

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

Hatton National Bank Limited,
No. 481, T.B. Jayah Mawatha,
Colombo 10.
Branch Office at No. 196, Galle Road,
Wellawatta, Colombo 6.

C.A. No. 395 / 2000 F
D.C. Mt. Lavinia No. 227/94/M

Plaintiff

Vs.

1. Dillip Palitha Jayadeva Munasinghe,
2. Subhashini Munasinghe, Both of No.6
Carrying on business on partnership
under the name, style and firm of
Jayasiri Trading Company at No 105,
New Bullers Road, Colombo 4.
3. Wedage Jayatissa,
No. 6, 32nd Lane, Colombo 6.
4. Hewa kondilage Jayasena,
No. 203, Galle Road,
Wellawatta, Colombo 6.

Defendants

AND

1. Subhashini Munasinghe, Both of No.6
Carrying on business on partnership
under the name, style and firm of
Jayasiri Trading Company at No 105,
New Bullers Road, Colombo 4.
2. Wedage Jayatissa,
No. 6, 32nd Lane, Colombo 6.

3. Hewa kondilage Jayasena,
No. 203, Galle Road,
Wellawatta, Colombo 6.

2nd 3rd and 4th Defendant Petitioners

Vs.

Hatton National Bank Limited,
No. 481, T.B. Jayah Mawatha,
Colombo 10.
Branch Office at No. 196, Galle Road,
Wellawatta, Colombo 6.

Plaintiff Respondent

Dillip Palitha Jayadeva Munasinghe
No. 6, 32nd Lane, Colombo 6.

1st Defendant Respondent

And Now Between

1. Subhashini Munasinghe, Both of No.6
Carrying on business on partnership
under the name, style and firm of
Jayasiri Trading Company at No 105,
New Bullers Road, Colombo 4.
2. Wedage Jayatissa,
No. 6, 32nd Lane, Colombo 6.
3. Hewa kondilage Jayasena,
No. 203, Galle Road,
Wellawatta, Colombo 6.

2nd 3rd and 4th Defendant Petitioner Appellants

Vs.

Hatton National Bank Limited,
No. 481, T.B. Jayah Mawatha,
Colombo 10.
Branch Office at No. 196, Galle Road,
Wellawatta, Colombo 6.

Plaintiff Respondent Respondents

Dillip Palitha Jayadeva Munasinghe
No 6, 32nd Lane, Colombo.

1st Defendant Respondent-Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : Kamran Aziz for the 2nd 3rd and 4th Defendant
Petitioner Appellants.

: Priyantha Alagiyawanna for the Plaintiff
Respondent-Respondent

ARGUED ON : 01.08.2013

DECIDED ON : 29.10.2013

UPALY ABEYRATHNE, J.

The present appeal has been preferred by the 2nd 3rd and 4th Defendant
Petitioner-Appellants (hereinafter referred to as the Appellants) from an order
made by the learned District Judge of Mt. Lavinia dated 30.05.2000. The facts
relevant to this appeal are briefly as follows;

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) instituted the said action against the Appellants seeking to recover sums of money as prayed for in the plaint. The 2nd Defendant Appellant has filed an answer denying the averments contained in the plaint and praying for a dismissal of the Respondent's action. Since the 3rd and 4th Defendant Appellants were absent and unrepresented on 06.05.1994 the case against the said Appellants had been fixed for an Ex Parte trial and an Ex Parte decree had been entered against them. Thereafter the 3rd and 4th Appellants have made an application under Section 86(2) of the Civil Procedure Code (CPC) seeking to vacate the said Ex Parte decree. Thereafter the case against the 2nd Appellant has been fixed for trial and the said Application of the 3rd and 4th Appellants under Section 86(2) too has been fixed for inquiry.

On 08.10.1997 when the said matters were taken up for trial and inquiry respectively the 2nd 3rd and 4th Appellants were absent and unrepresented. Thereafter upon an application made by the Plaintiff Respondent the case against the 2nd Appellant had been fixed for an Ex Parte trial and the said Application of the 3rd and 4th Appellants had been dismissed by the learned District Judge.

Thereafter the 2nd 3rd and 4th Appellants under the heading of "An Application under Section 839 and 862 of the Civil Procedure Code" has made an application seeking to vacate the order made on 08.10.1997 and to fix the trial against the 2nd Appellant and to fix the inquiry under Section 86(2) against the 3rd and 4th Appellants. After an inquiry, the learned District Judge has dismissed the said application by the said order dated 30.05.2000.

Both parties conceded that 'Section 862' contained in the heading of the said Application should be read as 'Section 86(2) in respect of the 2nd Appellant's application is concerned. The learned counsel for the Respondent submitted that the said application of the 2nd Appellant is misconceived in law since it has been joined with an application under Section 839 of the CPC. He further submitted that the 3rd and 4th Appellants cannot invoke the jurisdiction of the District Court under Section 839 of the CPC when an application under Section 86(2) is dismissed by the court and the proper remedy is an appeal under Section 88(2) of the CPC.

Section 88(2) of the CPC stipulates that "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." Hence it is crystal clear that an order made by a District Court in dismissing an application made under Section 86(2) of the CPC is a final order and direct appeal lies against such an order. Therefore the 3rd and 4th Appellants cannot invoke the jurisdiction of the District Court under Section 839 of the CPC in order to vacate the order of dismissal of their application under Section 86(2) of the CPC.

In the case of Wijesinghe vs Tharmarathnam Sriskantha's Law Reports 47 Jameel J, having observed the cases of C.A.L.A. 34/80 (CA Minutes dated 24.03.1983) DC Matara 2073, CA 1412/81 (CA Minutes dated 27.07.1982) DC Trincomalee 960, SC 17/83 SC 72/82 CA Appl. 568/82 DC Mt. Lavinia, held that "It is an application referable to Section 86(2) of the Civil Procedure Code and this refusal is made appealable by Section 88(2) of the Code. It is now well settled law that an appeal is the proper remedy and not an application for leave to appeal."

In the case of Peter Singho vs. Wydaman [1983] 2 SLR 238 (SC) Abdul Cader J, observed that “An order made under Section 86(2) is a final order which entitles the defendant to lodge an appeal without leave of the Court of Appeal.

In regard to the 2nd Appellant’s application is concerned since it has been joined with an application under Section 839 of the CPC it seems that the application of the 2nd Appellant is misconceived in law. The CPC has regulated the procedure with regard to the application to purge the default. Section 86 of the CPC read thus;

86 (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) At any time prior to the entering of judgment against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant and permit him 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 fit.

(3) Every application under this section shall be made by petition supported by affidavit.

Hence the 2nd Appellant must prefer his application to purge the default according to the said procedure laid down in the Code. Such an application should not be joined with an application under Section 839 of the Code. I am of the

view that inherent power of Court could be invoked only where provisions have not been made. But, where provisions have been made and are provided in section 86 of the Civil Procedure Code, inherent power of the District Court cannot be invoked. It is important to note that inherent power cannot be invoked to disregard express provisions contained in the CPC. Hence, as the law now stands such a course is not permissible in view of the procedure for Application to purge the default is laid down in the CPC.

In the said circumstances I see no reason to interfere with the order of the learned District Judge dated 30.05.2000. Therefore I dismiss the appeal of the Appellants with costs.

Appeal dismissed.

Judge of the Court of Appeal