

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

Srimathie Mallika Edirisuriya,
Mallatthawela,
Kabillawela South,
Bandarawela.
Plaintiff-Respondent

CASE NO: CA/307/1996/F

DC MONARAGALA CASE NO: 1494/L

Vs.

Ananda Vipulasena Edirisuriya,
Edirigiri, Kebellawala South,
Bandarawela.
And Others
Substituted Plaintiff-Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandarathne, P.C., for the
Defendant-Appellant.
Buddhika Gamage for the Substituted
Plaintiff-Respondents.

Argued on: 27.09.2019

Decided on: 21.10.2019

Mahinda Samayawardhena, J.

The plaintiff father instituted these proceedings against the defendant daughter in the District Court of Monaragala seeking to eject her from the premises in suit and for damages. On the summons returnable day, the defendant came to Court, and the proxy was filed. The Court granted a date, 26.05.1993, for the answer. On 26.05.1993 also the defendant came to Court, and the registered Attorney for the defendant moved for another date to file the answer. This was vehemently objected to by the counsel for the plaintiff who appeared on the instructions of the registered Attorney of the plaintiff who was the Acting District Judge on that day.

As seen from the proceedings on 26.05.1993, the objection was purely technical, which is, according to section 80 of the Civil Procedure Code after the amendment by Act No. 79 of 1988, the Court had no jurisdiction or discretion to grant a further date to file the answer, and if the answer is not filed on the first date fixed for the filing of the same, the Court shall mandatorily fix the case for *ex parte* trial against the defendant.

The instructing Attorney for the defendant had disagreed with that interpretation given to section 80 and stated that the discretion given to the District Judge to grant extension of time to file the answer had not been taken away by the said Amendment. Although that was the first date and not the final date for the answer, the instructing Attorney has given two reasons for the failure to file the answer on that date. One is the fact that he contested as a candidate at the recently concluded Provincial Council elections thereby not being able to take proper instructions from the client; and the other is closing

down the Land Registry for the election thereby not being able to obtain copies of Deeds relevant to this land in order to prepare the answer.

As seen from the proceedings, the counsel for the plaintiff has not denied or objected to those two reasons as false, but reiterated that the Court has no discretion to grant a further date for the answer after the aforementioned Amendment to the Civil Procedure Code.

This objection raised by the counsel for the plaintiff has been upheld by the District Judge by order dated 28.06.1993 and fixed the case for *ex parte* trial against the defendant.

In that order the District Judge has further stated that, there was however no prohibition in granting a date provided the plaintiff did not object to it. The reasoning of the District Judge, on the one hand, there is no discretion to grant a date, and on the other hand, a date can be granted if there is no objection by the plaintiff, is contradictory.

Thereafter, on a subsequent date, scanty evidence of the plaintiff had been led and *ex parte* judgment had been delivered.

Thereupon the defendant has made an application under section 86(2) of the Civil Procedure Code to vacate the *ex parte* judgment, and at the inquiry the registered Attorney for the defendant has given evidence to reiterate what he told in Court when he asked for another date to file the answer. This application has also been refused by the District Judge by order dated 07.02.1996 stating *inter alia* that the failure to file the answer is attributable to the negligence of the registered

Attorney of the defendant. It is against this last order, the defendant has preferred this appeal.

First, I must make this point clear. A judge makes several incidental orders in the course of proceedings before the delivery of the final Judgment. It is sometimes practically impossible to file leave to appeal applications against each and every order. It is better, if the incidental order goes to the root of the case to file a leave to appeal application as that will decide the whole matter at once without further ado. The classic example is the incidental order made by the District Judge in this case dated 28.06.1993 whereby the case was fixed for *ex parte* trial on the basis that the Court has no jurisdiction or discretion to grant another date to file the answer. But that does not mean that the party affected cannot canvass the said incidental order in the final appeal.

In *Mudiyanse v. Punchi Banda Ranaweera*¹ it was held by majority decision of the Supreme Court that:

A party aggrieved by an order made in the course of the action, though such order goes to the root of the case, has two courses of action open to him, namely (a) to file an interlocutory appeal or (b) to stay his hand and file his appeal at the end of the case even on the very same ground only on which he could have filed his interlocutory appeal. If he adopts the latter course, he cannot be shut out on the ground that his appeal being against the incidental order is out of time.

¹ (1975) 77 NLR 501

The said statement of law has been expressed in several other cases including *Abubakker Lebbe v. Ismail Lebbe*², *Perera v. Battaglia*³, *Cornel & Company Ltd v. Mitsui and Company Ltd*⁴, *Dominic v. Jeevan Kumaratunga*⁵.

This appeal depends on the interpretation given to section 80 of the Civil Procedure Code after the amendment by Act No. 79 of 1988 (which has now been repealed and replaced by a new section by Act No. 8 of 2017). Section 80 as it stood at that time reads as follows:

On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, the court shall appoint a date for the trial of the action, and shall give notice thereof, in writing by registered post to all parties who have furnished a registered address and tendered the cost of service of such notice, as provided by subsection (2) of section 55.

It is interesting to note that, section 80 only states that “on the date fixed for filing of the answer” of the defendant, whether the same is filed or not, the court shall appoint a date for the trial of the action. It is noteworthy that, it does not state “on the date **first** fixed for filing of the answer”.

This difference can be appreciated by making a comparison of section 80 of the Civil Procedure Code with section 93 of the Civil Procedure Code (after the amendment of Act No. 9 of 1991)

² (1908) 11 NLR 309

³ (1956) 58 NLR 447

⁴ [2000] 1 Sri LR 57

⁵ [2011] 2 BLR 503 at 509

where in the section 93 which deals with the subject of amendment of pleadings the words “on or after the day **first** fixed for trial” has been used instead of “on or after the day fixed for trial”. Even by amendment Act No. 9 of 1991, section 80 had not been amended by interpolating the word “first” before the word “fixed” to give the meaning to section 80, which the District Judge wanted to give.

Further, when section 80 was so amended by Act No. 79 of 1988, section 84 stood as follows:

If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the sub-sequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix.

If the intention of the legislature when amending section 80 by Act No. 79 of 1988 was to remove the discretion of Court to grant any more dates other than the first date given to file the answer, the legislature would not have left section 84 in that manner as section 84 speaks of “the day fixed for the filing of the answer” and “the day fixed for the subsequent filing of the answer”.

Then it is abundantly clear that the interpretation given to section 80 by the District Judge is erroneous. I must emphasize that the District Judge fixed the case for *ex parte* trial only on that ground and not on any other ground. If not for that misinterpretation of the section, I have no doubt that the District Judge would have given another date to file the answer following the normal practice of the Court.

The District Judge who wrote the last order refusing to vacate the *ex parte* Judgement has stated that, when perusing the proceedings, it is seen that the registered Attorney has not stated any reason when he moved for another date to file the answer, which is totally wrong. I have already adverted to the two reasons given by the registered Attorney for the failure to file the answer on the first date given for that purpose. It seems that the District Judge has not seen those proceedings.

I set aside the impugned order of the District Judge and allow the appeal with costs.

After the objection was taken for granting a date to tender the answer, but before making an order on that objection, the defendant has filed the answer dated 23.06.1993, which has not been accepted by Court. Let the District Judge now give a date to file a fresh answer, in which the defendant can take up any defence including that of *res judicata*, which the defendant wanted to make submissions on, before this Court.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal