

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

In the matter of an application for Leave
to Appeal made under Section 5C of the
High Court of the Provinces (Special
Provisions) Act No 19 of 1990 as
amended by Act No 54 of 2006.

SC Appeal 247/2017

SC/HCCA/LA 338/2017

CP/HCCA/81/2015/(FA)

DC Kandy No: L/15255

Dulith Alonzon Rohan De Soyza,

112/9, Thisarana,

Kurunegalawatta,

Gampaha

PLAINTIFF

Devana Acharige Siriyawathie,

26/22, 9th Lane,

Ambagahalawatta,

Yakkala

SUBSTITUTED-PLAINTIFF

Vs.

1. Rambukkange Gedara

Jinendradasa,

245/3/C, D.S. Senanayake

Veediya,

Kandy

DEFENDANT

2. Sheik Dawood Hasan Meerasaibo
3. Sheik Dawood Mohamed Rafeek
4. Sheik Dawood Mohideen Adbul Salam
5. Sheik Dawood Hawdh Mohideen
6. Sheik Dawood Ahamed Thajudeen

All of No. 214, Colombo Street
Kandy

**2nd TO 6th ADDED
DEFENDANTS**

AND NOW

2. Sheik Dawood Hasan Meerasaibo
3. Sheik Dawood Mohamed Rafeek
4. Sheik Dawood Mohideen Adbul Salam
5. Sheik Dawood Hawdh Mohideen
6. Sheik Dawood Ahamed Thajudeen

All of No. 214, Colombo Street
Kandy

**2nd TO 6th ADDED
DEFENDANT-APPELLANTS**

Vs.

Devana Acharige Siriyawathie,

26/22, 9th Lane,

Ambagahalandawatta,

Yakkala

**SUBSTITUTED-PLAINTIFF-
RESPONDENT**

AND

Rambukkanage Gedara Jinendradasa,

245/3/C, D.S. Senanayaka Veediya,

Kandy

1st DEFENDANT-RESPONDENT

AND NOW BETWEEN

2. Sheik Dawood Hasan Meerasaibo

3. Sheik Dawood Mohamed Rafeek

4. Sheik Dawood Mohideen Adbul
Salam

5. Sheik Dawood Hawdh Mohideen

6. Sheik Dawood Ahamed Thajudeen

All of No. 214, Colombo Street

Kandy

**2nd TO 6th ADDED
DEFENDANT-APPELLANT-
PETITIONERS**

Vs.

Devana Acharige Siriyawathie,

26/22, 9th Lane,

Ambagahalandawatta,

Yakkala

**SUBSTITUTED-PLAINTIFF-
RESPONDENT- RESPONDENT**

AND

Rambukkanage Gedara Jinendradasa,

245/3/C, D.S. Senanayaka Veediya,

Kandy

**1st DEFENDANT-RESPONDENT-
RESPONDENT**

Before: **Justice A. L. Shiran Gooneratne**
 Justice Achala Wengappuli
 Justice Dr. Sobhitha Rajakaruna

Counsel: Ikram Mohamed, PC with Saadi Wadood, Anuradha Abeysekere,
 Hashane Mallawarachchi and Harish Balakrishnan instructed by
 S.B. Dissanayake Associates for the **2nd to 6th Added**
 Defendants-Appellants-Appellants.

Sanjeewa Jayawardena, PC with Ranmalee Meepagala for the
Substituted **1st Defendant-Respondent-Respondent.**

Dr. Sunil Abeyratne instructed by Buddhika Alagiyawanna for the
Substituted **Plaintiff-Respondent-Respondent**.

Argued on: 30/04/2026

Decided on: 17/07/2026

A. L. Shiran Gooneratne, J.

By plaint dated 01/09/1986, the Plaintiff-Respondent-Respondent (hereinafter referred to as the “Plaintiff-Respondent”) instituted action No. 15255/L in the District Court of Kandy against the 1st Defendant-Respondent-Respondent (hereinafter sometimes referred to as the “1st Defendant-Respondent”), seeking *inter alia* a declaration that Deed of Transfer No. 1311 dated 08/02/1986 is a fraudulently executed deed and the endorsement of registration to be cancelled. The 1st Defendant by amended answer dated 13/03/1997, pleaded that the said Deed of Transfer was a valid execution and prayed for a dismissal of the action.

The 2nd to 6th Added Defendant-Appellant-Appellants (hereinafter sometimes referred to as the “2nd to 6th Defendant-Appellants”) by their answer dated 02/08/2007 stated that they purchased the said premises from the Plaintiff-Respondent by Deed of Transfer No. 3211 dated 11/11/1986 attested by C. Viknaraja, Notary Public, therefore they are the lawful owners of the said property. Upon application, they were added as party Defendants to the action.

The 1st Defendant having given evidence and partly cross-examined, defaulted in appearance, resulting in the case proceeding *ex-parte* against him. At the conclusion of the trial, the Learned District Judge by Judgment dated 18/12/2014, dismissed the Plaintiff’s action and the claim in reconvention of the 2nd to 6th Defendants.

Being aggrieved by the said Judgment both the Plaintiff-Respondent and the 2nd to 6th Defendants-Appellants appealed to the Civil Appeal High Court of Kandy (“the Appellate Court”). In both applications the 1st Defendant was named as the 1st Defendant-Respondent. With the concurrence of learned counsel, both Appeals were taken up together for hearing. At the commencement of hearing the learned Counsel for the 2nd to 6th Defendants-Appellants raised a Preliminary Objection that since the trial against the 1st Defendant had proceeded *Ex Parte*, before the District Court, the 1st Defendant was not entitled to be heard in an Appellate forum.

Considering the written submissions tendered by the respective parties on the preliminary objection, the learned Judges of the Appellate Court by Order dated 06/06/2017, distinguished the case of *Arumugam v. Kumaraswami* (CA No. 617/79 F, 2000 BLR Vol. 8 Part II) from the present action and held *inter-alia*, that a defaulting party ordinarily has no *locus standi* in appeal proceedings. However, the Court observed that in the instant matter, judgment has been entered in favour of the 1st Defendant, and both the Plaintiff and the 2nd to 6th Defendant-Appellants have appealed against that judgment. Therefore, if the 1st Defendant was denied a hearing, the judgment entered in his favour could be adversely affected, thereby causing grave injustice to the 1st Defendant. The Appellate Court relied on its inherent powers and decided to permit the participation of the 1st Defendant in the appellate proceedings without any restriction or condition imposed on him. Accordingly, the Preliminary Objection was overruled.

Being aggrieved by the Order dated 06/06/2017, the 2nd to 6th Defendants-Appellants sought Leave to Appeal to this Court by petition of appeal dated 14/07/2017, urging that the Order was contrary to law.

The 2nd to 6th Defendants-Appellants contend, *inter alia*, that:

- i. The Order is contrary to the Civil Procedure Code, which disentitles a party from participating in proceedings once trial has proceeded *ex-parte* against him, unless he first purges his default.
- ii. A party against whom trial *ex-parte* is held, is not entitled to a right of audience in an Appeal against the judgment entered in such proceedings.
- iii. The High Court erred in failing to follow the judgment of the Court of Appeal in ***Arumugam v. Kumaraswami*** (617/79 F, delivered on 29.02.2000, (2000 BLR Vol. 8 Part II), which held that a defaulting party is not entitled to participate in appeal proceedings.
- iv. The High Court erred in the exercise of its inherent powers by permitting the 1st Defendant to participate at the hearing of the Appeal without judicial justification.
- v. The reasons given by the High Court are arbitrary, unjustifiable, and contrary to the Civil Procedure Code.

As reflected in the Journal entry dated 13/12/2017, this Court agreed to grant leave to appeal on the following questions of law:

- a) Is the said Order of the High Court contrary to the Provisions of the Civil Procedure Code which disentitles the Added Defendants from participating from future proceedings once the case has proceeded trial *ex-parte* against him without first purging default and/or without that Order being set aside?
- b) Is the said Order of the High Court wrong in law since a party against whom an ex parte trial is held is not entitled in law to a right of audience in an appeal made against the Judgment entered in such *ex-parte* proceedings?
- c) Was the said High Court obliged in Law to follow the Court of Appeal Judgment in *Arumugam Vs Kumaraswami* and/or uphold that the 1st Defendant is not entitled to participate at the said appeal?

Although the first question of law refers to the “Added Defendants”, it is clear from the order of the Appellate Court in appeal, and the submissions made before this Court that it concerns the 1st Defendant-Respondent. The submissions of respective Counsel were also advanced on that basis. I therefore proceed to consider the questions of law raised as to whether the 1st Defendant, whose default had not been purged, was entitled to participate in the appeals before the Civil Appellate High Court.

The default Order against the 1st Defendant

The learned counsel for the 1st Defendant Respondent has strongly drawn the attention of court to section 769 (1) of the Civil Procedure Code (CPC) to urge the unqualified right of the Appellant and the Respondent to be heard in the appeal proceedings.

Emphasis is drawn to the fact that the 1st Defendant was made a party before the Appellate Court by the Appellants themselves. In the course of his submissions the learned President’s Counsel also drew the attention of Court to the fundamental protections afforded to a party litigant in upholding the hallowed principles of natural justice.

It was submitted on behalf of the 1st Defendant that, since the Plaintiff’s action and the claim in reconvention were dismissed, no decree adverse to the 1st Defendant had been served on him, and therefore no occasion had arisen for him to invoke section 86 of the Civil Procedure Code. It was further submitted that, as the appeals were filed against a judgment operating in his favor and as he had been named a respondent to those appeals, he was entitled to be heard in terms of section 769 of the Civil Procedure Code, or at least be allowed to participate based on the inherent powers vested with the Appellate Court.

On behalf of the 2nd to 6th Added Defendant-Appellants it was submitted that the legal effect of the 1st Defendant's default did not become obsolete because the District Court dismissed the Plaintiff's action and the claim in reconvention. Once the case proceeded *ex-parte* against the 1st Defendant, he was excluded from further participation unless and until his default was purged in the manner provided by section 86 of the Civil Procedure Code.

It was further submitted that having the 1st Defendant-Respondent in the caption to the Petitions was only for the purpose of giving him notice that the judgment of the District Court was challenged and that it did not automatically allow him to participate in the appeal proceedings. Accordingly, until a decree adverse to him is entered in the Appellate Court necessitating purge of default, the 1st Defendant may remain present only as a passive observer or a silent spectator and the Appellate Court may, through its inherent powers, seek clarification where necessary, but is not entitled to a right of audience.

It was also stated that the fact that no decree adverse to him had yet been entered or served only meant that the occasion to invoke section 86 had not yet arisen. If the final outcome of the proceedings is adverse to the 1st Defendant, the proper course available to him would be to invoke the jurisdiction of the District Court to purge his default and seek to be admitted to the proceedings, entitled under the law.

Analysis

The relevant part of section 86 of the Civil Procedure Code, as amended by section 3 of the Civil Procedure Code (Amendment) Act, No. 53 of 1980, and as it stood at the time of the trial, reads as follows:

“(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.

(2A) —

(3) —”

In this case, since the judgment ultimately dismissed the Plaintiff’s action and the claim in reconvention, no decree adverse to the 1st Defendant was entered or served on him. Therefore, the need to rely on section 86(2) did not arise.

Therefore, the question that arises is whether the 1st Defendant-Respondent, whose default was not purged, was nevertheless entitled to participate in the appellate proceedings on the basis that the judgment under appeal operated in his favor.

A similar procedural question has been addressed in the case of ***Arumugam v. Kumaraswami*** (617/79 F, CA minutes 29/02/2000, (2000 BLR Vol. 8 Part II), where the plaintiff’s action had been dismissed after it proceeded *ex-parte* against the defendant, and in appeal, the defendant-respondent claimed a right of audience even though the judgment was not adverse to him. However, the court held that;

“There is nothing in this case for the Defendant to respond in this appeal. He was not a party to the ex-parte proceedings and the Plaintiff’s action stood dismissed. The Defendant remained unaffected. The question whether the ex-parte judgment entered by the District Judge of Jaffna should stand or be set aside is a matter for the Court of Appeal. Unless this Court for any reason using its inherent powers

calls upon the Defendant-Respondent to respond to any matter, the Defendant-Respondent would remain a silent spectator to the proceedings taking place in this appeal. The fact that notice was served on the Defendant-Respondent, that security for costs was tendered in his favour, that a copy of the Brief was given to him on payment of charges, does not in any way confer on the Defendant-Respondent more rights than he is already entitled to. The procedure laid down in Chapter LVIII Civil Procedure Code did not take into account cases where the legitimacy of appearance of the Respondents to the appeal preferred, was in question. Thus, steps had been taken in this appeal on the basis that the Defendant was a legitimate Respondent to the appeal though he was not. His disabilities flowing from the entering of the ex-parte order still remains. He cannot properly be before Court without cleansing himself of the disabilities cast on him.”

The learned counsel for the 2nd to 6th Defendant-Appellants relied on ***Geethika Samaraweera v. Charaka Pathum Galagedara and Another SC/Appeal/78/2021*** (SC minutes 21/11/2022), to affirm the above position.

However, I wish to distinguish the facts of the present case from that of the aforesaid decision relied upon by the learned President’s Counsel for the 2nd to 6th Defendant-Respondent. In that case, the Civil Appellate High Court set aside the judgment of the District Court and entered judgment in favour of the Plaintiff. Consequently, a judgment and decree was entered against the defaulting defendant, thereby attracting the operation of section 86 of the Civil Procedure Code.

The defendant in that case, having failed to take the necessary steps before the District Court to purge his default and obtain relief therefrom, sought to invoke the jurisdiction of the Supreme Court directly by way of an application for leave

to appeal. It was in that context that the Court was called upon to consider the legal consequences arising from the defendant's continued default.

Nevertheless, certain observations contained in the aforesaid judgment are of particular relevance to the issues arising in the present case. Firstly, the reasoning of the Court on the status of a defendant who is still in default.

In *Geethika Samaraweera v. Charaka Pathum Galagedara and Another (Supra)* Samayawardhena J. states that the fact that the High Court decision went against the defendant does not mean that he becomes a contesting party once again. He stays in default until this is appropriately rectified. It is in this context that his Lordship refers to *Arumugam v Kumaraswamy (Supra)*, and states that a defaulting defendant becomes a party for the purpose of receiving notice but has no automatic right of hearing, where there is an appeal by a plaintiff against the dismissal of the action. While the facts in *Geethika Samaraweera v. Charaka Pathum Galagedara and Another (Supra)* are not identical to the case at hand it is nonetheless a reasoned conclusion on the procedural position of a defaulting defendant whose case was decided favourably in the District Court.

However, it must not be seen that the status of the 1st Defendant being unable to take part in the appeal in any way other than as a silent spectator or passive observer as a blanket rule which precludes him from participating under any circumstances before the Appellate Court. Should an issue arise during the appeal where clarification can only come from the 1st Defendant, he can always be called upon to do so by the court exercising its inherent power.

A different consideration may arise where the appeal proceeds beyond a mere review of the record before the District Court. Such instances may include applications for the admission of fresh or additional evidence, where the Appellate

Court is called upon to consider material that was not before the trial court. In such circumstances, if the Appellate Court permits the admission of new evidence and that material is capable of affecting a judgment standing in favour of the 1st Defendant, fairness and the requirement of natural justice may warrant affording him an opportunity to be heard on that limited matter.

Such participation should not be construed as restoring the 1st Defendant to the position of an active party contesting the findings of the trial court. As noted in both cases discussed earlier in this judgement, an appellate court is not a court of first instance and its function is to examine the correctness of the judgment of the District Court. It should not allow a party who defaulted before the District Court to conduct the trial at the appellate stage. If a defaulting defendant is permitted to participate without restriction, there is a risk that the appeal process may be converted into a trial process, allowing him to raise matters, or defences which ought to have been placed before the District Court. Therefore, such a defaulting defendant should be confined to addressing matters newly introduced before the Appellate Court, or to provide such clarification as the appellate bench may require for the proper administration of justice in accordance with the law. Any such participation would therefore be strictly limited to the scope of the new material or issue arising in the appellate forum.

Conclusion

For the reasons set out above, the order of the Civil Appellate High Court dated 06/06/2017 is set aside. The questions of law Nos. a, b, c are answered in favour of the 2nd to 6th Added Defendant-Appellants. This finding does not preclude the Civil Appellate High Court, in the exercise of its inherent powers, from seeking clarification from the 1st Defendant on matters where justice so requires. The 1st

Defendant is otherwise not entitled to participate in the appeal proceedings as a contesting party.

The matter is remitted to the Civil Appellate High Court of Kandy to proceed with the hearing of the appeals in accordance with the above directions and the law.

Appeal allowed. I order no costs.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court

Dr. Sobhitha Rajakaruna, J.

I agree.

Judge of the Supreme Court