MRS. SIRIMAVO BANDARANAIKE

v.

TIMES OF CEYLON LIMITED

SUPREME COURT.
M. D. H. FERNANDO, J.
DHEERARATNE, J. AND
RAMANATHAN, J.
S.C. APPEAL 20/91
C.A. NO. 515/84
D.C. COLOMBO 81692/M
JANUARY 19, 1995.

Revision – Has Court of Appeal jurisdiction by way of revision to reverse or vary an ex parte judgment entered against a defendant in default of appearance? – Duty of court in an ex parte trial – Duty of counsel – Sections 84, 85, 87, 88, 753, 754 of the Civil Procedure Code.

The Times of Ceylon Limited (defendant-respondent) published several newspapers including the Times of Ceylon. On 2.8.1977 the business undertaking of the defendant "having its registered office at No. 3 Bristol Street, Fort, was vested in the Government under and in terms of the Business Undertakings (Acquisition) Act, No. 35 of 1971 and a Competent Authority was appointed under that Act to administer the business undertaking. The "Sunday Times" of 4.12.77 reported that Mr. E. L. Senanayake, then Minister of Agriculture and Lands had stated that the plaintiff-respondent (the plaintiff) had revalued her lands in order to obtain enhanced compensation from the Land Reform Commission.

On 18.9.1978 the plaintiff filed action in the District Court of Colombo against the defendant alleging that this and a related statement were defamatory of her. The Government takeover was not disclosed. The defendant did not appear on the summons returnable date (17.11.78) and – *ex parte* trial was fixed for 10.1.79. On 10.1.79 witness Dr. K. L. V. Alagiyawanna gave evidence and produced the Sunday Times of 4.12.77 but neither did he say that the defendant published nor did he mention that the Government had taken over the defendant's undertaking. The name of the printer and publisher was stated in newspaper marked in evidence as "printed and published by the Competent Authority, Republic of Sri Lanka successor to the business undertaking of Times of Ceylon Ltd..." However the trial judge entered judgment against the defendant on 29.1.79. On 17.4.79 the draft decree was tendered to the District Court and signed. There was no journal entry that the copy of the decree was served on the defendant. On 29.12.80 the plaintiff applied for execution. The Court ordered notice on the defendant and the Fiscal reported on 13.2.81 there was no such establishment. Notice was re-issued and a copy was sent to the Competent Authority. The Fiscal reported on 17.3.81 that notice was pasted on the front door of the building of Times of Ceylon Ltd. and also served on the defendant at No. 9, Castle Street, Borella. The defendant filed objections stating that no summons or decree was served and praying that proceedings be set aside and that permission to file answer and defend the action be allowed. On 12.3.82 the Court upheld the objections and set aside the *ex parte* judgment and decree and ordered summons to re-issue on the defendant. This order was affirmed by the Court of Appeal on 13.8.82. On appeal to the Supreme Court, the Supreme Court allowed the appeal and set aside the orders of the District Court and Court of Appeal by the judgment reported in (1948) 1 Sri LR 178. Thereupon on 18.4.84 the defendant applied to the Court for revision of the *ex parte* judgment. The Court of Appeal by its judgment delivered on 11.12.90 held that the defendant had nothing to do with the impugned publication and there had been a failure of justice and set aside the judgment and dismissed plaintiff's action. In the meantime plaintiff had recovered the sum of Rs. 750,000/- from the defendant. The Court of Appeal ordered the plaintiff to repay this sum to the defendant but refused defendant's claim for interest. Leave to appeal to the Supreme Court was granted on the following questions.

1. Whether the remedy of revision is available in law to the (defendant) having regard to all the facts and circumstances of this case?

2. Whether the Court of Appeal had jurisdiction to revise the order of the learned District Judge entering judgment *ex parte* in favour of the plaintiff, which order (it is claimed) had been restored by the Supreme Court and had become *res adjudicata* between the parties?

Held: (Ramanathan, J. dissenting)

1. Judgment had been entered when there was not a scrap of evidence that defendant was responsible for the defamatory publication and no finding had been made on the question of publication.

2. The plaintiff's lawyers, unfortunately, failed to tell the trial judge that the defendant was not responsible for the impugned publication, despite their duty to court (now stated in Rule 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988) not to mislead or deceive or permit a client to mislead or deceive in any way the Court before which they appear.

3. The decision of the Supreme Court of 1.2.84 had the effect of restoring the *ex parte* judgment, but the Supreme Court did not expressly affirm or approve the judgment. None of the Courts considered the legality or propriety of the judgment.

4. Even in an *ex parte* trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An *ex parte* judgment cannot be entered without a hearing and an adjudication.

5. The revisionary jurisdiction of the Court of Appeal in Article 138 of the Constitution extends to reversing or varying an *ex parte* judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on the merits in the Court of Appeal in revision, though not in appeal and not in the District Court itself.

6. The judgment of the Supreme Court holding that the defendant had failed to purge its default does not amount to an affirmation of such *ex parte* judgment, so as to preclude the exercise by the Court of Appeal of its revisionary jurisdiction.

7. Section 85(1) requires that the trial judge should be "satisfied" that the plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the Judge's opinion is that the entirety of the relief claimed cannot be granted. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters in every instance; such satisfaction is after adjudication upon evidence.

8. Section 88 must be read with section 753 of the CPC. The fact that section 88(1) bars an appeal against an *ex parte* default judgment restricts the right of appeal conferred by section 754 of the CPC but does not affect the revisionary jurisdiction by section 753, if anything it confirms that jurisdiction. From the fact that section 88(2) confers a right of appeal, one cannot possibly infer an exclusion of revisionary jurisdiction on the same matter.

9. Insofar as a remedy in the District Court is concerned, the general rule is that 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. There are two distinct issues. The first is whether the *ex parte* default judgment was procedurally proper and this depends on whether a condition precedent had been satisfied namely whether a proper order for *ex parte* trial had been made and whether the defendant had failed to purge his default. The second is whether, apart from that default, the *ex parte* default judgment was on the merits i.e. in respect of its substance, vitiated by lack of jurisdiction, error and the like.

Cases referred to:

1. *Rustom v. Hapangama* (1978 – 79) 2 Sri LR 225.
2. *Rasheed Ali v. Mohamed Ali* (1981) 2 Sri LR 29.
3. *Ranasinghe v. Henry* (1896) 1 NLR 303.
4. *Amadoris v. Mendis* (1902) 7 NLR 333.
5. *Municipal Council of Colombo v. Munasinghe* (1968) 71 NLR 223, 225.
6. *Beebee v.Mohamed* (1965) 68 NLR 36, 38.
7. *Sabapathy v. Dunlop* (1935) 37 NLR 113.
8. *Krishen v. Kumar* AIR 1954 Jammu & Kashmir 67.
9. *Eknath v. Govind* AIR 1942 Bombay 344.
10. *Gwalior Municipality v. Motilal* AIR 1977 Madhya Pradesh 182.
11. *Velupillai v. Sivasithamparam* (1961) 67NLR 80.
12. *Mamnoor v. Mohamed* (1922) 23 NLR 494.
13. *Perera v. Nawanage* S.C. 75/94 SCM 14.10.94.
14. *Amerasekera v. Mohamadu Uduma* (1929) 31 NLR 36.
15. *Meedin v. Meedin* (1909) 5 A.C.R. 42.
16. *Banda v. Guneratne* (1891) 1 SCR 75.
17. *Brampy v. Peris* (1897) 3 NLR 34, 36.
18. *Sinnathamby v. Ahamadu* (1913) 2 BNC 13.
19. *Gargial v. Somasundaram Cheety* 9 NLR 26, 28.
20. *Loku Manika v. Selenduhamy* 48 NLR 353.
21. *Andradic v. Jayasekera Perera* (1985) 2 SRI LR 204.

APPEAL from judgment of Court of Appeal.

H. L. de Silva P.C. with *Gomin Dayasiri* and *Saliya Mathew* for the Plaintiff-Respondent-Applicant.

L. C. Seneviratne P.C. with *M. Illiyas, N. Sivendran* and *H. Situge* for the Defendant-Petitioner-Respondent.

Cur. adv. vult.

March 2, 1995.
M. D. H. FERNANDO, J.

An important question of law arises in this appeal: whether the Court of Appeal has jurisdiction, in revision, to reverse or vary an *ex parte* judgment entered against a defendant upon default of appearance.

These facts are not in dispute. For many years, the Times of Ceylon Ltd., the Defendant-Petitioner-Respondent ("the Defendant") had been engaged in the business of publishing several newspapers, including the "Sunday Times". On 2.8.77 the business undertaking of the Defendant, "having its registered office at No 3, Bristol Street, Fort", was vested in the Government under and in terms of the Business Undertakings (Acquisition) Act, No. 35 of 1971; its immovable property, including premises No. 3, Bristol Street, was vested; and a "Competent Authority" was appointed under that Act to manage and administer that business undertaking. The "Sunday Times" of 4.12.77 reported that Mr. E. L. Senanayake, then Minister of Agriculture and Lands, had stated that the Plaintiff-Respondent-Appellant ("the Plaintiff") had revalued her lands in order to obtain enhanced compensation from the Land Reform Commission.

The Plaintiff filed action in the District Court of Colombo on 18.9.78 against the Defendant alleging that this and a related statement were defamatory of her; that the Defendant was carrying on the business of publishing newspapers, including the "Sunday Times"; and that the Defendant had published the "Sunday Times" of 4.12.77. The Government takeover was not disclosed. The Defendant did not appear on the summons returnable date (17.11.78), and *ex parte* trial was fixed for 10.1.79. On that day, only one witness, Dr K. L. V. Alagiyawanna, Attorney-at-law, gave evidence. He said that he had served as Sri Lanka's High Commissioner in Malaysia until the end of 1977; and that newspapers published by the Times of Ceylon were received in Malaysia. He produced the "Sunday Times" of 4.12.77 ("P1"), but did not say that this had been published by the Defendant, nor did he mention that the Government had taken over the Defendant's undertaking. As required by section 6 of the Newspapers Ordinance (Cap. 180), the name of the printer and publisher was stated in the newspaper (P1): "Printed and published by The Competent Authority Republic of Sri Lanka successor to the Business Undertaking of Times of Ceylon Ltd ..."

One essential ingredient which the Plaintiff had to prove in order to establish the Defendant's liability was that the impugned statements had been published by the Defendant. But there was not a scrap of evidence which even suggested such publication; and, on the contrary, the newspaper (P1) produced by the Plaintiff's witness unambiguously established that it was not the Defendant who was responsible. I need hardly say that the take-over of a newspaper undertaking by the Government was neither an everyday occurrence nor an insignificant happening easily to be forgotten – although the trial judge was not entitled to take judicial notice of that. But one does wonder how lawyers advised the Plaintiff to institute or pursue an action against the Defendant in respect of what was essentially a Government publication, especially when this was so disclosed in the newspaper itself. It was in those circumstances that the trial judge entered judgment against the Defendant on 29.1.79, in total disregard of the evidence which irresistibly proved that publication was by another; indeed, he made no finding at all regarding publication. The Plaintiff's lawyers, unfortunately, failed to tell the trial judge that the Defendant was not responsible for the impugned publication, despite their duty to the Court (now stated in Rule 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-law) Rules, 1988 not to mislead or deceive or permit a client to mislead or deceive in any way the Court before which they appear. The factual position thus was that the defamatory statements had been published in a Government newspaper, in consequence of what the Minister was alleged to have said. Yet in proceedings against a party who had nothing to do with the statements or their publication, the trial judge entered an *ex parte* judgment on the basis that the statements were defamatory, and awarded the Plaintiff damages in a sum of Rs. 759,000. The Defendant was thus reduced to the position, as the Sinhala saying puts it, of the man who fell from a tree only to be gored by the bull: first having had its newspaper taken over by the Government, it was then called upon to pay damages for defamatory statements later published by or on behalf of the Government in that same newspaper.

There was another unfortunate circumstance. The summons had been left at the Defendant's registered office (No. 3, Bristol Street) which had been since August 1977 in the possession of the Competent Authority. The Defendant was undoubtedly at fault in having failed immediately to give due notice of a change in its

registered office. However, before *ex parte* judgment was entered, a journal entry dated 15.1.79 records that the summons was returned to the District Court, by an official representing the Competent Authority, with a letter stating:

> "I return herewith the attached summons addressed to the Times of Ceylon Ltd. which had been delivered at this office by an error. The defendant mentioned in the summons does not maintain an office in this premises."

On 17.4.79 the draft decree was tendered to the District Court, and was signed. The journal entries do not show that a copy of the decree was served on the Defendant.

On 29.12.80 the Plaintiff applied for execution of the decree. The Court ordered notice on the Defendant, and the Fiscal reported on 13.2.81 that there was no such establishment. Notice was re-issued, and a copy was sent to the Competent Authority. The Fiscal reported on 17.3.81 that notice had been pasted on the front door of the building of Times of Ceylon Ltd. and also served on the Defendant at No. 9, Castle Street, Borella.

The Defendant then filed objections, referring to the takeover; stating that neither the summons not the decree had been served on it; and praying that the proceedings, judgment and decree be set aside, that the writ of execution be withdrawn, and that the Defendant be permitted to enter an appearance, file answer and defend the action.

On 12.5.82 the District Court upheld the Defendant's objections to execution, holding that summons had not been duly served; set aside the *ex parte* judgment and decree; refused the Plaintiff's application for execution; and ordered that summons be re-issued on the Defendant. This order was affirmed by the Court of Appeal on 13.8.82. On appeal, this Court held on 1.2.84 (in a judgment reported in (1984) 1 Sri LR 178) that summons had been duly served, allowed the appeal, and set aside the orders of the Court of Appeal and the District Court. While this had the effect of restoring the *ex parte* judgment, this Court did not expressly affirm or approve that judgment. In fact, none of the Courts considered the legality or propriety of that judgment on the merits.

Thereupon the Defendant applied to the Court of Appeal on 18.4.84 for revision of that judgment. The Court of Appeal in a careful and comprehensive judgment delivered on 11.12.90 held that upon a perusal of the newspaper (P1) it was seen that the Defendant had nothing to do with its publication; that the Plaintiff's lawyers should have examined those matters and placed the true facts before court; that the trial judge should have considered those matters before entering judgment; the judgment was based upon a misapprehension of the Defendant's liability; that there had not been a fair *ex parte* trial, and a failure of justice had resulted; and that it would be a gross injustice to allow the judgment to stand. It was held that the Court of Appeal had wide revisionary powers (citing *Rustom v. Hapangama*,[1] and *Rasheed Ali v. Mohamed Ali*,[2]) exercisable, even though no appeal had been taken, in "exceptional circumstances"; although the power was discretionary, the Court would act in revision where an order is palpably wrong or "based wholly on a misapprehension" (citing *Ranasinghe v. Henry*,[3] and *Amadoris v. Mendis*.[4]) The *ex parte* judgment was set aside, and the plaintiff's action dismissed.

In the meantime, the Plaintiff had recovered the sum of Rs. 750,000 from the Defendant in 1984, upon a Bank guarantee. The Court of Appeal directed the Plaintiff to repay this sum, but refused the Defendant's claim for legal interest thereon.

Upon an application by the Plaintiff, the Court of Appeal granted leave to appeal to this Court in respect of the following questions:

1. whether the remedy of revision is available in law to the (Defendant), having regard to all the facts and circumstances of this case?

2. Whether the Court of Appeal had jurisdiction to revise the order of the learned District Judge entering judgment *ex parte* in favour of the (Plaintiff), which order (it is claimed) had been restored by the Supreme Court and had become a *res adjudicata* between the parties?

Mr. H. L. de Silva, PC, submitted on behalf of the Plaintiff that summons had been duly served on the Defendant, who was absent

without good cause on 17.11.78; that this Court had expressly so held (in (1984) 1 Sri LR 178); that that judgment was final and conclusive (*vide* Article 127); that the *ex parte* judgment entered on 29.1.79, despite any perversity, error, irregularity or omission was final, and could not be questioned by way of appeal (vide section 88(1) CPC); further, that the Defendant had not sought to question the *ex parte* judgment in the course of the first appeal to this Court, and so the 1984 judgment of this Court must be regarded as having confirmed that *ex parte* judgment, by implication; that the only remedy available to the Defendant in respect of an *ex parte* judgment was to purge his default by proceedings in the District Court (see section 86, CPC. and, if dissatisfied with the order made upon that application, to appeal under section 88(2)); and that by expressly providing those remedies, the legislature had manifested an intention to exclude all others, and therefore revision was excluded. The Defendant having failed to purge its default (on 17.11.78) was not entitled to challenge the judgment entered (on 29.1.79).

Several deficiencies in this line of argument were pointed out to Mr. de Silva in the course of his submissions. There were two distinct matters; the question whether the Defendant was in default, and if so whether it had purged its default, and the entirely separate issue whether the *ex parte* judgment should stand despite a vitiating element. The special remedy which section 86 provided was in respect of the first matter only, so how could that be regarded as excluding a remedy in respect of the second ? Section 88(1) expressly excluded an **appeal** against a judgment for default, but not revision – why should such an exclusion be implied because of an ordinary law, when subsequent constitutional provisions in Article 138 conferred an unrestricted revisionary jurisdiction ? Should not jurisdictional provisions be interpreted broadly, to allow errors in the administration of justice to be corrected, rather than narrowly, to perpetuate errors ? Mr. de Silva seemed at one stage to concede that jurisdictional error might be corrected in revision, but not other defects. That is a distinction which the statutory provisions do not recognise; and if the constitutional provisions in Article 138 do apply any such limitation would be one which the Constitution does not sanction; and in any event, that would bring in difficult questions as to when error becomes jurisdictional for this purpose. If the trial judge

was in fact satisfied that the Defendant did not publish the impugned statement, but nevertheless gave judgment for the Plaintiff, would that be jurisdictional error ? Or if there was no basis whatever on which he could have been so satisfied, would it have been a jurisdictional error to give judgment for the Plaintiff ? I put to Mr. de Silva a hypothetical example – if a defendant, sued for Rs. 10,000/- as damages, did not appear because he had decided that it would be cheaper to pay than to defend the suit, and later found that *ex parte* judgment had been entered against him for a sum of Rs. 10 million through manifest error, was he entitled to a remedy by way of revision since revision was not plainly excluded ? To all this Mr. de Silva was unable to give a persuasive answer. In regard to the converse situation where a trial judge dismissed a plaintiff's action, although on the evidence he was (or should have been) satisfied, Mr. de Silva had no hesitation in asserting that that would be a final judgment, against which the plaintiff would have a right of appeal, despite section 88(1).

To reach this conclusion, he contended that section 88(1) barred only an appeal by the party in default, interpreting "against any judgment entered upon default" as if restricted to "any judgment entered **against a party** in default". But this would mean that the consequences of a judicial error under section 85 would vary, not according to the nature of the error, but the party prejudiced – the party in default would be denied a remedy, but not his adversary. This would be an unfair and discriminatory result, which the principles of interpretation of statutes would not permit unless compelled by plain words. A similar interpretation of the judicial function was emphatically rejected in another context, as being like the toss of a double-headed coin (see *Municipal Council of Colombo v. Munasinghe.*[5]) Further, the defendant in default would thereby be penalised twice – his default disentitles him from contesting the plaintiff's case, and he is also denied the right to relief against a subsequent judicial error, which had nothing to do with his default. This anomaly Mr. de Silva failed to justify.

In regard to the 1984 judgment of this Court, we asked Mr. de Silva to explain how it in any way confirmed the *ex parte* judgment itself, when the order appealed against was the District Court order dated

12.3.82, setting aside the *ex parte* judgment not for lack of jurisdiction or for intrinsic error, but solely on the ground that the Defendant had not purged its default. It was pointed out to him that the need to seek revision of the *ex parte* judgment, on the merits, on the ground of error, could only have arisen after this Court had determined that the Defendant had been in default. His submission was that the Defendant could have raised the matter by way of a cross-appeal under section 772, CPC.

Mr. L. C. Seneviratne, PC, on behalf of the Defendant, submitted that the Court of Appeal had revisionary jurisdiction, whether an appeal was allowed by law or not, and whether an appeal had been taken or not; in addition to the cases cited in the judgment of the Court of Appeal, he referred to *Beebee v. Mohamed* [6], and *Sabapathy v. Dunlop* [7].

As to the circumstances when that jurisdiction would be exercised, he further submitted that section 85 required the trial judge to be "satisfied", and that this pre-supposed a judicial determination; the trial Judge must at least be satisfied *prima facie;* here there was no evidence on which he could possibly have been satisfied. Although he was unable to cite any local authority, he referred us to three Indian decisions *(Krishen v. Kumar* [8]; *Eknath v. Govind* [9]; and *Gwalior Municipality v. Motilal* [10]), in support of the principle that in entering an *ex parte* judgment a judge is as much bound to make a legal order as in a contested case: the absence of the defendant does not absolve the judge from acting according to law, and the judge must ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it.

Replying to Mr. de Silva's submission that the 1984 judgment of this Court had finally confirmed the *ex parte* judgment Mr. Seneviratne submitted that section 772 did not apply; and that the Defendant need not, and could not, have impugned the *ex parte* judgment on the ground of error, either in the District Court or in appellate proceedings against the District Court order dated 12.3.82.

The Plaintiff's case in appeal involves two distinct questions:

1. Does the revisionary jurisdiction of the Court of Appeal in Article 138 of the Constitution extend to reversing or varying an *ex parte* judgment entered against the Defendant upon default of appearance on the ground of manifest error or perversity or the like ?

2. Even if it does, does the judgment of the Supreme Court holding that the Defendant had failed to purge its default amount to an affirmation of such *ex parte* judgment, so as to preclude the exercise by the Court of Appeal of that jurisdiction ?

1. REVISIONARY JURISDICTION

Article 138(1) of the Constitution sets out the revisionary jurisdiction of the Court of Appeal:

> "The Court of Appeal shall have an exercise, subject to the provisions of the Constitution or of any law, an appellate jurisdiction . . . and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum,* of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance . . . may have taken cognizance:
>
> Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

I have to consider (A) whether this revisionary jurisdiction is excluded by virtue of sections 85, 86, and 88, CPC, and (B) if not, on what grounds it may be exercised.

(A) Since Article 138 is "subject to the provisions . . . of any law", the revisionary jurisdiction can be excluded by statute, whether passed before or after the Constitution. However, the sections cited do not expressly exclude revision. While I incline to the view that an implied exclusion is not enough to override a constitutional provision, especially one which confers jurisdiction, here there is no clear implied exclusion. There are two distinct issues. The first is whether

the *ex parte* default judgment was **procedurally** proper (and this depends on whether a condition precedent had been satisfied, namely whether a proper order for *ex parte* trial had been made, and whether the defendant had failed to purge his default). The second is whether, apart from that default, the *ex parte* default judgment was, on the merits (i.e. in respect of its **substance**), vitiated by lack of jurisdiction, error, and the like.

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.

At one stage, Mr. de Silva faintly suggested that a defendant who wished to question a default judgment on the merits should first purge his default. But he did not press that submission, perhaps because he realised that it was self-contradictory: if a defendant purges his default, he has no need to attack the judgment on the merits, because the judgment will be set aside regardless of its merits; and if he cannot explain his default, neither the law nor the practice of the District Court allows the judgment to be reviewed on the merits.

Mr. de Silva's submission is that the exclusion of revision should be implied because the legislature has provided specific remedies. However specific remedies are provided only in regard to **procedural** legality and propriety. Section 88(1) prohibits a direct appeal against a default judgment, in respect of procedure and merits. Section 88(2) permits an appeal against an order under section 86 – which relates to procedure and not merits. If at all, therefore, section 88 may impliedly exclude revision in respect of procedural aspects.

Indeed, even in respect of the procedural aspects, it is not clear that revision is excluded; thus in *Velupillai v. Sivasithamparam* [11],

H. N. G. Fernando, J. (as he then was) was prepared to act in revision to set aside an *ex parte* default judgment where the order for *ex parte* trial had been wrongly made.

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 in the Court of Appeal, in revision, though not in appeal, and not in the District Court itself. There are three compelling reasons which suffice to sweep away any lingering doubt on the matter.

The provisions of the Code are prior statutory provisions, which cannot prevail over, or whittle down, the later constitutional provision, unless the language is clear. Effect must be given to both as far as is possible. Looked at in that way, Article 138(1) permits revision in respect of the substance of an *ex parte* default judgment, while sections 85 to 88, CPC, merely exclude, wholly or in part, review by appeal.

The provisions of section 753, CPC, which was not referred to in the argument, are decisive:

> "The Court of Appeal may call for and examine the record of any case . . . for the purpose of satisfying itself as to the legality or propriety of any judgment or order . . . or as to the regularity of the proceedings . . . and may upon revision of the case so brought before it pass any judgment which it might have made had the case been brought before it in due course of appeal instead of revision."

This being a provision in the Code itself, section 88 must be read with it. The fact that section 88(1) bars an appeal against an *ex parte* default judgment restricts the right of appeal conferred by section 754, CPC, but does not affect the revisionary jurisdiction conferred by

section 753; if anything, it confirms that jurisdiction. From the fact that section 88(2) confers a right of appeal, one cannot possibly infer an exclusion of revisionary jurisdiction on the same matter.

Finally, the issue before us involves the jurisdiction of a superior court to grant relief in respect of a miscarriage of justice: it is a jurisdiction which the Court has in order to safeguard and promote the due administration of justice in general, and to void miscarriages of justice (cf Sansoni, CJ, in *Beebee v. Mohamed*) [6] and not merely to ensure that the rights of parties are correctly determined. Any uncertainty as to its scope must unhesitatingly be resolved in favour of a wider, than a narrower, jurisdiction.

I hold that the Court of Appeal did have revisionary jurisdiction.

(B) On what grounds could that jurisdiction have been exercised in relation to the **substance** of an *ex parte* default judgment ? Unlike in an appeal, not every error of fact or law may be corrected in revision.

Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. The Defendant's case is that if in fact he was not satisfied, or if on the evidence he could not reasonably have been satisfied, the error was so serious as to prejudice the substantial rights of the Defendant and to occasion a failure of justice. The question is whether entering an *ex parte* default judgment is a mere formality, or whether a hearing and a proper adjudication are necessary.

The plain meaning of the word "satisfied" in section 85(1) is that the trial judge must reach findings on the relevant points after a process of hearing evidence and adjudication, and that he cannot give judgment for the plaintiff as a matter of course. It is unnecessary to rely on the Indian decisions cited by Mr. Seneviratne as I find that there are four other independent and compelling reasons for this interpretation: the immediate context of section 85(1), the basic principles of justice underlying the Code, the legislative history of this and similar provisions, and judicial decisions in regard to those provisions.

Section 85(2) shows that a judge may award the plaintiff less than what is claimed if in his opinion the entirety of the relief cannot be granted. Obviously such an opinion can only be reached after hearing evidence and judicially assessing that evidence in relation to the ingredients of the Plaintiff's cause of action. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters: in every instance, such satisfaction is after adjudication upon evidence. It must be presumed that the word "satisfied" occurring in several sections in the same Chapter of the Code has the same meaning.

Even if there had been some ambiguity, this would have to be resolved *inter alia* in the light of basic principles of justice, and natural justice, underlying the Code. If there is ambiguity as to whether a power which affects the rights of a party is to be exercised with or without a hearing, natural justice will require a hearing; for the justice of the common law will supply the omission of the legislature. Likewise, a judge cannot dismiss an action without hearing it, unless specific power has been given to him by the Code: *Mamnoor v. Mohamed* [12]; and the same principle must apply to any final decision as to the rights of parties in an action. As I observed in *Perera v. Nawanage* [13], "nowhere does the Code confer on a judge the power to give judgment against a party because he fails to pay costs, without an adjudication on the merits – because adjudication is the essence of judicial duty, the purpose for which courts exists". There is no express provision which empowers a judge to enter an *ex parte* default judgment without a hearing and an adjudication on the merits. It would be contrary to the basic principles of the judicial process to interpret the word "satisfied" so as to allow such a power; there is in a democracy no unfettered, absolute, or arbitrary power, even in the judiciary.

I now turn to the legislative history of section 85 and local judicial decisions. The present sections 84 and 88 correspond, in all respects material to this case, to the old sections 85 and 87. There were also corresponding provisions in regard to the Court of Requests in section 823(2), now repealed. The old sections 85 and 823(2) were as follows:

> "85 If the defendant fails to appear on the day fixed for his appearance and answer . . . 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* and to pass a decree *nisi* in favour of the plaintiff . . ."

"823(2) If upon the day specified in the summons . . . the defendant shall not appear or sufficiently excuse his absence, the Commissioner . . . may enter judgment by default against the defendant:

Provided, however, that in all cases where in the title to, or interest in, or right to, the possession of land shall be in dispute, and in any other case in which the Commissioner shall deem it necessary or expedient to hear evidence in support of the plaintiff's claim, he shall order him to adduce evidence on any day to be fixed for that purpose; and after hearing such evidence the Commissioner shall give such judgment on the merits as justice shall require, and without reference to the default that has been committed."

It will be seen that originally there was nothing in the old section 85 of the Code, corresponding to the requirement in section 85(1) and (2) that the judge be "satisfied"; and this might have given the wrong impression that passing a decree was a mere formality.

These provisions covered three situations:

(a) where a judge had express statutory power to give judgment for the plaintiff, merely because of the defendant's default, without any hearing or adjudication (section 823(2));

(b) where a judge was required to hear evidence and to make a judicial determination on the merits (section 823(2) proviso);

(c) where a judge was empowered "to hear the case *ex parte* and to pass a decree in favour of the plaintiff" upon the defendant's default (section 85).

The proviso to section 823(2) was interpreted in *Amarasekere v. Mohamadu Uduma* [14], *Meedin v. Meedin* [15], and *Banda v.*

Guneratne[16]. Judgments entered without a hearing and an adjudication were set aside.

Despite the absence of express provision to that effect in the old section 85, that section was also interpreted – consistently with the principles I have set out – to require a hearing and an adjudication, more or less on the same basis as the proviso to section 823(2).

Thus in *Brampy v. Peris* [17], Browne, AJ, held that whatever the evidence, it must be sufficient to **satisfy** the judge who is not bound to give a decree until he is **satisfied;** if he had a doubt, he was not bound to enter judgment, but should have given the plaintiff an opportunity to dispel it.

In *Sinnatamby v. Ahamadu* [18], after an *ex parte* trial the trial judge refused to enter a decree *nisi* on the ground that the statement of the plaintiff as to his pedigree was "improbable and unreliable". It was urged in appeal that the trial judge had no power to dismiss the action at that stage, and should have entered a decree *nisi*. Lascelles, CJ, referred to Browne, J's observations in *Brampy v. Peris* [17] – that the plaintiff ought to adduce **some proof** of his case, that he ought to make out a **fair case** and that the judge was not bound to give a decree until he was **satisfied** on the evidence. While observing that he had some difficulty in reconciling that decision with the language of section 85, nevertheless he considered that it would be reasonable to follow the procedure laid down in that case.

The practice of the civil courts thus conformed to basic principles of justice.

The legislature twice had the opportunity to clarify or change the law, when drastic changes were made in the law relating to civil procedure. Instead, the legislature adopted the prevailing judicial interpretation (using the very word "satisfied" used in two of those decisions): first, in section 417 of the Administration of Justice (Amendment) Law, No. 45 of 1975, and then in Act No. 20 of 1977 which brought in the new section 85 (virtually identical to section 417), when reintroducing the Civil Procedure Code. It was thus that the word "satisfied" came into section 85.

I hold that an *ex parte* default judgment cannot be entered without a hearing and an adjudication.

I further hold that having regard to the facts and circumstances of this case, there has been no adjudication at all; it was not a mere error in exercising a judicial discretion, or in assessing the credibility of a witness, or the weight of evidence; judgment in favour of the Plaintiff was unreasonable and perverse *insofar* as it was based on the assumption that the Defendant had published the impugned statements; the Plaintiff's lawyers failed in their duty to the Court; the substantial rights of the Defendant were prejudiced, and there has been a manifest failure of justice. The exercise of the revisionary jurisdiction of the Court of Appeal was both lawful and proper.

2. EFFECT OF SUPREME COURT JUDGMENT

In the Defendant's revision application, it did not seek to question the previous judgment of this Court by reagitating the decision as to the due service of summons.

It is not suggested that the Defendant was debarred, by reason of delay or otherwise, from making that application. Although that application was made along after the default judgment and decree, at no stage was there a finding that the default decree had been duly served on the Defendant in terms of section 86(2). Mr. de Silva's submission is that the judgment of this Court confirmed the default judgment even on the merits.

The Code does not give the District Court the power or jurisdiction to examine or set aside an *ex parte* default judgment on the merits. Section 86(2) gave the Defendant the right (within fourteen days of the service of the default decree) to apply to and satisfy the District Court that he had reasonable grounds for such default, i.e. in respect of the **procedural** aspects antecedent to the default judgment. As have already pointed out, all that the District Court could have decided, in its order of 12.3.82, was whether the Defendant had satisfactorily explained its absence on 17.11.78.

The District Court decided only that matter, holding that summons had not been duly served. Mr. de Silva referred to one sentence in

the order to the effect that the Defendant "has a good defence in the present action", and submitted that the District Judge had examined the merits of the default judgment. This observation, particularly since there was no other reference whatsoever to the merits, cannot be regarded as a finding that the default judgment was flawed on the merits; it only meant that the Defendant had a *prima facie* defence, or an arguable case, on the merits, which deserved adjudication.

On appeal, both Courts considered only whether summons had been duly served, and did not even touch upon the merits. Mr. de Silva's submission that the Defendant could have questioned the merits of the default judgment, and sought an order in its favour, is untenable. That was not an appeal against the default judgment dated 29.1.79, and the errors of the District Judge were not in any way relevant to the default of the Defendant on 17.11.78. Had the Defendant attempted to raise the question of error, it would undoubtedly have been told that the merits of the judgment were unrelated to its antecedent default; that no appeal was allowed against the default judgment on its merits; and that if the Defendant was not entitled itself to appeal against the default judgment on the merits, then obviously it could not have raised the issue in an appeal taken by the Plaintiff.

The provisions of section 772 entitled the Defendant only to support the decree on a ground decided against it in the District Court, and to take any objection to the decree which it could have taken by way of appeal. The merits of the default decree were clearly outside the scope of section 772; and were not, and could not have been, considered by this Court of Appeal.

I therefore affirm the judgment of the Court of Appeal. I have considered whether the matter should be sent back to enable the District Court to consider what judgment should be entered upon the evidence led at the *ex parte* trial. Mr. H. L. de Silva very properly conceded that the impugned newspaper was not published by the Defendant. Even without that concession the evidence led cannot possibly justify a finding that the Defendant published the impugned statements; the Plaintiff's action must necessarily fail. No useful purpose would be served by sending the case back either for re-

consideration or for further evidence. In regard to the sum of Rs. 750,000 already paid by the Defendant, I direct the Plaintiff to repay that sum to the Defendant (if not already repaid) with legal interest from 11.12.90. The Plaintiff will also pay the Defendant a sum of Rs. 10,000 as costs in this Court.

My brother Ramanathan, J. does not agree with my judgment and order, because, as I understand it, he takes the view that the *cursus curiae* has been for a party to move the District Court in the first instance. Apart from the references I have already made to the law and practice, I would have wished, in deference to his views, to have considered in greater depth the matters which have persuaded him to a conclusion different to that reached by my brother Dheeraratne, J. and me; but that has not been possible because we have not had the advantage of seeing his judgment even in draft.

DHEERARATNE, J. – I agree.

RAMANATHAN, J.

I have had the great advantage of reading the judgment of my brother Fernando, J. who has, in his judgment, clearly, concisely, and accurately, set out all the facts relevant to the important question of law – "whether the Court of Appeal has jurisdiction, in revision, to reverse or vary an *ex parte* judgment entered against a defendant upon default of appearance," to use the words of my brother in his judgment. It is unnecessary, therefore, to repeat the facts here.

The judgment of this Court delivered on 1.2.84 (1984 1 SLR 178) had "the effect of restoring the *ex parte* judgment". With this finding of Fernando, J. I entirely agree. Thereafter the defendant applied to the Court of Appeal to revise the *ex parte* judgment and the Court of Appeal set aside that judgment.

The crucial question is whether the proper (and valid) procedure was to have made an application in revision to the Court of Appeal or whether the defendant should have **in the first instance** made an application to the District Court itself. Such an application to the District Court is not one made in terms of the Civil Procedure Code

but in accordance with a **rule of practice** recognized and adopted by our Courts over a very long period of time.

This "rule of practice" was considered and approved as far back as **1905** by Layard, C.J. in *Gargial v. Somasundram Cheety* [19]. Said the learned Chief Justice:–

> "The ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the Court which made the *ex parte* order to rescind the order, on the ground that it was improperly passed against them".

Again, Dias, J. in *Loku Menika v. Selenduhamy* [20] dealt with this "rule of practice" exhaustively. The learned Judge characterized the "rule of practice" as one "which has become deeply ingrained in our legal system – namely, that if an *ex parte* order has been made behind the back of any party, that party should first move the Court that made that *ex parte* order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter".

Once again, Siva Selliah, J. in a fairly recent judgment of the Court of Appeal (*Andradie v. Jayasekera Perera*) [21], reviewed the earlier cases and expressed himself thus:–

> "I am also of the view on the **long line of cases** quoted by the learned counsel for respondent that the practice has grown and **almost hardened into a rule** that where a decree has been entered *ex parte* in the District Court and is sought to be set aside **on any ground,** application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application **is not consistent with reason** or the proper exercise of the Judge's discretion or he has **misdirected himself on the facts or the law** will this Court grant extraordinary relief by way of revision . . ." Siva Selliah, J. concluded that the decisions "establish a procedure and practice which has taken **deep root and should not be lightly disturbed".**

The application to the Court of Appeal was accordingly refused.

There is one relevant and significant feature in *Andradie's* case (*Supra*) which must be emphasized. **There was here an allegation of fraud and false pleadings and evidence**. In other words, the ground of complaint was not confined to "procedural legality and propriety" but encompassed "the substance of the *ex parte* judgment" a distinction drawn by Fernando, J. in his judgment. As stated earlier, the application to the District Court contemplated is not one made in terms of any provision of the Civil Procedure Code.

Having regard to the long standing "rule of practice" which has over the years hardened into almost a rule of law, I hold that the Court of Appeal was precluded from exercising its revisionary jurisdiction in the instant case. I would therefore allow the appeal, set aside the judgment of the Court of Appeal, and restore the *ex parte* judgment and decree of the District Court awarding the plaintiff damages in a sum of Rs. 750,000/-. The defendant must pay the plaintiff a sum Rs. 10,000/- as costs of appeal.

Appeal dismissed.

Plaintiff-Appellant to repay Defendant-Respondent Rs. 750,000/- with legal interest from 11.12.90 and costs fixed at Rs. 10,000/-.