

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

Nanayakarawasam Godakanda
Arachchige Seelawathi,
Hapugala,
Batalewatte,
Wakwella.

1st Defendant-Appellant

Nalindra Wickramasinghe
Madanayake,
Hapugala,
Batalewatte,
Wakwella.

Substituted 3rd Defendant-
Appellant

CASE NO: CA/1138/1998/F

DC GALLE CASE NO: 12543/L

Vs.

Meetiyawala Gamage
Gnanawansa,
No. 282,
Wakwella Road,
Galle.

Substituted Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.
Counsel: T.M.S. Nanayakkara for the Defendant-
Appellants.
Anura Gonarathne for the Plaintiff-
Respondent.
Decided on: 08.05.2019

Samayawardhena, J.

The plaintiff filed this action against the three defendants seeking declaration of title to the land described in the schedule to the plaint, ejectment of the defendants therefrom, and damages. On the summons returnable date, all three defendants filed a joint proxy. However the case was fixed for *ex parte* trial against the defendants on 15.11.1996 as the answer was not tendered notwithstanding it was the final day. *Ex parte* trial has been held on 31.01.1997, and the Judgment has been entered for the plaintiff. Upon service of the *ex parte* decree, the 1st and 3rd defendants have made an application under section 86(2) of the Civil Procedure Code to get the *ex parte* Judgment and the Decree vacated on the basis that the 2nd defendant who is their daughter is a person of unsound mind and she went missing about five days before the case was to be called for the answer and all of them were desperately looking for her during that period and found her two days after the case was to be called and therefore they could not come to Court on 15.11.1996. At the inquiry into this application, the son of the 1st and 3rd defendants and the brother of the 2nd defendant, who

is a teacher by profession, has given evidence. At this inquiry the fact that the 2nd defendant was a person of unsound mind has been proved. The diagnosis card of the 2nd defendant has been marked as Y, and three paper articles where the 2nd defendant's unusual behavior in Court was reported, have been marked as X. On one day this case was to be called, the 2nd defendant has sat on the Judge's Chair in open Court before the Judge came to the Bench and acted as if she was the Judge. Thereafter she has been sent to the Mental Hospital for treatment. According to 1V1, it is the brother who gave evidence at the inquiry who has taken charge of the 2nd defendant sister after the recovery by order of the Court. In that backdrop, the evidence of this witness that the 2nd defendant's mental condition became worse on and around the date the case was to be called finally for the answer, and everybody including the 1st and 3rd defendant parents were not in a proper frame of mind to come to Court or to give instructions to their lawyer is, in my view, not unreasonable. The witness has asked the Court to appoint a guardian to proceed with the case against the 2nd defendant.

The learned Additional District Judge has refused to vacate the *ex parte* Judgment on two grounds.

One is that, when the joint proxy was filed in respect of all three defendants, the mental derangement of the 2nd defendant was not disclosed. This cannot, in my view, be a good ground to refuse the application to purge default. If the 2nd defendant was of unsound mind at the time of the institution of the action, or at any time thereafter, the plaintiff and the Court could not have

proceeded with the action against the 2nd defendant unless a guardian is appointed to act on her behalf. The Judgment entered against her is a nullity.

The second ground is that the defendants have not acted diligently in preparing the answer in that they cannot meet the lawyer in the morning of the final date on which the answer was to be tendered and expect the lawyer to file it on that day itself. In this case the evidence led was that the 2nd defendant went missing about five days before the final date for the answer and therefore the learned Judge cannot say that the 1st and 3rd defendants waited until the final date.

On the other hand, there is no necessity for the defendants to be physically present before the Court on the date on which the answer to be filed. That is the duty of the registered Attorney. It is not recorded in the journal entry of 15.11.1996 whether or not the registered Attorney appeared for the defendants and made any application. The learned Judge should have recorded that fact as it is directly relevant to the matter in issue. In this case, the registered Attorney for the defendants is the same throughout the case up to now.

I must also add that the plaintiff moved for a commission on the summons returnable date itself and amended the plaint about three years after filing the original plaint. The defendants did not object to it. Then the Court has given a date to file the answer on the amended plaint. On the next date answer was not filed, and the Court gave a final date for the answer. That is how 15.11.1996 became the final date for the answer. It is also

appropriate to note that the defendants filed the proxy on the summons returnable date itself without making a fuss. They never wanted to protract the case by making frivolous objections to the plan prepared on the commission, amended plaint etc. This conduct of the defendants is relevant.

In an inquiry into vacation of an *ex parte* Judgment, the burden of proof and the standard of proof expected from the defaulting defendant are not of high degree. This is explicable by plain reading of section 86(2) of the Civil Procedure Code.

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.

Then it is clear that what the defaulting defendant in an inquiry under section 86(2) of the Civil Procedure Code shall do is to satisfy the Court that he had reasonable grounds for such default. From the language used in that section, it is clear that the legislature does not expect a very high standard of proof from the defaulting defendant in order for the Court to purge default. The same language is used in section 87 also when the defaulter is the plaintiff. Therefore the Court shall adopt not rigid but liberal approach in such inquiries. The test is subjective as opposed to objective. In this process, the Court

can also take into account the past conduct of the defaulting party to come to a right conclusion. (Vide *Sanicoch Group of Companies by its Attorney Denham Oswald Dawson v. Kala Traders (Pvt) Ltd* [2016] BLR 44 (SC) in respect of section 86(2) and *Rev. Sumanatissa v. Harry* [2009] 1 Sri LR 31 (CA) regarding section 87.)

There is another aspect in section 86(2), which relates to the procedure. Section 86(2) does not specifically dictate the mode of making the application. It merely says “the defendant with notice to the plaintiff makes application”. It does not say that the application shall be made by way of a petition supported by an affidavit with documents if any. In practice the application is made by way of petition supported by an affidavit. However, the application can be made only by way of an affidavit as the inquiry can be concluded even without oral testimony. (vide *Inaya v. Lanka Orix Leasing Company Ltd* [1999] 3 Sri LR 197)

Similarly, no specific procedure is laid down in the Civil Procedure how such an inquiry be conducted. In *De Fonseka v. Dharmawardena* [1994] 3 Sri LR 49 it was held that “An inquiry on an application to set aside an ex parte decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness.” (vide also *Wimalawthie v. Thotamuna* [1998] 3 Sri LR 1)

The learned Additional District Judge has not considered the facts of this case in the light of the above-mentioned principles.

Had he done so, I am quite certain that he would have considered the application of the defaulting party favourably.

I set aside the order of the learned Additional District Judge dated 13.03.1998.

A guardian can be appointed for the 2nd defendant and a date can be given for all three defendants to file the answer before the case is re-fixed for trial.

Appeal allowed. No costs.

Judge of the Court of Appeal