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

Gunasena Jayawardena of
Moratota, Pelmadulla.

DEFENDANT-APPELLANT

C.A 249/1999(F)
D. C.Ratnapura 11254/D

Vs.

V. A. K. Cicilin Nona alias
Pesonahamy of Moratota,
Pelmadulla.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: S. N. Vijithsinghe for the Defendant-Appellant

H. Withanachchi for the Plaintiff-Respondent

ARGUED ON: 15.11.2011

WRITTEN SUBMISSIONS FILED ON: 02.12.2011 - (Defendant-Appellant)
09.01.2011 - (Plaintiff-Respondent)

DECIDED ON: 27.01.2012

GOONERATNE J.

This was an action filed in the District Court of Ratnapura for a declaration of title to 1/10th of the land described in the schedule to the plaint/eviction of the Defendant from the premises described in the plaint and a money claim. Trial in this case had been fixed for 27.5.1997 in the District Court. On the said date Plaintiff was represented by counsel. Defendant was absent. Counsel appeared and informed court that he had no instructions from the Defendant. The District Judge had thereafter taken up the case ex-parte. Plaintiff had given ex-parte evidence, and ex-parte judgment was entered on the same date, and it is only recorded in the judgment that court being satisfied on Plaintiff's evidence entered judgment in favour of the Plaintiff. (one sentence judgment). An application was made to the District Court to purge default and the District Judge after inquiry refused such application and affirmed the ex-parte judgment. This appeal is from the order of the learned District Judge dated 3.2.1999 refusing to set aside the judgment entered upon default.

There are some grounds urged in paragraph 7 of the Petition of Appeal. I have considered same. At the hearing before this court learned

Counsel for Appellant inter alia stressed the point that the learned District Judge has erred in fixing the case ex-parte merely on the application of the Proctor that he has no instruction from his client/Defendant. It was the position of the learned Counsel for Appellant that the District Judge has erred in that instance and relied on the authorities cited by him viz. *Andiappa Chettiar Vs. Sanmugam Chettiar. 33 NLR 217; Porolis Silva Vs. Porolis Silva 1 Times pg. 20;*

The learned Counsel for Appellant also supported his case on the footing that he has reasonable grounds for default and referred to document 'x' (Medical Certificate) and certain items of evidence at folio 65-67, 69/70.

In that way he sought to demonstrate that he has reasonable grounds for default and that in any event the trial Judge's order refusing to vacate the ex-parte judgment should be set aside. He also relied in the case of *Seynath Umma Vs. Rajabdeen 1997(2) SLR 134.*

It was the position of the learned Counsel for Plaintiff-Respondent at the hearing of this appeal that the learned counsel for Appellant has taken up two contrary positions and he should not in law be permitted to do so, since both positions are inconsistent. Viz Original Court cannot fix the case ex-parte and reasonable grounds for default as in

Section 86(2) of the Code. The learned Counsel for Respondent submitted to court that the Appellant could have appealed from the final judgment. Learned Counsel further stressed that the appeal in question is an appeal under Section 88(2) of the Civil Procedure Code and that it is an appeal from an order refusing to set aside an ex-parte judgment.

I have considered the position of each party and I had the benefit of hearing submissions of learned Counsel on either side. It is, I thought a complex question in view of the submissions of learned Counsel for Respondent, that a party should not be permitted to take up two contrary positions. However on one hand this appeal is of much interest and importance since this court is called upon to decide on a matter that is fundamental which goes to the root of the case. Viz whether it is an ex-parte trial or a trial interpartes. On the other hand the client Proctor relationship and the professional duty cast on the Proctor. Whether merely informing court that he has no instruction from his client, would entitled an Attorney at Law to withdraw from the case when a valid proxy is filed of record which has not been revoked.

The learned District Judge was never invited by either party to rule on the question of interpartes trial before the Original Court. As such the trial Judge proceeded to inquire only on the question of reasonable

grounds for default. Therefore the trial Judge cannot be faulted to that extent. But in a case where a party is absent and unrepresented there is justification to proceed to hold an inquiry to ascertain the reasonable grounds of default. When an application is made to court on the basis of no instructions from client, (when proxy is not revoked) Trial Judge has to be very cautious. The learned counsel for Respondent has very clearly stated that the Plaintiff is not at cross-purposes with the principle laid down in the above mentioned decided cases as adverted by learned counsel for Appellant. However I am unable to agree to the view that the application of the Attorney at Law that he has no instructions from Defendant cannot be continued in law as an express indication that he did not wish to take part as the trial. He cannot and should not express such intention or inform court the way he did when a proxy is not revoked or does not indicate to court that he would revoke proxy. The Attorney at Law on record for Defendant was duly appointed in terms of Section 24 of the Civil Procedure Code. As such law requires the Attorney at Law to appear, unless one could prove the converse of the dicta in the case of *Andiappa Chettiar Vs. Sanmugam Chettiar.* The proceedings of the day does not indicate that the Attorney at Law in no uncertain terms informed court that he is not appearing for the Defendnat. The dicta in the above cases requires the Proctor to very clearly express such

view or make such application, to enable the Original Court Judge to decide either way. In fact the Petition of appeal and the petition filed in the Original Court had been filed by the same Attorney at Law on behalf of the Defendant-Appellant. It is unfortunate that for reasons best known to the learned Attorney at Law on the date of trial, informs court that he has no instructions, but continued to look after the interest of his client on all subsequent stages of the case. This attitude of Attorney at Law might lead the court to be mislead and also his client.

At this point of this judgment I refer to the authorities submitted to this court and to the following extract from the text on Judicial conduct *Ethics and Responsibilities – A.R.B. Amarasinghe pg. 899...*

> A frequently heard ground for an application for postponement or adjournment is: 'No instructions'. Such applications need careful consideration. Where an attorney who has been retained is in court, does not state that he or she does not appear for a party, a decision made will be deemed to be an inter partes order. Merely stating that the attorney had no instructions is insufficient. In *Silva v Sayaneris*, where on the date of trail the proctors for some of the intervenients said they had no instructions, the Supreme Court said that that was a very unsatisfactory excuse. The Court said that proctors are expected to take instructions before they file pleadings, and to file pleadings without knowing anything about their client's case was a very objectionable practice. It is an equally, if not more, objectionable practice to seek a postponement on the alleged ground of 'no instructions' when the reluctance to appear is really due to the fact that the attorney's fees have not been paid. That matter was dealt with by the Supreme Court in Daniel v Chandradeva.

In *Andiappa Chettiar Vs. Sanmugam Chettiar 33 NLR 217...*

> The presence in Court, when a case is called, of the proctor on the record constitutes an appearance for the party form whom the proctor holds the proxy, unless the proctor expressly informs the Court that he does not, on that occasion, appear for the party.

Macdonell C.J.

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> The proctor of record is there when the case is called; then, if he wishes his presence in Court not to be reckoned an appearance for the defendant, he should make that clear to the Court forthwith. This is necessary in the interest of the Court itself, to inform it if, notwithstanding the presence of the proctor in Court, the occasion is not to be treated as an appearance; the Court needs this information that it may know how to proceed. This is necessary also in the interest of the proctor himself, that there may be some entry in the journal of the case to show what he did for his client on the case being called

Maartensz A.J.

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> I agree with my Lord the Chief Justice that a definite rule should be laid down for the guidance of proctors and the Courts of original jurisdiction; and that the rule should be that a proctor present in Court when his case is called, if he does not desire to enter an appearance for an absent party whose proxy he has filed should definitely state to the Court that he is not entering an appearance, and that otherwise his presence in Court should be deemed an appearance for that party.

The dicta in 33 NLR 217 followed in *Isek Fernando vs. Rita Fernando 1999(3) SLR 29...*

Held:

> Perusal of s 24 CPC demonstrates the fact that an appearance of a party may be by an Attorney-at-Law. When a client requests an Attorney-at-law to make an application it is an application the Attorney-at-law makes on behalf of the party he represents for the due administration of justice.
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> The trial judge erred in law by deciding to hold an ex parte trial offending s 84 read with s 24 CPC.

There is another matter that I wish to observe. As stated above the ex parte judgment is extremely brief and in one sentence the trial Judge held with the Plaintiff-Respondent. This is also contrary to Section 187 of the Civil Procedure Code. Whether the judgment is ex parte or inter partes the requisites of judgment required under Section 187 would be mandatory.

It is a requirement that as held in the case of *Sirimavo Bandaranaike Vs. Times of Ceylon 1995 (1) SLR 24....*

> Section 85(1) requires that the trial judge should be 'satisfied' that the plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the Judge's opinion is that the entirety of the relief claimed cannot be granted. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters in every instance; such satisfaction is after adjudication upon evidence.

In all the circumstances of this case it would be necessary to give a ruling to meet the ends of justice. The matter urged in appeal is of much importance, as a litigant should not suffer due to an application made

to court by his Attorney at Law who had in fact taken steps from the initial stages of this case right up to the appeal on behalf of his client. Though the trial Judge had not been invited by counsel to consider the matter urged in appeal, the District Judge had given his mind to the question of reasonable grounds for default and made order. However this Court is of the view that there is no necessity to rule on the grounds urged in the Petition of Appeal, in view of the above decision of this court in this appeal. Merely informing court that proctor has no instructions would not suffice in the circumstance of this case. Definite and clear words should be expressed by counsel or proctor that he does not desire to enter an appearance for the absent client, whose proxy he has filed. Further he should at least inform court that proxy would be revoked. Instead in the case in hand the Attorney at law concerned continued to take further steps for his client subsequent to the ex-parte judgment, entered against his client. Unsatisfactory excuses should never be made to court, only for reasons best known to the Attorney at Law. Further it has resulted in delay in litigation and increased costs/expenditure for the

litigant to whom the legal profession is bound to serve. Therefore I set aside the order of the learned District Judge and send the case back to the District Court to commence trial inter partes and conclude this case as expeditiously as possible. In the circumstances of this case I make no order for costs.

JUDGE OF THE COURT OF APPEAL