Y') dismissing an application to purge default on the basis that the application to purge default was outside the time limit permitted by law. (after a lapse of 14 days) Supreme Court granted Special Leave to Appeal on the following questions of law, as per paragraph 20 of the petition.

- (i) Has the Court of Appeal erred in Law in dismissing the said appeal of the Defendant Petitioner on the ground that the application to purge default had been made out of time in the absence of a finding of fact made by the learned Trial Judge that the said application had been made after 14 days of the service of ex parte decree?
- (ii) Has the Court of Appeal erred in law, in dismissing the said appeal on the ground that the application to purge the default had been made out of time in breach of the Principles of Audi Alteram Partem?
- (iii) Has the Court of Appeal erred in law in dismissing the said appeal on the ground that the application to purge the default had been made out of time, when the said matter was not a matter for the determination in the said appeal in the absence of a cross appeal being made by the Plaintiff Respondent?

- (iv) Has the Court of Appeal erred in law in dismissing the said appeal of the Defendant Petitioner in view of its finding that the evidence adduced at the inquiry established reasonable grounds for default within the meaning of Section 86(2) of the Civil Procedure Code?

In the District Court of Gampaha the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action for a declaration of title as prayed for in his plaint. The original Defendant filed answer and also amended answer and sought a dismissal of the action. Trial commenced on 05.08.1986 (pg. 67 of 'x') by recording admissions and issues. Plaintiff-Respondent led evidence on 20.01.1986, 13.03.1987 and on 29.08.1990. On 21.06.1994 Plaintiff-Respondent closed his case leading in evidence P1 to P4. Trial was re-fixed for 03.01.1995 for the Defendant's case but record indicates that both the original Plaintiff and Defendants died and steps were taken in the Original Court to substitute the legal heirs, of both parties. Thereafter the case was fixed for further trial on 04.06.1998 (Pg. 96 of 'X'). On the said day the Defendant party was absent and unrepresented. As such case had been fixed ex-parte and ex-parte evidence was led afresh, although the Plaintiffs had given evidence earlier and closed his case.

It is also noted that on the day the case was put off for the Defence case the Defendants were absent and unrepresented. (04.06.1948) No doubt it indicates the position of the registered Attorney. As long as a valid proxy is filed

of record and not revoked, it is no excuse for the registered Attorney or Proctor to keep away from Court merely because his client was absent. The registered Attorney is duty bound to be present in court and is required to at least make an application on behalf of his clients. However registered Attorney's absence along with the Defendants would be a ground to fix the case ex-parte.

In a gist, before I conclude this Judgment, I prefer to note the salient points in the Court of Appeal Judgment.

- (a) Learned District Judge's order which was to be set aside is dated 21.11.2000
- (b) Process servers report P1 accepted, as the date of serving the decree on the Defendants as 31.08.1998. Defendant's version of non-receipt of decree rejected by the Court of Appeal. Court of Appeal observes that the Defendant has failed to state of non-receipt of decree in their petition filed in the Court of Appeal
- (c) No objection on P1.
- (d) 14 days stipulated under Section 86(2) of the Civil Procedure Code is mandatory, vide a Ceylon Brewery Ltd. Vs. Jax Fernando 2001(1) SLR 270. Appellant failed to comply with the above mandatory requirement.
- (e) The term 'reasonable grounds' in the said Section 86(2) should be interpreted liberally and court need to be more flexible. Defendant's explanation of reasonable grounds are sufficient.

It is interesting to note the position taken up by the Defendant-Petitioner to overcome the jurisdictional objection resulting from time bar. Learned President's Counsel argues inter alia, as in his oral and written submissions as follows:

- (1) Respondent at the inquiry to purge default did not contest the application on the basis of time bar, either orally or in their objections/written submissions.
- (2) Objections filed for the purposes of the inquiry by the Respondent do not aver the question of a time bar.
- (3) Respondent's objections filed on 17.09.1999 indicate that decree was served on 16.09.1998. (one day before the application was made to vacate ex parte decree)
- (4) As such in the above circumstances the question of time bar never became a matter for the learned District Judge to decide. In the trial Judge's order it is stated

කෙසේ වෙතත් පෙත්සම ප්‍රමාදවී ඉදිරිපත් කිරීම පිළිබඳව පැමිණිල්ලෙන් ප්‍රශ්නයක් මතුකරේ නැත. එසේ හෙයින් මෙම ප්‍රමාදය පිළිබඳව මෙ අවස්ථාවේදී සලකා නොබලමි.

The several points urged by both learned counsel on either side raise several interesting points that need to be carefully considered, especially where the Court of Appeal Rules on the questions of reasonable grounds in favour of the substituted 1A Defendant-Petitioner-Appellant, but holds that the

time limit requirement specified under Section 86(2) of the Civil Procedure Code is mandatory and not directory. The Court of Appeal rely inter alia in the reported case of Ceylon Brewery Ltd. Vs. Jax Fernando 2001 (1) SLR 270 and also observe that it is trite law that a pure question of law can always be taken up in appeal. Notwithstanding above learned President's Counsel stress that there was no adjudication by the learned District Judge as regards the stipulated time limit in terms of the above stated section of the Civil Procedure Code and state that date of service of decree, whether served or not is not a pure question of law which can be raised in appeal for the first time. It is his view that the 14 day requirement is a procedural requirement, and though affects the jurisdiction of court, it does not affect the total want of jurisdiction. He cites an important case dealing with latent or contingent want of jurisdiction which could be waived by acquiescence or inaction, and the patent want of jurisdiction which cannot be waived by non-objection. Vide, Perera Vs. Commissioner of National Housing 77 NLR 361.

One has to be mindful of the language used by the legislature as referred to in Section 86 of the Civil Procedure Code. Is it mandatory or directory? A Court of Law need not transgress upon the domain of the legislature and rule otherwise, if the intention of the legislature was to apply the law and procedure strictly and stringently. As such the guidelines suggested by his

Lordship Justice Victor Tennekoon in the above decided case as regards patent and latent jurisdiction would no doubt assist this court. On the other hand to conclude on the question of mandatory or directory on the relevant piece of legislation would be of immense importance to arrive at a decision as regards the case in hand.

It is in a way, unfortunate for the Court of Appeal not to have granted relief for the Substituted 1A Defendant-Appellant, as the said Court, having ruled on the reasonable grounds of default in favour of the said party. The Court of Appeal was not in a position to grant any relief according to law as the time frame within which an application to purge default was made beyond the period stipulated by law. Section 86(2) of the Civil Procedure Code 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 fourteen days of service of default decree on the Defendant, vide, *The Ceylon Brewery Ltd. Vs. Jax Fernando Proprietor, Maradana Wine Stores* 2001 (1) SLR at 271.

It is settled law that provisions which go to jurisdiction must be strictly complied with. *Sri Lanka General Workers Union Vs. Samaranayake* 1992 (2) SLR 265 at 273-274. As such Section 86(2) of the Code is mandatory and not directory. It is the intention of the legislature to stipulate strictly time limits to

enable the District Court to be conferred with jurisdiction. A Court of law need to get at the real intention of the legislature by attending to the whole scope of the statute to be construed. Enactments which regulates procedure of courts are usually construed as imperative. As such I cannot conclude that the lapse on the part of the 1A Defendant-Appellant is a mere irregularity, as the law is settled that provisions which go to jurisdiction must be strictly complied with. On the contrary to take a different view to above would leave room for abuses in the Administration of Justice. A liberal approach is possible where a court has to decide on the reasonableness of default, but not as regards stringent procedure pertaining to a jurisdictional issue which could be described as a patent want of jurisdiction which is not curable for non-objection/acquiescence or waiver.

It is apparent from the proceedings in the lower court that the question of time bar was not a matter raised before the learned District Judge. On that basis learned President's Counsel argued that it is a mix question of fact and law and that such a position cannot be urged for the first time in appeal and as such the learned Judge of the Court of Appeal erred in this regard. I am unable to accept the argument of the learned President's Counsel. I have held, having considered the case of the 'Ceylon Brewery' as stated above and having considered the provisions contained in Section 86(2) of the Civil Procedure Code

that Section 86(2) is mandatory and must be strictly complied with. Construction of a statute is a pure question of law, and it can be raised in appeal for the first time (76 NLR 427). My views are also supported in *Talagala Vs. Gangodawila Corporative Store Society Ltd.* 48 NLR 472.

Held:

Where a question which is raised for the first time in appeal is a pure question of law and is not a mixed question of law and facts, it can be dealt with. The construction of an Ordinance is a pure question of law.

The Fiscal's report and Appellant's application to purge default is part of the record and proceedings. The Court of Appeal is within its authority to consider same, and rule on the time frame.

I also note that the absence of the Proctor or registered Attorney has never been explained in the proceedings/submissions made to this court or made available on behalf of the substituted 1A Defendant-Petitioner-Appellant-Petitioner. There is no excuse for the registered Attorney to be absent on the day in question, as long as a valid proxy is filed of record and not revoked. The registered Attorney along with the party concerned has to take the blame for the default. Negligence of the registered Attorney is much more serious as he has failed in his professional obligations towards his client.

I would answer the questions of law in terms of paragraph 20 of the petition as follows:

- (i) No. The absence of a finding by the learned District Judge is no bar for the Appellate Court to rule as a pure question of law.
- (ii) No. Opportunity was available to the party concerned in terms of the law, to purge default, and he had been cross-examined and Fiscal's report marked P1 was put to the witness which refer to date of service by Fiscal of the decree.
- (iii) No, and in view of the answer given in (i) above, it does not arise
- (iv) No. Section 86(2) requires two conditions to be satisfied i.e application to purge default to be filed within 14 days which is mandatory and to establish the grounds of reasonable requirement. Both conditions need to be satisfied, and the first being mandatory would be the intention of the legislature.

In all the facts and circumstances of this case I am not inclined to disturb the findings of the learned Judge of the Court of Appeal and the conclusions of the learned District Judge. The time limits specified in Section 86(2) of the Civil Procedure Code to set aside a default decree is mandatory.

As stated above, it is settled law, and only reasonable grounds could be explained to take a liberal approach, but both conditions in Section 86(2) need to be satisfied. Construction of a Statute is a pure question of law which could be raised for the first time in appeal. In a case where the default

occurred in a partly heard case court may proceed to dispose of the action in one of the modes directed by chapter 12 of the Civil Procedure Code or make such other order as the court thinks fit. That is a matter for the trial court. As such I proceed to affirm the Judgment of the Court of Appeal and dismiss this case without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

K. Sripavan C.J.

I agree.

CHIEF JUSTICE

Priyantha Jayawardena

I agree.

JUDGE OF THE SUPREME COURT