

**AUSTRALANKA EXPORTERS PVT LTD**

**v.**

**INDIAN BANK**

COURT OF APPEAL  
JAYAWICKRAMA, J.  
FERNANDO, J.  
C.A. 1009/98  
COM/HC COLOMBO 15/96  
FEBRUARY 14, 2001.

*High Court of the Provinces (Special Provisions) Act No. 10 of 1996 - S.5  
- Constitution Article 154P - Revision of Order of Commercial High  
Court - Jurisdiction of the Court of Appeal. Civil Procedure Code S.88(2).*

The Plaintiff Respondent instituted hypothecary action in the Commercial High Court of Colombo, to recover a sum of money lent to the Defendant-Petitioner as the Defendant Petitioner defaulted the matter went *exparte* and decree was entered against the Defendant Petitioner. The Application to purge default was dismissed. Thereafter the Defendant Petitioner sought to revise the said Order of the High Court-

**Held :**

- (i) The Order of the High Court Judge refusing the application to set aside the *exparte* order has been made under S.88(2) C.P.C.,

In terms of S.59 of the Mortgage Act where a hypothecary action is heard *exparte* under S.84 and 85 C.P.C. the decree entered thereunder shall not be set aside under the provisions of S.86 and the Judgment entered thereunder shall not be deemed to be a judgment entered upon default for the purposes of S.88 of the Code. The said order is a lawful order.

**Held further :**

- (ii) However the Appellate jurisdiction in respect of Judgments and orders of the High Court of the Provinces made in the exercise of its civil jurisdiction is vested exclusively in the Supreme Court.

**APPLICATION** in Revision from the Order of the Commercial High Court, Colombo.

*Dr. Jayatissa de Costa* with *J. Hēnnayaka* for Petitioner.

*P. Jayawardena* for Respondent.

*Cur. adv. vult.*

March 12, 2001.

**RAJA FERNANDO, J.**

The Defendant-Petitioner-Petitioner (hereinafter referred to as the Petitioner) has filed this application to revise the order of the learned High Court Judge of the Commercial High Court of Colombo made on 24.8.1998 dismissing the Petitioner's application to set aside the decree entered on the judgment of the Court made on 18.06.97.

When this matter was taken up for Argument on 16th November, 2000, the Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent) raised several preliminary objections. Both parties agreed to file written submissions on the preliminary objections and invited court to make order on the written submissions filed.

The preliminary objections raised by the Respondent are :

- (1) The only remedy available in law for the Petitioner is an appeal in terms of Section 88(2) of the Civil Procedure Code;
- (2) In terms of Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 an appeal or application from judgments or orders of the High Court established by Article 154 P of the Constitution in the exercise of its Civil Jurisdiction lies to the Supreme Court and not to the Court of Appeal;
- (3) The Petitioner's Application for Revision must fail since he has failed to aver the existence of any exceptional circumstances which justify the invocation of the revisionary jurisdiction;

- (4) The Petitioner's application would fail for non-compliance with the mandatory provision of Rule 3(1) of the Court of Appeal (Appellate procedure) rules of 1990;
- (5) The Petitioner is guilty of laches.

The facts of this case are briefly as follows:

The Respondent (Petitioner) instituted this action against the Petitioner for the recovery of a sum of money the Respondent Bank lent and advanced to the Petitioner upon the security of a mortgage bond which the Petitioner failed and neglected to repay.

The action was to recover the said money and to enforce the Mortgage bond for the said recovery of the monies lent.

The Petitioner filed answer admitting the execution of the Mortgage bond and the fact that he has borrowed monies from the Respondent. Thereafter the Petitioner has defaulted in appearing and the matter has been fixed for ex parte trial by the learned trial judge on 9.6.97. After ex parte trial on 18<sup>th</sup> June 98 judgment and decree has been entered in a sum of Rs.3,000,000/= and interest thereon.

After service of the ex parte decree the Petitioner has filed petition dated 21.11.97 making an application to vacate the said decree.

At the inquiry into the application to vacate the ex parte decree the Petitioner has not led any evidence and moved that the matter be decided on the written submissions filed by both parties.

After considering the written submissions tendered by the parties the learned High Court Judge has on 24.8.98 refused the application to set aside the judgement and decree.

Undoubtedly the order of the learned High Court Judge refusing the application to set aside the ex parte order has been made under the Provisions of Section 88(2) of the Civil Procedure Code.

Section 59 of the Mortgage Act states "where a hypothecary action is heard ex parte under Sections 84 and 85 of the Civil Procedure Code the decree entered thereunder shall not be set aside under the provisions of Section 86 of that code and the judgment entered thereunder shall not be deemed to be a judgment entered upon default for the purpose of Section 88 of that code".

Hence the order of the learned High Court Judge dismissing the application to vacate the order made ex parte is a lawful order.

Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1966 has clearly enacted that "Any person who is dissatisfied with any judgment pronounced by a High Court established by Article 154(P) of the Constitution, in the exercise of its jurisdiction under Section 2, in any action proceeding on matters to which such person is a party may prefer an appeal to the Supreme Court against such judgment, for any error in fact or in law."

Appellate jurisdiction in respect of judgments and orders of the High Court of the Provinces made in the exercise of its civil jurisdiction is vested exclusively in the Supreme Court.

On the above grounds the application for revision should be dismissed.

Further the Petitioner has not urged any exceptional circumstances for the exercise of the discretionary powers of revision of this Court.

The petitioner has failed to submit to Court all the journal entries and relevant pleadings and documents in this action

which are material for a determination of his application and hence this application should be dismissed for violation of rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990.

Considering all the circumstances of this case this court is of the view that the present application for revision filed by the Petitioner has no basis in fact or in law.

Therefore the application for revision is dismissed with costs fixed at Rs.20,000/=.

**JAYAWICKRAMA, J.** - I agree.

*Application dismissed.*