PETER SINGHO
v.
WYDAMAN

SUPREME COURT
SHARVANANDA, J. ABDUL CADER, J. & RODRIGO, J.
S. C. NO. 17/83; S. C. NO. 72/82 C.A. APPLICATION NO. 568/82
D. C. MT. LAVINIA NO. 1105/RE
19 OCTOBER 1983.

Civil Procedure Code, Section 86(2) — Decree entered ex parte — Application to vacate it on ground of non-service of summons.

Held —

When a defendant complains that summons had not been served on him and nevertheless a decree had been entered against him, he challenges the foundation of the default decree. When a defendant attempts to satisfy Court that the decree against him for "default" is not based on valid evidence for the finding that summons was served on him, he falls within the ambit of section 86(2) of the Civil Procedure Code.

APPEAL to the Supreme Court from judgment of the Court of Appeal.

Nimal Senanayake with *Miss S. M. Senaratne* and *Miss H. D. Telespha* for plaintiff-respondent-appellant.

M. A. Q. M. Ghazzali with *D. S. Rupasinghe* for the defendant-petitioner -respondent.

Cur. adv. vult

8 November, 1983
ABDUL CADER, J.

At the conclusion of the argument on 19.10.83, we dismissed the appeal with costs and indicated that we will give our reasons for the dismissal later. We now set out below the reasons.

The appellant before us was the plaintiff in an action against the defendant-respondent to eject him. Summons was not served on the respondent personally, but was reported to have been served by way of substituted service. The defendant failed to appear on the date of hearing and judgment was entered in

favour of the plaintiff ex-parte. The respondent moved to have the judgment set aside as no summons was served on him either personally or by way of substituted service. The learned District Judge made order refusing to vacate the judgment. The petitioner filed notice of appeal against the order and tendered the Petition of Appeal also within time.

Meanwhile the plaintiff-appellant filed application for execution of decree which was allowed by the Judge on the basis that the tenant had failed to obtain Leave to Appeal against his order which, according to the District Judge, was the proper procedure to be followed.

On petition for revision being filed by the defendant-respondent, the Court of Appeal took the view that Section 86(2) of the Civil Procedure Code, on which the defendant-respondent relied, presupposes that summons has been served on the defendant who is in "default". But since the respondent had taken up the position that no summons has been served on him, this Section has no application.

The Court, however, went on to discuss the question whether the order made by the District Judge was a final order and, after quoting very relevant authorities, came to the conclusion that the order made by the District Judge was a final order from which the petitioner had rightly preferred an appeal to that Court.

Before us, Mr. Senanayake conceded that if Section 86(2) had application the defendant had a right to appeal direct in view of Section 88 (2) of the Civil Procedure Code, but he contended that since Section 86(2) had no application even as the Court of Appeal had held, the defendant could not avail himself of Section 88(2). He did not deny that the District Court had a right to entertain an application by the defendant to set aside the order made ex parte, but he said that that would be under the inherent jurisdiction of the District Court and not under any particular section in the Code, and submitted that the order made by the learned District Judge was an "order" in terms of Section 754 (2) and, therefore, an appeal could be preferred only with the leave of the Court of Appeal.

This contention is thoroughly artificial for the reason that if an appeal lies when the defendant agrees that summons has been served on him and he was in default under Section 86(2), there is all the more reason why a direct appeal should be permitted when the defendant denies service of summons on him.

To give the word "default" the restricted meaning contended for would be to place the defendant who had received summons and kept away from Court at an advantage over a defendant who had not received summons altogether.

It may be noted that Section 88(2) has no reference expressly to Section 86(2).

Counsel relied strongly on the word "default" in Section 86(2) and submitted that this section would apply only to a defendant who had failed to appear in court after summons had been served on him. The scheme of this chapter does not support Counsel's contention. The word "default" is used in a technical sense, both in Section 86(2) and 88(2), and not in the meaning of common usage. Section 84 reads as follows :

> "If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith or on such other day as the court may fix."

When a defendant complains that summons had not been served on him and nevertheless a decree had been entered against him, he challenges the foundation of the default decree. He moves the court to reverse its finding that he was in default; to hold with him that summons was not served on him. It is to be noted that he

makes application after "service of the decree against him for default". The corresponding word in the Code of Indian Civil Procedure is "non-appearance" (09.R.7) which is the sense in which the word "default" has been used in our Code.

I am of the view that when a defendant attempts to satisfy Court that the decree entered against him for "default" is not based on valid evidence for that finding that summons was served on him, he falls within the ambit of Section 86(2). I have, therefore, come to the conclusion that Section 86(2) would apply. I do not agree with the view of the Court of Appeal that Section 86(2) is confined to cases where the defendant is in default after summons have been admittedly served on him.

Under these circumstances, it is not necessary to go into the question whether the order made by the District Judge was an "order" or a "judgment" in terms of Section 754. However, the Court of Appeal has given valid reasons for its finding that the order made in this case is a final order which entitles the defendant to lodge an appeal without leave of the Court of Appeal.

The appeal is dismissed with costs.

ABDUL CADER, J. — I agree.

RODRIGO, J. — I agree.

Appeal dismissed