

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In the matter of an Application for Leave to Appeal made under and in terms of Section 754 (2) of the Civil Procedure Code against an order dated 10<sup>th</sup> November 2006 in District Court, Panadura Case No.459/RE

Mirihanage Saman Dushmantha Perera  
No.124/1, Gangarama Road,  
Werahera,  
Boralesgamuwa.

**Defendant-Petitioner**

**C.A.L.A.NO.469/2006**  
**D.C.PANADURA CASE NO.459/RE**

Vs.

Mirihanage Janitha Dushmantha Perera  
After marriage Milda,  
Bon Street 76, 50321 Broll.,  
West Germany.

**Plaintiff-Respondent**

**BEFORE** : **K.T.CHITRASIRI, J.**

**ERIC BASNAYAKA, J**

**COUNSEL** : **L.S.J.Peiris Attorney-at-Law for the Defendant-Petitioner**

**Saliya Peiris with Asitha Devendra, Attorneys-at-Law for the Plaintiff-Respondent**

**ARGUED ON** : **18<sup>th</sup> September 2009**

**WRITTEN SUBMISSIONS**



**FILED ON** : 8<sup>th</sup> October 2008 by the Defendant-Petitioner  
8<sup>th</sup> October 2008 by the Plaintiff-Respondent

**DECIDED ON** : **23<sup>RD</sup> MARCH 2010**

**CHITRASIRI,J.**

This application is made to set aside the order of the learned District Judge dated 10<sup>th</sup> November 2006. By the said order, the learned District Judge allowed the plaintiff-respondent (hereinafter referred to as the plaintiff) to call witnesses and to proceed with the action, reversing her earlier order namely dismissing the plaint. Apparently, this Order of the learned District Judge was made in terms of the Sections 189 and 839 of the Civil Procedure Code. Having granted leave to proceed with this application, this Court heard both the parties on the issue. I will now examine whether the circumstances of this case would permit the learned District Judge to vacate the earlier order dated 8<sup>th</sup> July 2005 made by her acting under Sections 189 and 893 of the Civil Procedure Code.

The plaintiff by her petition dated 16<sup>th</sup> September 2005 moved the District Court to vacate the order made on 8<sup>th</sup> July 2005 dismissing the plaint. The order of the said dismissal of the plaint had been made by the learned District Judge acting upon Section 87(1) of the Civil Procedure Code. Section 87 of the Civil Procedure Code reads thus:

*“87 (1) Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the*

*plaintiff's action.*

*(2) Where an action has been dismissed under this action, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.*

*(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the Court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the Court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made”.*

Consequent upon an application by the defendant-petitioner, the learned District Judge made order dismissing the plaint acting under the aforesaid provision of law since the plaintiff was absent on the date the case was taken up for trial. This order reads thus.

**ඒ අනුව සිවිල් නඩු විධාන සංග්‍රහයේ 87(1) වගන්තිය යටතේ පැමිණිලිකාරිය වෙනුවෙන් විධිමත් පෙනී සිටීමක් නොමැති වීම මත පැමිණිල්ල නිෂ්ප්‍රභා කරමි.**

It is the above mentioned order that had been vacated by the learned District Judge by her subsequent order that is being challenged in this application. Since the impugned order had been made in terms of Sections 189 and 839 of the Civil Procedure



**PDF Complete**

*Your complimentary use period has ended.  
Thank you for using PDF Complete.*

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

Code, it is necessary to consider whether the learned District Judge had the jurisdiction to do so acting under those two sections of the Civil Procedure Code.

Section 189 of the Civil Procedure Code allows Court to correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission or to make any amendment which is necessary to bring a decree into conformity with the judgment. The order that had been reversed namely the dismissal of the action was made due to non-appearance of the plaintiff. The application of the plaintiff to vacate the said order does not state that there was any clerical or arithmetical mistake or any accidental slip or omission in the order made by the learned District Judge dismissing the plaint. There was no application to amend the decree as well. Hence, it is crystal clear that the application of the plaintiff is neither an application to correct any clerical or arithmetical mistake nor an amendment to bring the decree into conformity with the judgment. Therefore, learned District Judge has erred when she made the impugned order acting under Section 189 of the Civil Procedure Code.

I will now examine whether the learned District Judge could have resorted to Section 839 of the Civil Procedure Code when making the impugned order. Section 839 gives a wide discretion to Court in order to make necessary orders to ensure that the ends of justice are meted out and also to prevent the abuse of process of Court. At the time the

impugned order was made, the learned District Judge seems to have considered the fact that the plaintiff was away living in Germany and also the fact that her mother was present in Court when the order for dismissal was made. Even though those grounds seem to have been reasonable for the plaintiff to reopen the case, one cannot expect a court of law to make orders disregarding clear provisions of the law to have any error made by a judge rectified.

In this instance, the application of the plaintiff was to set aside an order made under Section 87(1) of the Civil Procedure Code. Section 87(3), referred to earlier in this judgment, states the way in which an order made in terms of Section 87(1) could be vacated. Even the authorities of the superior courts show that a person cannot seek redress under Section 839 of the Civil Procedure Code when specific provisions in law are found to obtain remedial measures.

In the case of **Abeygunasekera vs. Wijesekera**<sup>1</sup>, Justice Andrew Somawansa has held thus.

“inherent power of Court could be invoked only where provisions have not been made, but where provision has been made and are provided in Section 754 (2) of the Civil Procedure Code inherent powers of this Court cannot be invoked; **inherent powers cannot be invoked to disregard expressed statutory provisions**”

---

<sup>1</sup> 2002 (2) SLR 269



**PDF Complete**

*Your complimentary use period has ended.  
Thank you for using PDF Complete.*

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

In the circumstances, it is my considered view that since there is a clear provision for the plaintiff to make an application to set aside the order of the dismissal of the plaintiff, she would be barred from invoking the jurisdiction under Section 839 of the Civil Procedure Code as well.

However, it is prudent to consider the circumstances under which the order for the dismissal of the plaintiff was made and also to ascertain whether this order of dismissal could be vacated under Section 87(3) of the Civil Procedure Code since it is the correct provision in law to consider such an application. On a perusal of the original case record in the District Court of Panadura it is seen that:

- The plaintiff had been filed on the 30<sup>th</sup> August 2001. At the time the plaintiff was filed, the plaintiff has given her proxy to Mr.M.T.S.Fernando Attorney-at-Law. Along with the plaintiff, a Power of Attorney executed by Mr.Venon Mendis Attorney-at-Law in favour of the said Attorney at Law Mr.M.T.S.Fernando, by the plaintiff also had been filed.
- On the 30<sup>th</sup> March 2004, the trial had commenced and the issues also had been framed. On that date, the plaintiff was absent but she was represented by Mr.Ajith Perera, Attorney-at-Law instructed by the said Mr.M.T.S.Fernando Attorney-at-Law.

- On 26<sup>th</sup> August 2004 (JE 14) the proxy given to Mr.M.T.S.Fernando, Attorney-at-Law had been revoked and a new proxy had been given to Mrs.Jayanthi Peiris Attorney-at-Law. Therefore, Ms. Peiris has become the proxy holder of the plaintiff since 26<sup>th</sup> August 2004.
- Mr.M.T.S.Fernando, Attorney-at-Law had died on the 26<sup>th</sup> September 2004; exactly one month after his revocation of the proxy.
- Mr.M.T.S.Fernando, Attorney-at-Law as the holder of the power of attorney of the plaintiff who signed the proxy had died on 26<sup>th</sup> September 2004 and thereby the proxy given to Mrs.Jayanthi Peiris by the plaintiff also had become no force or avail in law.

When the case was called on 8<sup>th</sup> July 2005, Counsel who appeared for the plaintiff also has stated that the case of the plaintiff cannot be proceeded with, due to non-appearance of the plaintiff. On that date he has stated as follows:

**නීතිඥ අපිත් පෙරේරා මහතා කියා සිටින්නේ,**

**මෙම නඩුවේ මීට ප්‍රථමයෙන් ජයන්ති පිරිස් මහත්මියගේ උපදෙස් මත මා පෙනී සිටියා. මෙම නඩුවේ මුල් පැමිණිලිකාරිය නම ඇටෝර්නි බලය එම්. ටී. එස්. ප්‍රනාන්දු නීතිඥ මහතා වෙත ලබා දී තිබුණා. එම නීතිඥ තැන ඔහුට මෙම නඩුවේ ඇටෝර්නි බලය ලබා දීමෙන් පසුව හදිසියේ අපරාධකරුවෙකු අතින් මිය ගියා. ඉන්**

පසුව මෙම නඩුවේ වලංගු පැමිණිල්ලේ පෙරකලාසියක් තිබුණේ නැත. එසේ හෙයින්, අද දින ජයන්ති සිල්වා මහත්මිය වෙත පෙරකලාසියක් නොමැති බවත්, නීතිය ප්‍රකාරව පාර්ශ්වකරුවන් නියෝජනය කිරීමට හැකියාවක් නොමැති බවත් මම ප්‍රථමයෙන් ප්‍රකාශ කරමි. කෙසේ වෙතත්, මෙම නඩුවේ පැමිණිලිකාරියට මතු වී ඇති තත්වය පිළිබඳව ගරු අධිකරණයේ අවධානය යොමු කිරීම පමණක් සිදු කරමි.

On a perusal of the above mentioned facts, it is clear that on the date of the trial the plaintiff was absent and unrepresented. Hence, the learned District Judge had no option than to act under Section 87(1) of the Civil Procedure Code dismissing the plaint especially when an application referring to the said Section 87(1) had been made by the Counsel who appeared for the defendant-petitioner. Moreover, the order dismissing the plaint had been made on 8<sup>th</sup> July 2005 whereas the Power of Attorney holder had died on 26<sup>th</sup> September 2004 leaving a time gap of close upon one year. Without waiting for this long period of time, the plaintiff could have easily made arrangements to file a new proxy on her behalf though she was living out side the country. Therefore the said period of time taken to file a new proxy may have become a bar to obtain an order in favour of the plaintiff even if an application had been made under Section 87(3) of the Civil Procedure Code to obtain relief. Merely because her mother was present in Court that day, the order for dismissal cannot be reversed stating the same as a reason to make an order under Section 87(3) of the Civil Procedure Code.



**PDF Complete**  
Your complimentary use period has ended.  
Thank you for using PDF Complete.  
[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

For the aforesaid reasons, I conclude that the learned District Judge had acted contrary to law when she made the impugned order acting under Sections 189 and 839 of the Civil Procedure Code. Furthermore, even if an application had been made under Section 87(3) of the Civil Procedure Code there would not have been sufficient reasons to set aside the order made under Section 87(1) of the Civil Procedure Code in this instance.

In the circumstances, I set aside the order of the learned District Judge dated 10<sup>th</sup> November 2001. The plaint of the plaintiff should stand dismissed. No party is entitled to the costs of this application.

**JUDGE OF THE COURT OF APPEAL**

**ERIC BASNAYAKE, J.**

I agree

**JUDGE OF THE COURT OF APPEAL**