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

S.C. (CHC) Appeal No.08/2010
HC/Civil/ 263/2007/MR

Sanicoch Group of Companies,
No. 24, Bristol Street,
London FCIY 452
England.

Appearing by its Attorney
Denham Oswald Dawson
157, Dutugemunu Street,
Kohuwala.

PLAINTIFF

Vs.

Kala Traders (Pvt.) Limited,
No. 151, Dam Street,
Colombo 12.

DEFENDANT

In the matter of an application made under and in terms of Section 86(2) of the Civil Procedure Code.

Kala Traders (Pvt.) Limited,
No. 151, Dam Street,
Colombo 12.

DEFENDANT-PETITIONER

Vs.

Sanicoch Group of Companies
No. 24, Bristol Street,
London FCIY 452
England.

Appearing by its Attorney
Denham Oswald Dawson
157, Dutugemunu Street,
Kohuwala.

PLAINTIFF-RESPONDENT

AND NOW

Kala Traders (Pvt.) Limited,
No. 151, Dam Street,
Colombo 12.

DEFENDANT-PETITIONER-APPELLANT

Vs.

Sanicoch Group of Companies
No. 24, Bristol Street,
London FCIY 452
England.

Appearing by its Attorney
Denham Oswald Dawson
157, Dutugemunu Street,
Kohuwala.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Chandra Ekanayake J.
Upaly Abeyrathne J.
Anil Gooneratne J.

COUNSEL: Ikram Mohamed P.C. with Padma Bandara and
N. Udalagama for the Defendant-Petitioner-Appellant

S.C.B. Walgampaya P.C., with Upendra Walgampaya
for the Plaintiff-Respondent-Respondent

ARGUED ON: 18.05.2015

DECIDED ON: 02.10.2015

GOONERATNE J.

This is an appeal to the Supreme Court from the order of the High Court of Western Province in exercising its Civil Jurisdiction (Commercial High

Court). Order was delivered by the said High Court on 20.10.2010, refusing to vacate an ex-parte judgment entered in default as per Section 86(2) of the Civil Procedure Code. In this regard an Acceleration Application bearing No. 01/110 had also been filed, and the Journal Entry of 08.10.2010 in S.C. Acceleration No. 01/2010 may also be noted as parties agreed to accelerate the appeal on the following basis.

(i) All actions pending between the said parties would be stayed until the determination of Case No. SC (CHC) Appeal No. 08/2010.

(ii) The outcome of the decision in case SC (CHC) Appeal No. 08/2010 would be taken by all parties as full and final settlement of all disputes pertaining to this case between the parties.

(iii) As these matters are agreed upon the Defendant-Appellant-Respondent agrees to have this appeal referred for acceleration and application for acceleration is agreed upon.

Parties also agree that if the aforesaid agreement is not conceded then the acceleration would be refused.

The Plaintiff-Respondent-Respondent, Sanicoch Group of Companies of U.K. filed action through Power of Attorney holder as described in the caption to the petition, against the Defendant-Petitioner-Appellant namely Kala Traders

(Pvt.) Ltd. to recover a sum of Rs. 147,180.000/- in the Commercial High Court of Colombo. On the summons returnable date Defendant-Petitioner Company was not represented, and as such being absent and unrepresented the case had been fixed for ex-parte trial, against the Defendant-Petitioner-Appellant. Plaintiff-Respondent-Respondent obtained an ex-parte judgment after ex-parte trial and this appeal arises from the order of the learned High Court Judge dated 20.01.2010, refusing to set aside the ex-parte judgment, wherein the Defendant-Petitioner-Appellant sought to purge the default before the Commercial High Court. I would wish to refer to the following undisputed facts, prior to examining the above order of 20.01.2010, delivered by the learned High Court Judge of the Commercial High Court.

The record bears the fact that summons was served on the Defendant Company on 23.09.2007, and the summons returnable date was 29.10.2007. Defendant-Petitioner-Appellant does not dispute the service of summons on the Defendant Company. Subsequent to having obtained an ex-parte judgment, decree was served on the Defendant Company on 23.09.2008. An application to vacate the ex-parte decree was made by the Defendant-Petitioner-Appellant on 07.10.2008. Plaintiff-Respondent-Respondent filed objection to same on 15.01.2009. Inquiry into this application as per Section

86(2) of the Civil Procedure Code was held in the High Court on 30.03.2009, and order delivered as stated above on 20.01.2010. At the inquiry to purge default an employee of the Defendant Company one Chandrasiri Perera gave evidence. There was no appearance on behalf of the Defendant Company on the summons returnable date and parties do not dispute that the Managing Director of the Defendant Company was kidnapped and missing since 20.07.2006, and suspected of having been murdered for which the police had conducted investigations. The other Directress was the said Managing Director's daughter Ms. Vanaja Sriskandarajah, and the Defendant Company's position was that she was continuously resident in Australia, and was in Australia at all relevant times to pursue her studies. The evidence led at the inquiry also reveal that the wife of the Managing Director Yogarani Sriskandarajah (not a Director) was too compelled to leave Sri Lanka and had been residing in Australia as there had been threats to her life as well, and even during the short period she was present in the island she was staying in hotels in Sri Lanka, being reluctant to disclose her proper whereabouts.

The only witness who gave evidence at the above inquiry was the above named Chandrasiri Perera who was attached to the Company since 1996. It was his evidence that he held the post of an Executive Officer in the company

and that there were only two Directors, in the said company. One was the Managing Director who went missing since the year 2006 and the other was the daughter of the Managing Director Vanaja Sriskandarajah who had never participated in the affairs of the company. The evidence of this witness was that the daughter was in Australia from that time onwards and resident in that country for purposes of her studies. (The period referred to above according to evidence was the 1996 period-folio 587) A question posed may be to get further clarification, the witness states from the time he joined the company (1996) Vanaja Sriskandarajah would have been in Sri Lanka for two years only, but thereafter left Sri Lanka.

It was also the evidence of the above witness that since the Managing Director, Sriskandarajah went missing, the company was in a state of collapse and no proper person to take decisions on behalf of the company. It is stated that other subsidiary companies also faced the same fate. There is some reference in evidence to another company called 'Franklin Development Company' where the son of the Managing Director of the Defendant Company was involved but they were separate companies from each other, but had one office for all the other companies. It is further stated that the wife of the above Sriskandarajah was in the island around the year 2008 but she had been staying in

a hotel but never occupied the residence at Gregory's Road, Colombo 7. She was in Sri Lanka for about 2 ½ months but never visited the Defendant Company, nor was she willing to make her presence felt in Sri Lanka due to death threats. The evidence on this point was to impress court that the wife's movements within the country was very much restricted even during the short period of 2 ½ months mentioned above.

I find an important item of evidence that had transpired from the only witness, as to who gave instructions to take steps to file an application to purge the default. Evidence on this point, as testified by witness was that the wife Yogarani Sriskandarajah had been given a Power of Attorney by her daughter Vanaja Sriskandarajah but no document produced, and one Rohana Kumara had been appointed as a Director to take necessary steps in the process of purging default. However it is in evidence that subsequently a new board had been appointed to conduct the affairs of the company.

The above witness testified that in 2008, Yogarani Sriskandarajah the wife of the former Managing Director was present in the Island and he had told her about the case in question. He also states in evidence, having consulted may be the lawyers, he realized that nothing could be done to cure the defect until the receipt of the 'Decree' and he admits that the Decree was served and was signed

and accepted by him on behalf of the company. The position of the Defendant Company as testified by the witness in gist was that:

(1) During the period summons were served on the company, no proper steps could have been taken to represent the company in court, since there were no Directors available to take responsibility, and initiate action.

(2) According to form No. 48 issued by the Registrar of Companies which had been marked and produced in court as 'P1' details of the two Directors are provided and same being the only two persons mentioned above.

(3) Subsequent to serving the Decree, a new Board of Directors appointed, and as such steps were taken to purge default.

(4) Defendant Company could not take proper legal steps on the summons returnable date due to reasons beyond its control and not due to any negligence on the part of the organization.

At this point let me also consider the position of the opposing party who placed material before the learned High Court Judge who more or less relied upon the version of the Plaintiff-Respondent-Respondent in refusing to vacate the ex-parte order. The following points emerged in cross-examination of the above witness.

(a) As at today witness is serving as a Manager of the Company.

(b) No instructions taken from Vanaja Sriskandarajah after the year 2006 and no notice given to her, regarding the affairs of the company.

(c) After Nadarajah Sriskandarajah went missing from June 2006 his wife was consulted and he did what she told him.

(d) No connection with Company Secretary, but aware that the Secretary is in Bambalapitiya.

(e) Witness speaks of document P1 and the proxy signed during that time where Yogarani Sriskandarajah (wife) had signed based on a Power of Attorney obtained by the daughter Vanaja Sriskandarajah. Proxy was signed by Company Secretary as well.

(h) There is a connection between the case relevant to Proxy VI and the case pertaining to the inquiry regarding purge default.

(j) During the year 2006-2007 witness was doing office work. Suggestion made to witness that he was not aware of the whereabouts of the Directors and Company Secretary was a lie was denied by witness, and the suggestion that when the Defendant Company need to recover money steps taken to initiate proceeding in court and when others sought to recover money from the Company the Defendant-Petitioner-Appellant avoids such situation was also denied by witness.

(k) Yogarani Sriskandarajah had death threats and as such she had not disclosed her movements and stayed away from Sri Lanka. Even during the period she was in Sri Lanka she spoke from hotels, where she was staying and reluctant to disclose permanent or temporary residence due to threats.

The learned High Court Judge in his order dated 20.10.2010, states the fact of summons being duly served is not in issue. However he emphasizes the fact that in these circumstances internal mismanagement of the company and problematic situation within, would not be a ground to be considered to excuse default, for the reason that persons responsible had not acted with due diligence (ඊට වගකිව යුතු අයට පැන නැගුණු තත්වයක් තුල නිසි අවධානය යොමු කර කටයුතු නොකිරීම තුලින් පැන නගින්නක් බැවිනි). The above position of the learned trial Judge no doubt gives the impression that he has not totally rejected the position of mismanagement urged on behalf of the company by the Defendant-Petitioner-Appellant, but observes that such a situation which cannot condone default arose as a result of those responsible acting without due diligence.

The order of the learned High Court Judge also stress the fact that although the fact of mismanagement and the breakdown of the affairs of the company was suggested, cross-examination of the only witness reveal that as regards other cases during the relevant period the Defendant-Petitioner-Appellant Company had taken necessary steps, to defend or prosecute and appear in courts, in those cases. Further the learned High Court Judge doubts whether the evidence led to demonstrate that a person named as 'Rohana

Kumara' was appointed as Director to take necessary steps to purge default, was in fact done with due authority. No Power of Attorney or other written authority was produced in court, to prove above.

In this regard the High Court Judge also observes that difficulties undergone or faced by the other Directress resident in Australia and her mother who had death threats, are factual matters known to those two persons only, who had chosen not to give evidence in court. Order of the learned High Court Judge refer to the fact that evidence by the witness on the question of difficulty of getting the Directors and Secretary of the Company involved in the case in hand to defend the action is doubtful. The Judge in this regard draw a comparison and states that if the other cases were defended or prosecuted at the relevant period, there is no reason to excuse the default of the case in hand and it is nothing but negligence or willful negligence on the part of the Defendant-Petitioner Appellant.

Chapter XII of the Civil Procedure Code deals with consequences and cure (when permissible) of default in pleading or appearing. The relevant sections of the code dealing with the case in hand would be Section 86(2) of the Code. It reads thus:

> 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.

The above section enables the Defendant in an action to excuse his default and obtain an order to set aside the judgment entered in default in the manner provided by the above section. The above section requires the Defendant to satisfy court that the Defendant had reasonable grounds for such default. To state very briefly is that, the Defendant party need to satisfy court which would mean, to meet the expectations or desires, to be accepted by as adequate in the circumstances. What should or would be adequate needs to be only reasonable grounds. It is well known according to case law that inquires on application to set aside an ex-parte decree is not regulated by any specific provision of the Civil Procedure Code but such inquiries must be conducted consistent with rules of Natural Justice and the requirement of fairness. Section 839 of the Code applies. De Fonseka Vs. Dharmawardena (1994) 3 SLR 49. What is decided by court is

essentially a question of fact on the part of the Defendant whether there are reasonable grounds. Wimalawathie Vs. Thotamuna 1998 (2) SLR Vol. 1 at pg. 1.

At this point of my judgment I would also prefer to look at the other provisions relating to default which concerns the Plaintiff in an action. Such provisions are contained in Section 87(3) of the Code, the only difference in the two sections are that Section 86(2) enables to purge default only on service of decree and that too within 14 days. But Section 87(3) requires the application to restore be made within a reasonable time. (There is no rigid deadline for the Plaintiff to apply but for the Defendant to purge default a time limit is specified). However both these sections has set the standard of proof required by law to be only to satisfy court of reasonable grounds for default. Legislature has taken much care to see the ends of justice and to introduce the word 'reasonable', to excuse default.

No doubt it is a liberal approach which enables the defaulter to cure or rectify a defect on his part and get into the correct track and face an interpartes trial. However it should be permitted subject to terms in order to compensate the opposing party for whatever inconvenience caused to such party.

The entirety of the order of the learned High Court Judge pertains to the factual position and an analysis of evidence and his views of the material that

transpired at the inquiry. There is absolutely no reference made in the said order to the relevant provisions of the Civil Procedure Code viz. Section 86(2) of the Code. It is incumbent upon the trial Judge to have analysed in a case of this nature, the evidence led in the case along with the provisions of the statute i.e the important ingredients of Section 86(2), being satisfied or not of the required reasonable grounds, as per the relevant section. A mere statement in the order expressing the view (last para of order) that the above facts would not be sufficient to set aside the ex-parte judgment would not suffice especially where the intention of the legislature had been made very clear in the relevant section of the Code.

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. In a family business though it was a limited liability company the main person or the live-wire of the business went missing. It is no ordinary situation but an extreme, extraordinary situation for the family, that resulted in mismanagement of the

affairs of the company, which arose or had a serious impact on the other members of the family as observed above. Much emphasis need to be placed in interpreting Section 86(2) of the Code. Court must use the yardstick of a subjective test rather than having resorted to an objective test in determining what is reasonable.

There is another important matter to be considered. This is an action against a juristic person. Viz. Kala Traders (Pvt.) Ltd. The role of the legal personality also need to be considered and it could never have been dismissed by a stroke of a pen, expressing that mismanagement of the company is no ground of reasonableness. It is axiomatic that Directors are responsible for the management of a company's business and if for instance one scrutinizes Section 184 of the Companies Act No. 7 of 2007, one would observe that it grants the Board with all powers necessary for that purpose. These powers would include the right of representation for and on behalf of the company in litigations involving the company. In addition the articles of association of the company would also regulate the management of the company. As such a company operates through its contractual organ and the most important organ is an effective Board of Directors.

As far back as 1843 the seminal case of Foss Vs. Harbottle (1843) 2 Hare 461 held that only the company through its organs – the Board or general meeting can initiate proceedings for a wrong done to the company. In the same way it is the Board that can act for the company in litigation initiated against it. As such it becomes a question of fact for the learned District Judge or the High Court Judge as the case may be, in default proceedings to ascertain whether there was an Effective Board in the first place. It would be highly irregular to dismiss an application on the basis, that mismanagement of a company would not constitute a reasonable ground, for default.

There had been much emphasis placed by a Plaintiff-Respondent-Respondent that Defendant had appeared in other actions filed by the Defendant or filed against the Defendant marked V1 and V2, and as such the default in the case in hand is nothing but their negligence. In any event V1 relates to an action as far back as year 2006. However I observe that such a finding by the learned High Court Judge is an erroneous conclusion and a misconstruction of the relevant circumstances when a subjective test and a liberal approach is clearly envisaged within the four corners of the relevant Sections, (86(2)). The question of default has to be assessed by a case by case basis. In all the above matters expressed and stated in this judgment, I am strongly of the view that the circumstances which

prevailed at the relevant period although summons had been served on an employee of the company, it would not have been possible to enter an appearance on behalf of the company on the summons returnable day in the absence of an active/effective Board of Directors. Therefore in all the above facts and circumstances I set aside the order of the learned High Court Judge dated 20.01.2010, and vacate the ex-parte judgment, and permit the Defendant to file answer and defend the said action. However considering whatever inconvenience caused to the Plaintiff-Respondent-Respondent, we direct the Defendant-Petitioner-Appellant to make payment in a sum of Rs.100,000/- as costs to the Plaintiff-Respondent-Respondent prior to filing answer in the relevant High Court. Registrar of this court is directed to send a copy of this judgment to the Registrar of the relevant High Court of Colombo.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT