RAVI KARUNANAYAKE

vs

WIMAL WEERAWANSA

COURT OF APPEAL.
SOMAWANSA.J (P/CA).
WIMALACHANDRA. J.
CALA 71/2004.
DC COLOMBO 29767/MR.
MARCH 17, 2006.

Civil Procedure Code - section 75, section 86, section 87, section 437, section 438, section 839 - District Court setting aside its own order - Legality - Inherent jurisdiction of Court ?–Affidavit - Form 75 - Jurat to mention that oath being administered or affirmed ? - Absence - Is it fatal ?

The defendent respondent sought to amend the answer : the plaintiff-petitioner objected to the application and the matter was fixed for inquiry on which date the defendant-respondent was absent and unrepresented and on an application made by the plaintiff – petitioner the matter was fixed for trial on the original answer. The defendant-respondent thereafter made an application to

set aside the said order rejecting the amended answer on the basis that his Counsel had failed to note down the correct date for inquiry. The plaintiff-petitioner objected to the said application and written submissions were tendered. The District Judge acting under section 839 vacated his own order and fixed the matter for inquiry.

On leave being sought –

HELD:

(1) There is no provision in the Code for the District Judge who made the earlier order to vacate same for not only has he dismissed the application to amend the answer but has also fixed the matter for trial.

(2) Section 839 does not contemplate overriding an express provision of the Code or being used as a source of a new jurisdiction. Section 839 must be complementary to the Code and not detract from it.

Per Somawansa. J (P/CA) :

"However without prejudice to the above principle section 839 can be invoked in instances where Court is desirous of redressing a wrong done to a party by its own acts, but the respondent does not come within that ambit in the instant action. The respondent and the lawyers who had taken down the wrong date either due to negligence or an alleged lapse on his part or lawyers for which no other could be blamed and therefore the petitioner must suffer the consequences of his own negligence or that of his lawyers".

(3) Section 437 provides that an affidavit must be sworn or affirmed to by the person professing to make the statement embodied in the affidavit before any Court, Justice of the Peace or Commissioner for Oaths.

(4) The law requires that the jurat must mention the fact of an oath being admitted or an affirmation made – Form 75 of the Code and the affidavit could not have been 'read over'.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to :

1. *Kamala vs Andiris* 41 NLR 71.
2. *Jeyaraj Fernandopulle vs De Silva* 1991 1 Sri LR 70.
3. *Fernando vs Ceylon Breweries Ltd.* 1998 3 Sri LR 61.
4. *Ceylon Breweries Ltd., vs Fernando* 2001 -1 Sri LR - 270
5. *Rankira vs Silindu* 10 NLR 76.
6. *Julius vs Hodgson* 11 NLR 25.
7. *Karunawathie Ekanayake vs Gunasekera* 1986 2 CALR 250.
8. *Pakir Mohamed vs Mohamed Casim* 4 NLR 289.
9. *Inaya vs Lanka Orix Leasing Company* 1993 3 Sri LR 197.
10. *Loku Menika vs Senduhamy* 48 NLR 353.
11. *Haibu Lebbe vs Punchi Etana* 3 CLR 84 at 85.
12. *Garlilal vs Somasundaram Chetty* 9 NLR 26.
13. *Weeraratne vs Secretary, Provincial Council Badulla* 2 CL Rec 180-8 CWR 95.
14. *Caldera vs Santiagopillai* 22 NLR 155 at 158.
15. *Sayadoo Mohamedo vs Maula Abubakar* 28 NLR 58 at 3.

Sanjeewa Jayawardane for plaintiff-petitioner.
Manohara R. de Silva for defendant-respondent.

Cur.adv. vult.

March 17th, 2006.

ANDREW SOMAWANSA, J.(P/CA)

This is an application seeking leave to appeal from the order of the learned District Judge of Colombo dated 09.02.2004 vacating his own order of rejecting the defendant-respondent's application to amend the answer and fixing the matter for inquiry and if leave is granted to set aside the aforesaid order dated 09.02.2004. The plaintiff-respondent-petitioner (hereinafter sometimes called the petitioner also supported and obtained an interim order staying further proceedings in the District Court until the final determination of this application.

As per minute dated 13.01.2005 leave to appeal has been granted and when this main appeal was taken up for argument both counsel agreed to resolve the matter by way of written submissions.

The relevant facts are that on or about 20.08.2002 the defendant-petitioner-respondent (hereinafter sometimes called the respondent) sought to amend the answer. The petitioner objected to the said application to amend the answer and the matter was fixed for inquiry on 06.01.2003 on which date the respondent was absent and unrepresented and on an application made by counsel for the petitioner the matter was fixed for trial on the original answer. Thereafter the respondent made an application to set aside the said order rejecting the amended answer on the basis that counsel for the respondent had failed to note down the correct date of inquiry. Counsel for the petitioner objected to this application too and both parties tendered written submissions in respect of this application. In the meantime, the respondent had already filed an application for leave to appeal bearing No. 22/2003 in this Court from the very same order rejecting his application to amend the answer. This leave to appeal application bearing No. 22/2003 too was dismissed by the Court of Appeal for default of appearance on the part of the respondent. The respondent sought to have the matter re-listed and though formally re-listed upon the consent of counsel for the petitioner the Court of Appeal by its judgment dated 13.01.2005 dismissed the said application on the basis that it was merely academic to determine the matter involved.

Meanwhile, in the District Court consequent to the parties tendering their written submissions the learned District Judge made the aforesaid order dated 09.02.2004. It is from this order that the petitioner sought leave to appeal and leave has been granted.

Both parties have tendered comprehensive written submissions and invited Court to decide the appeal on the written submissions so tendered. The question of law formulated for decision of this Court is the legality of the order of the learned District Judge dated 09.02.2004 vacating the earlier order made by him on 06.01.2003 rejecting the respondent's application to amend the answer and fixing the matter for trial on the original answer.

It is contended by counsel for the petitioner that the learned District Judge has in the instant action sought to set aside his own order of rejecting the amended answer for non-appearance of the respondent and fixing the matter for trial on the original answer filed when it is trite law that the District Court has jurisdiction to set aside his own order only in specific

and limited instances which are countenanced by the law either in terms of specific provisions of the Civil Procedure Code or if the said order is *per incuriam*. The learned District Judge having made reference to the aforesaid fact nevertheless thereafter proceeded to state that he may set aside his own order in terms of section 839 of the Civil Procedure Code which reads as follows :

> "Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"

It would be useful to examine the impugned order dated 06.01.2003 which was later vacated by the same District Judge. The journal entry No. 12 dated 06.01.2003 reads as follows :

සටහන් බලන්න.

සං/උත්තරයට කළ ඉල්ලීම නිෂ්ප්‍රභා කරමි.

විභාගය 19.03.2003.

According to proceedings of 06.01.2003 the order reads as follows :

සංශෝධිත උත්තරයට කරන ලද ඉල්ලීමට විත්තිකරුගේ නීතිඥ මහතා නොමැති බැවින් ද මුල් උත්තරය මත නඩුව විභාගයට තබමි.

විභාගය 19.03.2003.

Admittedly, there is no provision in the Civil Procedure Code for the learned District Judge who made the aforesaid order to vacate the same for not only has he dismissed the application to amend the answer but has also fixed the matter for trial. The learned District Judge has taken the view that he has jurisdiction to vacate the said order in terms of section 839 of the Civil Procedure Code. However in view of the established judicial authority section 839 of the Civil Procedure Code does not contemplate overriding an express provision of the Civil Procedure Code or being used as a source of a new jurisdiction.

In the case of *Kamala* vs. *Andris* [1] it was held :

> "Section 839 of the Civil Procedure Code is not intended to authorize a court to override the express provisions of the Civil Procedure Code".

> Again in the case of *Jeyaraj Fernandopulle* vs. *De Silva*[2] "The inherent powers of a court are adjuncts to existing jurisdiction to remedy injustice. They cannot be made the source of new jurisdictions to revise a judgment rendered by court".

It is apparent that the legislature provided the District Court with the power to vacate its own orders only in a very limited and expressly identified situations. It is clear that the legislature did not intend the District Court venturing to vacate its own orders in other situations for which no express provision had been made. This is also clear on the *expressio unius* rule that the express mention of one excludes by necessary implication that which no mention has been made of. Thus it could be seen that section 839 cannot be used to provide an additional situation for vacating its own orders which was never contemplated by the legislature. Section 839 must be complementary to the Code and not detract from it. However without prejudice to the above principle section 839 can be invoked in instances where Court is desirous of redressing a wrong done to a party by its own act. But the respondent does not come within that ambit for in the instant action the respondent failed to appear on the due date due to his own doing. It was the respondent and his lawyers who had taken down the wrong date either due to negligence or an alleged lapse on his part or his lawyers for which no other could be blamed and therefore the petitioner must suffer the consequences of his own negligence or that of his lawyers.

Counsel for the respondent submits that grounds adduced by him are sufficient for the Court to set aside its previous order. In this respect he submits that the respondent was not present in Court and not represented on the date of the inquiry was due to the fact that the counsel appearing for the respondent had taken down the wrong date. In this respect he has cited a dictum of U. de Z. Gunawardena in the case of *Fernando* vs. *Ceylon Breweries Ltd.* in support of his contention that the default of an Attorney-

at-Law may be excused. However it appears that the respondent has completely suppressed from this Court the fact that this judgment of the Court of Appeal was set aside in appeal by the Supreme Court by Justices Fernando, Wijetunga and Weerasekera in Ceylon Breweries Ltd. Vs. Fdo. [4]. The general thinking of the Court is that although a client would be prejudiced by the acts or omission of his Attorney nevertheless this is a necessary consequence of appointing an Attorney-at-Law as one's agent to appear in Court as it secures the objects of ascertainability, propriety and discipline in an even playing field.

In the case of *Rankira* vs. *Silindu*[5] it was held :

"That a mistake or over sight on the part of the Proctor of a party to a suit cannot be construed to be a cause not within the applicant's control".

Also in the case of *Julius* vs. *Hodgson*[6]

"The practice is not to give leave to appeal where the only ground relied on is that the appellant or his proctor made some miscalculation of time or some other mistake or that the failure was due to the proctor's neglect".

In *Karunawathie Ekanayake* vs. *Gunasekera* [7]

The wording of section 86(2) of the Civil Procedure Code and section 418(2) of the Administration of Justice Law remaining the same, the legislature could not have intended a different interpretation to that which had been judicially expounded in relation to section 86(2) of the Civil Procedure Code.

In *Pakir Mohideen* vs. *Mohammadu Casim*[8]

It is the duty of the proctor to inform his client the proper date of trial and to have asked for instructions.

Be that as it may, if the petitioner or his lawyers wanted to demonstrate to Court that the default in appearance on the date of inquiry into the acceptance of the amended answer was not due to negligence but was due to a *bona fide* genuine mistake in noting the date then the burden is on the respondent to satisfy Court either by oral evidence or at the very least evidence in the form of a proper and a valid affidavit setting out the detailed reasons as to such a mistake.

In this respect, along with the affidavit of the respondent three other affidavits were filed all of which were bad in law and objected to on the basis that they were tainted and flawed in law as the jurat attested by the Justice of the Peace does not state that he either administered an oath or that the affidavit was affirmed to by the affirmant. The aforesaid omission has been brought to the attention of Court and an objection has been taken in paragraph 2 of the petitioner's statement of objections in respect of the application to amend the plaint.

The law requires that the jurat must mention the fact of an oath being administered or an affirmation being made. This is clear from form 75 of the Civil Procedure Code which specifies the "Formal parts of an affidavit in Sri Lanka". It says it must be sworn or affirmed in the jurat. Section 437 provides that an affidavit must be "sworn or affirmed to by the person professing to make the statement embodied in the affidavit before any court or Justice of the Peace or Commissioner for Oaths ..... such person qualified to administer the oath or affirmation". Section 438 provides that :

> "Every affidavit made in accordance with the preceding provisions shall be signed by the declarant in the presence of the court, Justice of the Peace or Commissioner for Oaths or persons qualified before whom it is sworn or affirmed".

Thus, it is clear that the law requires the affidavit to be sworn or affirmed in the jurat and the affidavit could not have been "read over" as stated by the Justice of the Peace. Furthermore and very significantly, no Oath has been administered. In order for the affidavit to be validly constituted in law, the affirmant therein should have been affirmed by the Justice of the Peace, which in the present instance has not been done.

Counsel for the respondent submits that the respondent in his affidavit has specifically stated at the beginning that he solemnly, sincerely and truly declares and affirms to the contents of the same. In the circumstances he submits that the absence of the word 'affirmed to' in the jurat would not and ought not to miliate against the affirmant's manifest intention of affirming to the contents of the affidavit. However in view of the aforesaid reasons I am unable to agree with counsel for the respondent.

In the case of *Inaya* vs. *Lanka Orix Leasing Company*[9] the head note reads as follows :

After decree was served, the defendants-appelants filed petition and affidavit to have the *ex parte* judgment and decree set aside. It was contended that there was no proper application under section 86 (2)-(3) as there was no proper affidavit ; the defendants-appellants have made a declaration under the Oaths and Affirmation Ordinance. District Court upheld the objection.

It was held :

> "In the affidavit before Court the defendants being Muslims had failed to solemnly, sincerely and truly declare and affirm the specific averments set out in the affidavit. The recital merely states that they make a declaration and in the jurat there is no reference as to whether the purported affidavit was sworn to or affirmed to".

It is to be seen that in respect of the aforesaid affidavit tendered by the respondent the learned District Judge has come to an erroneous finding that the petitioner has failed to satisfactorily refute or challenge the contents of the affidavit filed by the respondent. However the learned District Judge has failed to appreciate that far from the contents of the affidavit the petitioner has raised a far more fundamental issue that there was no material or evidence before Court to accept the position that the lawyer had in fact made a genuine mistake as opposed to being simply negligent. Furthermore, in the absence of a valid affidavit supporting the averments in the petition before Court there is no evidence of the circumstances in which the respondent failed to appear on 06.01.2003.

It is interesting to note that though the page of the lawyer's diary relevant to the date on which he says he had erroneously noted down the inquiry date to be 06.02.2003 was produced most significantly the page of the diary relevant to 06.01.2003 which was the day on which the inquiry was actually fixed for was not produced. If that page in the lawyer's diary was produced and if it was blank then it would have established his *bona fides*. In the circumstances it is to be noted that the respondent has failed to discharge his onus of demonstrating to Court that non appearance on the inquiry date was a mistake and not negligence. Erroneously the learned District Judge without considering the aforesaid matters proceeded to believe the lawyer's version of not being present on the inquiry date due to erroneously noting a wrong date.

Counsel for the respondent submits that the legislature cannot legislate for all the circumstances which may arise in the District Court and enumerate the same within the provisions of the Civil Procedure Code. In sections 86 and 87 of the Civil Procedure Code the legislature has specifically dealt with the cause of action which ought to be taken if an order is entered in default. Therefore it is only reasonable to assume that a same cause of action ought to be taken in a case of a default in other inquiries, which are conducted before the District Court. An inquiry into the question as to whether an order made in default should be set aside or not may require evidence being led on the matter. In the circumstances the District Court is better equipped to conduct an inquiry of such nature. It would not only make the function of the Appellate Court more easy, it would secure the due administration of justice expeditiously. Counsel submits that it is due to these reasons that Appellate Courts have held in a number of instances that the Court of first instance have power to vacate its own orders entered in default. In support of his argument he has cited the following cases.

In the case of *Loku Menika* vs *Selenduhamy*[10] Dias J. having considered the cases of *Haibu Lebbe* vs. *Punchi Ettana*[11] *Garlial* vs. *Somasunderam Chetty*[12] *Weerarathe* vs. *Secretary PC Badulla*[13] *Caldera* vs. *Santiagopillai*[14] *at 158. Sayadoo Mohamado vs. Maula Abubakkar*[15] at 63 followed these decisions and held :

"Where an order is made *ex parte* the proper procedure to be adopted by the person against whom that order has been made is in the first instance, to move the Court which made the order to set it aside, such an application would not be in terms of the Civil Procedure Code but is one which is the rule of practice which has become deeply ingrained in the legal system of Ceylon".

The respondent was not present and not represented on the date of the inquiry due to the fact the counsel appearing for the respondent has taken down the wrong date. However at times making mistakes regarding dates, dates fixed for trials being changed, trials being postponed and defaults of appearance excused and order dismissing actions, vacated because of mistakes having been made by Attorney-at-Law regarding dates given by Court. In the said circumstances he submits that the objection based on jurisdiction is totally misconceived and equally untenable and that the learned District Judge acted within jurisdiction when he vacated its own order made on 6th January, 2003.

I am not at all impressed with the aforesaid submission for on an examination of the aforesaid cases one could see most significantly that they deal with situations where the District Court has been specifically conferred with the power in terms of the Civil Procedure Code to purge the default and vacate its own order. As such the aforesaid excerpt has been quoted out of context and has no application to the issue at hand. In any event, the argument raised by counsel for the respondent that although the Civil Procedure Code does not deal with an instance when default is made on a date of inquiry nevertheless the District Court can vacate its own order of default if reasonable grounds for default is shown by a party is mere surmise and conjecture. It would be seen that the aforesaid submission would completely cut across the express provisions contained in the Civil Procedure Code.

For the foregoing reasons, I would allow the appeal and set aside the order of the learned District Judge dated 09.02.2004 with costs fixed at Rs. 15,000.

WIMALACHANDRA, J. – *I agree.*

Appeal allowed.

Order of District Court set aside.