

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

In the matter of an Appeal with leave of the Supreme Court first had and obtained in terms of section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ahangoda Acharige Karunalatha
Rathnaweera
No.111, Quarry Road,
Dehiwala.

SC Appeal No.86/2022

SC/HCCA/LA No. 223/2020

WP/HCCA/MT/LA 87/2019 DC

Mt.Lavinia Case No. 2669/L/2011

Plaintiff

Vs.

1. Janitha Dilrukshi Kavatilake
No.30, Vimala Vihara Road,
Nawala.
2. Premanath Dayananda Rathnaweera
No.111, Quarry Road,
Dehiwala.

Defendants

In an application made in terms of the Provisions contained in Section 87(3) of the Civil Procedure Code.

Ahangoda Acharige Karunalatha
Rathnaweera,

No.111, Quarry Road,
Dehiwala.

Plaintiff-Petitioner (Deceased)

Vishwanath Ratnaweera
No.1/A "Araliya" Piligala Road,
Yalegoda, Handessa.
(Appearing through his Power of
Attorney holder)

Upali Senadara Dharmawardena
No.67, Prathibimbarama Road,
Dehiwala.

Substituted-Plaintiff-Petitioner

Vs.

1. Janitha Dilrukshi Kavitalake
No.30, Vimala Vihara Road,
Nawala.
2. Premanath Dayananda Rathnaweera
No.111, Quarry Road,
Dehiwala.

Defendants- Respondents

And then

Janitha Dilrukshi Kavitalake
No.30, Vimala Vihara Road,
Nawala.
(Presently at
No. 107/15, Rabel Place,
Galvihara Road, Dehiwala.)

1st Defendant-Respondent

-Petitioner

Vs.

Ahangoda Acharige Karunalatha
Rathnaweera
No.111, Quarry Road,
Dehiwala.

Plaintiff-Petitioner (Deceased)

Vishwanath Ratnaweera
No.1/A "Araliya" Piligala Road,
Yalegoda, Handessa.
(Appearing through his Power of
Attorney holder)

Upali Senadara Dharmawardena
No.67, Prathibimbarama Road,
Dehiwala.

**Substituted-Plaintiff-Petitioner-
Respondent-Petitioner**

Premanath Dayananda Ratnaweera
No.111, Quarry Road,
Dehiwala.

**2nd Defendant-Respondent
-Respondent**

And Now Between

Ahangoda Acharige Karunalatha
Rathnaweera
No.111, Quarry Road,
Dehiwala.

Plaintiff-Petitioner (Deceased)

Vishwanath Ratnaweera
No.1/A "Araliya" Piligala Road,
Yalegoda, Handessa.
(Appearing through his Power of
Attorney holder)

Upali Senadara Dharmawardena
No.67, Prathibimbarama Road,
Dehiwala.

**Substituted-Plaintiff-Petitioner-
Respondent-Petitioner**

Vs.

Janitha Dilrukshi Kavitalake
No.30, Vimala Vihara Road,
Nawala.

(Presently at
No. 107/15, Rabel Place,
Galvihara Road, Dehiwala.)

**1st Defendant- Respondent-
Petitioner-Respondent**

Premanath Dayananda Ratnaweera
No.111, Quarry Road,
Dehiwala.

**2nd Defendant-Respondent
-Respondent-Respondent**

Before : Achala Wengappuli, J.
Dr. Sobhitha Rajakaruna, J.
Menaka Wijesundera, J.

Counsel : Senaka De Saram instructed by Nelusha Malshani
Dheerasekara for the Substituted-Plaintiff-Petitioner-
Respondent-Petitioner.
J.M. Wijebandara with Dmithri Pandiwita and Parami
S. Wimalasena instructed by Randitha Jayasinghe for the
Respondent.
Yamuna Gunasekara for the 2nd Defendant-Respondent-
Respondent-Respondent

Written
Submissions : Written submissions on behalf of the 1st Defendant-
Respondent-Petitioner-Respondent on 22nd November,
2022.
Written submissions on behalf of the Substituted-Plaintiff-
Petitioner-Respondent-Petitioner on 14th October,
2022.

Argued on : 19.11.2025
Decided on : 31.03.2026

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 04.08.2020 of the Civil Appellate High Court of Mount-Lavania.

In the instant matter, the Substituted-Plaintiff-Petitioner-Respondent-Petitioner (hereinafter referred to as “the Plaintiff”) has instituted action in the District

Court of Mount Lavinia against the 1st Defendant-Respondent-Petitioner-Respondent (hereinafter referred to as “the 1st Defendant”) and the 2nd Defendant-Respondent-Respondent-Respondent (hereinafter referred to as “the 2nd Defendant”) for relief prayed for as per the prayer to the petition at page 72.

The 1st and 2nd Defendant has filed their answers and has prayed for relief as at pages 82 and 92. The plaintiff has filed the Replication in response to the said answers filed by 1st and 2nd Defendants on 24.09.2012.

The trial had been started with the parties recording 5 admissions and 22 issues.

The plaintiff had conducted the case and it had concluded as per journal entry no. 30 at page 39. The 1st Defendant had commenced her evidence.

The 1st Defendant was to be cross examined and thereafter, the case had been postponed to the 14th July 2016. On this day, when the matter was taken up, around 1:45 pm, the plaintiff had not been present. The Attorney at law appearing on behalf of plaintiff had been absent. There had been no counsel appearing for the Plaintiff.

The 1st and 2nd Defendant had been present along with their counsel. Therefore, the counsel for the 2nd Defendant had moved as the plaintiff had not been present in court that her case being dismissed and that it may be fixed *ex parte*.

The 2nd Defendant had said as the 1st Defendant had been present, he could have been cross examined on that day.

The learned District Judge, by Order appearing at page 530 of the brief, dismissed the plaint and directed that the 1st Defendant’s cross-claim be fixed for *ex parte* trial. The *ex parte* trial had been fixed for the 4th of November, 2016.

Thereafter, on 22nd of July, 2016, the plaintiff had made an application to purge the default, an inquiry has been held and P1 - P22 has been marked. Thereafter, the Hon. District court judge under section 87 (3) of the Civil Procedure Code had vacated the *ex parte* order and re-fixed the matter for further trial.

Section 87(3) of the Civil Procedure Code states as follows:

“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.”

As per the case of **Nanayakkara v. Faleel (60 N.L.R. 304)**;

“Where, in an action in the District Court, both parties are absent on the date fixed for ex parte hearing of the trial, the appropriate order for the court to make is an order dismissing the action. In such a case, it is open to any party prejudiced to move the court that made the order in an attempt to have it vacated.”

The said 1st Defendant been aggrieved by the said order dated 30.08.2019, had filed leave to appeal application to Civil Appellate High Court of Mt. Lavinia in terms of 754(2) of the Civil Procedure Code.

Section 754(2) of the Civil Procedure Code reads as follows:

“Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding, or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

In the case **Gunarathna v. Thambinayagam and others 1993 (2) S.L.R. 355** Justice Kulatunga held that;

“(1) The right of appeal is a statutory right and must be expressly created and granted by statute.”

In the Civil Appellate High Court, the plaintiff took up the objection that the application filed by the 1st Defendant cannot be maintained on the basis that as per Section 88(2) of the Civil Procedure Code; If a party wants to purge a default under Section 87(3) that if an appeal is filed under Section 88(1) of the Civil Procedure Code, the relevant application under Section 88(2) should be an appeal and not a leave to appeal application.

There are a wide range of decided cases which has dealt with this particular section and both the parties in their written submissions have drawn the attention of this Court to those cases.

In the case of **Nonahamy v Divunhami (25 NLR 415)** has decided that an appeal lies against an order refusing to set aside a judgment enter by default.

In the case of **Sangarapille v Kadiravellu (2 Sri Kantha Law Report 99) and Wijenayake v Wijenayake (5 Sri Kantha Law Report 28)**, has also decided

that order made under Section 88 (2) of the Civil Procedure Code give rise to a direct Appeal and not leave to appeal.

The learned High Court Judges have overruled the preliminary objection of the Plaintiff and the Plaintiff being aggrieved by the said judgement of the Civil Appellate High Court, have filed the instant application in this court.

When this matter was supported for leave, this Court has granted leave to appeal on the following Questions of Law,

a) Have the Learned Judges of the High Court failed to consider the fact that a decision made in terms of in Section 87(3) of the Civil Procedure Code can only be canvassed by way of a final appeal made in terms of Section 754 of the Civil Procedure Code?

b) Have the Learned Judges of the High Court failed to consider Section 88(2) of the Civil Procedure Code in making their order dated 4th August 2020 in the leave to appeal application bearing No. WP/HCCA/MT/LA 87/2019?

Upon considering the submissions of both parties written and oral Section 88 (1) and Section 88 (2) Code of Civil Procedure reads as follows;

Section 88 (1)

“No appeal shall lie against any judgment entered upon default.”

Section 88 (2)

“The order setting aside or refusing to set aside the 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”.

As per the sections stated above and the case law, which has been laid down so far, it is very clear that an order setting aside or refusing to set aside the judgment entered upon default, is liable to an **appeal** to the Court of Appeal. But upon the amendment to the Civil Procedure Code No. 05 of 2022, which has amended Section 88 (2) of the Civil Procedure Code, has stated that it shall be liable to an appeal to the relevant High Court established by Article 154 (p) of the Constitution with **leave** first obtained from such High Court. However, this amendment had come into operation from the 4th of November 2022, therefore it doesn't apply to the instant matter.

Therefore, up until the amendment to the Civil procedure Code No.05 of 2022, Judicial Precedents had been that and judgments setting aside or refusing to set aside a judgment entered upon default has been liable to an appeal to the Court of Appeal.

Hence, in view of the law which existed at the time of filing this action and the authorities cited above it has to be concluded that the correct application which should have been filed should be a direct appeal and not a leave to appeal application.

As such, I answer the two questions of law in the affirmative and I set aside the impugned judgment of the Civil Appellate High Court dated 04.08.2020 and affirm the judgment of the learned District Judge of the Mt. Lavinia dated 30.08.2019.

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