ABN-AMRO BANK N.V.
V.
CONMIX (PRIVATE) LIMITED AND OTHERS

SUPREME COURT.
FERNANDO, J.
KULATUNGA, J.
WADUGODAPITIYA, J.
PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 1/95.
C.A. REVISION APPLICATION NO. 602/92.
D.C. COLOMBO NO. 15740/L.
JULY 28, 1995.

Civil Procedure Code-Civil Procedure Code, sections 84, 86 (2), 90 and 91A-Default- Fixing for ex parte *trial-Natural justice* - audi alteram partem rule.

Section 84 (Civil Procedure Code) applies after the *audi alteram partem* rule has been complied with-i.e. after the defendant has been given due notice and an adequate opportunity of stating his case.

If there has been no due service of summons (or due notice) but the Court nevertheless mistakenly orders an *ex parte* trial then for breach of natural justice section 86 (2) provides a remedy: a defendant's default can be excused if it is established that there were reasonable grounds for such default and one such ground would be the failure to serve summons. The consequence of non-compliance with natural justice is not that non-appearance ceases to be a default, only that, although the lapse is a "default", yet it is a default for which there are reasonable grounds, and which therefore can be excused. The need to comply with natural justice and "default" are therefore two distinct matters. While the *audi alteram partem* rule does not modify or restrict the meaning of "default", breach of that rule affords an excuse for "default".

Default cannot be confined to a wilful or deliberate failure or refusal.

The date for *ex parte* trial may be fixed by the Court on the day of the default or on another day. Although section 84 provides that the Court shall proceed to hear the case *ex parte*, this is not imperative. Despite default section 91A empowers the Court to grant further time to a defendant who has failed to file answer, and this is so even if the plaintiff objects: and section 90 seems to permit the Court to refrain from proceeding with *ex parte* trial against one defendant, if there is another defendant against whom *inter partes* proceedings are necessary.

While in appropriate circumstances it is open to a trial judge to give time, even if it is not sought (e.g. following a practice of granting time for answer on the summons returnable date, or where a defendant is not represented) yet it cannot be argued that the non-exercise of that discretion is always wrongful.

Section 84 does not require proof of intentional default as a condition precedent to an *ex parte* trial. The failure to file the answer on that day or to apply for an extension of time to file answer was *per se* a default within the meaning of section 84.

Cases referred to:

1. *Ameen v. Raji* (S.C. 88/94-S.C. Minutes of 3.11.94)
2. *Silva v. Silva* (1957) 60 N.L.R. 272, 275.
3. *Sameen v. Abeywickrema* (1960) 61 N.L.R. 442.
4. *Rajapakse v. Senanayake* (1987) 1 CALR 146.
5. *Millingdon London Borough Council v. Cutler* (1968) 1 QB 124, 135. *Ameen v. Raji* (S.C. 88/94-S.C. Minutes of 3.11.94 overruled)

APPEAL from judgment of the Court of Appeal.

Romesh de Silva, P.C. with *Palitha Kumarasinghe, Mrs. Saumya Amarasekere* and *Hiran de Alwis* for Defendant - Petitioner- Appellants.
Faisz Mustapha P.C. with *Ikram Mohamed, M.S.M. Suhaid and H. Vithanachchi* and *A. Panditharatne* for the Plaintiff-Respondent-Respondents.

Cur.adv.vult.

September 11, 1995.
FERNANDO, J.

I have had the advantage of seeing the judgment, in draft, of my brother Kulatunga, and while I am in agreement with his conclusion and order I wish to deal at greater length with the Appellant's submissions as to the interpretation and application of section 84 of the Civil Procedure Code.

The submissions of Mr. Romesh de Silva, PC , for the Appellant may be summed up as follows:

1. "Default" in section 84 refers to a deliberate, wilful or contumacious refusal to participate in the proceedings (by not filing answer or appearing), and does not include an inadvertent omission; in this case there was, if at all, only an inadvertent omission by the Appellant to file answer.
2. Even if "default" does include an inadvertent omission, and assuming that the Appellant was in default, yet-

(a) an order for *ex parte* trial could only have been made if the Plaintiff-Respondent ("the Respondent") had appeared on the occasion of the Appellant's default on 5.3.92, and had moved for an order for *ex parte* trial: the journal entry of that day does not show that the Respondent appeared on that day, or moved for such an order; and

(b) in respect of the default on 5.3.92, the Court could have made such an order only on the same day, and not on any subsequent date-this being one of the grounds on which His Lordship the Chief Justice had expressly rested his judgment in *Ameen v Raji* , [1] it is the duty of the Court to fix the case for *ex parte* hearing by an order made on the very day of the default, and if it does not, there is no statutory bar to the Court accepting the answer on a subsequent date.

3. In fact, however, the Appellant was not in default on 5.3.92, because (although the journal entry did not record this) the Appellant's instructing Attorney had asked for, and had been granted, time till 11.3.92 to file answer. Reliance was placed on that Attorney's affidavit dated 24.9.92, filed in the Court of Appeal, in which he also states that on 11.3.92 he made a statement from the Bar to that effect.

4. When it was pointed out to Mr. de Silva, that on 11.3.92 (whatever the position might have been on 5.3.92) the Appellant had not only failed to file answer but had also neglected to ask for further time, and that the Respondent had moved for *ex parte* trial on that day, Mr. de Silva submitted that the learned trial Judge and the Court of Appeal had proceeded solely on the basis of the Appellant's default on 5.3.92, and that therefore the order for *ex parte* trial made by the learned trial Judge could not now be supported or justified by reference to the admitted default on 11.3.92.

5. In any event, section 84 is not imperative, and the Court has a discretion, after considering all the circumstances, to refrain from making an order for *ex parte* trial. Here the Appellant had manifested an intention to contest the Respondent's claim, and had even reserved, in its statement of objections filed on 11.3.92, the right to file answer "after the Court has dealt with the question of interim orders". Hence the trial Judge should not have ordered *ex parte* trial.

NATURAL JUSTICE

Mr. de Silva commenced with a general submission that the policy of the law, consistently with natural justice, was that Courts hear cases *inter partes* and that a Court would depart from that principle only if a person voluntarily refused to participate in the proceedings. Accordingly, he argued, the *audi alteram partem* principle required that section 84, and particularly "default", be liberally construed so as to permit *ex parte* trial only against a defendant who refused to participate in the proceedings. This is misconceived. Section 84 applies after the *audi alteram partem* rule has been complied with - i.e. after the defendant has been given due notice and an adequate opportunity of stating his case. The question that we are faced with relates to a subsequent failure by the defendant to make use of the opportunity given to him: whether that failure justifies proceedings without his participation.

If there has been no due service of summons (or due notice), but the Court nevertheless mistakenly orders an *ex parte* trial, then for that breach of natural justice, section 86 (2) provides a remedy: a defendant's default can be excused if it is established that there were reasonable grounds for such default, and one such ground would be the failure to serve summons. The consequence of non-compliance with natural justice is not that non-appearance ceases to be a "default", only that, although that lapse is a "default", yet it is a default for which there are reasonable grounds, and which therefore can be excused. I am therefore of the view that the need to comply with natural justice and "default" are two distinct matters; that while the *audi alteram partem* rule does not modify or restrict the meaning of "default", breach of that rule affords an excuse for "default".

"DEFAULT"

Mr. de Silva contended that the ordinary meaning of "default" is wilful refusal, and did not include an inadvertent omission; he claimed that the corresponding Sinhala word "පැහැර හැරීම" also had the same meaning. He was unable, however, to support these assertions with either dictionary definitions or judicial precedents. The ordinary meaning of "default" and "පැහැර හැරීම" is the failure to be present or to act in the required manner. In section 84 "default" refers to the two "failures" previously mentioned: namely, "failure" to file answer, and "failure" to appear, and it is not intended to introduce a different concept, such as wilful refusal or deliberate omission. The word "such" puts this beyond doubt, since it confirms an intention to refer, compendiously, to something previously mentioned, namely "failure". The Sinhala text is even clearer, since the same word "පැහැර හැරීම" (and its variations) is used throughout. "Default", therefore, cannot be confined to a wilful or deliberate failure or refusal. This view is reinforced by a consideration of Chapter XII of which section 84 is a part. Thus, section 86 (2) refers to "default" in the same sense; and section 87 uses "non-appearance" as being equivalent to "default in the appearing".

If reliance is placed only on the journal entry of 5.3.92, the Appellant was in default.

IMMEDIATE ORDER FOR EX PARTE TRIAL

Although the journal entry of 5.3.92 does not record any appearance

by or on behalf of the Respondent on that day, the written submissions tendered by the Appellant in the District Court, and the Appellant's instructing Attorney's affidavit dated 24.9.92, show that the Respondent was in fact represented. While usually an order for *ex parte* trial would be made upon the plaintiff's application, section 84 casts a duty on the Court "to proceed to hear the case . . . . . ", and accordingly even if the plaintiff does not ask for it, the Court has the power to order *ex parte* trial.

Mr. de Silva strenuously contended that, either on the plaintiff's application or *ex mero motu*, the Court could not make such an order on any subsequent date. This was part of the *ratio decidendi in Ameen v Raji* [1] and was relied on in the Appellant's written submissions. It would thus seem that this appeal was referred to this bench of five Judges to reconsider that decision.

Superficially, the word "forthwith" tends to suggest that the Court must make an order immediately. However, section 84 requires the Court "to hear the case *ex parte* forthwith, or on such other day as the Court may fix". Obviously, a decision to hear the case on same day, must be taken the same day. But a decision to hear the case on some other day is not required to be taken the same day; the phrase "as the Court may fix" is not qualified by "forthwith" or other similar words. Accordingly, I am of the view that the date for *ex parte* trial may be fixed by the Court either on the day of the default, or on another day; and with respect, that *Ameen v Raji* must be overruled on that point.

There are practical considerations which confirm this interpretation. On the summons returnable date it may not be known- for good reasons, such as illness or absence abroad, when the plaintiff, his Counsel or an essensial witness would be available, and the Court may therefore fix a calling date. Again, *Ameen v Raji* shows that a case may come up in the roll Court and, upon the defendant's default, be sent immediately to the appropriate Court dealing with trials of that kind, to enable a trial date to be fixed; and it may happen that when the record reaches that Court, it has already adjourned for the day. Similar problems may arise when there is an impending change in the territorial jurisdiction of a Court, or a re-allocation of its work; or when a Judge is on leave or is due to go on transfer soon; or when on the day of the defendant's default, the matter comes up before a Judge who does not wish to deal with it for personal reasons.

Thus the language of the section as well as practical considerations compel an interpretation which does not require an immediate order for *ex parte* trial-although, undoubtedly, in the normal course such an order will be made the same day.

Mr. de Silva also argued that the Respondent's conduct on 5.3.92 resulted in an estoppel or a waiver, which would preclude the making of a subsequent order for *ex parte* trial. In view of the foregoing, this contention is unsustainable both on the facts and the law.

CONTRADICTING THE JOURNAL ENTRIES

The Court of Appeal held that the question of default had to be determined by reference only to the case record and the journal entries, and that the record could not be supplemented by means of affidavits.

While this is the general rule, it is settled law that in exceptional circumstances journal entries can be contradicted:

"A journal has been maintained in this action and the Court is entitled to presume that it was regularly kept . . . . . *omnia praesumuntur rite et solemniter esse acta.* This presumption is of course rebuttable, but the Respondent, on whom is the burden, has not placed before the Court sufficient material to rebut it." (*Silva v Silva,*[2] *Sameen v Abeyawickrema,*[3])

Mr. de Silva relied on the Appellant's instructing Attorney's affidavit dated 24.9.92 to contradict the journal entry of 5.3.92. It is not permissible to attack the order of the learned trial Judge, made on 22.7.92, on the basis of facts which could have, and should have been placed before him for consideration before he made his order. Further even the Appellant's written submissions filed in the District Court on 25.3.92 do not make any reference to a statement from the Bar said to have been made on 11.3.92. Indeed, that affidavit was not tendered promptly even to the Court of Appeal, for it was filed only six weeks after the petition dated 7.8.92 for revision. Mr. de Silva ventured to explain away that delay by suggesting that the Attorney-at-Law had been abroad, but this was untenable because we found that the petition dated 7.8.92 had been signed by him, so that obviously he could also have submitted his affidavit at the same time.

In these circumstances I am of the view that the Appellant had failed to rebut the presumption that the journal entries are correct, and I hold that the Appellant was in default on 5.3.92.

DEFAULT ON 11.3.92

Mr. de Silva was thus forced to concede that, even on its own version, the Appellant was in default on 11.3.92. He was unable to explain why on that day, even after the Respondent had moved for *ex parte* trial, no application was made for further time for answer in terms of secton 91A, which empowers the Court to grant further time even after the expiration of the time originally allowed.

Mr. de Silva sought to get over this difficulty by arguing that the order for *ex parte* trial which the learned trial Judge thereafter made, was based on the default on 5.3.92, and not on the default on 11.3.92. However, the journal entry of 11.3.92 records that the Respondent moved for *ex parte* trial because the Appellant had failed to obtain or apply for time to file answer, and makes no reference to a specific date of default; this seems referable to a default on 11.3.92, or even to a continuing default, rather than to a default only on 5.3.92.

I hold that the Appellant was in default on 5.3.92 and on 11.3.92. The order for *ex parte* trial was correct. Insofar as it was based on the default on 5.3.92, it was correct because the learned trial Judge had power to make that order on a subsequent day; and in any event, it was made consequent upon an application referable to the admitted default on 11.3.92, and the failure to refer to that default would not vitiate that order.

DISCRETIONARY POWER TO ORDER EX PARTE TRIAL

Although section 84 provides that "the Court shall proceed to hear the case *ex parte*..... I agree with Mr. de Silva that this is not imperative. Despite default, section 91A empowers the Court to grant further time to a defendant who has failed to file answer, and this is so even if the plaintiff objects; and section 90 seems to permit the Court to refrain from proceeding with *ex parte* trial against one defendant, if there is another defendant against whom *inter partes* proceedings are necessary.

The question is, however, whether the learned trial Judge erred in failing to grant further time, *ex mero motu*, where the Appellant's lawyers had failed to ask for time- even after the Respondent had moved for *ex parte* trial. While in appropriate circumstances it is open to a trial Judge to grant time, even if not sought (e.g. following a practice of granting time for answer on the summons returnable date, or where a defendant is not represented), yet it cannot be argued that the non-exercise of that discretion in favour of the Appellant, in the circumstances of this case, was wrongful. In coming to this conclusion, I take into consideration the fact that section 86 (2) will allow the Appellant an opportunity, if a default decree is entered, to satisfy the trial Judge that he had reasonable grounds for that default. I am not impressed by the argument that the Appellant had manifested an intention of contesting the claim, and had purported to reserve the right to file answer. Section 84 requires a Judge to consider only the default, and the intention of the defaulter; and a defendant cannot give himself the right to file answer after the time allowed by law unless he first obtains the permission of the Court.

For these reasons, I agree that the appeal must be dismissed with costs in a sum of Rs. 5,000/- payable by the Appellant to the Respondent.

KULATUNGA, J.

This is an appeal by the 1st defendant in the above action who had unsuccessfully applied to the Court of Appeal to set aside, by way of revision, an order made by the District Judge, fixing the case for *ex parte* trial and issuing an interim injunction pending the final determination of the case. His Lordship the Chief Justice has directed that this matter be heard by a Bench of five Judges.

The plaintiff and the 1st and 2nd defendants are companies incorporated under the Companies Act. The plaintiff sued the said defendants and another *inter alia*, for a declaration that the plaintiff is the owner of a portion of the land which had been ordered to be sold in execution of the decree in D.C. Colombo case No.15626/MB. The 1st defendant was the plaintiff in that action. He was the mortgagee of an extent of 51A.3R.20P. which had been mortgaged to him by the 2nd defendant. The plaintiff in this action claims to be the owner of a divided extent of 1A.OR.25P. out of the said mortgaged property and seeks to have the said extent excluded from the sale in execution of the decree in the aforesaid mortgage action.

The plaintiff also prayed for an interim injunction/enjoining order, to stay the sale.

On 20.02.92 the Court issued an enjoining order and notice of the application for interim injunction together with summons returnable on 05.03.92. The record shows that on 05.03.92 the registered Attorney for the 1st defendant filed proxy and obtained a date for objections, which was 11.03.92. The enjoining order was extended upto that date. No answer was filed on 05.03.92. Nor is there any record of an application for an extension of the date for filing answer, made on that day.

On 11.03.92 objections of the 1st Defendant were filed; and of consent, the enjoining order which had been issued in respect of the entire land was restricted to 1A.OR.25P., which was the extent claimed by the plaintiff. At that stage, an application was made on behalf of the plaintiff, to fix the case for *ex parte* trial on the ground that the 1st defendant had failed to file answer or to obtain or apply for a date to file answer. This was objected to by Counsel for the 1st defendant; whereupon, the Court directed the parties to file written submissions on 25.03.92. According to the record, no application for further time to file the 1st defendant's answer had been made, even on 11.03.92.

On 25.03.92 written submissions were filed. The1st Defendant's position was that on 05.03.92 the registered Attornery for the 1st defendant moved for a date for objections and answer, even though there is no record of the fact that he asked for a date for answer. Secondly, no application had been on 05.03.92 on behalf of the plaintiff to fix the case for *ex parte* trial. Hence, the Court should permit the 1st defendant to file answer. On behalf of the plaintiff, it was contended that in view of the 1st defendant's dafault on 05.03.92, the plaintiff was entitled to move the Court to proceed to *ex parte* trial even on a later day. *Rajapakse v. Senanayake.*[4]

By his order dated 22.07.92, the District Judge fixed the case for *ex parte* trial. He also granted an interim injunciton on the same terms as were contained in the enjoining order which was in force. The 1st defendant's application to the Court of Appeal to set aside that order was dismissed on the ground that in view of his default on 05.03.92, the District Court had no option but to fix the case for *ex parte* trial, in view of the imperative provisions of section.84 of the Civil Procedure Code.

Section 84 of the Code reads as follows :-

"If the defendant fails to file his answer on or before the date 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 subsequent filing of answer, or 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 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".

In terms of the provisions of section 91A(1) of the Code, the defendant may by motion obtain an extension of time to file the answer. The question for decision is whether in the circumstances of this case, the District Judge was empowered to fix the case for *ex parte* trial on a day subsequent to the summons returnable date.

Section 84 of the Code is different from the corresponding section 85 of the former Code which did not require the Court to proceed to *ex parte* trial forthwith, which is the present requirement. "Forthwith" Harman L.J. has said "is not a precise time and provided no harm is done, 'forthwith' means any reasonable time thereafter ..... It may involve action within days; it may not involve action for years". *Hillingdon London Borough Council v. Cutler*[5]. See also Maxwell 12th Edt. p. 311. Hence, where the defendant is in default, the Court may proceed to hear the case *ex parte* immediately or "on such other day as the Court may fix". The question is whether the Court is enjoined to fix "such other day" on the summons returnable date itself. I am of the view that although such day would ordinarily be fixed on the summons returnable date itself, the law does not require such procedure to be imperative; for there can arise situations in which it may not be possible for the Court to promptly fix another day for the *ex parte* trial.

I am also of the view that there can be a case in which, having regard to the totality of the facts and circumstances, the Court may permit a defendant to file the answer notwithstanding his failure to file it on the summons returnable date e.g. where the default is inadvertent and savours of a mere technicality.

Thus in *Ameen v. Raji* [1] on the date for objections to the interim injunction and answer namely, 16.02.94, defendants' proxy was filed together with objections. Apart from paragraphs admitting or denying the several averments in the plaint and a statement of the facts upon which the defendants relied for their defence, there was a prayer in the statement of objections for the dismissal of the action. This Court observed: "though in form it was not an answer, in substance it was". No answer as such was filed; nor did the record disclose the making of an application on 16.02.94 for time to file the answer. However, on 23.02.94, the answer was tendered but the Court rejected it and fixed the case for *ex parte* trial, on the application of the plaintiff. The Court of Appeal affirmed that order. This Court observed that in the particular facts and circumstances of the case, at most there was an inadvertent omission on the part of the Attorney-at-Law to move for time to file answer; on 16.02.94 the Court had not fixed the case for *ex parte* trial; hence there was no statutory bar to the Court accepting the answer on 23.02.94. The Court held that it was a proper matter for the intervention of the Court of Appeal by way of revision. Accordingly, the Court set aside the order of the District Judge and directed him to allow the defendants an opportunity to file answer.

In Raji's case (which was decided by a Bench of which I myself was a member), the Court said "In terms of the section it was the duty of the Court to have fixed the case for *ex parte* hearing on 16.02.94". This statement is *obiter dicta;* and after further consideration, I am now of the view that it is not an accurate statement of the law, though the decision itself was otherwise correct, on the facts and circumstances of that case.

In Rajapakse v. Senanayake[4] (*supra*) notice of injunction together with the summons were served on the defendant on 22.02.86. The summons returnable date was 26.02.86 on which date the defendant's proxy had been filed and 26.03.86 obtained as the date to file objections. However, no answer had been filed nor a date for answer obtained. On 18.03.86, the plaintiff moved for *ex parte* trial. Further proceedings were held up as two Judges declined to hear the case for personal reasons. In the meantime, by 26.05.86 an answer which was insufficiently stamped had been tendered. A duly stamped answer was tendered only on 20.06.86. On 25.08.86 the Attorney-at-Law for the plaintiff once again moved that the case be fixed for *ex parte* trial, which was allowed. The Court of Appeal

dismissed an application to set aside the order of the District Judge, by way of revision. The Court held that the defendant was in default by failing to file answer on the due date or to apply for an extension of time to file answer under section 91A (1) of the Code, even after the original date appointed therefor had lapsed.

In the instant case, Mr. Romesh de Silva P.C. for the 1st defendant submitted that the 1st defendant was not in default, in that in view of an affidavit filed by his registered Attorney-at-Law stating that he had applied for a date for objections and answer on 05.03.92, no intentional default has been made out. But, section 84 does not require proof of intentional default as a condition precedent to an *ex parte* trial. The failure to file the answer on that day or to apply for an extension of time to file the answer, was *per se* "default" within the meaning of section 84. In any event, even on the next date namely, 11.03.92, no answer was tendered; nor was any application made for a date for filing the answer, even when the plaintiff's Attorney-at-Law moved to have the case fixed for *ex parte* trial. The defendant was, therefore, in continuous default. Hence the Court of Appeal was right in refusing to interfere with the order of the District Court, by way of revision.

Mr. de Silva strenuously submitted that both the District Judge and the Court of Appeal rested the decision on the alleged default of the defendant on 05.03.92. As such, it would not be proper for this Court to take into account the defendant's conduct subsequent to that date. I cannot agree. The remedy sought being by way of revision, this Court is competent to consider the entirety of the defendant's conduct in determining whether we may vary the decision of the Court of Appeal. The facts show that the defendant was in default on 05.03.92 and even thereafter. There is thus no valid ground for setting aside the order for *ex parte* trial.

Mr. de Silva also submitted that on 05.03.92 the plaintiff was absent and unrepresented; hence no application for *ex parte* trial could have been made on a later date. I am of the view that in the particular facts and circumstances of this case such absence cannnot *per se* bar the right of the plaintiff to have moved the Court to proceed to *ex parte* trial, on a later day.

Mr. de Silva argued that even if the order fixing the case for *ex parte* trial is valid, yet the granting of an interim injunction without considering

the objections already filed by the 1st respondent, was bad. I am of the view that in the context of the order for an *ex parte* trial, there is no legal defect in the order issuing the interim injunction, for maintaining the *status quo,* pending the final decision of the case.

For the foregoing reasons, I dismiss the appeal and affirm the judgment of the Court of Appeal. The 1st defendant-appellant is directed to pay the plaintiff-respondent costs in a sum of Rs. 5000/= (Rupees Five Thousand).

WADUGODAPITIYA, J.

I have had the advantage of reading, in draft, the judgments of my brothers Fernando, J. and Kulatunga, J. and I am in respectful agreement wtih their conclusions and orders.

WIJETUNGA, J.

I have had the advantage of reading, in draft, the judgments of my brothers' Fernando, J. and Kulatunga, J. and I am in respectful agreement wtih their conclusions and orders.

P.R.P. PERARA, J.

I have read, in draft , the judgments of my brothers Fernando, J. and Kulatunga, J.. I agree that this appeal should be dismissed with costs in a sum of Rs.5000/-.

I also agree that the opinion expressed in *Ameen v. Raji* that the Court must fix the *ex parte* hearing on the summons returnable date itself is not an accurate statement of the law. But, that decision (which was otherwise correct) turned on the particular facts and circumstances of that case. The decision in the present case rests on the ground of the continued default of the appellant, which would disentitle him to revisionary relief. Hence, the necessity for overruling Raji's case does not strictly arise, particularly for the reason that learned President's Counsel for the respondent himself said Raji's case "can be distinguished".

Appeal dismissed.