

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

S.C. Appeal No. 50/2010
S.C. HCCA L.A 78/2009
C.A No. CP/HC/CA 66/2007
D.C. Kandy Case No. L/20399

In the matter of an Application for Leave to Appeal against the Judgment dated 17.03.2009 made by the High Court of Civil Appeals of the Central Province in Appeal No. CP/HCCA/Kandy/66/2007

1. Edirisinghe Mudiyanseelage Gunamal Ethana
Edirisinghe
2. Samarasinghe Thantrige Chinthaka
Samarasinghe

Both previously of:

No. 22.

Hewaheta Road,

Illukmodera, Gurudeniya.

Presently of:

No. 46/1,

Tennekumbura, Kandy.

PLAINTIFFS

Vs.

1. Dharmaratne Perera
No. 38, Tennekumbura,
Kandy.
2. W. A. P. Perera
No. 71,
Tennekumbura,
Kandy.

3. Nissanka Bandara Sirimalwatte
No. 71,
Tennekumbura,
Kandy.
4. Kurundeniya Seneviratnage Nissanka
Seneviratne
No. 43/40, Talwatte, Kandy.
5. Nihal Perera
No. 48/2, Hewaheta Road,
Talwatte, Kandy.
6. Ajith Nanayakkara
“Olga Beer Point”
No. 229, Srimath Bennet Soysa Street,
Kandy.

DEFENDANTS

AND

2. A. P. Perera
No. 71,
Tennekumbura,
Kandy.
3. Nissanka Bandara Sirimalwatte
No. 71,
Tennekumbura,
Kandy.
4. Kurundeniya Seneviratnage Nissanka
Seneviratne
No. 43/40, Talwatte, Kandy.
5. Nihal Perera
No. 48/2, Hewaheta Road,
Talwatte, Kandy.

DEFENDENT-PETITIONERS

Vs.

1. Edirisinghe Mudiyanseelage Gunamal Ethana
Edirisinghe
2. Samarasinghe Thantrige Chinthaka
Samarasinghe

Both previously of:
No. 22.
Hewaheta Road,
Illukmodera, Gurudeniya.

PLAINTIFFS-RESPONDENTS

AND

Presently of:
No. 46/1,
Tennekumbura, Kandy.

PLAINTIFFS

3. Nissanka Bandara Sirimalwatte
No. 71,
Tennekumbura,
Kandy.
4. Kurundeniya Seneviratnage Nissanka
Seneviratne
No. 43/40, Talwatte, Kandy.
5. Nihal Perera
No. 48/2, Hewaheta Road,
Talwatte, Kandy.

DEFENDENTS-PETITIONERS-APPELLANTS

Vs.

1. Edirisinghe Mudiyanseelage Gunamal Ethana
Edirisinghe
2. Samarasinghe Thantrige Chinthaka
Samarasinghe

Both previously of:
No. 22.
Hewaheta Road,
Illukmodera, Gurudeniya.

Presently of:
No. 46/1,
Tennekumbura, Kandy.

PLAINTIFFS-RESPONDENTS-RESPONDENTS

1. Dharmaratne Perera
No. 38, Tennekumbura,
Kandy.

1ST DEFENDANT-RESPONDENT

6. Ajith Nanayakkara
"Olga Beer Point"
No. 229, Srimath Bennet Soysa Street,
Kandy.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. Edirisinghe Mudiyanseelage Gunamal Ethana
Edirisinghe
3. Samarasinghe Thantrige Chinthaka
Samarasinghe

Both previously of:
No. 22.
Hewaheta Road,
Illukmodera, Gurudeniya.

Presently of:
No. 46/1,
Tennekumbura, Kandy.

**PLAINTIFFS-RESPONDENTS-RESPONDENTS-
PETITIONERS**

Vs

- 3 Nissanka Bandara Sirimalwatte
No. 71,
Tennekumbura,
Kandy.
4. Kurundeniya Seneviratnage Nissanka
Seneviratne
No. 43/40, Talwatte, Kandy.
5. Nihal Perera
No. 48/2, Hewaheta Road,
Talwatte, Kandy.

**3rd, 4th & 5th DEFENDENTS-PETITIONERS-
APPELLANTS-RESPONDENTS**

1. Dharmaratne Perera
No. 38, Tennekumbura,
Kandy.

**1ST DEFENDANT-RESPONDENT-
RESPONDENT**

6. Ajith Nanayakkara
"Olga Beer Point"
No. 229, Srimath Bennet Soysa Street,
Kandy.

**6TH DEFENDANT-RESPONDENT-
RESPONDENT**

BEFORE: B. P. Aluwihare P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Thisath Wijayagunawardene with Janaka Basuriya
For Plaintiff-Respondent-Respondent-Petitioners

Presanna Goonetilleke instructed by Gaithrie de Silve
For 3rd, 4th, & 5th Defendant-Petitioner-Appellant-Respondents

ARGUED ON: 19.01.2016

DECIDED ON: 02.06.2016

GOONERATNE J.

This is an appeal to the Supreme Court from the Judgment dated 17.03.2009 of the Civil Appellate High Court of the Central Province Holden in Kandy. By the said Judgment the High Court set aside the Judgment and order of the District Court, Kandy, where the learned District Judge refused to set aside an application in a purge default inquiry and set aside an ex-parte Judgment. This court on 04.06.2010 granted Leave to Appeal on the following questions of law, set out in paragraph 16(a), (b), (c) and (d) of the petition dated 24.08.2009.

The said questions reads thus:

- (a) Were the 3rd to 5th Defendants entitled to have the said Ex-parte Judgment and Decree set aside under Section 86(2) of the Civil Procedure Code without satisfying the said Court that their Registered Attorney had reasonable grounds for his default to appear on the said date of trial?
- (b) Must the 3rd to 5th Defendants suffer for the default of their Registered Attorney of not informing the said Defendants the proper trial date and defaulting to appear on the date of the trial?
- (c) Is the mistake alleged to have been made by the said Defendants of taking down a wrong date as the trial date of the said case, a reasonable ground for their default that

would entitle them to have the said Ex-parte Judgment and Decree set aside under section 86(2) of the Civil Procedure Code?

- (d) Did the failure to file a list of witnesses and documents in terms of Section 121 of the Civil Procedure Code by the said Defendants establish that there was no bona fide intention to defend the said action on the said trial date?

The material placed before this court indicates that at the close of pleadings in the lower court, the case had been fixed for trial on 16.03.2004. The case itself was a land case, where the two Plaintiff-Respondent-Petitioners (hereinafter referred to as the Plaintiffs) sought a declaration of title and eviction of the 3rd, 4th, & 5th Defendant-Petitioner-Appellant-Respondents (hereinafter referred to as the Defendants). On the trial date the said Defendants were absent and unrepresented. Prior to leading ex-parte evidence by the Plaintiff the said Defendants made an application by way of petition and affidavit to have the order made by the District court to fix the case for ex-parte trial vacated. Case had been called on 18.06.2009 for such purpose and the Petitioners state that the Defendants were again absent and unrepresented on 18.06.2004. I find on a perusal of the submissions that the petitioner emphasis the fact that the Defendants were continuously in default.

On this point the Defendants take up another position. Defendants submit that no sooner they became aware that the District Court had fixed the case for ex-parte trial, in order to establish their bona fides and establish a genuine mistake as submitted on behalf of the Defendant's, petition and

affidavit was filed and they moved court to have the matter mentioned in court. However the Plaintiff's party did not consent to vacate the order fixing the case for ex-parte trial, and as such there was no appearance on behalf of the Defendants on the day the case was called in the District Court. As such it is stated that the Defendant party thereafter moved court to have the ex-parte judgment vacated, on decree being served on them.

The questions of law suggested in this appeal are relevant and important to decide this appeal. I have perused the written submission of both parties and the judgments delivered by both courts. It is prudent to start with the pleading and proceedings of the inquiry to purge default. The petition dated 12.11.2004 filed by the 2nd to 5th Defendants aver in paragraphs 5 to 8 of the petition and merely state that they were unaware of the fact that the trial has been fixed for 16th March 2004 and they genuinely believed that the trial was fixed for 26th March 2004. (paragraph 5) In order to get ready for the trial the said Defendants met the registered Attorney on the 20th of the same month. Only then that they came to know that the case had been fixed for trial on the 16th instant and the court had fixed the case ex-parte trial.(as the Defendants were absent and unrepresented) It is stated so in paragraph 6 of the petition. Thereafter the Defendants took steps immediately to get the order fixing the case for ex-parte trial vacated but as advised withdrew that application.

(paragraph 7) The only other remaining paragraph 8 merely state that if the Defendants are deprived from claiming the land in dispute it would be an irreparable loss to them. Further the Defendants submit that they were at all times ready and willing to contest the case. It is the genuine belief on the part of the Defendants as pleaded that they were not aware that the trial was fixed for 16th March 2004.

This court observes that the above pleadings do not precisely and with clarity plead the required reasonable grounds to purge default, which is a requirement under Section 86(2) of the Civil Procedure Code. The written submissions filed of record on behalf of the Defendants take up the position that by mistake the wrong trial date had been taken down. That would be a good defence, but not pleaded in the way it should have been pleaded in the pleadings filed of record. There is no reference in the petition at all that the registered Attorney made a mistake by taking down the wrong date, is a lapse on the part of the Defendants. A point relied upon for one's defence should be disclosed in the pleadings, as this seems to be the only ground that court has to give its mind.

Let me now consider the evidence led at the inquiry as the burden lies on the Defendants. The 3rd Defendant in his evidence inter alia state that he heard the trial date to be 26th March 2004. He came to know from the registered

Attorney that the case was called on 16th March, and that he was unaware of the correct date. He also states he had no reason not to be present in court. එහෙම නෑවිත් ඉන්න හේතුවක් තිබුණේ නැහැ. In cross examination of the 3rd Defendant inter alia it is stated by the 3rd Defendant, to a question posed, having shown the journal entry of 16.03.2004, that not only the Defendants, but the Proctor on record was also absent. Witness answer that question as, we 'did not come' 'අපි අවේ නැහැ' It is recorded in the said journal entry that the Defendants were absent and unrepresented and such a position was not denied by the witness. (P3) It is in evidence that the registered Attorney had said that it was the 26th. 'හිඟ්ලා මහතා නමයි කිව්වේ 26 කියලා' To make matters worse the following answers also transpired in cross-examination.

ප්‍ර: හිඟ්ලා මහතා 16 දා ඉඳලා නැහැ?

උ: 26 වැනි දින අපි හිතුවේ.

ප්‍ර: නමුත් කියන්නේ හිඟ්ලා මහතාත් 16 දා තිබෙනවා කියලා හිතාගෙන හිටියා?

උ: ඔව්

The above items of evidence no doubt is hearsay. On the other hand it has no evidentiary value. Answer of the witness is on what he and the Attorney contemplated to be. The words 'අපි හිතුවේ' and the question හිතාගෙන හිටියා for which the witness answered as yes , is nothing but what the witness thought, it to be. In the first instance the trial Judge cannot act upon this

evidence. Even if the trial Judge decided to admit the above items of evidence he cannot bring within it the registered Attorney by the answer 'we' (we) unless the Proctor or the registered Attorney was called to give evidence. I am unable to accept the views expressed by learned counsel for the Defendants on the above items of evidence. Court cannot surmise evidence. It is no answer to state that specific number of witnesses need not be called. Unless there is clear and strong evidence to the effect that Proctor mistook the date to be 26th of March or he took down the wrong date, court cannot act upon conjecture, or on hearsay evidence.

It is no excuse for the registered Attorney not to be present in court as long as a valid proxy is filed of record. It is the responsibility and duty of the registered Attorney to represent his client in court, on all days the case is called, or on the trial dates. The registered Attorney has to make arrangements to enter an appearance. If the registered Attorney made a mistake as taking down the wrong date, he should give oral evidence or at the least if acceptable to court file an affidavit explaining his position. He cannot be heard to say that the clients mistook the date or to depend on the client's answer to court that they mistook the date. It is no doubt, a highly unsatisfactory and an unacceptable position arose for which the registered Attorney alone should take the blame.

The learned District Judge in his reasoning inter alia comment that if the Defendant was mindful and keen about their case, a list of witnesses and documents should have been filed on time. It was not done and it indicates their indifference. However I observe the failure to file the list of witnesses and documents does not necessarily mean that the Defendants were not getting ready for the trial. The learned trial Judge has considered several decided cases. Especially the case of Karunawathie Ekanayake Vs. Gunasekera & Others 1986(2) SLR 250 which held that Defendants negligence and mistake of Attorney cannot excuse the party concerned and in such event an ex-parte Judgment should not be vacated. In the case in hand there is no acceptable evidence placed before the District Court that the registered Attorney-at-Law made a mistake. Such a defect cannot be cured by Defendant's excuse for their negligence alone, so long as a valid proxy is filed of record it operates, until proxy is revoked.

When an Attorney is appointed by a party, such party must take all steps in the case through such Attorney-at-Law Seelawathie Vs. Jayasinghe 1985(2) SLR 266. Once an Attorney-at-Law was duly appointed by the party concerned he foregoes his rights Fernando Vs. Sybil Fernando 1996(2) SLR 169. I also wish to cite Wijesekera Vs. Wijesekera and Others 2005(1) SLR at 58...." It is to the best interest of the Administration of Justice that Judges should not ignore or deviate from procedural law and decide matters on equity and

justice". As such I observe that there is an absence of proof of reasonable grounds as required by Section 86(2) of the Civil Procedure Code.

The learned High Court Judge does not seem to consider at all whether the registered Attorney-at-Law was negligent or not. He merely gets on to a procedural aspect and two factual matters. High Court reject the argument which has already been dealt in this judgment as regards filing of list of witnesses and documents. That position stated by the learned High Court Judge cannot be faulted but he should have examined the applicability of reasonable grounds as contemplated by Section 86(2) of the Code. No doubt the above matters were dealt by the learned District Judge. As such the High Court may have touched upon the above with some reasoning but the fundamental issue is the question of reasonableness and the role of the registered Attorney, on the day in question.

There may have been a bona fide mistake done by the Defendants, but the absence of the role played by the registered Attorney would be the fundamental issue. One cannot merely project the case of the clients of the registered Attorney who are the Defendants and attempt to draw comparisons with the role of the registered Attorney without evidence on that aspect. I observe once again that the registered Attorney either knowingly or

unknowingly or wittingly or unwittingly chose not to provide any material as stated above to support his client's case.

The situation that has resulted from the two Judgments of the District Court and the High Court could be summed up as follows. Learned District Judge's ultimate conclusion in refusing to vacate the ex-parte order is correct. But in the process of arriving at that conclusion, the voyage of discovery by the trial Judge cannot be so sound. The learned High Court Judge who assumed Appellate jurisdiction no doubt thought it fit to reverse the District Court Judgment and allow the appeal on matters dealt by the learned District Judge may be correct, but failed to examine the fundamental issue as discussed above.

The questions of law as per paragraph 16 of the Petition are answered as follows:

- (a) No. Registered Attorney has failed in his duties and has shirk his professional responsibility. No explanation was forthcoming from the registered Attorney who has not taken the steps to revoke proxy. Primary duty is on the registered Attorney to appear in court as long as a valid proxy is in operation.
- (b) Yes.
- (c) No, in view of registered Attorney's lapse as described above.
- (d) No, as stated above.

The case of the Defendants had not been established in satisfaction of Section 86(2) of the Code. Prior to considering the conduct of the party concerned it is incumbent upon court to examine the role of the registered Attorney as a proxy was filed of record and as such was in operation. The procedural law as in Section 24 of the Civil Procedure Code leaves no room for a client to act on his own. Whatever it may be the party concerned should take all steps in the case through his registered Attorney, and not on his own. In all the facts and circumstances of this case and in the context of the case in hand I set aside the Judgment of the High Court dated 17.03.2009, and allow the appeal without costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne

I agree.

JUDGE OF THE SUPREME COURT