

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

1. Kaluwadewage Piyadasa
2. Kaluwadewage Ariyaratne  
both of Palayangoda,  
Bombuwala.

**PLAINTIFFS**

C.A 442/1998 (F)  
D.C Kalutara 4321/L

Vs.

1. G. D. P. Dharmaratne
2. Janaka Dharmaratne  
both of Palayangoda,  
Bombuwala.

**DEFENDANTS**

**AND NOW**

1. G. D. P. Dharmaratne
2. Janaka Dharmaratne  
both of Palayangoda,  
Bombuwala.

**1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANT-  
APPELLANTS**

Vs.

1. Kaluwadewage Piyadasa
2. Kaluwadewage Ariyaratne  
both of Palayangoda,  
Bombuwala.

**PLAINTIFF-RESPONDENTS**

**BEFORE:** Anil Gooneratne J

**COUNSEL:** S. Gunasekera for the Defendant-Appellants

Nalinda Indatissa with N. Dayananda  
Instructed by D. Punchihewa for the Plaintiff-Respondent

**ARGUED ON:** 10.08.2012

**DECIDED ON;** 07.11.2012

**GOONERATNE J.**

Plaintiff-Respondent filed action claiming a 10 feet wide roadway by long prescriptive possession. Summons were served on the Defendants and proxy had been filed by Proctor Gangaboda. The case had been called in the District Court on 30<sup>th</sup> April and court had given a date 4.6.1997 to file answer. It is the case of the Defendants that the Attorney-at-Law for Defendants, and the Defendants heard the date as 4.7.1998. On 4.6.1977, answer was not filed on that date, and the case had been fixed ex-parte against the Defendant-Appellants for 17.7.1997. Ex-parte trial was held on 17<sup>th</sup> July and judgment entered as prayed for in the plaint. Ex-parte decree served on the Defendants on 22.1.1998. The Appellant filed their petition/affidavits to set aside the ex-parte decree purportedly mentioning the

date of petition as 2.2.1998, but in fact filed on 6.2.1998 as shown by the District Court seal. After inquiry the learned District Judge dismissed the application to purge default on 18.6.1998, on the basis that the application was out of time.

The only matter that has to be decided in this appeal is on the computation of time, under Section 86(2) of the Civil Procedure Code. The trial Judge has taken the view very correctly that the Petitioner before the District Court who are the Defendant-Appellants have filed the petition to purge default after the required 14 days stipulated in Section 86(2) of the Civil Procedure Code. It was the position of the Appellant in this appeal as well as in the original court that in the computation of time under Section 86(2) of the Code, Sundays and Public holidays need to be excluded. The facts placed before this court reveal that the petition/affidavit filed in the District Court to vacate the ex-parte judgment was filed on the 15<sup>th</sup> day. Learned counsel for Appellant inter alia submitted to this court that the order of the learned District Judge is a nullity and that the ex-parte judgment has to be vacated on the basis of nullity for the reason that all owners of the servient-tenement have not been made parties to this case and that there are 6 parties who should be made Defendants. This is the first time in appeal that the Appellant is attempting to maintain the position that all necessary

parties are not added. If this position was taken up in the original court, I agree that the position may have been different. Learned counsel for Appellant has cited authorities to support the position of the Appellant i.e David Vs. Gnanawathie. 2002 (2) SLR 352-366. I have perused the written submission of both parties. Appellant no doubt has cited case law which are sound law. But none of these matters have been urged in the original court. The most fundamental issue in the case in hand is the question of computation of time. As contemplated by the legislature, under Section 86(2) of the Code, computation of time is mandatory and court need to strictly interpret the law.

My views are fortified and attention of this court are drawn to the following case law cited by the learned counsel for Plaintiff-Respondent which include decision of the Court of Appeal and the Supreme Court? The following to be noted.

In Fernando Vs. Ceylon Breweries Ltd. 1998 (3) SLR 67/68 held that:

It is to be observed that the said section 86(2) requires the defendant to make the application to excuse his default “within the 14 days of the service of the decree” which means that the application must be tendered to court inside 14 days and not beyond that specific period.

The expression “within 14 days’ connotes less than that time which is 14 days. The fact that the framers of the Code of Civil Procedure intended that, in calculating the period of 14 days, - Sundays and public holidays ought not be excluded is evident from an

examination of sections 754(4) and 757(1) of the Civil Procedure Code where the identical time limit, that is within a period of 14 days, is stipulated for presenting (to court) of the notice of appeal, and application for leave to appeal respectively. But what is significant is that in the body of the said two sections themselves, i.e 754 (4) and 757 (1) it is stated that in reckoning the 14 days for the purpose of filing the notice of appeal, and the application of for leave to appeal respectively. Sunday and Public holidays and to be excluded or not to be counted.

The framers of the code, by deliberately omitting to say so in 86(2) of the Civil Procedure Code, that is, that 14 days ought to be reckoned exclusive of Public holidays and Sundays must be taken to have clearly intended that the period of 14 days within which the application has to be made, in terms of 86 (2) of the Civil Procedure Code, has to be reckoned inclusive of all days which fall within that period not excepting Public holidays and Sundays.

It is to be noted that in appeal to the Supreme Court of the aforesaid case, The Ceylon Brewery Limited Vs. Jax Fernando, Proprietor, Maradana Wine Stores 2001 1 SLR pg 270, held that; Section 86(2) of the Civil Procedure Code confers jurisdiction on the District Court to set aside a default decree. Hence the period of 14 days provided by that Section to make an application to set aside a default decree is mandatory.

Per Fernando, J. further stated that “it is settled law that provisions which go to jurisdiction must be strictly complied with.”

Wijeratne Vs. Abeyratne Reported in page 193 of Bar Association Law Journal Reports (2008) Vol. XIV held that; Section 86 (2) of the Civil Procedure Code makes it abundantly clear that the defendant to file an application with notice to the plaintiff within 14 days of the service of the decree entered against him for default and thereafter he should satisfy Court that he had reasonable grounds for such default. On being satisfied of the above then only Court shall set aside the judgment and decree already entered and permit the defendant to proceed from the stage of default.

In all the above circumstances I am not inclined to disturb the order of the learned District Judge. The provisions contained in Section 86(2) of the Civil Procedure Code have to be interpreted strictly, since it contain mandatory provisions. Trial Judge's order affirmed. Appeal dismissed without costs.

Dismissed.

JUDGE OF THE COURT OF APPEAL