KARUNADASA

v

REV. PHILLIPS

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
C.A NO. 363/97/F
D.C. BADULLA 97/86
OCTOBER 4, 1999 AND
JANUARY 18, 2000 AND
FEBRUARY 3, 2000

Civil Procedure Code, section 86(2) – Ex-parte judgment – Decree served on defendant – Should an application to purge default be made with notice to the plaintiff?

Held:

(i) The language used in section 86(2) does not seem to suggest that the defendant is required to give notice of his application to the plaintiff simultaneously with the filing of such application.

(ii) In the absence of a requirement the notice must accompany the filing of application in court or words with similar import conveying a meaning indicative of a specific time frame, one would be justified in assuming that the defendant is at liberty to give notice of such application even subsequently.

APPEAL from the judgment of the District Court of Badulla

Cases referred to:

1. *Ceylon Brewery Ltd.*, v *Jax Fernando* - (2001) 1 SriLR 270
2. *Sri Lanka General Workers Union* v *Senanayake* - (1996) 2 Sri LR 268 at 273
3. *Edward* v *de Silva* — 46 NLR 342 at 344

D.W. Abeykoon PC with *W.G. Deen* for defendant-appellant

L.C. Seneviratne PC with *S. Samarasekera* for plaintiff-respondent

Cur.adv.vult.

August 4, 2002

WEERASURIYA, J.

This is an appeal arising from the order of the District Judge dated 02.11.1987, dismissing the application of defendant-appellant made in terms of section 86(2) of the Civil Procedure Code, seeking to vacate the *ex parte* decree.

The facts leading upto that application are briefly as follows:

The plaintiff-respondent instituted action against the defendant-appellant seeking a declaration of title to the land morefully described in the schedule to the plaint, ejectment of the defendant-appellant therefrom and damages.

On 30.05.1986, upon the report of the fiscal that summons had been served on the defendant-appellant, court made order directing the defendant to file proxy and answer on 29.08.1986. On 29.08.1986 Mr. Dimbulana filed proxy on behalf of the defendant-appellant and court directed him to file answer on 02.11.1986. On 02.11.1986, a final date was granted to the defendant-appellant to file his answer on 20.02.1987. On this day, upon the failure of the defendant to file his answer, case was fixed for *ex parte* trial for 31.03.1987. Thus, case was taken up for *ex parte* trial on 31.03.1987 and at the conclusion of the plaintiff's evidence, decree was entered in favour of the plaintiff-respondent. Thereafter, upon the service of the decree, the defendant-appellant filed an application by way of petition and affidavit seeking to vacate the *ex parte* decree entered against him. The plaintiff-respondent objected to

the said application on the ground that notice of such application had not been given to him as required by section 86(2) of the Civil Procedure Code. Learned District Judge after hearing submissions, upheld the objection raised by the plaintiff-respondent and dismissed the aforesaid application of the defendant-appellant with costs.

At the hearing of this appeal, both parties preferred to tender written submissions *in lieu of* oral submissions.

The only matter that arises for determination in this appeal is, whether the learned District Judge was correct in upholding the objection raised by the plaintiff-respondent that, defendant-appellant had failed to comply with the mandatory provision that an application in terms of section 86(2) must be made with notice to the plaintiff-respondent.

Section 86(2) of the Civil Procedure Code is in the following terms:

> "*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.*"

In the case of *Ceylon Brewery Ltd.* v *Jax Fernando*[1] it was held that section 86(2) of the Civil Procedure Code is the provision which confers jurisdiction on the District Court to set aside default decree and that jurisdiction depends on two conditions being satisfied. One condition is that the application should be made within fourteen days of the service of the default decree on the defendant.

In the instant case, admittedly the defendant-appellant filed the application seeking to purge his default within 14 days of service of the decree. The question that arises for consideration is whether the non-compliance of the requirement to give notice of such application to the plaintiff is necessarily fatal.

It was observed in *Sri Lanka General Workers Union* v *Senanayake*[2]

> "*that where the requirement goes to jurisdiction, it is unquestionably mandatory and the failure to invoke the jurisdiction of a court or tribunal within the prescribed time limit generally results in the court or tribunal lacking the power to deal with the matter.*"

The following observations of Soertsz, A.C.J. in *Edward* v *de Silva*[3] is relevant in examining this question.

> "*Some of those rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act and that would render anything done or any order made thereafter devoid of legal consequences. The failure to observe other rules, less fundamental as pertaining to the letter of the law, and the matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve exercise of it in irregularity.*"

The language used in section 86(2) does not seem to suggest that the defendant is required to give notice of his application to the plaintiff simultaneously with the filing of such application. In the absence of a requirement that notice must accompany, the filing of application in court or words with similar import conveying a meaning indicative of a specific time frame, one could be justified in assuming, that the defendant is at liberty to give notice of such application even subsequently. Therefore, the failure to give notice to the plaintiff, simultaneously with the filing of the application would not amount to a defect which is necessarily incurable.

For the above reasons, I set aside the order of the District Judge dated 02.11.1987 and direct him to proceed to inquire into the application of the defendant-appellant and make an appropriate order in accordance with the law.

This appeal is allowed with costs.

DISSANAYAKE, J. - I agree.

Appeal allowed.