IN THE SURPEME COURT OF THE DEMOCRATIC REPUBLIC SOCIALIST REPUBLIC OF SRI LANKA

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-Ela.

PLAINTIFF

SC Appeal: 80/2016
SC.HC.CALA.No: 286/2015
HCCA/NWP/K/61/2007(F)
DC Chilaw Case No: 2017/2005 -M

VS

Herathpathirannehelage Ranjan Hera
of Punchi Vileththewa,
Mugunawatawana.

DEFENDANT

AND BETWEEN

Herathpathirannehelage Ranjan Herath
of Punchi Vileththewa,
Mugunawatawana.

DEFENDANT-PETITIONER

VS

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-Ela.

PLAINTIFF-RESPONDENT

AND BETWEEN

Herathpathirannehelage Ranjan Herath
of Punchi Vileththewa,
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DEFENDANT-PETITIONER-APPELLANT

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Ushettige Vinodanie Preethika Dayadarie
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PLAINTIFF-RESPONDENT-RESPONDENT

AND NOW BETWEEN

Herathpathirannehelage Ranjan Herath
of Punchi Vileththewa,
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DEFENDANT-PETITIONER-APPELLANT-APPELLANT

VS

Ushettige Vinodanie Preethika Dayadarie
Perera of No. 532, Weligampitiya, Ja-E
la.

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

Before : Priyantha Jayawardena PC, J
E. A. G. R. Amerasekera, J
Yasantha Kodagoda PC, J

Counsel : Ikram Mohamed PC with J. M. Wijesundara, Nadeeka Galhena and Charitha Jayawickrema for the Defendant-Petitioner-Appellant-Appellant.

Dr. Sunil Cooray for the Plaintiff-Respondent-Respondent-Respondent

Argued on : 13th May, 2020

Decided on : 1st of April, 2022

Priyantha Jayawardena PC, J

This is an appeal filed by the defendant-petitioner-appellant-appellant (hereinafter referred to as the "appellant") against the judgment of the High Court (Civil Appeal) of the North Western Province holden in Kurunegala, which affirmed the order of the District Court of Chilaw refusing the appellant's application made under section 86(2) of the Civil Procedure Code as amended (hereinafter referred to as "the Code") to set aside the *ex parte* judgment entered against him for failure to file the answer on the day fixed for filing the same.

Facts of the case

The plaintiff-respondent-respondent-respondent (hereinafter referred to as the "respondent") had filed an action in the District Court claiming a sum of Rs. five million (Rs. 5,000,000/-) as damages from the appellant for seduction.

On the 14th of December 2005, which was the first summons returnable date, the Attorney-at-Law for the appellant (hereinafter referred to as the "instructing attorney for the appellant") had filed a proxy on behalf of the appellant and had moved for a date to file the answer. Accordingly, the court had fixed the 01st of March, 2006 as the second date to file the answer.

However, on the 01st of March 2006, when the case was called to file the answer, the said instructing attorney had moved for further time to file the answer. Hence, the court had fixed the 17th of May, 2006 as the third date to file the answer.

When the case was called on the 17th of May 2006, neither the appellant nor the respondent had been present in court. Further, the said instructing attorney had informed court that the appellant had not given instructions despite the several reminders and the registered letter that was sent to the appellant requesting for instructions to proceed with the trial.

As the appellant had failed to file the answer on the 17th of May 2006, the learned District Judge had fixed the case for *ex parte* trial. At the *ex parte* trial held on the 22nd of May 2006, the respondent had given evidence. Thereafter, considering the evidence given at the *ex parte* trial, the learned District Judge had delivered an *ex parte* judgment on the 05th of July 2006, in

favour of the respondent and awarded a sum of Rs. five million in damages as prayed for in the plaint, and a decree had been entered accordingly.

Subsequently, the appellant had filed an application in the District Court under section 86(2) of the said Code to set aside the judgment and decree entered against him on the basis that he had reasonable grounds for his default for not filing the answer on the answer due date.

During the inquiry held into the said application for purged default, whilst giving evidence, the appellant had produced a letter dated the 20th of February 2006, marked as "V1", whereby the respondent had allegedly instructed her registered attorney to withdraw the action under reference instituted against the appellant.

The appellant in his evidence had further stated that the said letter was given to him by the respondent and that the appellant did not file his answer on the 17th of May, 2006 because he believed that the said action would be withdrawn by the respondent's instructing attorney as per the instructions given to him in the said letter marked as "V1".

Therefore, the appellant stated that he had reasonable grounds for his default in filing the answer and that the *ex parte* judgment entered against him should be set aside in terms of section 86(2) of the said Code.

Furthermore, the appellant stated that the respondent had not given any evidence during the aforesaid purged default inquiry denying that she had given the said letter to her instructing attorney requesting to withdraw the action. However, the proceedings of the purged default inquiry revealed that the respondent's lawyer had cross-examined the appellant at length. This aspect is dealt with in detail under the subheading, submissions of the respondent.

At the conclusion of the said inquiry, the learned District Judge had delivered the order dated the 25th of March 2009, refusing the appellant's application for vacation of an *ex parte* judgment on the ground that he had failed to satisfy the court that he had reasonable grounds for his default in terms of section 86(2) of the said Code. Aggrieved by the above order, the appellant had appealed to the High Court.

Judgment of the High Court

After hearing the parties, the High Court held that the appellant had not satisfied the learned District Judge that he had reasonable grounds for his failure to file the answer on the third date fixed for filing the answer by court.

It was further held that, had the appellant believed that the action would be withdrawn as per the said letter dated the 20th of February 2006, he would have given instructions to his instructing attorney of the same. Particularly since his instructing attorney had sought instructions from him.

The court further observed that, notwithstanding the said letter dated the 20th of February 2006, the respondent had not withdrawn the action filed against the appellant on the 01st of March 2006, when the case was called to file the answer for the second time.

Furthermore, although the appellant was made aware of the fact that the court had granted a further date to file the answer by his instructing attorney in writing and sought for instructions from the appellant, he had nevertheless failed to give necessary instructions to his instructing attorney.

Thereafter, the High Court held that it did not have any basis to interfere with the District Court judgment as the defendant had not given sufficient reasons for his default.

Appeal to the Supreme Court

Being aggrieved by the aforementioned judgment of the High Court, the appellant appealed to this court and was granted special leave to appeal on the following questions of law:

“

i. Does the evidence adduced at the inquiry before the District Court to vacate the *ex parte* decree establish a reasonable ground for purging the default of the appellant within the meaning of Section 86(2) of the Civil Procedure Code contrary to the judgment of the Civil Appeal High Court and the order of the learned Additional District judge?

ii. Have the learned judges of the Civil Appeal High Court erred in law in not considering the fact that the respondent had in fact represented to the appellant that she had decided to withdraw the said action and/or had given instructions to her Registered Attorney to

withdraw the action by the said letter dated 20/02/2006 marked "V1", in interpreting the term "reasonable ground" in section 86(2) of the Civil Procedure Code in the said judgment?"

Furthermore, the learned counsel for the respondent had raised the following question of law at the time special leave was granted:

"As this is not a revision application, can the quantum of damages awarded in the *ex parte* decree be contested in these proceedings for purging default?"

Submissions of the appellant

The learned President's Counsel for the appellant submitted that, in terms of section 86(2) of the Civil Procedure Code, the appellant must satisfy the court that he had "reasonable grounds" for such default in order to get the judgment and decree entered against the appellant set aside for default in filing the answer.

It was further submitted that the appellant did not file the answer on the 17th of May, 2006 because he had believed that the respondent would withdraw the said action instituted against him in view of the said letter marked as "V1". Therefore, it was submitted that he had reasonable grounds for his default.

Further, it was contended that the term "reasonable grounds" in the said subsection 86(2) of the said Code should be interpreted by applying a subjective test in lieu of an objective one, which the District Court and High Court had failed to do.

In support of the above submission, the learned President's Counsel cited ***Kala Traders (Pvt) Limited v Sanicoch Group of Companies*** **S.C. (C.H.C.) Appeal No.08/2010 SC Minutes 02nd October, 2015**, where it was held:

"Section 86(2) of the Code contemplates of a liberal approach emphasising the aspect of reasonableness as opposed to a rigid standard of proof ... Much emphasis needs to be placed in interpreting Section 86(2) of the Code. Court must use the yardstick of a subjective test rather than having resorted to an objective test in determining what is reasonable".

It was further submitted that the respondent had neither filed objections to the application made by the appellant under the said section 86(2) nor given any evidence denying that she had given the said letter to the appellant.

The learned President's Counsel drew the attention of this court to section 115 of the Evidence Ordinance and submitted that the appellant is entitled to rely on the letter "V1" in terms of the said section. Further, the respondent is estopped in law from denying the representation made to the appellant by the said letter**.** Thus, the appellant had urged reasonable grounds at the inquiry to set aside the *ex parte* judgment and the decree.

Moreover, it was submitted that the District Court had awarded damages as prayed for by the respondent although the loss suffered was not established by evidence and that, therefore, the judgment entered for payment of the said damages is contrary to law.

In support of the above submission, the learned President's Counsel drew the attention of this court to the cases of ***Mrs. Sirimavo Bandaranaike v Times of Ceylon Limited*** **[1995] 1 SLR 22** and ***Cisilin Nona v Gunasena Jayawardana*****, SC Appeal No. 190/2012 SC Minutes 05th May, 2016**.

In the circumstances, it was submitted that the aforesaid District Court order refusing to set aside the *ex parte* judgment and the decree, and the High Court judgment should be set aside.

Submissions of the respondent

The learned counsel for the respondent submitted that during cross-examination, the appellant had admitted that he had three (03) original copies of the said letter produced, marked as "V1". Further, it was submitted that the appellant had admitted that he had neither given the copies of the said letter to his instructing attorney nor informed his attorney that the said action instituted against him would be withdrawn by the instructing attorney of the respondent in compliance with the said letter "V1".

Thus, the counsel for the respondent contended that the appellant had not believed that the said action would be withdrawn in accordance with the said letter and that, therefore, the appellant had failed to establish that he had reasonable grounds for his default.

Further, the respondent submitted that, in any event, the said letter was dated the 20th of February, 2006. However, the appellant's instructing attorney had appeared in court on the 1st

of March, 2006, the date fixed for filing the answer for the second time, and had moved for a further date to file the answer without referring to the said letter "V1".

Therefore, the counsel for the respondent submitted that neither party to the said action had acted on the said letter marked as "V1" and, hence, the appellant had no reasonable grounds for failing to file the answer on the 17th of May, 2006.

Moreover, it was submitted that the appellant had obtained the said letter from the respondent by using force on her and that she had written the said letter under duress and had lodged a Police complaint stating the same. As such, no court should act on a document that has been obtained by using force and/or undue influence.

The learned counsel for the respondent further submitted that the appellant has no right to canvass the quantum of damages awarded in the *ex parte* judgment in a purge default inquiry. Further, it was submitted that as section 88(1) of the said Code states that "*No appeal shall lie against any judgment entered upon default*", the merits of the default judgment cannot be considered in an appeal filed against an order either refusing or allowing to vacate an *ex parte* judgment and the decree.

In the circumstances, it was submitted that the appeal should be dismissed.

Has the appellant satisfied the court that he had reasonable grounds for his default?

In the instant appeal, one of the questions of law that needs to be considered is whether the appellant had satisfied the learned District Judge that he had reasonable grounds for his default in terms of section 86(2) of the said Code.

In order to consider the above, it is necessary to consider the relevant provisions in the said Code.

Section 73 of the said Code states:

> *"If the defendant does not admit the plaintiff's claim, he shall himself, or his registered attorney shall on his behalf, deliver to the court a duly stamped written answer."*

Therefore, it is incumbent on the appellant to file his answer if he is denying the claim of the Plaintiff.

Further, section 84 of the said Code states:

> "*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 subsequent 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*." [Emphasis added]

Thus, section 84 of the said Code requires a defendant to file his answer on the day fixed by the court for filing the same or the subsequent date fixed for filing the answer. Moreover, the said section confers power on the court to fix the case for *ex parte* trial if the defendant fails to file his answer on the date fixed or the subsequent date fixed for answer, 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 subsequent filing of the answer.

In the instant appeal, it is common ground that on the 14th of December, 2005 which was the summons returnable date, the appellant's instructing attorney had filed the proxy on behalf of the appellant and moved for a date to file the answer. Accordingly, the court had fixed the 1st of March, 2006 as the second date to file the answer.

However, on the 1st of March, 2006 the instructing attorney for the appellant had once again moved for further time to file the answer. Consequently, the court had given a further date to file the answer and fixed the 17th of May, 2006 as the third date to file the answer.

As stated above, on the 17th of May 2006, the appellant had been absent in court and the instructing attorney for the appellant had informed the court that the appellant had not given instructions to proceed with the case, although he had sought instructions from the appellant.

If a client fails to give instructions to proceed with a case, a registered attorney is entitled to inform court that he does not appear for the defendant on that occasion, even though he has filed the proxy for the party. Otherwise, his appearance in court will *ipso facto* be an appearance for his client. When such a matter is brought to the notice of court, it should be recorded forthwith as a journal entry in the case record by the learned District Judge and the case should

be fixed for *ex parte* trial unless the defendant is present in court and moves for a date to defend the action.

It is pertinent to observe that such a practice would prevent disputes arising thereafter in respect of whether there was or was not an appearance for the relevant party. It further prevents the subsequent raising of allegations against the instructing attorney.

Any such statement by the registered attorney is admissible in the inquiry held under section 86(2) of the said Code. In the current context, the appellant not only did not dispute the said statement of the registered attorney but also admitted that he did not give the necessary instructions to his registered attorney.

In the instant case, the appellant's answer had not been filed in court even on the third date fixed for filing the same. Accordingly, the court had acted in terms and under section 84 of the said Code and fixed the case for *ex parte* trial.

Section 86(2) of the said Code sets out the recourse available to the defendant who has had an *ex parte* decree entered against him:

> "*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."* [Emphasis added]

In the case of ***Mrs. Sirimavo Bandaranayike v Times of Ceylon*** **[1995] 1 SLR 22**, it was held;

> *"Insofar as a remedy in the District Court is concerned, the general rule would apply that the judge is functus officio, and cannot review its own judgment. However, section 86 makes an exception, by conferring jurisdiction on the District Court to set aside a default judgment if it was flawed in procedural respects – but not on the merits. The necessary implication of the grant of that jurisdiction is that the District Court is not competent to review a default judgment on the merits. That is, beyond question, the long-established practice of the District Court."*

The abovementioned provision confers jurisdiction on the District Court to set aside an *ex parte* judgment and a decree.

In the case of ***The Ceylon Brewery Ltd. v Jax Fernando, Proprietor, Maradana Wine Stores***, **[2001] 1 SLR 270**, it was held that the jurisdiction of the court in respect of a section 86(2) inquiry is subject to two conditions being satisfied. Firstly, the application should be made by the defendant within fourteen days of the service of the decree on the defendant. Secondly, the defendant must satisfy the court that he had reasonable grounds for the said default. Accordingly, the learned judge must reach a finding on whether the defendant had reasonable grounds for his default based on the evidence led at the inquiry held under section 86(2) of the said Code. Once the said conditions are satisfied, it is imperative that the court vacate the *ex parte* judgment.

Further, in terms of section 86(2), it is evident that the burden of proof lies on the party in default to satisfy the court that he had reasonable grounds for such default. In ***Rani Lokugalappaththi v H. H. D. De Silva*, SC/Appeal No/117/2013 SC Minutes 02nd October, 2015**, it was held that:

> *"It must be noted that the burden of proof cast upon an Applicant who makes an application under section 86(2) of the Civil Procedure Code is not similar to a proof of balance of probability. It is much less than that. What is required under Section 86(2) is that to adduce 'reasonable grounds for default' to the satisfaction of Court".*

The sole explanation of the appellant during the inquiry held under section 86(2) of the said Code was that the defendant did not file his answer on the 17th of May, 2006 because he believed that the said action instituted against him would be withdrawn by the respondent's instructing attorney in compliance with the instructions given in the said letter "V1". Therefore, the appellant had stated that he had reasonable grounds for his default in terms of section 86(2) of the said Code.

During the said inquiry, the appellant had produced an original of the said letter dated 20th of February 2006, marked as "V1", by which the respondent had instructed her registered attorney to withdraw the said action instituted against the appellant.

Further, during cross-examination at the said inquiry the appellant had admitted that he had known that the court had fixed the 01st of March, 2006 as the second date to file the answer.

Moreover, the appellant admitted that the respondent had given him three (03) original copies of the said letter before the 01st March, 2006. Further, he admitted that he had failed to inform his instructing attorney of the receipt of the said letter or the contents thereof.

In particular, the appellant admitted at the said inquiry that his instructing attorney had by registered letter, informed him that the court had fixed the 17th of May, 2006 as the third date to file the answer and had requested the appellant's instructions before the said date to proceed with the case. He has further admitted that, after receiving the said letter, he had neither contacted his instructing attorney nor given instructions that were required to proceed with the said action.

Furthermore, the appellant admitted that, after receiving the said letter, he had not taken any steps to verify whether the said action instituted against him had been withdrawn on the 1st of March, 2006.

It is evident from the above facts that the appellant had received the said letter dated the 20th of February, 2006 marked as "V1" before the 01st of March, 2006, which was the second date fixed by the court for filing the answer. Therefore, had the appellant believed that the said action would be withdrawn as per the said letter, he would have informed his instructing attorney before the 01st of March, 2006 that the said action would be withdrawn.

However, the appellant had admitted that he did not inform his instructing attorney about the said letter. As a result, his instructing attorney had appeared in court on the 01st of March, 2006 and moved for a further date to file the answer.

It is also significant to note that, after the 1st of March, 2006, the appellant's instructing attorney had informed the appellant by registered letter that he was required to file the answer on the 17th of May, 2006. Therefore, the appellant had become aware that the said action had not been withdrawn as per the said letter of the respondent produced marked as "V1".

Further, the appellant had admitted that he neither inquired from his instructing attorney nor the Court Registrar whether the said action had been withdrawn by the respondent. From the date of receiving the letter marked as "V1" on the 01st of March, 2006 until the 17th of May, 2006, the appellant had not taken any steps to verify whether the action instituted against him had been withdrawn.

It is useful to consider if the defendant was entitled to rely on the letter marked as "V1" alleged to have been written by the plaintiff as a reasonable ground for not filing the answer on the 17th

of May, 2006 which was the third date fixed for the answer. It was submitted by the appellant that the said letter amounted to an agreement between the parties not to file an answer.

In an action filed under regular procedure, the defendant shall file his answer on the day fixed for answer, or obtain further time to file his answer, either personally, through a registered attorney, or by his recognized agent referred to in section 24 of the said Code, if he does not admit the plaintiff's claim. The wording of section 73 and section 84 when read together contemplate that a court can grant more than one extension of time. Accordingly, if further time is granted to file the answer, the defendant shall file the answer on the subsequent day fixed for filing of the answer. Granting of an extension of time is within the discretion of the court and such discretion shall be exercised judicially.

The Civil Procedure Code as amended stipulates the procedure applicable to regular actions and summary actions. It stipulates the procedure that should be followed by the court as well as the parties. The procedural law facilitates the administration of justice and to adjudicate cases by applying substantive law. Although some requirements in procedural law are directory, the others are mandatory. If a specific step in a procedural law is mandatory it cannot be circumvented by the consent of parties. The word "shall" used in section 73 of the said Code makes it mandatory for the defendant to file an answer if he does not admit the plaintiff's claim.

Accordingly, the mandatory requirement imposed by section 73 of the said Code on the appellant to file his answer on the date fixed by the court could not have been circumvented by an agreement of the parties, as fixing a date for an answer is a judicial act.

Further, parties by agreement cannot circumvent the procedure stipulated by a statute unless the statute provides for such an agreement. Furthermore, such practices or arrangements would adversely affect the administration of justice.

Moreover, such agreements would be against public policy. In any event, parties cannot interfere with a judicial act that is required to be performed under the law.

Such agreements or arrangements are quite different from agreements to settle cases by the parties. Even in an arrangement to settle a case in court, the court has a duty and a right to consider whether such an arrangement is according to law and is in the interests of all the parties concerned, as entering into such settlement in court would become a judicial act.

Although courts should encourage settlement of disputes, common law prohibits a court from entering a consent decree under the guise of a judicial act if it violates the law or public policy. In the circumstances, the duty to file an answer subsequent to an order made by a court cannot be circumvented by consent of the parties as it amounts to a violation of the said provisions of the said Code and the judicial order granting a date to file the answer.

The learned President's Counsel for the appellant drew the attention of court to section 115 of the Evidence Ordinance and submitted that the learned District Judge should have allowed the application for vacation of the *ex parte* judgment as the appellant relied on the letter marked "V1" and acted according to the contents of the said letter.

Section 115 of the Evidence Ordinance states:

> "*When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing"*.

In light of the above, the learned President's Counsel for the appellant stated that the respondent is estopped in law from denying the representation made to the appellant by the said letter**.**

However, as the aforementioned facts show that the appellant has not acted on the letter marked and produced as "V1", section 115 of the Evidence Ordinance has no application to the instant appeal.

Moreover, the said section has no application for acts performed contrary to public policy. In the present context, as stated above, the said letter was an attempt to circumvent the course of the administration of justice. When an agreement or undertaking is tainted with illegality, such agreement or undertaking cannot be enforced through courts.

A similar view was expressed in the case of ***Jayasuria v Kotalawala*** **23 NLR 511**, wherein the defendant was in prison when he was sued on a bond. Being deceived by the plaintiff, he made no effort to appear in the action and judgment was entered for the plaintiff. He moved to re-open judgment. The reason given by him as to why the defendant did not appear in the action was not that he was prevented by misfortune from appearing to show cause, and as such, it was held that his proper remedy was to apply for *restitutio in integrum* or seek damages for fraud.

In the current circumstances, the facts establish that the appellant's default was effectuated by his own inaction and lack of due diligence in respect of his duty to file the answer on the date fixed by court.

Further, a defendant is entitled under section 86(2) to adduce evidence to prove that he was prevented from appearing in court by reason of accident or misfortune or not having received due information of the proceedings about the case. However, in the instant appeal, the appellant had failed to discharge the burden of satisfying the court that he had reasonable grounds for his default in terms of section 86(2) of the said Code.

The above conduct of the appellant demonstrates that he was negligent in instructing his instructing attorney to file his answer on the 17th of May, 2006.

Can the legality of the quantum of damages awarded in the *ex parte* decree be contested in proceedings for the vacation of the said *ex parte* decree?

Learned President's Counsel for the appellant submitted that the District Court had awarded damages as prayed for by the respondent although the loss suffered was not established by evidence and that, therefore, the judgment entered for payment of the said damages is contrary to law. In support of the above submission, the learned President's Counsel drew the attention of the court to the cases of ***Mrs. Sirimavo Bandaranaike v Times of Ceylon Limited*** *(supra)* and ***Cisilin Nona v Gunasena Jayawardana*** *(supra).*

In the circumstances, it was submitted that the aforesaid District Court order and High Court judgment should be set aside.

In response to this submission, the learned counsel for the respondent raised the following question of law at the time special leave was granted:

> *"As this is not a revision application, can the quantum of damages awarded in the ex parte decree be contested in these proceedings for purging default?"*

A plain reading of section 86(2) shows that the scope of an inquiry under section 86(2) of the said Code is only limited to satisfy court that the defendant had reasonable grounds for such default. Further, if the defendant satisfies court that the defendant had reasonable grounds for such default, the word "shall" used in the said section makes it mandatory for the court to set

aside the *ex parte* judgment and decree entered against the defendant and permit him to proceed with the case.

In this context, it is necessary to consider whether the District Court has the jurisdiction to consider the legality of the *ex parte* judgment and the decree entered against the defendant at an inquiry to vacate an *ex parte* order and set it aside if the judgment is contrary to law. In other words, whether a defendant is entitled to invite the District Court to reconsider the *ex parte* judgment under the pretext of vacation of an *ex parte* judgment. If the answer to the above is in the affirmative, even if the defendant failed to satisfy court that he had reasonable grounds for his default, he should be entitled to get the *ex parte* judgment set aside on the basis that the said judgment is contrary to law.

In this regard, it is useful to consider the judicial power of a District Court to re-consider a judgment delivered by the same court. Once a judgment is delivered by a court, it becomes functus as far as the legality of the judgment is concerned, and it cannot re-open the case.

However, section 189 of the said Code has conferred jurisdiction on the court to correct any clerical or arithmetical mistakes in any judgment or order or any error arising therein from any accidental slip or omission, or to make any amendment which is necessary to bring a decree into conformity with the judgment.

This view was expressed in ***Muttu Raman v Mohammadu* 21 NLR 97, at page 98**, where it was held; "A Court has no jurisdiction to alter or amend its decree, except in conformity with the provisions of section 189 of the Code, in order to bring the decree into harmony with the judgment or to rectify a clerical or arithmetical error."

Further, in ***Deonis v. Samarasinghe et al* 15 NLR 39 at 41**, ***Charles Bright & Co., Ltd v. Sellar* (1904) 1 K.B. 6** was cited with approval, wherein it was held that a court cannot correct a mistake of its own after the judgment has been perfected, even though the error is apparent on the face of the judgment.

The exception to this rule is set out in section 86 of the said Code, which allows for an *ex parte* judgment and the decree entered against the defendant to be set aside if the defendant satisfies the court that he had reasonable ground for default. However, in such instances, the court has no power whatsoever to consider the legality of the *ex parte* judgment.

Thus, a court that delivers an order or a judgment cannot sit in appeal to review its own order or judgment.

Further, section 88 of the said Code states:

> *"(1) No appeal shall lie against any judgment entered upon default.*
>
> *(2) 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."*

In the circumstances, the scope of the inquiry under section 86(2) of the said Code should be considered in the light of section 88 of the said Code.

It is clear that when the legislator has specifically excluded the right to appeal against a judgment entered upon default, the question of whether the same court could review its own judgment cannot arise. In this regard, the doctrine of "*quando aliquid prohibetur ex directo*" which states that when anything is prohibited directly, it is not possible to do it indirectly, is applicable. Thus, when section 88(2) of the said Code acts as an ouster clause for appeals in respect of default judgments, it is not possible in law to use an inquiry for *ex parte* vacation as a means of appeal against an *ex parte* judgment.

Thus, in an inquiry under section 86(2) of the said Code, the court is not conferred with the power to consider the legality of an *ex parte* judgment delivered by the said court. However, if a court comes to a finding that there were reasonable grounds for default by the defendant, it is incumbent on the court to set aside the judgment and decree and permit the defendant to proceed with his defence.

However, though it is not possible to canvass the legality of the *ex parte* judgment in an inquiry held under and in terms of section 86(2) of the said Code, a defendant who is served with an *ex parte* judgment is not without a legal remedy. He can canvass the merits and legality of such a judgment either by invoking the revisionary jurisdiction of an appropriate court or by way of an application for *restitutio in integrum* under Article 138 of the Constitution.

In the case of ***Mrs. Sirimavo Bandaranayike v Times of Ceylon*** *(supra),* it was held:

> *"No specific remedy has been provided to correct errors in respect of the substance of an ex parte default judgment. Section 88(1) confers no remedy, but merely excludes an appeal; from that exclusion it is not permissible to infer an exclusion of revision as well. On the contrary, the express exclusion of an appeal*

justifies the inference that it was intended to permit other remedies, such as revision.

I am therefore of the view that a default judgment can be canvassed on the merits of the Court of Appeal, in revision, though not in appeal, and not in the District Court itself."

Further, it is important to note that sections 86 and 88 were amended by section 23 of Law No. 20 of 1977 and, therefore, the judgments that were decided on the repealed sections 86 and 88 of the said Code have no application in interpreting the present sections 86 and 88 of the said Code.

Thus, a defendant who was served with an *ex parte* decree cannot invoke section 86(2) of the said Code to revisit an *ex parte* judgment and if he is unsuccessful in his attempt to set aside the *ex parte* judgment in such proceedings, to file an appeal under section 88(2) of the said Code to canvass the order refraining to vacate the *ex parte* judgment.

In the circumstances, I affirm the judgment of the High Court, which upheld the order of the District Court.

The appeal is dismissed. I order no costs.

Judge of the Supreme Court

E. A. G. R. Amarasekera, J

I agree. **Judge of the Supreme Court**

Yasantha Kodagoda PC, J

I agree. **Judge of the Supreme Court**