RANASINGHE
v
TIKIRI BANDA

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A.512/94 (F)
D.C.KURUNEGALA 3917/L
JUNE 24, 2003

Civil Procedure Code – Sections 86(2A), 86(2C) and 189 – Ex parte – Papers to purge default filed prior to service of decree – Validity – Judgment.

Held :

(i) There is no strict prohibition or that one is barred by any positive rule of law to come to court to purge default prior to the service of the decree but after Judgment – papers filed though filed prior to the service of the decree are valid in law.

(ii) After Judgment is entered there is no legal requirement at all for the defendant-appellant to obtain the consent of the plaintiff-respondent to come to Court – consent is required only if the defendant-appellant was to come to Court prior to entering Judgment.

APPEAL from the judgment of the District Court of Kurunegala

Case referred to :

Coomaraswamy v *Mariamma* – 2001 3 Sri LR 312

Chula Bandara for the defendant-appellant.

Anil Silva with *S.L. Priyantha* for the plaintiff-respondent.

Cur.adv.vult

October 10, 2003

SOMAWANSA, J.

This is an appeal arising from an order made by the learned District Judge of Kurunegala in case No.3917/L dated 22.11.1994 holding that the defendant-appellant has failed to comply with the provisions contained in section 86(2) of the Civil Procedure Code to purge the default. It is to be seen that the said order has been made sequent to an application made by the plaintiff-respondent for an order in terms of section 86(2) of the Civil Procedure Code.

The relevant facts are that when this case was taken up for trial on 27.10.1992, the defendant-appellant was absent and unrepresented. Hence the learned District Judge decided to proceed with the case *ex parte* and on the same day evidence of the plaintiff-respondent was recorded and an *ex parte* judgment was entered in favour of the plaintiff-respondent. Thereafter the defendant-appellant filed petition and affidavit dated 28.10. 1992 to purge the default and moved to have the *ex parte* judgment set aside. It is to be noted that though the petition and affidavit are dated 28.10.1992 according to journal entry No. 07 these papers have been journalised in the record only on 19.11.1992. The matter was fixed for inquiry and both parties had agreed to resolve the matter by way of written submissions. The learned District Judge having considered the written submissions tendered by both parties, by his order dated 15.06.1994 disallowed the application made by the defendant-appellant on the ground that after an *ex parte* judgment is entered the defendant-appellant had no right to make an application to set aside the *ex parte* judgment prior to the serving of decree on him unless with the consent of the plaintiff-respon-

dent. The *ex parte* decree was served on the defendant-appellant on 26.02.1993 but he failed to make a fresh application to set aside the *ex parte* decree entered in terms of section 86 (2) of the Civil Procedure Code. In the circumstances the Attorney-at-Law for the plaintiff-respondent filed a motion dated 29.07.1994 seeking a variation of the order made by the learned District Judge on 15.06.1994 on the basis that the learned District Judge in making his order dated 15.06.1994 had considered only the first limb of section 86(2) and moved Court that an order be made in terms of the second limb of section 86(2).

It appears that once again parties had agreed to resolve the matter by way of written submissions. The learned District Judge having considered the submissions made by both parties rejected the objection taken by the defendant-appellant, made order dated 22.11.1994 holding that the defendant-appellant had failed to file the necessary papers to vacate the *ex parte* decree within 14 days after receiving the decree. It is from the said order that this appeal is lodged.

When this appeal was taken up for hearing parties again agreed to resolve the matter by way of written submissions and accordingly both parties have tendered written submissions.

Counsel for the defendant-appellant strongly urged that the plaintiff-respondent does not have a legal right to make an application to revise, amend or confirm the judgment (it should read an order) made by the learned District Judge on 15.06.1994, that if the plaintiff-respondent was not satisfied with the order delivered by the learned District Judge he should have appealed against the said order. That the learned District Judge does not have jurisdiction to amend, alter or confirm its own judgment unless it comes under section 189 of the Civil Procedure Code. Hence it is submitted that the subsequent order made by the learned District Judge on 22.11.1994 had been made without jurisdiction and the said order should be set aside. While I agree with him that the said order should be set aside, I am unable to agree with the reasons adduced by him as to why the order should be set aside.

The relevant section which makes provision for the defendant-appellant to excuse his default and move to have the *ex parte* judg-

ment set aside is section 86 of the Civil Procedure Code. The said section reads as follows:

> 86.(2) "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.
>
> (2A) At any time prior to the entering of judgment 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 upon such terms as to costs of otherwise as to the court shall appear fit.
>
> (3) Every application under this section shall be made by petition supported by affidavit:"

Applying this provision to the issues at hand, it is to be seen that the *ex-parte* judgment had been entered on 27.10.1992. Petition and affidavit to purge the default are dated 28.10.1994 and has been journalised as per journal entry 07 on 19.11.1992. On 29.07.1993 parties had agreed to resolve the matter on written submissions and the learned District Judge having considered the written submissions tendered by both parties has rejected the application of the defendant-appellant to purge the default. It appears that the written submissions have been tendered not on the merits of the application but purely on the legality of the application. Viz. whether the application is in conformity with Section 86(2A).

It is to be seen that the learned District Judge has accepted the objections raised by the plaintiff-respondent on the basis that in terms of section 86(2A) the defendant-appellant is prevented from coming to Court to purge the default without the consent of the plaintiff-respondent before the decree is served on him. The said objection was sustained by the learned District Judge, the relevant portion of his order is as follows:

"එහෙත් තීන්දු ප්‍රකාශය විත්තිකරුට බාරදී නැත. විත්තිකරුට තීන්දු ප්‍රකාශය බාර දීමට පෙර විත්තිකරු විසින් ලියවිලි ඉදිරිපත් කරමින් නැවත නඩුවට ඇතුලත් වීමට අවසර පතා ඇත. පැමිණිල්ල විසින් මෙම ලියවිලි සම්බන්ධව මෙම විරුද්ධ වීම දක්වා ඇත්තේ පැමිණිලිකරුගේ එකඟතාවයකින් තොරව තීන්දු ප්‍රකාශය විත්තිකරුට බාරදීමට ප්‍රථම නඩුවට ඇතුලත් වීමට නොහැකි බව දන්වමිනි. මෙම නඩුවේ පැමිණිලිකරු එකඟතාවයක් දක්වා ඇත. එවැනි අවස්ථාවකදී විත්තිකරුට නඩුවට ඇතුලත් වීම යදහා ඉල්ලුම් කල හැක්කේ තීන්දු ප්‍රකාශය බාරදීමෙන් දින 14ක් ඇතුලත බව පෙනේ.

එහෙයින් පැමිණිල්ලේ කරුණු පිලිගන්වා විත්තිකරුට නඩුවට ඇතුල්වීමට ඉල්ලුම් කිරීමට මුහුකුරා ගිය තත්ත්වයක් තවම නොමැති හෙයින් විත්තිකරුගේ ඉල්ලිම දැනට ප්‍රතික්ෂේප කරන අතර, නියි කාලයේදී ඒ යදහා ඉල්ලිම් කරන ලෙස දන්වමි"

This finding I would say is clearly a misdirection on the law on the part of the learned District Judge for on an examination of section 86 2(A), it is apparent that for the defendant-appellant to come to Court to purge the default consent of the plaintiff-respondent is required only if the defendant-appellant were to come to Court prior to the entering of judgment. In the instant case the *ex parte* judgment had been already entered on 27.10.1992 and the defendant-appellant has in compliance with section 86(3) of the Civil Procedure Code filed a petition supported by an affidavit dated 28.10.1992 to purge the default. (after the judgment was entered). In the circumstances I would hold that (after the judgment was entered) there was no legal requirement at all for the defendant-appellant to obtain the consent of the plaintiff-respondent to come to Court and the learned District Judge has clearly erred in applying the provisions of section 86(2A) to the application made by the defendant-appellant to purge the default in the instant case. Hence the order of the learned District Judge dated 15.06.1994 is bad in law and is liable to be set aside.

As for the period of 14 days specified in section 86(2) computed from the date of the service of the decree within which the defendant-appellant must come to Court to purge the default must be taken in its literal sense and thus would mean that the defendant-appellant must after the decree is served on him come to Court to purge the default within 14 days. However this does not mean that there is any strict prohibition or that he is barred by any

positive rule of law to come to Court prior to the service of the decree but after the judgment, so that the petition and affidavit filed in the instant case though filed prior to the service of the decree to the defendant-appellant is valid in law and the learned District Judge should have accepted the same and inquired into whether the defendant-appellant had reasonable grounds for such default, and determined the matter on the merits of the application.

In the reasons given for his order dated 22.11.1994 the learned District Judge states as follows:

"මුල් අවස්ථාවේදී මා විසින් දෙන ලද නියෝගය දීමේදී පැමිණිල්ල විසින් ඉදිරිපත් කරන්නට යෙදුන ප්‍රධාන කරුණු දෙකින් එක කරුණක් මත පමණක් පදනම් කොට ගෙන නියෝගය දුනිමි. එහෙත් දැන් පැමිණිල්ල කියා සිටින්නේ, අනෙක් කරුණු ද සැලකිල්ලට ගන්නා ලෙසය. එනම්, විත්තිකරු විසින් ඒකපාක්ෂික නිත්දුව බාරදීමේ දින සිට දින 14ක් තුල අධිකරුණයට කරුණු ඉදිරිපත් නොකිරීම සම්බන්ධවය. නඩුවට ඇතුල්වීම පඳහා විත්තිකරු, තීන්දු ප්‍රකාශය බාරදීමට ප්‍රථම පෙත්සම්, දිවුරුම් පෙත්සම් ඉදිරිපත් කොට ඇති නමුදු, තීන්දු ප්‍රකාශය බාර දීමෙන් පසුව දින 14ක් ඉක්මයාමට ප්‍රථම අධිකරණයට ඉදිරිපත් වී නැත. ඒ අනුව නීත්‍යානුකූල අවශ්‍යතාවයන් සලකා බැලීමේදී විත්තිකරු තීන්දු ප්‍රකාශය ලැබී දින 14 ක් තුල අධිකරණයට ඉදිරිපත් විය යුතුව ඇත. එහෙත් මෙම නඩුවේදී විත්තිකරු විසින් එකී කාලය තුල කිසිදු ලියවිල්ලක් ඉදිරිපත් කොට නැත. නීතිය අතින් බැලිමේදී එය එසේ වන නමුදු සාමාන්‍ය තත්වයන් අනුව බැලිමේ දී විත්තිකරු මුල් අවස්ථාවේ දී අධිකරණයට පැමිණ සිටි හෙයින්, තීන්දු ප්‍රකාශය බාරදීමෙන් පසුව නැවතත් පෙත්සම්, දිවුරුම් පෙත්සම් ආදිය ඉදිරිපත් කිරීම නිෂ්ඵල ක්‍රියාවක් යයි පිතුවා වන්නට ඇත. ඒ අතින් බලන කල්හි එය සාධාරණ විය හැකි නමුදු නීතිමය අතින් තීන්දු ප්‍රකාශය බාරදීමෙන් අනතුරුව එළඹෙන දින 14 තුලදී විත්තිකරු අධිකරණයට නිසි ලියවිලි ඉදිරිපත් කිරීමට ඉල්ලීමක් කර නොමැති නිසා, එකී කරුණු මතද දැන් විත්තියේ ඉල්ලීම ප්‍රතික්ෂේප කිරීමට මට සිදුවේ.

කෙසේ වුවද, මා විසින් ඉහතින් දක්වන ලද කරුණු පරිදි විත්තිකරු නිසි කාලය තුළදී ඉල්ලීමක් කර නැති හෙයින්, නීත්‍යානුකූලව කළ හැකි අන් කිසිවක් නොමැති නිසා විත්තිකරුගේ ඉල්ලීම ප්‍රතික්ෂේප කරමි."

I cannot subscribe to the view expressed by the learned District Judge that the defendant-appellant has failed to comply with the provisions of section 86(2), for it is to be seen that a valid petition and affidavit to purge the default was before him when he made the impugned order.

In the case of *Coomaraswamy* v *Mariamma*[1] per Weerasuriya, J:

> "It is manifest that the application to purge the default had been made prior to the service of the decree. However, it would appear that the requirement for the party to make the application within 14 days of the service of the decree does not preclude the defendant to make an application before service of the decree and for the Court to inquire into such application after decree was served."

For the foregoing reasons, I would hold that the order of the learned District Judge dated 22.11.1994 as well as the order dated 15.06.1994 cannot stand and should be set aside. Accordingly I would allow the appeal and set aside the orders of the learned District Judge dated 22.11.1994 and 15.06.1994 and remit the case to the appropriate District Court for the learned District Judge to hold a fresh inquiry into the application of the defendant-appellant to purge the default on the merits and proceed to hear and determine the case. The plaintiff-respondent will pay Rs. 5000/- as costs of this appeal.

DISSANAYAKE, J. - I agree.

Appeal allowed.