

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

Dehigahawattage Pushpakanthie,
No. 50/6, Mantrimulla Road,
Attidiya, Dehiwala.

Plaintiff

C.A. No. 972 / 2000 F

Vs.

D.C. Mt. Lavinia No. 1749 / 98/M

1. Sri Jayawardenapura General
Hospital,
Sri Jayawardenapura,
Kotte.
2. Dr. Dayananda Wijeratne,
No 79/3A,
Dharmadootha Mawatha,
Pagoda Road, Nugegoda.

Defendants

AND

Dehigahawattage Pushpakanthie,
No. 50/6, Mantrimulla Road,
Attidiya,
Dehiwala.

Plaintiff Petitioner

Vs

1. Sri Jayawardenapura General
Hospital,
Sri Jayawardenapura,
Kotte.

2. Dr. Dayananda Wijeratne,
No 79/3A,
Dharmadootha Mawatha,
Pagoda Road, Nugegoda.

Defendant Respondents

AND NOW BETWEEN

1. Sri Jayawardenapura General
Hospital,
Sri Jayawardenapura,
Kotte.
2. Dr. Dayananda Wijeratne,
No 79/3A,
Dharmadootha Mawatha,
Pagoda Road, Nugegoda.

Defendant Respondent Appellants

Vs.

Dehigahawattage Pushpakanthie,
No. 50/6, Mantrimulla Road,
Attidiya,
Dehiwala.

Plaintiff Petitioner Respondent

BEFORE

: UPALY ABEYRATHNE, J.

COUNSELS

: Palitha Kumarasinghe PC with V. Fernando for
the Defendant Respondent Appellants

Plaintiff Petitioner Respondent- Absent and
unrepresented

ARGUED ON

: 21.02.2012

DECIDED ON : 10.05.2012

UPALY ABEYRATHNE, J.

The Plaintiff Petitioner Respondent (hereinafter referred to as the Respondent) instituted the said action against the Defendant Respondent Appellants (hereinafter referred to as the Appellants) in the District Court of Mount Lavinia seeking to recover a sum of Rs. 1000000/- as damages.

The Appellants filed answer denying the averments in the plaint and prayed for a dismissal of the Respondent's action. Thereafter the case has been fixed for trial on 28.09.1999. Thereafter on 29.07.1999 the Respondent has sought permission of court to amend the plaint and the said application to amend the plaint has been fixed for support on 10.08.1999. Accordingly the case has been called in open court on 10.08.1999 and a date, namely 16.11.1999, has been given to file objection to the said application. Furthermore, it is apparent from the said Journal Entries that the Respondent has not made an application to take the case out of the trial role on 28.09.1999. Therefore the original trial date has been remained unchanged.

Thereafter the case has been taken up for trial on 28.09.1999 and since the Respondent was absent and unrepresented the learned Additional District Judge has dismissed the action of the Respondent. Thereafter the Respondent has made an application to vacate the said ex-parte order. The Appellants have filed their statement of objection to the said application and upon the written submissions of the parties the learned Additional District Judge has vacated the said ex-parte order by her order dated 17.10.2000.

The Appellants contended before this court that the learned Additional District Judge has erred in law in holding that the order of the dismissal should be set aside when in her own findings the Respondent had acted negligently. In support of the said submission the learned Counsel for the Appellants drew the attention of this court to the judgment at page 78 of the brief. The learned Additional District Judge has stated therein that “ඉහතින් සඳහන් කළ කරුණු කෙසේ වුවත් මෙම පැමිණිලිකාරියට තම නඩුව අධිකරනයට ඉදිරිපත් කිරීමට අවස්ථාවක් තිබිය යුතුය.”

It seems from the said sentence of the judgment that the learned Additional District Judge without paying her attention to the provisions contained in Section 87(3) of the Civil Procedure Code has arrived at a conclusion that in any event the Respondent should be given an opportunity to proceed with the action. It must be placed on record that Section 87(3) of the Code has not laid down such a simple procedure when an action is dismissed under Section 87(1) of the Code. Subsection (3) of Section 87 read thus;

87(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.

According to Subsection (3) if the court is satisfied that there are reasonable grounds for the non-appearance of the plaintiff, then the court shall make order setting aside the dismissal. When I consider the aforementioned piece of the judgment in the light of Subsection (3), I am of the view that the learned Additional District Judge has blatantly disregarded the requirement of subsection (3) when making the impugned order.

In the said circumstances I set aside the order of the learned Additional District Judge dated 17.10.2000 and allow the appeal of the Appellants with costs.

Appeal allowed.

Judge of the Court of Appeal