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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 69/2007

CALA/ 283/2003

DC Colombo No/19597/MR

Uralaliyanage Caroline Perera,

Dewala Road,

Pamunuwa,

Maharagama.

Plaintiff

Vs.

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant

AND

Uralaliyanage Caroline Perera,

Dewala Road,

Pamunuwa, Maharagama.

Plaintiff petitioner

Vs.

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent

AND

Uralaliyanage Caroline Perera,

Dewala Road,

Pamunuwa,

Maharagama.

Plaintiff Petitioner-Petitioner

Vs.

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent-Respondent

AND

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent-Respondent Petitioner

Vs.

Uralaliyanage Caroline Perera (dead),

K. M. C. Perera

Dewala Road,

Pamunuwa,

Maharagama.

Substituted Plaintiff Petitioner-Petitioner Respondent

AND NOW BETWEEN

Uralaliyanage Caroline Perera (dead),

K. M. C. Perera (dead)

Kalubowilage Prema Kumara Perera,

Dewala Road,

Pamunuwa,

Maharagama.

1A. Substituted Plaintiff Petitioner-Petitioner Respondent Appellant

Vs

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent-Respondent Petitioner Respondent

BEFORE	:	BUWANEKA ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	M.C. Jayaratne with M.C.J. Bandara and Nelanthi Abeyrathne for the 1A Substituted Plaintiff Petitioner-Petitioner Respondent Appellant Manohara De Silva PC for the Defendant Respondent- Respondent Petitioner Respondent
WRITTEN SUBMISSION ON:		29.03.201 (1A substituted Plaintiff Petitioner-Petitioner Respondent Appellant) 17.06.2016 (Defendant Respondent-Respondent Petitioner Respondent)
ARGUED ON	:	05.12.2016
DECIDED ON	:	01.08.2017

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the Court of Appeal dated 23.07.2007. By the said judgment the Court of Appeal has set aside the order of the learned Additional District Judge of Colombo dated 17.07.2013. Also, the Court of Appeal has granted leave to appeal to this court from the said judgment dated 23.07.2007 on the following questions of law;

1. Is the learned trial judge empowered to entertain and to hold an inquiry into an application seeking to set aside an order made by the same court under Section 87(3) of the Civil Procedure Code – (in the case in hand the order dated 02.07.2002)?
2. Whether the proper remedy available to a party dissatisfied with an order of the District Court made in terms of Section 87(3) of the Civil Procedure Code, is by way of an Appeal?

The Plaintiff instituted an action against the Defendant Respondent-Respondent Petitioner Respondent (hereinafter referred to as the Respondent) in the District Court Colombo seeking *interalia* to recover a sum of Rs 9,700,000/- as damages. Subsequent to the answer filed by the Respondent, the case has been fixed for trial on 02.04.2001. On the said trial date, since both the Plaintiff and her Attorney on record were absent, the action of the plaintiff had been dismissed.

Thereafter the Plaintiff had made an application in terms of Section 87(3) of the Civil Procedure Code seeking to vacate the said order of dismissal. In the said application, in order to purge default, the Plaintiff had averred that on 19.09.2000, the learned Additional District Judge sitting in court No 2, having delivered the order which was due on the said date, fixed the matter for trial on 01.12.2000. On 01.12.2000, as the Attorney at Law of the Plaintiff was indisposed, the learned Additional District Judge sitting in court No 2 had re-fixed the matter for trial on 02.04.2001. On 02.04.2001, the Attorney at Law for the Plaintiff was present in court in court No 2, but the case was not called for the trial in the said court. Thereafter the Attorney at Law checked up on the notice board and found that the said case number was not in the list of cases list in court No 2 but had been included in the list of cases listed in court No 3. Thereafter the Attorney at Law of the Plaintiff had attended court No 3 and discovered that on 02.04.2001, the

plaintiff's case had been called and dismissed for want of appearance. The Plaintiff pleaded that the default in appearance on the said date i.e. 02.04.2001, was due to the said change of court No 2 to court No 3.

The Respondent has filed a statement of objections and thereafter the matter has been fixed for inquiry on 02.07.2002. On the said date of inquiry too, the Plaintiff and her Attorney at Law were not present in court and for the said reason the said application to purge default has been dismissed with costs fixed at Rs 20,000/-.

Thereafter the Plaintiff has filed a second application, by way of a petition dated 12.07.2002 supported with an affidavit, seeking to vacate the said order of learned Additional District Judge dated 02.07.2002 and for the restoration of the first application to purge default for hearing on the ground that the Plaintiff Attorney at Law had taken down a wrong date in his diary. Accordingly, the said second application too had been fixed for an inquiry.

Subsequently, an affidavit dated 06.11.2002 has been filed seeking to substitute one K. M. C. Perera in place of the Appellant. In the said affidavit, he averred that he was the widower of the said Appellant, Uralaliyanage Caroline Perera. He had further stated that Uralaliyanage Caroline Perera, the Appellant, had died on 16th August 2002 and he is the widower of the said Appellant. On the said basis, he sought for an order for substitution in place of the Appellant. Although the said affidavit had been filed by the Applicant claiming to be the widower of the Appellant, he had failed to produce the marriage certificate of the Appellant in order to establish that he is the legal representative of the deceased as required in terms of Section 395 of the Civil Procedure Code.

On the other hand, having made such application to court for substitution, the said Applicant, by way of two motions dated 14.11.2002 and 03.01.2003 respectively, had made an application to support the application for substitution and to support the application to set aside the order of dismissal of the Appellant's action. In fact, the said Applicant had no *locus standi* to file the said motion dated 03.01.2003 seeking to support the application to set aside the order of dismissal of the Appellant's action, because, prior to the making of the said application by way of the said motion, he had not been substituted in place of the deceased Appellant.

It appears that the said two motions had been filed on 14.11.2002 and 03.01.2003 respectively, after the death of the Appellant on 16.08.2002. But the Appellant's name appears as a living person in the caption of the said two motions. However, the said application for substitution of K. M. C. Perera in place of the Appellant had been taken up for support and thereafter parties had filed their written submissions. The learned Additional District had thereafter delivered the impugned order dated 17.07.2003 substituting said K. M. C. Perera in place of the deceased Appellant and setting aside the said order of dismissal of the action dated 02.04,2001 and, also, re-fixing the case for trial on 12.11.2003.

It is clear from the said impugned order dated 17.07.2003, that the learned Additional District Judge had dealt with the said order dated 02.04.2001 whilst dealing with the application for substitution. The matter before the District Court was the application for substitution. Nevertheless, the learned Additional District Judge, without considering the application for substitution, has dealt with the order of dismissal of the case without giving the opposing party an opportunity to present their objections to the application to purge default.

On the other hand, as I mentioned above, the Appellant's application to vacate the said order dated 02.04.2001 had already been dismissed by the learned Additional District Judge of the same court, by the order dated 02.07.2002. As the Court of Appeal has correctly observed, the District Court lacks jurisdiction to deal with the said order dated 02.04.2001, an order which was dealt with by the order dated 02.07.2002. Hence the said impugned order made by the learned Additional District Judge dated 17.07.2003 has the effect of an order made by the same District Court exercising the revisionary jurisdiction. Hence, I hold that such an order is in excess of power of the District Court.

In the circumstances, I see no reason to interfere with the Judgment of the Court of Appeal dated 23.07.2007. Therefore, I dismiss the instant appeal of the Appellant with cost.

Appeal dismissed.

Judge of the Supreme Court

BUWANEKA ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

K.T.CHITRASIRI, J.

I had the opportunity of reading the judgment written by Upaly Abeyrathne J and I am inclined to agree with His Lordship's conclusions found therein. However, I thought it would be useful if I elaborate further on the questions of law raised in this appeal. The two questions of law advanced by the appellant read as follows:

1. Is the learned trial judge empowered to entertain and to hold an inquiry into an application seeking to set aside an order made by the same court under Section 87(3) of the Civil Procedure Code? [In the case in hand, the order dated 02.07.2002]

2. Whether the proper remedy available to a party dissatisfied with an order of the District Court made in terms of Section 87(3) of the Civil Procedure Code, is by way of an appeal?

These two questions pose two different situations. One is whether the court has the power/right to vary or annul an order made earlier by the same court and the other is whether an appeal could be lodged upon an order being made under Section 87(3) of the Civil Procedure Code pursuant to a default to appear in court by the plaintiff. I will first advert to the first question of law referred to above.

It is established and well settled law that the court which makes a specific order, on an issue raised whilst the pendency or at the conclusion of the inquiry or trial in a civil suit, cannot be vacated or varied by the same court unless clear provision in law is found permitting to do so. The general rule is that a decision of a court cannot be revisited. A very early decision in this regard is from the English Court of Appeal in, ***in re*** **St. Nazaire Co. (1879), 12 Ch. D. 88.**

The basis for it was that the power to rehear is vested with the appellate courts. In our procedural law, Section 189 of the Civil Procedure Code permits to amend a judgment or an order, only for the purpose of correcting any clerical or arithmetical mistake or any error arising from any accidental slip or omission. Such a provision implies the finality of a judgment or an order of an original court judge. Judges are also empowered to make changes to their own decisions when those are made *per incuriam*.

In this case, trial had been fixed for 01.12.2000. On that date, on an application by the plaintiff-petitioner-petitioner-respondent-appellant, [hereinafter referred to as the plaintiff] trial was refixed for the 02.04.2001. On that date namely 02.04.2001, learned District Judge dismissed the plaint with costs due to the nonappearance of the plaintiff and her attorneys. Accordingly, it is an order made in terms of Section 87(1) of the Civil Procedure Code. Thereafter, the plaintiff by way of a motion supported with a petition and an affidavit made the application dated 10.04.2001. In that application, it is clearly mentioned that it is an application made in terms of Section 87(3) of the Civil Procedure Code. Accordingly, it is seen that the plaintiff who needed to have the order dated 02.04.2001 vacated, has taken the correct step according to law. The inquiry regarding the said application had been fixed for the 02.07.2002. On that date too, neither the plaintiff nor her attorneys were present in court. Accordingly, the same learned District Judge who dismissed the plaintiff's action has also dismissed the said application made under Section 87(3) of the Civil Procedure Code, for non-appearance.

Now, it is clear that the court had made an unambiguous and clear order under Section 87(1) of the Civil Procedure Code. Such a decision precludes a plaintiff bringing a fresh action in respect of the same cause of action. [Section 87(2)] Moreover, Section 88(1) prevents a

plaintiff filing an appeal against such a judgment entered upon default unless the order of dismissal under Section 87(1) has been first vacated by an order made under Section 87(3). Those provisions show the strength of the finality attached to an order made under Section 87(1) of the Code when the plaintiff is in default, unless that order is vacated in terms of Section 87(3). In this instance, learned District Judge who succeeded the Judge who made the earlier two decisions has entertained an application on behalf of the plaintiff, which was supported on 31.03.2003 seeking to vacate the order made on 02.07.2002 along with an application for substitution. Under those circumstances, it is my opinion that it is wrong for the learned District Judge to entertain any application even after the delivery of the order dated 02.07.2002 made pursuant to the application dated 10.04.2001 that had been made in terms of Section 87(3) of the Code. Accordingly, the impugned order of the learned District Judge made on 17.07.2003 should be set aside since the learned trial judge, without any authority has vacated an order made by the same court. Hence, the order dated 02.07.2002 shall remain intact.

Remaining issue is whether an appeal could be filed by a plaintiff who is aggrieved by an order made under Section 87(1) having defaulted to be present in court on the day; the case is fixed for trial. In such a situation, an opportunity to make an application under Section 87(3) is given to a defaulted plaintiff probably because Section 88(1) precludes a plaintiff filing an appeal against an order made under Section 87(1) of the Code. Therefore, it is a unique opportunity given through the aforesaid Section 87(3), to a plaintiff in a civil suit that had been filed and proceeded according to the regular procedure referred to in Section 7 of the Civil Procedure Code. The said Section 87(3) reads thus:

"87(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made."

Looking at the aforesaid Section, it is seen that it provides for a plaintiff who is aggrieved by an order made under sub Section 87(1), to make an application to have it vacated. If the court is satisfied by the reasons given for the default, it could act under Section 83(3) to set aside the said order made under 87(1) and allow the plaintiff to proceed with the action from the point that it was stopped. Therefore, it is further seen that if the court is not satisfied with the reasons adduced by the plaintiff for his default, the order so made dismissing the plaint will remain intact. It shows that the Legislature has taken a serious stance against a plaintiff who has defaulted in proceeding with the action. Under those circumstances, court is not in a position to allow an aggrieved plaintiff to file an appeal either. However, such a plaintiff may have the opportunity to make an application to a higher forum by way of a revision application provided he/she establishes exceptional circumstances to do so.

I will now advert to the procedure that is to be followed by a plaintiff-petitioner who needs to have an order made under Section 87(3) canvassed. As mentioned earlier, Section 88(1) precludes a plaintiff filing an appeal against any judgment entered upon default. However, Section 88(2) stipulates that an order made in an application under Section 87(3), which set aside or refused to set aside a judgment entered upon default shall be accompanied

by a **judgment adjudicating upon the facts and specifying the grounds upon which it is made and shall be liable to an appeal to the Court of Appeal.** [emphasis added] The manner in which this Section 88(2) is worded, it is seen that an order made pursuant to an application made under Section 87(3) should accompany a judgment that should contain the matters similar though not identical, to the matters contained in Section 187 of the Civil Procedure Code. Section 187 is the Section in which the requisites of a judgment are found. Certainly, such a pronouncement would decide the rights of the parties in a conclusive manner. When such a judgment is delivered by a competent court, the party who is aggrieved by that should be able to file an appeal, as of a right. Indeed, this right is guaranteed under the aforesaid Section 88(2) of the Code as well, by having it included the words "shall be liable to an appeal" at the end of that Section. Accordingly, it clearly removes any misconception with regard to the appealability of an order made under Section 87(3).

This position of law had been discussed in the cases of **Wijenayake Vs Wijenayake [Srikantha Law Reports Vol. 5 at page 99] and Sangarapillai Brothers Vs. Kathiravelu [Srikantha Law Reports Vol. II at page 30]** as well. In Wijenayake Vs. Wijenayake [supra], Palakidnar J. held as follows:

"If Section 88(2) did not contain the requirement that the order shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds on which it is made, one may deem it to be an order contemplated in Section 752(2), and that the instant application was correctly made. But Section 88(2) makes it very plain that the order shall be accompanied by a judgment and is an appealable order as distinct from an order for which leave has to be had and obtained from the Supreme Court. On the mere reading of the two Sections 754(2) and Section 88(2) one has to reject without hesitation the argument that the former repeals the latter".

I will now refer to the facts of this case once again, in order to ascertain whether the plaintiff has followed the procedure referred to above when making the application to have the order dated 02.07.2002 vacated. Attorneys for the plaintiff, in order to have the said order dated 02.07.2002 vacated, has made the application dated 12.07.2002. It had been filed by way of a petition stating that both the plaintiff and her attorneys heard the date of inquiry as 08.07.2002 and not as the 02.07.2002. It is on that basis, the plaintiff sought to have the order dated 02.07.2002 vacated.

As mentioned earlier in this judgement, the decision made on 02.07.2002 is an order made pursuant to an application made under 87(3) of the Code. Section 88(2) stipulates that such an order shall accompany a judgment and it is liable to an appeal being filed. Therefore, the decision on 02.07.2002 is clearly falls within the meaning of a judgement and a party who is aggrieved by such a finding shall follow the appellate procedure referred to in Chapter LVIII of the Civil Procedure Code. Admittedly, the plaintiff has failed to follow the said procedure found in the said Chapter LVIII of the Civil Procedure Code. Instead, her attorneys have filed a petition in the same District Court on the 12.07.2002 seeking to set aside the order dated 02.07.2002. Therefore, it is my considered opinion that the plaintiff's said application dated 12.07.2012 should stand dismissed for not adhering to the procedure stipulated in the Civil Procedure Code.

As mentioned above, the plaintiff has failed to follow the procedure stipulated in the Civil Procedure Code when she challenged the order made in terms of Section 87(3) of the said Code. I believe it is a serious violation of the procedural law and should not consider it as a mere technicality. This is because this particular Section namely Section 88(2) determines the court in which an order under 87(3) could be canvassed. At this stage, I am also reminded

of the decision made in the case of **Fernando Vs. Sybil Fernando and others [1997 (3) SLR at page 01]** to show the importance attached to the procedural law. In that decision, Dr.Amerasinghe J. stated thus:

"There is substantive law and there is the procedural law. Procedural law is not secondary: The maxim ubi ius ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action."

In view of the above, I am compelled to answer the questions of law raised in this appeal in favour of the defendant-respondent-respondent-petitioner-respondent. Accordingly, this appeal is dismissed with costs having affirmed the judgment of the Court of Appeal.

JUDGE OF THE SUPREME COURT