SITTHI MALEEHA AND ANOTHER
v.
NIHAL IGNATIUS PERERA AND OTHERS

COURT OF APPEAL.
S. N. SILVA, J. AND
GUNASEKERA, J.
C.A. (L.A.) NO. 36/91
D.C. PANADURA NO. 2114/M
AUGUST 17, 1993.

Mortgage Act, S. 59 – Hypothecary action – Default in a hypothecary action – Effect of amendment to Civil Procedure Code by Law, No. 20 of 1977 – Invalidity of recasting S. 59 in the unofficial publication of the Legislative Enactments in 1980 – Present law relating to defaults in a hypothecary actions.

In the amendment by Law, No. 20 of 1977 to the Civil Procedure Code, the provision in section 85 for a decree absolute in the first instance in the case of a hypothecary action was dropped. So also were the provisions for a decree *nisi* and decree absolute in the case of other actions.

Held:

Accordingly the recasting of section 59 of the Mortgage Act in the 1980 unofficial revision of the Legislative Enactments was wrong and the version as recast is misleading, in that, it is based on the premise that a defendant in a hypothecary action against whom a decree is entered upon default cannot move to have it set aside.

The default of a defendant in a hypothecary action is governed by the general provisions of Chapter XII of the Civil Procedure Code, as amended by Law, No. 20 of 1977 and thereafter. The special provisions in relation to such defaults as contained in section 85, form 22A of the First Schedule and section 87 of the Code prior to the 1977 amendment are not kept in force by virtue of section 59 of the Mortgage Act. Section 59 of the Mortgage Act should be considered as being of no force or effect in law consequent upon the amendments made to the Civil Procedure Code by Law, No. 20 of 1977. The version of section 59 of the Mortgage Act as appearing in the 1980 (unofficial) revision of the Legislative Enactments, does not represent the correct law and is misleading.

Failure to serve summons goes to the root of jurisdiction of the court. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered in such circumstances is a nullity and the person affected by the proceedings can apply to have them set aside *ex debito justitiae*. The District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons.

to *Per* S. N. Silva, J.

"The new section 85 (of the Civil Procedure Code) does not make special provision for a default in a hypothecary action and in any event is not based upon a statutory scheme where two types of decrees are entered upon default of a defendant. Thus upon the application of the rule of interpretation (section 16(1) of the Interpretation Ordinance) the provisions of section 59 of the Mortgage Act are rendered nugatory".

Case referred to:

1. *Board of Directors of Ceylon Savings Bank v. Nagodavitane* 71 N.L.R. 90, 92

APPLICATION for leave to appeal under section 754 (2)

Faiz Musthapha, P.C. with *N. M. Saheed* for defendant-petitioners.
Ranjan Gunaratne for plaintiff-respondents.

Cur. adv. vult.

August 17, 1993.
S. N. SILVA, J.

The Defendant-Petitioners are seeking relief from the order dated 3.12.1990. By that order learned District Judge upheld the objection of the Plaintiff-Respondents that a decree entered upon default cannot be set aside in terms of Section 59 of the Mortgage Act. Learned District Judge has also rejected a notice of appeal filed from the order on the basis that the order dated 3.12.1990 is not a final judgment.

The action was filed by the Plaintiff-Respondents upon Mortgage Bond No. 8257 against the Defendant-Petitioners and two other defendants (who derived interests on a secondary mortgage). The Defendant-Petitioners defaulted in appearing on the summons returnable day and the case was heard *ex parte*. Decree was entered on 12.5.1989. Thereupon the Defendant-Petitioners made application to set aside the decree on the basis of non-service of summons. In the course of the inquiry into this application, an objection was raised that the decree cannot be set aside in terms of Section 59 of the Mortgage Act. This objection was upheld.

Learned District Judge has made the order on the basis of Section 59 of the Mortgage Act as appearing in the 1980 revised edition of the legislative enactments which reads thus:

> "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."

A footnote to that section states that it has been recast "as references to decree *nisi* and decree absolute in Sections 84 and 85 of the Civil Procedure Code have been omitted by the 1977 amendment of that Code".

Section 59 of the Mortgage Act appearing in the 1956 revision of the legislative enactments (being the last official revision) reads thus:

> "Where a hypothecary action is heard *ex parte* under section 85 of the Civil Procedure Code, the decree shall be a decree absolute and not a decree *nisi*."

It is seen that the person preparing the 1980 revision has recast the section incorporating substantial modifications. The version as recast has no legislative authority since the 1980 revision is "unofficial" as stated at the commencement of each volume of these enactments. In these circumstances we hold that the learned District Judge erred in making her order on the basis of this unofficial revised version of the Act. The footnote to section 59 of the 1980 revision should have put the learned Judge on guard and reference ought to have been made to the 1956 revision.

In the original Civil Procedure Code, Section 85 provided for decree *nisi* to be entered upon default on the part of the Defendant. This decree was made absolute in terms of section 86 on the failure of the Defendant to purge the default. Section 87 provided that no appeal will lie from a decree nisi but that the order setting aside or refusing to set aside the decree shall be accompanied by a judgment

which shall be liable to an appeal. The amendment to the Civil Procedure Code effected by Law No. 20 of 1977 did away with the distinction between a decree *nisi* and a decree absolute. Under the amended section 85(1) upon default a decree is entered, which is served on the defendant and in terms of section 86(2) an application may be made within 14 days of service to set aside such decree. In substance the provisions of the present section 88 are the same as the corresponding provisions of the former section 87, in that there is no appeal from the judgment (decree) entered upon default but the order setting aside or refusing to set aside that judgment should be accompanied by a judgment adjudicating upon the facts and specifying the grounds on which it is made, which is liable to an appeal. Thus it is seen that the amendment which eliminated the distinction between "decree *nisi*" and "decree absolute" did not bring about a substantial alteration of the law but simply removed what may be described as the administrative necessity of entering two types of decrees.

As regard hypothecary actions there was specific provision in the original section 85 of the Civil Procedure Code. It provided that upon default the case be heard *ex parte* and decree absolute entered in terms of Form number 22 A of the First Schedule to the Code. Section 87(1) of the original Code provided for the decree absolute thus entered to be set aside upon application by the defendant made within reasonable time on the grounds stated in that subsection. Section 59 of the Mortgage Act, as appearing in the 1956 revision, is thus based on provisions of section 85 of the original Civil Procedure Code relating to hypothecary actions.

We have to now consider the construction that should be placed on the provisions of section 59 of the Mortgage Act which refers to section 85 of the old Civil Procedure Code. As noted above section 85 has been repealed and substituted with a new provision by Law No. 20 of 1977. The matter of reference in written law to other written law which is subsequently repealed is specifically provided for in section 16(1) of the Interpretation Ordinance which reads thus:

"Where in any written law or document reference is made to any written law which is subsequently repealed, such reference shall

be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof."

The rule of interpretation is that reference in existing law to any other written law that is subsequently repealed, is deemed to be a reference to the law by which the repeal is effected or the corresponding portion of it. When the rule is applied to the matter of interpretation that confronts us now, the existing written law is section 59 of the Mortgage Act and the reference to repealed law is the reference to section 85 of the Civil Procedure Code prior to the amendment of 1977. That reference is deemed to be to the corresponding portion of the repealing statute, namely section 85 as substituted by Law No. 20 of 1977. The new section 85 does not make special provision for a default in a hypothecary action and in any event is not based upon a statutory scheme where two types of decrees are entered upon default of a defendant. Thus upon the application of the rule of interpretation, the provisions of section 59 of the Mortgage Act are rendered nugatory.

The foregoing conclusion is supported by an examination of the provisions of Chapter XII of the Civil Procedure Code as it existed before in the light of the new sections substituted by Law No. 20 of 1977. As noted above, the former section 85 contained specific provision that upon default of a defendant in a hypothecary action, decree absolute be entered according to form 22 A of the First Schedule. In the amendment of 1977 where all the relevant provisions were substituted upon the recommendations of a Committee that went into the working of the Civil Procedure Code as a whole, no special provision was made with regard to a default of a defendant in a hypothecary action. The omission should therefore be considered as intentional. In our view the learned author of the 1980 (unofficial) revision erred in attempting to supplant this omission by his recasting of section 59 of the Mortgage Act. The version as recast is misleading, in that, it is based on the premise that a defendant in a hypothecary action against whom a decree is entered upon default cannot move to have it set aside. It ignores the fact that under the provisions of section 87(1) of the Code (prior to the 1977 amendment) a defendant had the right to have such a decree set aside upon an application made within reasonable time. Indeed, it

was held by the Supreme Court in the case of *Board of Directors of Ceylon Savings Bank v. Nagodavitane*[1] that, that was the proper remedy of a defendant.

For the reasons stated above, we hold that the default of a defendant in a hypothecary action is governed by the general provisions of Chapter XII of the Civil Procedure Code as amended by Law No. 20 of 1977 and thereafter. That the special provisions in relation to such defaults as contained in section 85, Form 22A of the First Schedule and section 87 of the Code prior to the 1977 amendment are not kept in force by virtue of section 59 of the Mortgage Act. That, section 59 of the Mortgage Act should be considered as being of no force or effect in law consequent upon the amendments made to the Civil Procedure Code by Law No. 20 of 1977. Since we have come across previous instances where District Courts have been guided by section 59 of the Mortgage Act as appearing in the 1980 (unofficial) revision of the legislative enactments, we specifically note that, that version does not represent the correct law and is misleading.

In this case the defendant is seeking to set aside the decree on the basis that summons was not served on him. In *Ittepana v. Hemawathie*, it was held by the Supreme Court that the failure to serve summons is one which goes to the root of the jurisdiction of the Court. That, if a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered in such circumstances is a nullity and the person affected by the proceedings can apply to have them set aside *ex debito justitiae*. It was specifically held that the District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons. Therefore we hold that the District Judge erred in upholding the objection of the Plaintiff to the application of the Defendant-Petitioners being inquired into. We accordingly set aside the order dated 3.12.1990.

The resulting position is that the inquiry into the application to set aside the decree entered should proceed in the District Court. Learned counsel for the Plaintiff-Respondents consented to the decree being set aside, in order to prevent any further delay in this

matter. In view of this concession we set aside the decree dated 12.5.1989 and grant to the Defendant-Petitioners a final date to file answer on or before 11.10.1993. If no answer is filed on or before that day decree will be entered against the Defendant-Petitioners. Learned President's Counsel appearing for the Defendant-Petitioners agreed to decree being entered in such event in view of the concession made by learned counsel for the Plaintiff-Respondents. If answer is filed as provided by law the case will be fixed for trial early. The application is allowed. We make no order for costs on this application. The Registrar is directed to return the record forthwith, with this order.

D. P. S. GUNASEKERA, J. – I agree.

Case sent back for
action as directed.