IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

A.L.A.Ahamed Lebbe
Ovitigama,
Pugoda.
(Deceased Defendant)

1A. Ahamed Lebbe Abuhaneefa
Substituted 1A Defendant-Petitioner-Appellant
And others

C.A.No.1194/2000(F)
D.C.GAMPAHA CASE NO.24537/L

Vs.

Mohamed Ali Abdul Wadood
Ovitigama,
Pugoda.
(Deceased Plaintiff)

1A. Mohammed Ashraff
Mohammed Aswer
Substituted 1A Plaintiff-Respondent-Respondent
And others

2B. Ahamed Lebbe Siththi Thamna
Substituted 2B Defendant-Respondent-Respondent
And others

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Ikram Mohamed P.C.with S.Weeraratne
for the Substituted 1A Defendant-Petitioner-Appellant

Rasika Dissanayake with Chandrasiri Wanigapura
for the Substituted-Plaintiff-Respondent-Respondents

ARGUED ON	:	26.03.2014
WRITTEN	:	29th April 2014 by Substituted 1A & 2A Plaintiff-Respondent-Respondents
SUBMISSIONS FILED ON	:	29th May 2014 by Substituted 1A -Defendant-Petitioner-Appellant
DECIDED ON	:	**11.06.2014**

CHITRASIRI, J.

This is an appeal preferred by Substituted 1A Defendant-Petitioner-Appellant seeking to set aside the order dated 21.11.2000 and the judgment dated 04.06.1992 of the learned District Judge of Gampaha. Even though the appellant, in the petition of appeal has stated that it is the order dated 27.11.2000 of the learned District Judge that he seeks to set aside, the correct date should have been 21.11.2000. No order had been made on 27.11.200. He has mentioned the date correctly, in the notice of appeal. Hence, it may have been a typographical error to mention the date of the order as 27.11.2000 in the petition of appeal. Therefore, it is necessary to note that the appellant by filing this appeal, among other things, is challenging the order dated 21.11.2000.

In the petition of appeal, the appellant also has sought to have the judgment dated 04.06.1992 vacated and to have the action of the plaintiff dismissed. However, setting aside the judgment dated 04.06.1992 and the application to have the action dismissed, as sought by the appellant would

depend on the decision to be arrived at, by this Court in respect of the order dated 21.11.2000. By which order, the learned District Judge dismissed the petition dated 17.9.1982 filed by the appellant in order to have the *ex parte* decree dated 04.06.1992, vacated. Learned District Judge in his order dated 21.11.2000, while refusing to accept the reasons given by the appellant for the absence of the defendants on the date fixed for further trial namely 4.6.1998, decided that the defendant-petitioners have failed to establish "reasonable grounds" for the failure to appear in the District Court on 04.06.1992.

The way in which the applications are to be presented to purge the default and the manner, such an application should be considered is stipulated in Section 86(2) of the Civil Procedure Code. The said Section reads 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."*

Counsel for the respondents submitted that the substituted 1A defendant-petitioner-appellant has failed to file the application to have the judgment vacated within the stipulated period of time, as mentioned in the aforesaid Section 86(2) of the Civil Procedure Code. The law requires to have such an application made within 14 days of the service of the decree entered against the

person who makes such an application. Admittedly, the impugned order had been made on 21.11.2000. The document **මැ1** which is the report of the process server shows that the decree was served on the defendants on 31.8.1998. The said document had been admitted to in evidence without any objection being taken. Therefore, it is clear that acceptable evidence is forthcoming to establish the date on which the decree had been served.

Learned President's Counsel when he made oral submissions before this Court submitted that the petitioner-appellant did not receive the decree entered in this case though he has filed an application to have it vacated. The appellant in his evidence also has stated that he was not served with such a decree. Then the question arises as to the person who is coming out with the truth in connection with serving of the decree; whether he is the appellant or the process server who filed the document marked **මැ1**.

At this stage, it is necessary to note that the appellant has failed to mention the fact, that he did not receive the decree in his petition filed, to have the decree vacated. If the evidence of the appellant as to the non-serving of the decree is correct, he could have mentioned so, in the application he made under Section 86(2) of the Civil Procedure Code in order to have the *ex parte* decree vacated. He is completely silent on that point. Why was he so silent as to the non-service of the decree if it is true. Obviously, if he did mention the date of service of the decree in his application, then it would have been rejected at the

very outset. It may have been the reason for the 1A defendant-petitioner-appellant not to disclose the date of service of the decree.

On the other hand, the document marked **මැ1** had gone in evidence without any objection been taken. (vide proceedings at page 108 in the appeal brief) Therefore, this Court cannot reject the evidence contained in the said report (**මැ1**) which is in the form of an affidavit, affirmed to by the process server. After all, he is an officer of Court. Moreover, the appellant has not taken steps to contradict the contents of the report of the process server at least by calling him to the witness box.

In the circumstances, I am not inclined to accept the mere denial by the appellant as to the service of the decree on the substituted defendants. Hence, I accept the evidence contained in the document marked **මැ1** with regard to the date of service of the decree. Accordingly, it is my opinion that the decree entered in this case had been served on the appellant on 31.8.1998.

As mentioned before, in terms of Section 86(2) of the Civil Procedure Code, an application to purge the default shall be made within 14 days of the service of the decree. When the date of service of the decree is 31.8.1998, the application under Section 86(2) of the Civil Procedure Code should have been made within 14 days therefrom. Admittedly, the application to purge the default in this case had been made on 18.09.1998. It is a date that falls beyond the period stipulated in Section 86(2) of the Civil Procedure Code. In the circumstances, it is clear

that the appellant has filed the application to purge the default outside the period allowed in law.

Then the question arises whether it is mandatory or not, to follow the time frame stipulated in Section 86(2) of the Civil Procedure Code when an application under the said Section 86(2) is made in order to have an *ex parte* decree vacated. In the case of **Ceylon Brewery Limited vs. Jax Fernando [200 (1) S.L.R. 270]** it was 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."*

In that decision, His Lordship Justice Mark Fernando J stated as follows:

> *"It is settled law that provisions which go to jurisdiction must be strictly complied with".*

Furthermore, in the case of **Fernando v. Sybil Fernando and another, [1997 (3) S.L.R. at page 1]** it was held thus by Dr.Aamarasinghe J.:

> *"There is the substantive law and there is the procedural law. Procedural law is not secondary. The two branches are complementary. The maxim ubi ius, ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. Halsbury (ibid.) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which*

puts life into substantive law, gives its remedy and effectiveness and brings it into being".

In the case of **Wijesekera v. Wijesekera and others [2005 (1) S.L.R. at page 58]** it was held thus"

"It is to the best interest of the administration of justice that judges should not ignore or deviate from the procedural law and decide matters on equity and justice".

In the circumstances, it is clear that it had always been held that it is mandatory to adhere to the fourteen day period referred to in Section 86(2) in the Civil Procedure Code when filing an appeal. The appellate courts do not have discretion to have it waived considering the merits of each case. Accordingly, the learned District Judge should have dismissed this application made under Section 86(2) of the Civil Procedure Code on that ground even *ex mero motu.*

However, the learned President's Counsel in his oral submissions argued that the issue as to the delay in filing the application to purge the default cannot be raised for the first time at this appeal stage since it was not taken up in the Court below. Hence, he was of the view that the respondents are now estopped from taking up such a position since they have waived it off.

It is trite law that a pure questions of law can always be taken up in appeal. It had been clearly held so, in the decisions referred to herein below.

- **Talagala Vs. Gangodawila Co-operative Store Society; [48 N. L. R. 472]**
- **Jayawickrema Vs. David Silva; [76 N.L.R. at 427]**
- **Dassanayake Vs. Eastern Produce and Estates Co. Ltd. [1986 (1) S.L.R. at 258]**

The issue before Court is basically the period, within which an application to have the decree vacated should be presented in terms of Section 86(2) of the Civil Procedure Code. It has nothing to do with the facts of the case. The above authorities show that such a question of law could always be taken up in appeal though it was not considered in the lower court. Therefore, I am not inclined to agree with the contention of the learned President's Counsel on that point.

In the circumstances, it is clear that the appellant has failed to comply with the mandatory requirement mentioned in Section 86(2) of the Civil Procedure Code when he filed the application to have the *ex parte* decree vacated. Hence, the said application of the petitioner-appellant is rejected and accordingly this appeal also is rejected.

Learned President's Counsel for the appellant in his written submissions has extensively adverted to the issue on the question of "reasonable grounds" that should have been shown by the petitioner who made the application under Section 86(2) to have the *ex parte* decree vacated. Having looked at the evidence of the appellant and of his son, I too believe that they have come up with

sufficient "reasonable grounds" to purge the default as decided in **Rev.Sumanatissa v. Harry [2009 (1) S.L.R. at page 31]** and **Chandrawathie v. Dharmaratne. [2002 (1) S.L.R. at page 43]** I also agree that the Courts should extend a liberal attitude and give flexible interpretations to the words "reasonable grounds" found in Section 86(2) in the Civil Procedure Code.

Unfortunately, this Court is not in a position to look at those circumstances which prevented the substituted defendants attending Court on 04.06.1998 because the petitioner-appellant has not come to Court within the stipulated period of time mentioned in Section 86)2) of the Civil Procedure Code. Even the merits of the main action filed by the deceased-plaintiff cannot be examined for the same reason though the learned President's Counsel has adverted to such facts too, in the submissions he has filed on behalf of the appellant.

For the aforesaid reasons, this appeal is dismissed. Considering the circumstances of the case, I make no order as to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL