FERNANDO
v.
CEYLON BREWERYS LTD.

COURT OF APPEAL
U. DE Z. GUNAWARDENA, J.,
C.A. NO. 659/97 (REV).
D.C. COLOMBO NO. 17168/MR
NOVEMBER 5TH, 1997

Civil Procedure Code – Amending Act No. 79 of 1988 – s. 24, s. 86 (2), s. 753, s. 754 (4), s. 757 (1), 247 – Exparte-purging default within 14 days of the service of Decree – Is it mandatory – Interpretation Ordinance s. 8 (3) – Appealable Order – Does Revision lie.

The learned District Judge vacated the judgment that had been entered against the defendant-respondent for default in filing answer, and permitted him to file answer. The application to set aside the judgment was not made within 14 days of service of the decree on the defendant. The plaintiff-petitioner moved in revision.

Held:

1. Before the amendment to s. 753 by Act, No. 79 of 1988, the Court of Appeal in the exercise of its revisionary powers could have only made the "Same order" which it might have made had the case been brought before it by way of an appeal ***whereas*** in the amended form the section empowers the Court of Appeal in the exercise of its powers of revision to make any order "as the interests of justice may require".

Per Gunawardana, J.

"The amended section enable the court to be more flexible and less legalistic in its means and in approach in dealing with a matter for s. 753 in its amended form seems to exalt not so much the rigour of the law but unalloyed justice, in the sense of good sense and fairness, so that the basis of the rationale for insistence on the requirement of special circumstances as a condition precedent to the exercise of Revisionary jurisdiction had disappeared."

2. s. 86 (2) requires the defendant to make the application to excuse his default within 14 days of service of the decree, in calculating the period of 14 days Sundays and Public Holidays ought not be excluded. – the expression "within 14 days of the service connotes less than that time which in 14 days".

3. Although the application seeking to vacate the Decree was late by one day, it ought not to be rejected on that score alone for the reasons that the requirement in s. 86 (2) is merely directory and not mandatory.

Per Gunawardana, J.

"It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non-compliance with the provisions of a statute may be directory.

4. The mistake on the part of the attorney-at-law in mistakenly taking down the wrong date for filing the answer on the due date is not a palpable error of law committed by the learned District Judge.

APPLICATION in Revision from an order of the District Court of Colombo.

Cases referred to:

1. *Ameen v. Rasheed* – 6 CLW 8.
2. *Allapitchai v. Sinni Marikkar* – 9 SCC 182.
3. *Sri Lanka General Workers, Union v. Samaranayake* – 1996 2 SLR 268.
4. *Wickremasuriya v. Appu Singho* – 1 NLR 178.
5. 16 Times Law Reports 119.
6. *Kathiresu v. Sinniah* – 71 NLR 450.

S. L. Gunasekera with *Kushan de Alwis* for plaintiff-petitioner.

S. Rupasinghe for defendant-respondent.

Cur. adv. vult.

November 5, 1997.

U. DE Z. GUNAWARDANA, J.

This is an application in revision in respect of an order dated 4.7.1997 whereby the learned Additional District Judge had vacated the judgment that had been entered against the defendant-respondent for default in filing answer and also permitted him (the defendant-respondent) to file answer.

At the hearing before me, the defendant-respondent put forward one solitary argument, ie that the application in revision does not lie in respect of the aforesaid order inasmuch as the relevant order was appealable. The plaintiff-petitioner, on the other hand, challenged the correctness and the validity of the aforesaid order of the learned Additional District Judge on two grounds which were as follows:

(*a*) that the judgment and decree for default entered as against the defendant-respondent could not have been set aside by the learned Additional District Judge since the application seeking to set aside the same had not been made to the District Court within 14 days of the service of the decree on the defendant-petitioner;

(*b*) that the learned Additional District Judge had, to quote verbatim from the somewhat needlessly pungent written submissions that had been filed on behalf of the plaintiff-petitioner: ".... the Additional District Judge had committed another palpable error of law in holding that the evidence of J. A. Welcome established reasonable grounds for default of the respondent".

But the sequel would show that the learned Additional District Judge's view that the lapse or the slip on the part of the attorney-at-law in mistakenly taking down, the wrong date for filing answer is a good ground of exculpation (for default in filing answer on the due date) and cannot be faulted in the least, let alone describe the view

taken by the learned District Judge as a "palpable error", more so as his view finds a warrant in the decisions of the Supreme Court which makes such condemnatory submissions on the part of the counsel for the plaintiff-petitioner, in relation to the Additional District Judge's finding or view even less excusable. Submissions would be all the better for being measured and attuned to politeness as opposed to bring gruff.

It is to be observed that, if as argued by the counsel for the defendant-respondent, an application in revision in respect of an order is precluded by or in virtue of the fact that an appeal too lies in respect of the same order, then that would entail a dismissal or rejection of the application in revision and the two grounds, stated therein ie (*a*) and (*b*) above, impeaching the correctness of the order of the learned District Judge, would not arise for consideration. As such, it is proposed to, first, consider the question whether an application in revision (in respect of the aforesaid order of the learned District Judge dated 04.07.1997) ought not to be entertained or rejected in limine since an appeal also lies in respect of the same order. The authorities cited by either side reflect 2 schools of thought or ways of thinking in regard to the question – one holding that in respect of an order that is appealable the availability of relief by way of revision is almost as unrestricted as the availability of relief by way of an appeal and the other taking the view that one can avail oneself of the remedy in revision only upon proof of exceptional circumstances.

But one salient point calls for remark, ie that all the decisions that have been cited by either side had been made prior to the amendment of section 753 of the Civil Procedure Code by Act No. 79 of 1988 – that being the section (ie section 753) making provision for relief by way of revision – there being no decisions of the Superior Courts, subsequent to the amendment in regard to the relevant question – wherein the scope of the amendment had been considered. Anyhow, no such authority has been cited.

The essence of the difference between the two forms of section 753 ie in its original and amended form is this: as the said section stood originally, the Court of Appeal or the Supreme Court in the exercise of its revisionary powers could have only made the "same order" which it might have made had the case been brought before it by way of an appeal whereas in the amended form the section

empowers the Court of Appeal, in the exercise of its powers of revision, to make any order "as the interests of justice may require".

Thus it would be noticed that the amended section enables the court to be more flexible and less legalistic in its means and in approach in dealing with a matter for section 753 in its amended form seems to exalt not so much the rigour of the law but unalloyed justice, in the sense of good-sense and fairness. So that the basis of the rationale for insistence on the requirement of special circumstances as a condition – precedent to the exercise of revisionary powers had disappeared as a consequence of the amendment of section 753 of the Civil Procedure Code by virtue of which amendment the Court of Appeal is now freed from the duty or rather the necessity of making "the same order" as it would have made in appeal and is empowered to make any order "as the interests of justice may require".

A party seeking relief by way of revision cannot now, ie after the amendment of section 753 of the Civil Procedure Code be asked what special reasons or circumstances justify his seeking the same order and consequently the same relief when, in fact, he can obtain the same order (and consequently the same relief) by the ordinary method of appeal, for the order that the Court of Appeal can now make in the exercise of its revisionary jurisdiction is substantially different from the order that it could have made formerly. When the order that could be made in appeal prior to introduction of the amendment to section 753 of the Civil Procedure Code was the "same" as that could be made in revision – there was good reason for thinking that the procedure in revision was, more or less, alternative to procedure in appeal or vice versa and the two remedies were available in such a way that when one is available – particularly when the right of appeal was open to a party, the other remedy in revision must be refused, - except in exceptional circumstances. That being so, the present state of the law is such that existence of special circumstances need not be shown as a condition – precedent to the invocation of the relief by way of revision.

The fundamental reason for restricting or not making the remedy of revision freely available seems to be succinctly summed up by Abrahams, CJ in *Ameen v. Rasheed*[1] as follows: "It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in the

revision. It has been said in this court, often enough, that revision of an appealable order is an exceptional proceeding and in the petition no reason is given why this method of rectification has been sought rather than ordinary method of appeal. I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed and I would allow the preliminary objection and dismiss the application with costs".

But the validity of the above reason for denying the relief in revision can no longer be accepted with favour inasmuch as the Court of Appeal in consequence of the amendment of section 753 by Act No. 79 of 1988 is now clothed with greater amplitude of power in making orders and is not confined, as formerly, ie before the aforesaid amendment, to making the "same order" which it might have made had the matter been brought before it by way of appeal. Since, prior to the amendment of section 753 the court could whilst acting in revision only make the "same order" as it could have made in the exercise of its appellate jurisdiction – the right of appeal and right in revision were justifiably treated as more or less, alternative remedies – available, more or less, in such a way that when one was accepted or made available the other had to be rejected or refused. When, as was the case prior to the amendment of section 753 of the Civil Procedure Code, the reliefs available or the orders that could be made by the court, by way of appeal and revision, were conterminous or the same – it could legitimately and even logically be inquired or queried, as had been done by His Lordship, Abrahams, CJ, in the excerpt of the judgment cited above, as to why the revisionary process, which may be described as a privileged procedure, was invoked in preference to that of appeal, several advantages or benefits being attendant on the revisionary process which would not be available to one who seeks relief by way of an appeal (for instance one need not furnish security or keep to certain prescribed time-limits as in the case when one appeals against an order) – the recourse to revision was treated as an extraordinary procedure in contradistinction to the procedure of appeal which was considered to be the normal remedy, when the order in question was appealable – as is the order in this case before me.

For the aforesaid reasons I hold that existence of special circumstances, in any event, is not an indispensable condition, as such, for the exercise of revisionary powers vested in the Court of Appeal. For

reasons given above the application in revision filed by the plaintiff-petitioner ought to be entertained which entails on the court the duty of considering the soundness of the 2 grounds set up therein challenging the correctness of the order dated 4.7.1997. It is cause for some dismay that the counsel acting or appearing for the defendant-respondent (before us) did not think it worth – while to take the trouble – apart from saying that an application in revision does not lie to say one syllable in support of the aforesaid order (itself) of the learned Additional District Judge made in favour of the defendant-respondent vacating the decree for defalt (on the part of the defendant-respondent). Dismay is all the greater for it was incumbent upon to them to have put forward arguments to support the order of the learned Additional District Judge (which order is the subject of revision proceedings before me) to expiate or make amends, at least out of regret, for the original sin of the attorney-at-law (who appeared for the defendant) and whose lack of alertness or laxity in taking down a wrorng date for filing answer had fathered all these troubles on the defendant-respondent. To consider the grounds (*a*) and (*b*) referred to above in order, it has been submitted by the plaintiff-petitioner that the application to set aside the judgment (that had been entered against the defendant for default in filing answer) not having been made "within fourteen days of the service of the decree on the defendant as required by section 86 (2) of the Civil Procedure Code ought to be rejected".

The decree had been served on the defendant-petitioner on 3.2.1997 and the application to set aside the same had been made on 18.2.1997. So that the defendant-respondent in making the application to the District Court was late by one day, for the Sundays and public holidays could not be excluded in reckoning the 14 days as the learned Additional District Judge had done. It is to be observed that the said section 86 (2) requires the defendant to make the application to excuse his default "within 14 days of the service of the decree" which means that the application must be tendered to court inside 14 days and not beyond that specified period. The expression "within 14 days" connotes less than that time which is 14 days. The fact that the framers of the Code of Civil Procedure intended that, in calculating the period of 14 days, – Sundays and public holdays ought not to be excluded is evident from an examination of sections 754 (4) and 757 (1) of the Civil Procedure Code where the identical time-limit, that is, within a period of 14 days, is stipulated for presenting (to court) of the notice

of appeal, and application for leave to appeal respectively. But what is significant is that in the body of the said two sections themselves, ie 754 (4) and 757 (1) it is stated that in reckoning the 14 days for the purpose of filing the notice of appeal, and the application for leave to appeal respectively, Sundays and public holidays have to be excluded or not to be counted. The framers of the code, by deliberately omitting to say so in 86 (2) of the Civil Procedure Code, that is, that 14 days ought to be reckoned exclusive of public holidays and Sundays, must be taken to have clearly intended that the period of 14 days within which the application has to be made, in terms of 86 (2) of the Civil Procedure Code, has to be reckoned inclusive of all days which fall within that period not excepting public holidays and Sundays.

It would be germane to point out that that the above construction of section 86 (2) of the Civil Procedure is countenanced by section 8 (3) of the Interpretation Ordinance and is in keeping with it for the said section stipulates for the exclusion of public holidays from the computation of time only where a limited time not exceeding 06 days is appointed for the doing of any act or the taking of any proceeding and not when the time-limit exceeds 06 days as in the period prescribed by section 86 (2) of the Civil Procedure Code.

So that exclusion of Sundays and public holidays is authorized or permitted only when an act has to be done in less than six days or when the relevant law itself, which requires that act to be done specifically excludes Sundays and public holidays from the reckoning. In fact, it has been held in an analogous case, that is, that in reckoning the 14 days within which an action under section 247 of the Civil Procedure Code must be brought – Sundays and public holidays are not excluded. Vide *Allapitchai v. Sinni Marikar*[2]

This case was not cited to the Additional District Judge by the counsel who appeared for the plaintiff-petitioner at the inquiry nor was it cited to me. Perhaps, the learned Additional District Judge could have been dissuaded or prevented from making the "palpable errors" of law that he is airily alleged to have committed had the counsel, whose duty it was to have done so, cited the relevant authorities to the Additional District Judge. I have sometimes wondered whether the Bar has any *raison d'etre* if the Bench has to decide un-aided.

Although the application seeking to vacate the decree was late by one day, I feel, it ought not to be rejected on that score alone for the reason that the requirement in section 86 (2) of the Civil Procedure Code is merely directory and not mandatory. One must ask the obvious question: could it possibly have been the intention of the legislature that the application to purge default ought to be rejected without consideration of the matters urged therein for no other reason than that it was somewhat belated or late by just one day, as is the case in hand. The legislature itself had studiously refrained from spelling out the consequence of non-compliance with the requirement in section 86 (2) as to the time-limit within which the application has to be tendered to court and also not chosen to say whether this provision is mandatory or directory. That being so, the court itself must determine the matter "exercising a nice discrimination along broad-based common-sense lines".

The question whether provision in a statute is mandatory or directory is not capable of generalisation but when the legislature has not said which is which, one of the basic tests for deciding whether a statutory direction is mandatory or directory is to consider whether violation thereof is penal or not. It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non-compliance with the provisions of a statute may held to be directory.

The judgment in Allapitchai case referred to above can be distinguished in that a cardinal aspect, viz whether the provision stipulating that a 247 action ought to be filed within the time-limit prescribed by that section, is mandatory or directory has not been considered therein – although that judgment had considered the other question whether the Sundays and public holidays ought to be excluded when the relevant provision of the law was silent in that regard. In interpreting a provision of the Industrial Disputes Act which required that every petition of appeal, to be filed within 30 days, "shall" be accompanied by a certificate issued under the hand of the President of the Labour Tribunal that the appellant had furnished security - it was held by the High Court of Colombo in case No. HCA. 561/92 – that the requirement that the said certificate ought to "accompany" the petition of appeal was not mandatory but merely directory and the relevant

certificate could be furnished even after the lapse of 30 days. The judgment of the High Court was upheld by the Supreme Court by a Bench of three Judges in *Sri Lanka General Workers, Union v. Samaranayake*[3] *piece de resistance,* so to speak, of the High Court decision was that, inasmuch as the consequence of non-compliance with the relevant provisions of the law relating to filing of appeal within the stipulated period was not spelt out, it could legitimately be inferred that the legislature intended that a discretion should reside in the hands of court to decide for itself, after considering the degree of importance of the provision that has been disregarded and upon a review of all the relevant considerations, whether the relevant provision is what is called mandatory or only directory. As had been stated by Lord Coleridge, CJ: "An absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially".

In a case referred to in Bindra on Interpretation page 669 it had been stated that: "a statute which requires certain things to be done or provides what result shall follow a failure to do them, is mandatory but if the statute does not declare what result shall follow a failure to do the required acts it is directory".

To quote from a judgment of the Indian Supreme Court: "after all, courts are to do justice, not to wreck this end product on technicalities. Viewed in perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied within time or in extended time...".

The requirement in section 86 (2) of the Civil Procedure Code being, in my view, directory the defendant-petitioner must be held to have substantially complied with the relevant provision by tendering the application to court one day later than the period or date on which he ought to have tendered the application to court in terms of section 86 (2) of the Civil Procedure Code to ensure compliance to the very letter of the law – the general rule of the law being, as pointed out above, that a mandatory provision must be fulfilled exactly but it is sufficient if a directory provision is complied with substantially".

It is not without interest to note that in *Wickramasooriya v. Appu Singho*[4] it was held that in calculating a period within which an act

is required to be done, the day from which such period is to be commenced is excluded and the last day of such period is included. If this test is applied the defendant-respondent's application to the District Court made in terms of section 86 (2) of the Civil Procedure Code falls within the prescribed period of time. But this view has not been followed in the decision of this matter for a just decision, within the framework of the law, can be arrived at by other means.

It remains to consider whether the mistake as to date on which the answer was to be filed, made by the attorney-at-law, viz Mr. Welcome, who had been retained by the attorney-at-law for the defendant-respondent on record, viz Mr. G. G. Arulpragasam can be held to be a "reasonable ground" for default in filing answer. According to the evidence given by Mr. Welcome at the inquiry (before the learned Additional District Judge) into the application to purge default Mr. Welcome had stated that he had mistakenly or inadvertently taken down 20th September as the date for filing answer when, in fact, the correct date given by the court was 30.8.1996 which correct date was discovered only on an inspection of the case record on a later date. According to the evidence of Mr. Welcome and the facts averred to in his affidavit by Mr. Arulpragasam (who had filed the proxy for the defendant-respondent) – Mr. Arulpragasam had retained Mr. Welcome (on the summons returnable date) to tender the proxy to the court and obtain a date to file answer. It is to be observed that in terms of the proviso to section 24 of the Civil Procedure Code an attorney-at-law instructed by the registered attorney represents the registered attorney-at-law in court. The learned Additional District Judge had accepted the evidence of Mr. Welcome and had evidently held the mistake made by him (Mr. Welcome) to be a reasonable ground for the default on the part of the defendant-respondent in not filing answer on the due date, and had vacated the decree that had been entered after trial *ex-parte*. As stated above, the view taken by the Additional District Judge that, on the facts referred to above, the decree for default ought to be set aside is fully vindicated by two decisions of the Supreme Court reported in 16 Times Law[5] Reports page 119 *Kathiresu v. Sinniah*[6] which are on all fours with the facts of the case before me. The above decisions of the Supreme Court are not only persuasive but in fact, have a binding force so far as this court is concerned. In both the said cases cited above, the proctor and his client being absent on the trial date because the proctor had by mistake taken down wrong date of trial – Decree Nisi that had been

entered on account of the non-appearance was set aside. It is to be recalled that it was in relation to the view or the finding of the learned Additional District Judge – ie that the mistake on the part of the attorney-at-law in mistakenly taking down the wrong date for filing the answer was a reasonable ground for default in filing the answer on the due date – that the learned counsel for the plaintiff had opined that "the learned Additional District Judge had committed another palpable error of law" – when, in fact, the learned Additional District Judge's view was supported by decisions of the Supreme Court one of which decisions was a celebrated decision of a former Chief Justice – renowned for his incisive reasoning.

For the aforesaid reasons I do hereby make order affirming the order of the learned Additional District Judge dated 4.7.1997 and dismissing the application in revision filed by plaintiff-petitioner.

Application dismissed.