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**JAYASINGHE  
VS  
RAMANAYAKE AND OTHERS**

COURT OF APPEAL  
SOMAWANSA J. (P/CA),  
BASNAYAKE J.  
CA, APPLICATION 1396/2004 (REV)  
D.C. MT LAVINIA 1001/98/L  
MARCH 1, 2005

*Civil Procedure Code - Section 86(2) and , S 839 - Party not a Defendant - Is he bound by the Decree? - Can the decree be vacated by the successor in office? Audi alteram partem Rule-Pradesheeya Saba Act, 15 of 1987, Section 214 - Urban Councils Act - Section 220*

The Plaintiff - Petitioner Instituted action against one 'R' and the Maharagama Pradesheeya Sabhawa. Judgement and decree were entered exparte. The decree was not served on the Pradesheeya Sabawa as it was not in existence then. The Maharagama Urban Council, which succeeded the Pradesheeya Sabha accepted the decree and filed papers to have the Judgment and decree vacated.

The Plaintiff Petitioner objected to the application as the papers were filed after the 14 day period stipulated in Section 86(2). The trial Court overruled the objection and vacated the decree and permitted the Urban Council to file answer.

**HELD:**

- (i) It was the duty of the Plaintiff to make the Urban Council a party to the case. The decree issued on the Pradesheeya Saba without making the Urban Council a party, has no effect on the Urban Council.

Per Basnayake J.

"I am of the view that, the learned Additional District Judge has rightly exercised the inherent powers in this case, in a situation where no other provision is available and at the same time to have the principle of audi alteram partem Rule observed."

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An application in Revision from an Order of the District Court of Mt. Lavinia.

**Case referred to :**

1. *Fonseka vs Dharmawardena* - 1994 3 Sri LR 49.

*Ranjan Suwandarathne with Mahinda Nandasekera for Plaintiff Petitioner.*  
*Harsha Gamlath with S. M. S. Jayawardena for 2A Defendant Respondent.*

*cur.adv. vult.*

March 7, 2005

**Eric Basnayake J.**

This is a revision application filed by the plaintiff - petitioner (plaintiff) to have the order of the learned Additional District Judge, Mt Lavinia, dated 30.04.2004, set aside. This case was filed in the District Court of Mt. Lavinia against Namarathne Ramanayake and the Maharagama Pradeshiya Sabha as 1st and 2nd defendants. The Pradeshiya Sabha was succeeded by the Maharagama Urban Council (2A respondent) in 2001. The plaintiff anyhow did not take steps to have the caption amended and to make the Urban Council a party to the case. The case was fixed for trial against the original defendants and on the date of the trial as both defendants were absent, the case was fixed *ex parte*. *Ex parte* evidence was led on 10.06.2003 against the original defendants namely Namarathne Ramanayake and the Maharagama Pradeshiya Sabha. The judgment and the decree were entered against the same parties and the decree was ordered to be served on them. The decree was not served on the Pradeshiya Sabha as the Pradeshiya Sabha was not in existence then. Instead the Maharagama Urban Council the 2A respondent, who succeeded the Pradeshiya Sabha, accepted the decree on 8.10.2003. On 23.10.2003 the 2A respondent filed papers in court to have the said decree vacated.

At the inquiry the plaintiff took a preliminary objection with regard to the delay in filing papers as these papers were admittedly filed outside the stipulated 14 day period. The court after inviting written submissions from both parties, the learned Additional District Judge made an order vacating the decree and allowing the 2A respondent to file answer.

The plaintiff complains that the 2A respondent filed papers to vacate the *ex parte* decree in terms of section 86(2) of the Civil Procedure Code

having taken the responsibility on behalf of Maharagama Pradeshiya Sabha. He states that the 2A respondent succeeded to the rights and liabilities of the original 2nd defendant and the learned Judge erred by not considering section 86(2) of the C. P. C.

Section 86(2) of the C. P. C. is as follows :

Where within fourteen days of the service of the decree entered against him for default, the **defendant** with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the **defendant** to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper (emphasis is mine).

This section undoubtedly applies to the defendants. The 2A respondent states that neither on the date of the *ex parte* judgment nor at the time of the service of the decree was he a defendant in this case. This action was filed against Maharagama Pradeshiya Sabha. At the time of the judgment and the service of the decree the Pradeshiya Sabha was not in existence. The 2A respondent further complained that the plaintiff had not complied with the mandatory provisions contained in section 214 of the Pradeshiya Sabha Act No. 15 of 1987 nor section 220 of the Urban Council Act.

He further informs this court that in pursuance of the order of the learned Additional District Judge, the plaintiff has now taken steps to have the caption amended and also move to file a replication and thereby complied with the order which he is seeking to revise. The relevant journal entry had been marked 2R1.

*The learned Additional District Judge relying on the judgment of Fonseka vs. Dharmawardena<sup>(1)</sup> said that although the 2A respondent accepted the decree that was issued to Maharagama Pradeshiya Sabha, it was not regular and hence by invoking the inherent powers vested in the courts by virtue of section 839 of the C. P. C. the learned Additional District judge set aside the decree and allowed the 2A respondent to file answer.*

In the case of *De Fonseka vs. Dharmawardena (Supra)* His Lordship S. N. Silva, the President of the Court of Appeal (as he then was) held as

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follows. "An inquiry that is held upon an application made by a defendant to set aside an *ex parte* decree, in terms of section 86(2), is not regulated by any specific provision of the Civil procedure Code. Therefore the inquiry should be conducted by the Judge in a manner that is consistent with the principles of natural justice and fairness".

I am of the view that it was the duty of the plaintiff to make the 2A respondent a party to this case. The decree issued on the Pradeshiya Sabha without making him a party, had no effect on the 2A respondent. Therefore I am of the view that the learned Additional District Judge has rightly exercised the inherent powers in this case, in a situation where no other provision is available and at the same time to have the principle of *audi alteram partem* rule observed. Hence I am of the view that the plaintiff's application is without merit and is therefore dismissed. I make no order for costs.

**ANDREW SOMAWANSA, J. (P/CA)** —I agree

Application dismissed.

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