

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

In the matter of an application for Leave
to Appeal against Judgment of the
Provincial High Court of Western
Province dated 07/10/2014 in Case No.
WP/HCCA/Col/146/2013 LA and D.C.
Colombo Case No. 17007/MB

In the District Court of Colombo

Pramuka Savings and Development
Bank Limited No.30/63 J,
Longden Place, Colombo 07.

1. SC(LA) Appeal No.216/2016

SC/HCCA/LA No. 607/14
WP/HCCA/COL/146/2013 LA
DC COL Case No. 17007/MB

Plaintiff

Vs.

1. H J V Fernando
No.38, Deniya Road,
Dalupotha,
Negombo.

2. Pramuka Holdings Limited
No. 30/63J,
Longden Place,
Colombo 07.

Defendants

And between in an application to purge default

H J V Fernando
No.38, Deniya Road, Dalupotha,
Negombo.

1st Defendant-Petitioner

Vs.

Pramuka Savings and Development
Bank Limited
No. 30/63 J Longden Place,
Colombo 07.

And now carrying on business under
Section 76(m)(3) of the Banking Act
amended by Act No. 30 of 1988.

Sri Lanka Savings Bank Limited of
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

And presently of No. 265, Ward Place,
Colombo 07.

Plaintiff-Respondent

2. Pramuka Holdings Limited
No. 30/63J,
Longden Place,
Colombo 07.

2nd Defendant- Respondent

*And Between in the Provincial High
Court of Western Province*

Pramuka Savings and Development
Bank Limited
No. 30/63, J Longden Place,
Colombo 07.

And now carrying on business under
Section 76(m)(3) of the Banking Act
amended by Act No. 30 of 1988.

Sri Lanka Savings Bank Limited of
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

And presently of No. 265, Ward Place
Colombo 07.

Plaintiff-
Respondent-Petitioner

Vs.

H J V Fernando
No.38, Deniya Road,
Dalupotha,
Negombo.

1st Defendant-Petitioner
-Respondent

And Now Between in the Supreme Court

H J V Fernando
No.38, Deniya Road,
Dalupotha,
Negombo.

1st Defendant-Petitioner
-Respondent-Appellant

Vs.

Pramuka Savings and Development
Bank Limited
No. 30/63 J Longden Place,
Colombo 07.

And now carrying on business under
Section 76(m)(3) of the Banking Act
amended by Act No: 30 of 1988.

Sri Lanka Savings Bank Limited of
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

And presently of No. 265, Ward
Place, Colombo 07.

Plaintiff -Respondent-Petitioner-
Respondent

In the matter of an application for Leave
to Appeal to the Supreme Court in terms
of Article 127 of the Constitution read
with the High Court of the Provinces
(Special Provisions) Act No. 19 of 1990
as amended by Act No. 54 of 2006

2. SC(LA) Appeal No.217/2016
SC HCCA LA No. 93/16
WP HCCA COL/147/2013 LA
DC Case No: 17008/MB

Pramuka Savings and Development
Bank Limited No.30/63 J,
Longden Place, Colombo 07.

Plaintiff

Vs.

1. H J V Fernando
No.38, Deniya Road,
Dalupotha,
Negombo.
2. Pramuka Holdings Limited
No. 30/63J,
Longden Place,
Colombo 07.

Defendants

AND BETWEEN

H J V Fernando
No.38, Deniya Road,
Dalupotha, Negombo.

1st Defendant-Petitioner

Vs.

Pramuka Savings and Development
Bank Limited
No. 30/63 J Longden Place,
Colombo 07.

And now carrying on business under
Section 76(m)(3) of the Banking Act
amended by Act No. 30 of 1988.

Sri Lanka Savings Bank Limited of
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

And presently of No. 265, Ward Place,
Colombo 07.

Plaintiff-Respondent

AND BETWEEN

Pramuka Savings and Development
Bank Limited
No. 30/63 J Longden Place,
Colombo 07.

And now carrying on business under
Section 76(m)(3) of the Banking Act
amended by Act No. 30 of 1988.

Sri Lanka Savings Bank Limited of
No. 110, D. S. Senanayake Mawatha,

Colombo 08.

And presently of No. 265, Ward Place,
Colombo 07.

Plaintiff-Respondent-
Petitioner

Vs.

H J V Fernando
No.38, Deniya Road,
Dalupotha,
Negombo.

1st Defendant-Petitioner
-Respondent

AND NOW BETWEEN

Pramuka Savings and Development
Bank Limited
No. 30/63 J Longden Place,
Colombo 07.

And now carrying on business under
Section 76(m)(3) of the Banking Act,
amended by Act No. 30 of 1988.

Sri Lanka Savings Bank Limited of
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

And presently of No. 265, Ward Place,
Colombo 07.

Plaintiff-Respondent-
Petitioner-Appellant

Vs.

H J V Fernando
No.38, Deniya Road,
Dalupotha,
Negombo.

1st Defendant-Petitioner
Respondent-Respondent

- Before : Achala Wengappuli, J.
Dr. Sobhitha Rajakaruna, J.
Menaka Wijesundera, J.
- Counsel : SC. APPEAL. NO.216/2016
Dr. S.F.A. Coorey for the 1st Defendant-Petitioner-Appellant.
Ms. Vijula Arulanantham instructed by Sinnadurai Sundaralingam & Balendra for the Plaintiff-Respondent-Respondent.
- SC. APPEAL. NO.217/2016
Ms. Vijula Arulanantham instructed by Sinnadurai Sundaralingam & Balendra for the Plaintiff-Respondent.
Dr. S.F.A. Coorey for the 1st Defendant-Petitioner-Appellant.
- Written Submissions : Latest written submissions on behalf of the Plaintiff-Respondent-Petitioner-Respondent's case in SC Appeal 216/2016 and Plaintiff-Respondent-Petitioner- Petitioner's case in SC Appeal 217/2016 on 15th October, 2025.

Argued on : 04.09.2025

Decided on : 05.12.2025

MENAKA WIJESUNDERA J.

The instant appeals in SC/APPEAL/216/2016 has been filed to set aside judgment dated 07.10.2014 of the provincial High Court of Colombo and in SC/APPEAL/217/2016 has been filed to grant leave to appeal from the judgment dated 20.01.2016 of the Civil Appellate High Court of the Western Province.

When this matter was taken up for argument it was submitted by both Counsel of this Court as the facts pertaining to both matters are very similar and that it is based on two mortgage bonds and the lending institution is also the same and that single judgment would be sufficient for both matters and submissions were made accordingly.

In both matters leave has been granted on the following questions of law,

- 1) Did the learned High Court err by failing to appreciate that Fiscal process Server who was alleged to have affected personal service on 1st Defendant-Petitioner-Appellant was not called as a witness and no reason has been given by Plaintiff for the failure to call him and apply the decision in ***Wimalawathie v Thotamuna 1998 3 SLR 1?***
- 2) Whether in any event the Plaintiff-Respondent-Respondent's application by way of leave to appeal to the High Court could not be maintained in view of Section 88 of the Civil Procedure code?

In **SC/APPEAL/216/2016**, the Plaintiff-Respondent-Respondent (hereinafter refers to as the "Plaintiff-Respondent") filed action against the 1st Defendant-Petitioner-Appellant (hereinafter referred to as the "Appellant") on the basis that the Plaintiff-Respondent granted a loan facility to the appellant in a sum of Rs. 3 million at the interest of 21% per annum on the security of a mortgage of a land depicted as Lot 2 in Plan No. 3175.

The said plaint has averred that the appellant after obtaining the said facility defaulted in paying and accordingly, the Plaintiff-Respondent had prayed for judgment be entered in favor of the Plaintiff.

In **SC/APPEAL/217/2016, DC Colombo 17008/MB** action was filed again by the plaintiff respondent against the 1st Defendant-Petitioner-Appellant (H.J.V. Fernando) for having obtained a loan to the value of Rs. 4 million on 21% interest

per annum on the security of a land. In this case to the above-mentioned H.J.V Fernando had defaulted payment and the plaintiff company had prayed that judgment be entered in favor of the Plaintiff to auction the said land to recover the interest and the principal loan amounts from the above mentioned H.J.V. Fernando.

After the said actions were filed in the District Court summons have been issued on the above-mentioned H.J.V. Fernando, but according to the journal entries of both cases he had evaded the summons and *ex parte* trial had been fixed and thereafter *ex parte* judgment and decree had been entered against the above mentioned H.J.V. Fernando. But the said *ex parte* decrees had not been served on the 1st Defendant-Appellant because he had been evading Court.

But the 1st Defendant-Appellant had filed Petition and affidavit in both cases stating that although the address given in the caption of the two cases is the address appearing in the two mortgage bonds which is No.38, Deniyaya road, Dalupotha that he had not been residing in the said address since 1999 and that he was never served the summons nor the *ex parte* decrees.

Therefore, both the District Court cases relating to SC/APPEAL/216/2016 and 217/2016 by the numbers 17007/MB and 17008/MB respectively were fixed for inquiry to ascertain whether the position of above mentioned H.J.V. Fernando was correct. As such an inquiry had been held.

On behalf of the H.J.V Fernando three witnesses had given evidence (marked as 1v1-1v9) and the plaintiff respondent bank had relied on the journal entries of the District Court record which had born out that the summons had been duly served and the affidavit of the fiscal process server of Court.

The learned District Judge had held in favour of the 1st Defendant-Appellant, but the Plaintiff-Respondent had filed a leave to application to the Civil appellate High Court and leave had been granted in 17007/MB and had set aside the judgment of the District Court dated 15.03.2013.

The main ground of the appellant before this Court was that although the affidavit of the fiscal was marked in Court but his evidence was not led and that leaves a doubt that whether the summons in person was really served on the above-mentioned appellant.

The position of the respondent was that the Court record of the District Court is sacrosanct and that unless that presumption is rebutted that the entries in the Court record stands and the respondent further alleges that the said presumption was never rebutted by the appellant.

The respondent further argued that in such a case the onus of proving that the summons was not served shifts to the appellant to prove that the summons was not served on him.

Upon perusal of the journal entries, the following matters are established,

- (i) On 18th July 2000 the plaintiff-respondent had made an application that summons be made on the appellant.
- (ii) On 13th October 2000 Fiscal of the District Court of Negombo had reported back that the appellant was in remand custody at the Negombo remand prison.
- (iii) On 23rd October 2000 the plaintiff-respondent had requested Court to issue summons through the Superintendent of Negombo remand prison
- (iv) On 18th January 2001 the Fiscal had informed Court that the appellant had been bailed out.
- (v) Therefore, on 9th February 2001 the Plaintiff-Respondent requested summons to be reissued to the Appellant at the given address.
- (vi) Thereafter, on 29th June 2001 the Fiscal has reported back that he had personally delivered the summons to the Appellant, in the case No. 17007/MB Negombo District Court.
- (vii) In case no. 17008/MB the Plaintiff-Respondent had requested that summons be issued on the Appellant by way of substituted services which had been allowed and the said substituted services also had been carried out according to the fiscal.

Therefore, it is quite obvious that the Plaintiff-Respondent had made every effort to serve the summons on the Appellant and the fiscal had reported back on two occasions that he had served the summons on the Appellant.

But the Appellant had denied right through out and through the witnesses at the enquiry that the summons was not received by him.

At the inquiry, the Appellant had led the evidence of the Grama sevaka, his sister and his evidence from which this court can gather is that the address of the Appellant had been the address which he had given to the Plaintiff-Respondent bank and according to the Grama sevaka he had not taken any steps to change the address such as the electoral register.

Therefore, according to the above-mentioned material and the journal entries in the District Court case, and the evidence at the inquiry, it can be concluded on a balance of probability that the summons had been served on the Appellant. This is further substantiated by the affidavit and the fiscal report of the fiscal of the District Court of Negombo.

But the point raised by the Counsel for the appellant is when the fiscal himself is available to have been called as witness by the Plaintiff-Respondent bank the failure on the part of the Plaintiff-Respondent bank creates a situation where this court is compelled to presume under Section 114 (f) of the Evidence Ordinance that had the evidence of the fiscal been produced in Court it would have been unfavorable to the Plaintiff-Respondent.

But the Plaintiff-Respondent has quoted Section 61 of the Civil Procedure Code according to which when summons is served by way of any of the legally permissible manner an affidavit of such service shall be sufficient evidence of such service of summons and the details contained therein is presumed to be correct unless and otherwise proven.

At this point the appellant has raised the 1st question of law which questions whether the learned High Court Judge had erred in law by not following the legal principles laid down in the case of *Wimalawathie and others vs Thotamuna and others 1998 3 SLR 1*.

Therefore, in the instant case, the journal entries in the case record and the affidavit tendered by the Fiscal process server are proof of summons being served but it has been challenged by the appellant and therefore it has to be rebutted by the Plaintiff by the best evidence which is to have called the process server as a witness.

But the Plaintiff-Respondent has failed to call the process server of the District Court to give evidence on the contents of the affidavits filed of record by him which leaves a *lacuna* in the case for the plaintiff-respondent which has to be held in favour of the appellant and to answer the question of law relating to the same in the affirmative.

This has been followed in the case cited above by the appellant that is **Wimalawathie and others v Thotamuna and others 1998 3 SLR 1.**

The 2nd question of law raised is whether in any event the Plaintiff-Respondent-Respondent's application by way of leave to appeal to the High Court could not be maintained in view of Section 88 of the Civil Procedure Code.

The Plaintiff-Respondent argued that the appellant never raised a proper objection to the lack jurisdiction at the time when the matter was taken up for argument.

Section 88 (1) reads of the Code of Civil Procedure reads as follows

“No appeal shall lie against any judgment entered upon default.”

Section 88 (2) reads of the Code of Civil Procedure reads as follows

“The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal”.

In the case of **Nonahamy v Divunhami (25 NLR 415)** has decided that an appeal lies against an order refusing to set aside a judgment enter by default.

In the case of Sangarapille v Kadiravelli (2 Sri Kantha Law Report 99) and Wijenayake v Wijenayake (5 Sri Kantha Law Report 28), has also decided that order made under Section 88 (2) of the Civil Procedure Code give rise to a direct Appeal and not leave to appeal.

But upon the amendment to the Civil Procedure Code No. 05 of 2022, which has amended the above section 88(2) had taken away the right of appeal to the Court of Appeal and has granted the same to the relevant High Court upon obtaining leave from the same. The said amended section reads as follows,

“The order setting aside or refusing to set aside the judgment entered upon default shall accompany the facts upon which it is adjudicated and specify the grounds upon which it is made, and shall be liable to an appeal **to the relevant High Court established by article 154P of the Constitution, with leave first had and obtained from such High Court.”**

Recently pronounced Judgment by Justice **Mahinda Samayawardhena, in SC Appeal No. 78/2021 dated 21.11.2022,**

which has decided that “in terms of Section 88(2) as it stands now (after its amendment by the Civil Procedure Code (Amendment) Act No. 05 of 2022), the order made after such inquiry to purge default is appealable by the dissatisfied party with the leave of the High Court first had and obtained. Section 88(2) as it stands now reads: “the order setting aside or refusing to set aside the judgement entered upon default shall accompany the facts upon which it is adjudicated and the specify grounds upon which it is made, and shall be liable to an appeal to the relevant High Court established by Article 154P of the Constitution, with leave first had and obtained from such High Court.”

In the impugned judgment marked as X2 dated 20.01.2016 by then Civil Appellate High Court Judge Mahinda Samayawardhena himself had concluded that “to vacate the ex parte decree” the 1st Defendant namely H.J.V. Fernando should’ve acted under 88(2) of the Code and the proper remedy for the Plaintiff-Respondent bank in Section 88(2) is to file a final appeal and not a leave to appeal against the order of the District Court, and he has cited certain case laws to substantiate the position.

But in the latest judgment by Justice Mahinda Samayawardhena in the Supreme Court, as quoted above has considered Section 88(2) as per the amendment to the Civil Procedure Code No. 05 of 2022, which has come in to operation on 04th of November which has been after the filling of the instant action.

Therefore, in view of the law which existed at the time of filing this action and authorities stated above it has to be concluded that the correct application would have been for the Plaintiff-Respondent to have filed a direct appeal and not a leave to appeal application as held in the impugned Civil Appellate High Court.

As such, I answer the 2nd question of law in the affirmative as well.

Therefore, upon the consideration of the above mentioned facts and the law and the submissions of both parties it is the considered view of this Court that the SC/APPEAL/216/2016 should be allowed and the High Court judgment dated 07.10.2010 is hereby set aside and the judgment of the District Court of Colombo in case number 17007/MB a is affirmed and the 1st Defendant-Petitioner-Appellant should be allowed to file an answer in the District Court case.

In the SC/LA/APPEAL/217/2016 is hereby dismissed and leave is not granted from the judgment dated 20.01.2016 of the Civil Appellate High Court and the

order dated 15.10.2013 of the Additional District Judge of Colombo in case no. 17008/MB is hereby affirmed and the 1st Defendant-Appellant is allowed to file answer in the relevant District Court case.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.

I agree.

JUDGE OF THE SUPREME COURT

Dr. Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE SUPREME COURT