

**WIJESEKERA**  
**vs**  
**WIJESEKERA AND OTHERS**

COURT OF APPEAL,  
AMARATUNGA J., AND  
WIMALACHANDRA J.,  
CALA 534/2002/(LG),  
D. C. GALLE L/14260/00  
SEPTEMBER 01, 2000

*Civil Procedure Code, sections 84, 85, 86(2) and 86(2A) Ex-parte trial - Setting aside of same-Procedure to be followed - Setting aside of the proceedings without consent of plaintiff - Is it valid ? - Can the court override express provisions of the Code on equity and justice ?*

**Held :**

- (i) Under section 86(2A) it is only if the plaintiff consents and not otherwise the court can set aside an order made fixing a case for *ex-parte* hearing against a defendant.
- (ii) An *ex-parte* order made in default of appearance of a party cannot be vacated until he makes an application under section 86(2) and purges the default.
- (iii) A court cannot override the express provisions of the Code.
- (iv) It is only in cases where no specific rule exists the court has the power to act according to equity, justice and good conscience.

*Per Wimalachandra, J.*

"It is to the best interest of the administration of justice that judges should not ignore or deviate from the procedural law and decide matters on equity and justice.

**APPLICATION** for leave to appeal from an order of the District Court of Galle, with leave being granted.

**Cases referred to :**

1. *Karunaratne et al vs Mohideen et al* - 43 NLR 102
2. *Fernando vs Sybil Fernando and others* - 1997 3 Sri LR 1 at 12.

*Rohan Sahabandu* for plaintiff petitioner

*C. Weerakkody* for 1st and 2nd defendant respondents

*S. A. D. S. Suraweera* for 3rd defendant respondent

*Cur. adv. vult.*

October 14, 2004

**WIMALACHANDRA, J.**

The plaintiff-petitioner (hereinafter referred to as the plaintiff) filed this leave to appeal application against the order of the learned Additional District Judge of Galle dated 04.12.2002

The facts relevant to this application as set out in the petition are briefly as follows :

The plaintiff filed the action bearing No. 14260/L in the District Court of Galle, inter-alia for a declaration, that the land described in the schedule to the deed No. 8873 dated 23.03.1978 is held in trust by the 1st defendant for and on behalf of the plaintiff and that the 2nd and 3rd defendants have no right, title or interest to the said property.

On that day fixed for trial, the 1st and 2nd defendants were absent and so was their Attorney-at-Law. The learned Judge proceeded to hear the case *ex-parte* against 1st and 2nd defendants. The *ex-parte* trial commenced and whilst the plaintiff was giving evidence and after nine pages of his evidence were recorded, an Attorney-at-Law entered an appearance in the midst of the *ex-parte* trial and made an application that the 1st and 2nd defendants be allowed to participate in the trial, on the ground that the registered Attorney-at-Law for the 1st and 2nd defendants was sick and unable to be present in Court and, as the husband of the 2nd defendant was due to leave the Island on that day, the 1st and 2nd defendants were unable to be present in Court. The plaintiff objected to the said application on the ground that it was misconceived and contrary to the provisions of sections 84, 85(1), 86(2) and 86(2A) of the Civil Procedure Code.

However, the learned Judge, by his order dated 04.12.2002, allowed the application as stated by him, in the interest of justice and on equitable grounds. It is against this order the plaintiff has filed this application for leave to appeal. This Court granted leave to appeal against the said order.

Section 84 of the Civil Procedure Code states that if the defendant 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 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.

Once the case has been fixed for *ex-parte* trial against a defendant for default, the Court may if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant, and

---

permit him to proceed with his defence as from the stage of default (Section 86(2A) of the Civil Procedure Code)

Accordingly, it is to be seen that, under Section 86(2A) it is only if the plaintiff consents and not otherwise the Court can set aside an order made fixing a case for *ex-parte* hearing against a defendant. A Court cannot override the express provisions of the Civil Procedure Code.

In the case of *Karunaratne et al Vs. Mohideen et al*<sup>(1)</sup>. Howard, C. J. said it is only in cases where no specific rule exists, the Court has the power to act according to equity, justice and good conscience.

In the case of *Fernando Vs. Sybil Fernando and others* Dr. Amerasinghe, J made the following observations with regard to the importance of procedural law :

“Admittedly, Courts of law are concerned with ensuring justice according to law ; however, in my view, civil procedure law cannot be consigned to a place of inferiority as being merely technical and therefore relatively unimportant or as serving no other purpose than conveying a particular litigant in a safe, expeditious and economical manner on his way to the fair resolution of his dispute by a Court of Law. To consign civil procedural law to a place of inferiority and to regard it as something unimportant, or antithetical to the substantive law is erroneous”

Then at page 13 he said :

“The concept of the laws of Civil Procedure being a mere vehicle in which parties should be safely conveyed on the road to justice is misleading, for it leads to the incorrect notion that the laws of Civil Procedure are of relatively minor importance, and may therefore be disobeyed or disregarded with impunity.”

It is to the best interest of the administration of justice that judges shall not ignore or deviate from the procedural law and decide matters on equity and justice as Dr. Amerasinghe J. pointed out in the aforesaid case of *Fernando vs. Sybil Fernando and others* (*Supra*). He said at page 16

“If the laws and customs you have to administer are wrong, it is for the Parliament to put them right - not for the Judges”

---

In the circumstances it is my considered view that in the instant case the learned Judge was wrong when he ignored the provision in Sections 84, 85, 86(2) and 86(2A) of the Civil Procedure Code and allowed the 1st and 2nd defendants to participate in the proceedings in the midst of an *ex-parte* trial against them.

It is only after the *ex-parte* decree has been served on the defendants that they can make an application under Section 86(2) of the Civil Procedure Code by way of petition and affidavit to set aside the *ex-parte* decree. An *ex-parte* order made in default of appearances of a party will not be vacated until he makes an application under Section 86(2) of the Civil Procedure Code, and purges the default.

For these reasons, we set aside the impugned order dated 04.12.2002 made by the learned Additional District Judge and direct the learned Judge to proceed with the *ex-parte* trial against the 1st and 2nd defendants. The appeal is accordingly allowed. We direct the 1st defendant-respondent to pay the plaintiff a sum of Rs. 1,050 as costs.

The Registrar of this Court is directed to return the record of this case forthwith to the District Court of Galle so that the parties could comply with the aforesaid direction.

**AMARATUNGA, J.**—I agree.

---