

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

Sri Lanka Savings Bank Limited,
No. 110, D.S. Senanayake Mawatha,
Colombo 08.

Plaintiff

SC APPEAL NO: SC/CHC/APPEAL/81/2014

CHC NO: HC (CIVIL) 283/2001

Vs.

01. Globe Investments (Private) Limited,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.

02. Nirmala Anura Fernando,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.

03. Estelita Rozobelle Dolores Fernando,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.

Defendants

AND NOW BETWEEN

Nirmala Anura Fernando,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.
2nd Defendant-Appellant

Vs.

01. Sri Lanka Savings Bank Limited,
No. 110, D.S. Senanayake Mawatha,
Colombo 08.

Plaintiff-Respondent

02. Globe Investments (Private) Limited,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.

1st Defendant-Respondent

03. Estelita Rozobelle Dolores Fernando,
No. 233/8, Cotta Road, Colombo 08.
Presently at: No. 65/09,
Wickramasinghe Mawatha,
Battaramulla.

3rd Defendant-Respondent

Before: Hon. Justice Priyantha Jayawardena, P.C.
Hon. Justice A.H.M.D. Nawaz
Hon. Justice Mahinda Samayawardhena

Counsel: Shivan Coorey with Manjula Fernandopulle for the 2nd
Defendant-Appellant.
Erusha Kalidasa for the Plaintiff-Respondent.

Argued on : 08.09.2022

Written submissions:

by the Plaintiff-Respondent on 26.03.2021 and 03.10.2022.

Decided on: 28.02.2024

Samayawardhena, J.

Introduction

The plaintiff filed this action against the three defendants in the Commercial High Court of Colombo seeking to recover a sum of Rs. 19,810,648.00 together with interest at a rate of 32% per annum on a sum of Rs. 12,574,121.12 with 1% Business Turnover Tax and 6.5% National Security Levy. The 1st defendant, who is the borrower, is an incorporated company and the 2nd and 3rd defendants are the guarantors to the loan. The address stated in the summons for all three defendants is No. 233/8, Cotta Road, Colombo 8 which appears to be the registered address of the 1st defendant company. However, in the guarantee agreement marked P9 the address of the 2nd and 3rd defendant guarantors is given as No. 3, Torrington Avenue, Colombo 7. Summons issued on the defendants to be served through the fiscal could not be served on two occasions since the premises were reportedly closed but on the third occasion on 10.05.2002 the fiscal reported personal service of summons on all three defendants (in that the 2nd defendant reportedly accepted his summons and that of the 1st defendant company). The defendants did not respond to summons and the case was fixed for *ex parte* trial and the judgment was delivered against all three defendants

as prayed for in the plaint. The *ex parte* decree was reportedly served on all three defendants on 15.11.2002 in the manner the summons was served. The plaintiff did not take steps until 2008 to make an application for the execution of writ. The notice of the application for writ was reported to have been served on a different person at a different address, namely, the Manager of Rhythm Collection (Pvt) Ltd of No. 10/209, 4th Floor, Union Place, Colombo 2.

The 2nd defendant filed an application in terms of section 839 read with section 86(2) of the Civil Procedure Code by petition dated 19.10.2009 supported by affidavit and documents seeking to set aside the *ex parte* judgment and decree on the basis that he did not reside at No. 233/8, Cotta Road, Colombo 8 but was overseas at the time summons and decree were reported to have been served on him.

At the inquiry into this matter the 2nd defendant gave evidence. He produced two of his passports marked P1 and P2. He also called an officer from the Department of Immigration and Emigration as a witness to corroborate the fact that he had been overseas during the relevant period. The plaintiff called the process server (commonly but erroneously known as “fiscal”) to give evidence.

After the inquiry, the learned High Court Judge by order dated 29.08.2014 dismissed the application of the 2nd defendant on the basis that the 2nd defendant had not shown on a balance of probability that summons was not served on him on 10.05.2002 as the passports tendered to Court did not corroborate that he was abroad on that day.

In respect of service of the *ex parte* decree on 15.11.2002, however, the learned High Court Judge accepts that there is an endorsement on page 9 of the passport marked P2 that the 2nd defendant had left Sri Lanka on 14.11.2002. According to page 36 of the passport P2, there is an entry

stamp from “Immigration Bangkok Thailand” that the 2nd defendant had been “Admitted 15.11.2002” “Until 12.02.2003”. The exit stamp on page 36 of P2 indicates that the 2nd defendant “Departed” Thailand on 08.02.2003. Although there had been some confusion whether the endorsement in relation to the period of 15.11.2002 to 12.02.2003 pertains to the visa or whether it is an endorsement made after the 2nd defendant arrived in Thailand, the validity period of the visa (from 04.04.2002 to 03.04.2003) is separately available at page 35 of P2 and hence there cannot be such confusion. It is clear that the 2nd defendant was in Thailand when the fiscal reported to Court that he served the *ex parte* decree personally on the 2nd defendant on 15.11.2002 at No. 233/8, Cotta Road, Colombo 8.

The learned High Court Judge in the impugned order states that no prejudice has been caused to the 2nd defendant due to this fact because the 2nd defendant’s application to purge default was not objected to on the basis that it was filed out of time.

Of the two passports, what is relevant to this case is P2. It has multiple entries and it is not possible to clearly identify the 2nd defendant’s movements during the relevant period from the said passport. The evidence of the officer from the Department of Immigration and Emigration is not helpful to ascertain the specific dates on which the 2nd defendant had left Sri Lanka and returned to Sri Lanka during the relevant period. The fact in issue is whether the 2nd defendant was abroad on 10.05.2002, i.e. the date on which summons was reportedly served on the 2nd defendant. The officer’s evidence was that the department had no data in its system prior to 29.10.2002.

The fiscal had been cross-examined on the service of summons and decree. It had been suggested to him that at the time the decree was

reported to have been served on the 2nd defendant, the 2nd defendant had been abroad. His reply was that he has no recollection or personal knowledge of those matters as they took place more than 10 years ago.

This is a direct appeal against the order of the Commercial High Court. The grounds of appeal as set out in the petition of appeal are (a) the order is contrary to law, (b) the order is against the weight of the evidence, (c) the Court failed to properly evaluate the evidence, and (d) the Court erred in law in holding that the summons and the decree were duly served on the 2nd defendant.

Let me now consider the law relating to the application for setting aside *ex parte* judgments and decrees in order to properly consider whether the conclusion of the learned High Court Judge is justifiable.

When shall the defendant make the application to purge default?

In terms of section 84 of the Civil Procedure Code, upon the defendant having been duly served with summons, if he fails to file answer or having filed answer fails to appear on the trial date (in person or through his recognised agent or Attorney-at-Law as provided for in section 24 of the Civil Procedure Code) when the plaintiff appears, the Court shall fix the case for *ex parte* trial. Section 84 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 for 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.

After the *ex parte* trial, if the Court decides to enter judgment for the plaintiff as prayed for or subject to modification, the *ex parte* decree drawn up in terms of the judgment shall be served on the defendant.

Once the decree is served, in terms of section 86(2) of the Civil Procedure Code, the defendant may with notice to the plaintiff make an application within fourteen days of service of the decree to purge default. Section 86(2) 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 costs or otherwise as to the court shall appear proper.

In terms of section 86(3), the application shall be made by petition supported by affidavit.

It was held in *Karunadasa v. Rev. Phillips* [2003] 2 Sri LR 140 that the language used in section 86(2) does not suggest that the defendant is required to give notice of his application to the plaintiff simultaneously with the filing of such application.

How to calculate fourteen days?

The period of fourteen days is referred to in several other sections of the Civil Procedure Code.

Section 754(4), which deals with when a notice of appeal shall be tendered against a judgment, states that it shall be tendered “*within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays*”.

Section 757(1) which deals with when an application for leave to appeal shall be made against an order is couched in identical terms.

In contrast, section 86(2) which enacts that the application shall be presented “*within fourteen days of the service of the decree*” does not specify which days are excluded. Comparing the wording of section 86(2) with the wording of sections 754(4) and 757(1), the intention of the legislature is clear. In calculating fourteen days for the purpose of purging default in terms of section 86(2), the date when the decree was served, the date when the application to purge default is presented to Court, Sundays and public holidays are not excluded. The word “within” in section 86(2) means the application shall be presented to the Court within the specified fourteen-day window and not beyond that period. In the case of *Flexport (Pvt) Ltd v. Commercial Bank of Ceylon Ltd* (SC/APPEAL/3/2012, SC Minutes of 15.12.2014) the Supreme Court reached the same conclusion.

The *Black’s Law Dictionary* (6th Edition, pages 1602-1603) defines the word “within” as “*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*”.

Nevertheless, if the fourteenth day falls on a day on which the office of the Court is closed, filing the application on the next day on which the office of the Court is open would be in compliance with section 86(2).

In *Fernando v. Ceylon Brewerys Ltd.* [1998] 3 Sri LR 61, the decree was served on the defendant on 03.02.1997 and he filed the application under section 86(2) on 18.02.1997. The finding of the Court of Appeal that the application to the District Court was late by one day was upheld by the Supreme Court in *The Ceylon Brewery Ltd. v. Jax Fernando, Proprietor, Maradana Wine Stores* [2001] 1 Sri LR 270.

Even though the word “within” is used in a section, if the section specifies the days which shall be excluded within that period, the strict application of the rule is relaxed. In other words, the specified days shall be excluded notwithstanding the use of the word “within”. This can be understood by reading the above quoted section 754(2) and the Supreme Court judgment in *Selenchina v. Mohamed Marikar* [2000] 3 Sri LR 100 at 102.

What section 86(2) states is “*within fourteen days of the service of the decree*”. The word used here is “of”, not “from”. Section 14(a) of the Interpretation Ordinance, No. 21 of 1901, as amended, states “*for the purpose of excluding the first in a series of days or any period of time, it shall be deemed to have been and to be sufficient to use the word “from”*”.

Maxwell on *The Interpretation of Statutes*, 12th edition, page 309, states:

Where a statutory period runs “from” a named date “to” another, or the statute prescribes some period of days or weeks or months or years within which some act has to be done, although the computation of the period must in every case depend on the intention of Parliament as gathered from the statute, generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included.

In the context of tendering a petition of appeal, section 755(3) states “*Every appellant shall within sixty days from the date of the judgment or*

decree appealed against present to the original court a petition of appeal". It may be noted that the word used in this section is "from", not "of". Hence it was held in the Divisional Bench decision of the Court of Appeal in *Jinadasa v. Hemamali* [2006] 2 Sri LR 300 that the date of pronouncing the judgment should be excluded from the computation of the time within which the petition of appeal should be presented.

Section 8(1) of the Interpretation Ordinance states "*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.*"

Fourteen days is "a limited time" given to a party to make the application. It is in that context I stated that if the fourteenth day coincides with a day when the office of the Court is closed, submitting the application on the next day when the office is open would be sufficient compliance with the time limit stipulated in section 86(2). This is in consonance with the finding in *Jinadasa v. Hemamali (supra)* where the calculation of time was done in relation to section 755(3).

Can the application be made before the service of the *ex parte* decree?

Does the term "within fourteen days of the service of the decree" in section 86(2) mean that the defaulting defendant must make the application after service of the decree? In other words, can the Court state that there is no proper application filed in terms of section 86(2) when the application has been filed between fixing the case for *ex parte* trial and before service of the *ex parte* decree? The answer is in the negative.

Justice Weerasuriya in *Coomaraswamy v. Mariamma* [2001] 3 Sri LR 312 at 315 held “*the requirement for the party to make an application within 14 days of the service of the decree does not preclude the defendant to make an application before service of the decree and for the Court to inquire into such application after decree was served.*” This was followed by Justice Somawansa in *Ranasinghe v. Tikiri Banda* [2003] 3 Sri LR 252.

Is the fourteen-day period mandatory?

The fourteen-day period within which the application to purge the default shall be made is mandatory, not directory.

Provisions of statutes conferring private rights are in general construed as being imperative and those creating public duties are construed as directory. (*Perera v. Perera* [1981] 2 Sri LR 41)

N.S. Bindra Interpretation of Statutes, 13th Edition (2023), at page 464 quotes the following dicta expressed in *Executive Engineer v. Lokesh Reddy* 2003 (4) KarLJ 151 with approval:

It is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would primarily be mandatory, but when a public functionary is required to perform a public function within a timeframe, the same will be held to be directory unless the consequences therefore are specific.

In *The Ceylon Brewery Ltd. v. Jax Fernando, Proprietor, Maradana Wine Stores (supra)*, Justice Fernando attributed the mandatory nature of the fourteen-day period as an essential requirement for the proper invocation of jurisdiction:

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 jurisdiction must be strictly complied with. See Sri Lanka General Workers Union Vs. Samaranayake [1996] 2 Sri LR 265 at 273-274.

Vacating the *ex parte* decree by invoking the inherent jurisdiction of Court

However, the above time limit shall be understood subject to the condition that the defendant, although not admitting service of summons, nevertheless admits service of the decree. If the defendant does not admit service of both summons and decree, then the fourteen-day period is inapplicable. In such a situation, the defendant can make an application invoking the inherent jurisdiction of the Court under section 839 of the Civil Procedure Code (perhaps read with section 86(2) of the Civil Procedure Code) soon after he becomes aware that an *ex parte* decree has been entered against him without his knowledge (despite the fact that the application is made well beyond the fourteen-day period of the alleged service of the decree).

Ittepana v. Hemawathie [1981] 1 Sri LR 476 is the leading case which illustrates this position. In that case the wife came to know that her husband had obtained a decree of divorce against her when she appeared in the Magistrate's Court on 09.03.1979 in her maintenance case. The District Court had made the decree *nisi* absolute on 16.06.1978. The District Court had concluded the divorce case as an *inter partes* uncontested trial but the wife stated that despite what was stated in the case record she had not filed proxy or instructed an Attorney-at-Law to appear for her and consent to the *a vinculo matrimonii* decree being

entered against her. After inquiry, the District Court set aside the *ex parte* decree and the Court of Appeal affirmed it. On appeal to the Supreme Court, Justice Sharvananda (later C.J.) stated at page 484 that if decree had been entered against a defendant without summons being served, the decree is a nullity and the District Court can set it aside *ex debito justitiae* (i.e. as a debt of justice or a remedy that can be invoked as of right) in the exercise of the inherent jurisdiction of the Court.

Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity. And when the Court is made aware of this defect in its jurisdiction, the question of rescinding or otherwise altering the judgment by the Court does not arise since the judgment concerned is a nullity. Where there is no act, there can be no question of the power to revoke or rescind. One cannot alter that which does not exist. The exercise of power to declare such proceedings or judgment a nullity is in fact an original exercise of the power of the Court and not an exercise of the power of revocation or alteration. The proceedings being void, the person affected by them can apply to have them set aside ex debito justitiae in the exercise of the inherent jurisdiction of the Court.

The same conclusion was reached in several other cases including *Perera v. Commissioner of National Housing* (1974) 77 NLR 361.

In *Ittepana's* case, in relation to the applicability of section 839, the Supreme Court at page 485 stated:

Section 839 of the Code preserves 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”. This section embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. The inherent power is exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist.

The Supreme Court at the same page further fortified the exercise of inherent power to undo injustice by the application of another principle of law – *actus curiae neminem gravabit* – an act of the Court shall prejudice no man. In this regard, Justice Sharvananda quoted the following passage of the judgment of Lord Cairns in *Rodger v. Comptoir D’Escompte de Paris* (1871) 3 PC 465:

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression ‘the act of the Court’ is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole; from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is a duty of the aggregate of those tribunals, if I may use the expression to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.

Knowledge of the case despite non-service of summons

There is some uncertainty as to whether the defendant’s knowledge of the case, notwithstanding that summons was not served, will deprive the defendant of invoking the provisions of section 86(2) with/or section 839 to vacate the *ex parte* decree.

This may be due to the *obiter dictum* of Justice Sharvananda in *Ittepana's* case where it was held at page 486 “*It is to be noted that it was never the position of the plaintiff that even though the defendant had not been served with summons, she had become otherwise aware of the proceedings against her and had acquiesced in or waived the irregularity or failure, in which event there would not have been any failure of natural justice.*” This shall not be misconstrued to say that service of summons is not mandatory if the defendant had knowledge of the proceedings.

In terms of section 84 of the Civil Procedure Code, the Court shall fix the case for *ex parte* trial “*if the Court is satisfied that the defendant has been duly served with summons*”. If there is no due service of summons in Form 16 of the first schedule to the Civil Procedure Code (together with a copy of the plaint and annexures), the Court cannot fix the case for *ex parte* trial against the defendant. The Court is clothed with jurisdiction over the defendant only upon due service of summons on him. Knowledge of the case by any other means is no substitute for the due service of summons.

In *Leelawathie v. Jayaneris* [2001] 2 Sri LR 231, the plaintiffs filed action for declaration of title to the land in suit and damages. They also sought an enjoining order and an interim injunction in the plaint. Notice of interim injunction was served on the defendants but not summons. This happened by oversight. The Court entered *ex parte* judgment against the defendants and the application to vacate the *ex parte* decree was refused. The 1st defendant had filed objections to the application for interim injunction. On appeal by the 1st defendant, one of the questions to be decided was whether the 1st defendant could complain about the case having been fixed for *ex parte* trial on non-service of summons when he was fully aware of the case. Justice Wigneswaran at pages 236-237

emphasised service of summons as a condition precedent to fixing the case for *ex parte* trial:

Unless summons in the Form No. 16 in the 1st Schedule to the Civil Procedure Code issues, signed by the Registrar requiring the Defendant to answer the plaint on or before a day specified in the summons and is duly served on the Defendant there cannot be due service of summons. In this case the original summons with attached copies of plaint and affidavit tendered with the original plaint dated 05.10.1988 to be issued against the 1st-3rd Defendants are still in the record unsigned by the Registrar. They had been duly tendered on 05.10.1988 with the original plaint as per Court seal of that date. What had been served on 1st-3rd Defendants were notices that issued under the hand of the Registrar on 07.10.1988. Hence there had been no service of summons on the 1st-3rd Defendants. Unless summons were served on them, all the consequences of default in appearance would not apply to them. There is no question of implying or presuming that the Defendants were aware of the case filed, since statutory provisions apply to service of summons and unless the summons are duly served the other statutory consequences for non-appearance on serving of summons, would not apply to Defendants.

In *Joyce Perera v. Lal Perera* [2002] 3 Sri LR 8 also, there was no doubt that there was no service of summons on the defendant but only service of the order *nisi* in respect of the alimony *pendente lite*. In such circumstances, Justice Nanayakkara held that service of summons on the defendant is a fundamental and imperative requirement before a case is fixed for *ex parte* trial by Court. The Court rejected the argument that the appearance by the defendant in response to the order *nisi* and the

filing of objections along with the counter claim for alimony would regularise the non-service of summons on the defendant.

In *Dharmasena v. The People's Bank* [2003] 1 Sri LR 122 the Supreme Court gave purposive interpretation to the term “*duly served with summons*”. The plaintiffs filed action against the defendant on 01.02.2002. Summons was issued returnable on 05.04.2002 but served on the defendant only on 03.04.2002, two days before the case was to be called for proxy and answer. On 05.04.2002 an Attorney-at-Law appearing on behalf of the defendant informed Court that the proxy was not ready and the Court granted a date (10.05.2002) for proxy and answer. On 29.04.2002 the plaintiffs moved for an order for *ex parte* trial on the ground that the defendant had failed to appear on 05.04.2002 and the defendant's Attorney-at-Law was not duly authorised to move for time. The District Judge refused that application. On appeal, whilst affirming the said order, Justice Fernando stated at page 124:

Ex parte trial can be ordered only if the court is satisfied that the defendant has been duly served with summons. The question then is whether the court shall proceed to hear the case ex parte even where the summons is served so soon before the date for answer that it is not reasonably possible for the defendant to prepare and file his answer. 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. In this case summons was served at such short notice that the Defendant hardly had time even to grant a proxy to an attorney-at-law. An attorney-at-law having actual authority to appear was entitled to move for further time to file a proxy, and any

irregularity in that regard was cured by the subsequent filing of a proxy within the time granted by the court.

Onus of proof in a default inquiry

The fiscal's report on any process (service of summons, *ex parte* decrees etc.) is accompanied by an affidavit as stated in sections 371 and 372 of the Civil Procedure Code. Such reports present *prima facie* evidence of service on the defendant. In terms of illustration (d) to section 114 of the Evidence Ordinance, the Court can presume that all official acts have been done regularly. The burden of proof is on the defendant to rebut that presumption by leading evidence. The right to begin the inquiry lies with the defendant and not with the plaintiff. This is by application of section 102 of the Evidence Ordinance which states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Once the defendant discharges that burden, the burden shifts to the plaintiff to lead evidence in rebuttal. An important witness for the plaintiff in leading evidence in rebuttal is the fiscal.

In the case of *Sangarapillai & Brothers v. Kathiravelu*, Vol II Sri Kantha Law Reports 99 at 106, Justice Siva Selliah made the following observation regarding the onus of proof in an inquiry into purging default.

Further, the District Judge has misdirected himself on the onus of proof – for the burden squarely lay on the defendant who asserted that no summons was served on him to establish that fact and it was wrong for the District Judge to require from the Plaintiff beyond reasonable doubt of the service of summons on the defendant.

The above position of law was recognised in a series of cases including *Wimalawathie v. Thotamuna* [1998] 3 Sri LR 1, *Chandrasena v. Malkanthi*

[2005] 3 Sri LR 286, *Wijeratne v. Abeyratne* [2008] BLR 193 and *Malani Aponso v. Karunawathi Aponso* [2008] BLR 302.

In *Selliah Ponnusamy v. People's Bank* [2016] BLR 128, the Supreme Court stated that once the defendant gives affirmative evidence that summons was not served on him, the failure on the part of the plaintiff to rebut such evidence by calling the fiscal as a witness warrants setting aside the *ex parte* decree entered against the defendant.

Standard of proof

In an inquiry into vacating an *ex parte* judgment and decree, the standard of proof expected from the defaulting defendant is not of a high degree. It is a misconception that, in order to succeed at a default inquiry, the defendant must prove that summons was not served on him. That is the most common ground but not the only ground. The defendant can successfully make an application under section 86(2) despite summons being duly served on him if he can adduce reasons acceptable to Court for his failure to appear in Court. In terms of section 86(2), the law requires the defendant only to satisfy Court that he had reasonable grounds for such default. Similar terms are used in section 87 when the defaulter is the plaintiff. Whether or not what is elicited by way of evidence constitutes reasonable grounds is a question of fact and not of law. This needs to be decided on the unique facts and circumstances of each individual case. The test is subjective as opposed to objective. The Court shall view the issue with flexibility rather than rigidity in considering whether the defendant discharged the burden expected of him.

This is clear from a plain reading of section 86(2) of the Civil Procedure Code.

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.

In *Sanicoch Group of Companies by its Attorney Denham Oswald Dawson v. Kala Traders (Pvt) Ltd* [2016] BLR 44 there was no issue that summons was served on the company but the company was not represented in the Commercial High Court. After *ex parte* trial, the Court entered judgment for the plaintiff. At the inquiry into purging default, the sole witness called by the company testified that there were only two directors of the company and one director had been kidnapped and possibly murdered and the other director who was the daughter of the missing director was in Australia pursuing her studies and had never participated in the affairs of the company. The wife of the missing director also lived overseas and, due to death threats, stayed in temporary places such as hotels during her short visits to Sri Lanka. The evidence of the sole witness was that the company was in a state of collapse and there was no proper person to take decisions on behalf of the company. The wife and the daughter of the missing director did not give evidence. The High Court refused to vacate the *ex parte* decree predominantly on the basis that mismanagement of the affairs of the company would not constitute a reasonable ground for purging default.

On appeal, the Supreme Court took the view that although the mismanagement of a company cannot normally be considered a reasonable ground, in the unique facts and circumstances of that case, it was a relevant fact which should have been considered by the High

Court in favour of the defaulter. Whilst vacating the *ex parte* judgment, Justice Gooneratne stated at page 48:

Section 86(2) of the Code contemplates of a liberal approach emphasising the aspect of reasonableness opposed to rigid standard of proof. That being the yardstick, the learned Judge's order should indicate with certainty that reasonable grounds for default had not been elicited at the inquiry. Nor does the order demonstrate by reference to evidence and provisions contained in Section 86(2), that there was a willful abuse of the process or willful default which would enable court to reject the Defendant-Petitioner-Appellant's case. This is essential in the background of undisputed facts referred to in this judgment at the very outset. I cannot lose sight of the fact that undisputedly the two Directors of the company who are responsible and bound to take decisions on behalf of the company were not available since one went missing and the other not resident in Sri Lanka, which resulted in mismanagement of the affairs of the company at the relevant time. In the context of the case in hand with reference to evidence led at the inquiry, death threats to the family which resulted in the Managing Director going missing and suspected of being murdered would have had a serious adverse impact on the rest of the family and their affairs with its business establishment at the relevant period.

Ordinarily in the absence of a plausible explanation it is possible to conclude that reasonable grounds had not been elicited as regards the case in hand. If that be so, mismanagement of the company may not be a reasonable ground, and this court would not have had a difficulty in affirming the views of the learned High Court Judge. However the facts placed before the High Court is an extreme and an unavoidable situation where a court of law cannot ignore having

regard being had to the common course of events, human conduct and public and private business in their relation to the facts of the case in hand.

A genuine mistake as opposed to willful negligence made by a lawyer is considered as a ground to purge default. In *Kathiresu v. Sinniah* (1968) 71 NLR 450, Chief Justice H.N.G. Fernando at page 451 stated:

The affidavit and the evidence are to the effect that the Proctor and the plaintiff himself were absent on the trial date because the Proctor had by mistake taken down the date of trial as 18th August, when in fact the trial was fixed for 10th of August. It is clear from the order of the District Judge that he has accepted this evidence as correct. He nevertheless refused to set aside the decree nisi because he relied on certain decisions in which the failure of a party to appear was due to his own negligence. Counsel for the plaintiff has now referred us to a case reported in 16 Times of Ceylon Reports, page 119, in which the only reason for non-appearance was a mistake made by the parties' Proctor. The present case is on all fours with that.

We allow the appeal and send the case back to the District Court. The District Judge will then fix a date, on or before which, the plaintiff will deposit a sum of Rs. 150 as costs of the past proceedings. If this amount is duly paid the District Judge will set aside the decree appealed from and set the case down for trial. If the costs are not paid before the fixed date, the decree under appeal will stand affirmed.

In the case of *Ariyaratne v. Attorney-General* [2015] BLR 33 the Supreme Court regarded a “slip of counsel” as a ground to vacate *ex parte* orders. In *Ariyaratne*’s case the accused was convicted by the High Court and when the appeal was taken up for argument in the Court of Appeal the appellant being absent and unrepresented having been represented by

counsel previously, the Court of Appeal had proceeded to hear the appeal *ex parte* and dismissed the same. In the Special Leave Application before the Supreme Court, counsel filed an affidavit explaining his absence in court in that he had erroneously and inadvertently taken down the wrong date as the date for argument. Counsel tendered unreserved apology. Allowing the appeal and setting aside the judgment of the Court of Appeal, Justice Sripavan (as he then was) observed:

From the contents of the affidavit, I do not think that Counsel had the intention to offend the dignity of the court or to abuse the process of court. It is not always possible to lay down any rigid, inflexible or invariable rule which would govern all cases of default by counsel. Each case has to be considered on its own merits. If, however, the default was in fact accidental and committed without any evil or ulterior motive, latitude has to be given to counsel to plead his case.

The legal profession is a noble one and the mark of nobility includes the straightforward habit of owning mistakes or errors and apologizing to the opposite party and/or to court once such mistakes or errors are realized. When counsel tenders an unreserved apology and explained to the satisfaction of court, the circumstances under which the mistakes or errors were committed, it may be appropriate for the court to accept it. Once the counsel regrets his act, it is the duty of court to make him feel that he is an essential link in the administration of justice and that his apology is accepted with a view that he will henceforth uphold the highest tradition with due diligence and thereby uphold the prestige of court.

No counsel in my view should be punished for bona fide mistakes. The learned counsel frankly admitted his default on 02.02.2009 for reasons adduced in his affidavit. It appears to me that it was really a slip on his part not to have taken the date of hearing correctly.

Slips of counsel have been held to be sufficient to set aside decrees or dismissal for default.

Procedure

No specific procedure is laid down in the Civil Procedure Code for the conduct of default inquiries whether the application is filed under section 86(2) or section 839. In *De Fonseka v. Dharmawardena* [1994] 3 Sri LR 49 it was held “An inquiry on an application to set aside an *ex parte* decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness.” (vide also *Wimalawathie v. Thotamuna* [1998] 3 Sri LR 1)

There are no hard and fast rules. In *Inaya v. Lanka Orix Leasing Company Ltd* [1999] 3 Sri LR 197 at 200, Justice Jayasinghe observed that the application to have an *ex parte* judgment and decree set aside can be disposed of even without oral testimony. But, Justice Somawansa in *Ravi Karunanayake v. Wimal Weerawansa* [2006] 3 Sri LR 16 at 25 opined that leading oral evidence is preferable.

The question whether process was duly served and whether there were reasonable grounds for the default etc. are questions of fact and therefore it is not possible to successfully pursue an application to purge default without oral evidence being led.

Analysis of evidence in light of the law

There cannot be any doubt that the report and the oral evidence of the fiscal on the alleged personal service of the *ex parte* decree on 15.11.2002 on the 2nd defendant in respect of himself and the 1st defendant company is false in the teeth of the passport entries which prove that the 2nd defendant was in Thailand on that date. The learned High Court Judge

ignored this reasoning that the 2nd defendant suffered no prejudice from the false evidence because the plaintiff did not object to the application being filed after the fourteen-day period following the service of the *ex parte* decree had elapsed. This approach of the learned High Court Judge does not commend itself to me. The Court has not considered whether the fiscal is a trustworthy witness on the question of service of summons on the 2nd defendant. It is the same fiscal who claims to have served summons on the 2nd defendant personally on 10.05.2002.

The evidence of the 2nd defendant is that the office at No. 233/8, Cotta Road, Colombo 8 was closed during the relevant period and he was abroad. I accept that the 2nd defendant could not prove by the entries in the passport that he was abroad on 10.05.2002. The officer from the Department of Immigration and Emigration could not assist Court in that regard either since computer evidence was not available for that period.

In my view, the 2nd defendant's failure to prove by independent evidence that he was aboard on 10.05.2002 does not *ipso facto* conclusively prove that summons was served on him on that day. Even if he were in Sri Lanka, if the Court is not satisfied that summons was not served, the Court can vacate the *ex parte* decree.

If the registered address of the 1st defendant company, No. 233/8, Cotta Road, Colombo 8, was the residential address of the 2nd and 3rd defendant, I cannot understand why they gave a different address for the guarantee agreement.

Another point of concern arises: if the summons and the decree were served properly, why did the plaintiff not promptly initiate the process of taking out a writ?

Conclusion

On the facts and circumstances of the case, I take the view that the High Court ought to have considered the application of the 2nd defendant favourably and vacated the *ex parte* judgment and decree, thereby allowing the 2nd defendant to contest the case. I am inclined to concur with the primary argument presented on behalf of the 2nd defendant, which asserts that the Commercial High Court did not properly evaluate the evidence and imposed a higher burden of proof on the 2nd defendant than what is required by the law. The 2nd defendant in my view has satisfied Court that he had reasonable grounds for the default.

I set aside the order of the Commercial High Court dated 29.08.2014 and vacate the *ex parte* judgment and decree entered against the 2nd defendant. The Commercial High Court will now allow the 2nd defendant to file answer and the trial will be conducted *inter partes* against the 2nd defendant.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.

I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

I agree.

Judge of the Supreme Court