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

Ishantha Avindra Jayawickrama
West Charlie Mount Estate,
Uduwaka

Also at, No. 655/3, Elvitigala Mawatha,
Colombo 05.

Attorney appointed by Suresh Rashindra
Jayawickrama of South Ville, England.

PLAINTIFF

C.A. 1285/1998 (F)
D.C. Matara 8085/L

Vs.

Wimaladasa Pallewala
Akurugoda, Sulthanagoda

DEFENDANT

And

Wimaladasa Pallewala
Akurugoda, Sulthanagoda

PETITIONER-APPELLANT

Vs.

Ishantha Avindra Jayawickrama
West Charlie Mount Estate,
Uduwaka

Also at, No. 655/3, Elvitigala Mawatha,
Colombo 05.

Attorney appointed by Suresh Rashindra
Jayawickrama of South Ville, England.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Rohan Sahabandu with Dulani Warawewa for
Petitioner-Appellant

Uditha Egalahewa with Ranga Dayananda
For the Plaintiff-Respondent

ARGUED ON: 19.03.2012

DECIDED ON: 25.05.2012

GOONERATNE J.

This is an appeal from a default judgment in a land case. The summons returnable date was 03.01.1994. Petitioner-Appellant was absent and unrepresented on the said date, and court fixed the case for exparte trial

on 21.2.1994. After leading exparte evidence judgment was entered in favour of the Plaintiff-Respondent and decree entered in terms of the Civil Procedure Code. In the Petition of Appeal (paragraph 5) it is stated that before service of notice of decree the petitioner filed petition and affidavit to have the judgment and decree vacated. It was the position of the petitioner that he was prevented from attending court on the notice returnable date due to severe illness. Inquiry was held by the learned District Judge to decide whether the exparte judgment could be vacated. However after purge default inquiry, trial Court Judge dismissed the application to vacate the exparte judgment, on 29.6.1988.

It was the position of the Appellant that he was suffering from swelling of joints and unable to move. This illness is described by the party concerned as Rheumatic Arthritis. The Appellant was treated by a native physician, who gave evidence on behalf of the Appellant at the purge default inquiry. In the written submission Appellant states, the Native Physician in his evidence refer to the register of patients and confirm that he treated the Appellant on 02.01.1994. In the register particulars of Defendant-Appellant, home, date of treatment, the No. assigned, address of patient and a brief

description of the illness stated and evidence on those matters had been elicited. Perusal of the proceedings does not indicate whether the register itself was produced in court. The evidence reveal, as stated according to the register the Petitioner-Appellant was treated on 3 separate occasions for the same illness.

I have also made a note of the comments of the Petitioner as regards the judgment.

The trial Judge accept that the Petitioner-Appellant was treated for the illness as stated by him and for being treated for a long period. Further the Judge states that evidence does not show that he was unable to walk on the particular day (02.01.1994) to visit his Native Physician, who was 5 miles away. Defendant had walked 5 miles. Appellant stress that this is on erroneous assumption and a wrong inference which amounts to a serious misdirection on the part of the Original Court. It is also observed in the written submission of the Appellant that the trial Judge does not find the Physician to be a liar or to have uttered falsehoods.

This court takes the view that, what is significant in this type of inquiry is to ascertain whether in fact the Petitioner-Appellant was prevented from attending court due to illness. I have perused an unreported judgment

bearing No CA 841/96 (F) D.C. Kegalle 4687/L of Justice T.B. Weerasooriya (argued and decided on 23.5.2000) where a similar view had been expressed in a similar case. In the above CA 841/96 (F) the defendant was on the 7th date of trial absent but the Appellate Court based on above dicta set aside the default judgment of the Lower Court. Another point stressed by the Appellant was that the type of illness of the Appellant-Petitioner cannot be cured immediately. It takes time and in fact the decease can only be controlled.

The learned Counsel for Appellant has drawn the attention of this court to the following Indian Case and also to certain observations as follows:

> In Chakvadhar Choudhary vs. Padmalav Das AIR 1983 Ori 184 – it was observed thus. "The mental state of a person is subject to and dependent upon other faculties of the person concerned. With the same type of illness one person may be going about his errands while another may be nervous and panicky and consequently disabled – this is a matter which has to be kept in mind, as in the instant case- Court accepts that the defendant was treated for this illness for a long period of time. The Courts judgment was based on the single fact, that the 'Doctor' could not say whether the patient "could not walk" – but it is respectfully submitted the Court would have to look at the issue subjectively. The Indian case was in relation to the plea of High Blood Pressure.

The Appellant's Counsel emphasis that conclusion drawn by the learned District Judge from relevant facts are not rationally possible and is perverse per H.N.G. Fernando J. in 64 NLR 217. It is also stated that the Appellate Court is generally in as good as position to evaluate the evidence as the trial Judge and ought not to shrink from that task 68 NLR 49.

The learned Counsel for Plaintiff-Respondent more or less supported the order of the learned District Judge an opposed all moves to set aside the order of the trial Judge. Learned Counsel also submitted that the evidence offered by the Appellant and his witnesses were contradicting each other and no court should place any reliance on same. Appellant failed to tender a Medical Certificate. As such evidence of the Native Physician should be considered cautiously. In a well considered written submission of the Respondent the case of Walter Nutter & Co Vs. Mohammadu Lebbe cited.

Bonser CJ held:

> "Mere illness of the defendant is no excuse for his proctor not preparing or filing an answer in time. To justify the acceptance of an answer after its due date, it should be proved that the defendant was so ill that he could not attend to business or see his proctor."

It was also the submission of the Respondent that the Physician's evidence described the symptoms of the alleged illness and

testified that anybody suffering from the said illness would experience difficulty in walking, and if the pain is severe it may be impossible to walk. As such the evidence does not indicate that it would have not been possible to move/walk and thus Appellant was unable to attend court. In other words the Appellant was not in a serious condition on the date in question.

In the case of Dick Vs. Piller. Cited with approval in W. Stephen Fernando Vs. W. James Fernando 55 NLR 119.

> "It (the certificate) does not even say that the defendant is at present suffering from acute gastritis. But only say she is under treatment for gastritis. It may be that he is now not so bad as he was when he first started treatment. I refuse the application for a date."

The requirement under Section 86(2) of the Civil Procedure Code is for the Defendant to satisfy that he had reasonable grounds for his default. This is the only requirement to be considered and no other extraneous matter of fact need be considered by court. The fact that the Defendant was a habitual litigant or that he was involved in fraud etc. are not matters that should influence court. As regards in the case in hand did the Defendant-Appellant adduce sufficient evidence to satisfy court of his reasonableness not to attend court on the summons returnable date. There is

no specific challenge to his illness, and the question of mobility seems to be the fact that has influenced the Original Court to have refused to vacate the order.

The condition of the illness, the treatment taken for same and the continuous nature of the illness does not seem to be in doubt. It is the person who suffers from an illness who could really explain the difficulty to get about. No doubt the party concerned was in constant pain. I think the question of walking or mere illness would not be the only ground to refuse an application of this nature. However, even if a person could walk, if he is prevented from normal movements as a human being due to pain, would certainly be a reasonable ground to excuse a default. Fact that he did not make prior arrangements before the day in question or that he could not contact his Attorney on time due to his own indifferent attitude would tend to encourage a Court of Law to arrive at an adverse finding. Nevertheless what is significant in an inquiry of this nature is to ascertain as observed above whether in fact he was prevented from attending court, due to illness. Both physical and mental element would play a role in this type of case and illness as relied upon by the Appellant. The trial Judge has not rejected the

evidence of the Native Physician. Court will have to consider the case of the Appellant subjectively. Trial Judge accept that the Appellant was suffering from the illness and was treated by the Physician on 02.01.1992.

It is no easy task for a Court of Law to conclude on the degree of pain due to a complicated illness. Court or layman could arrive at a decision if the illness was just common cold or flu, or uncomplicated gastritis. An illness of a high degree of complications is best left to a Medical Practitioner to comment. As such I am of the view that the benefit should be given to the Appellant although certain lapses could be detected in the case in it's entirety (I do not propose to repeat those which need to be determined according to the facts and circumstance of each case).

In all the above circumstances I set aside the order of the learned District Judge dated 29.6.1998. However the Plaintiff-Respondent need to be compensated by way of costs. The Appellant-Respondent would only be entitled to file answer and proceed with the interpartes trial by paying prepayment of costs to the Plaintiff-Respondent in a sum of Rs. 20,000/-. Unless costs in the said sum is paid on a specified date and time to be decided by the learned District Judge, Appellant will loose his right to proceed to defend his case. Failure to comply with this order will result in judgment being entered in favour of the Plaintiff-Respondent.

Order vacated subject to above direction. Registrar of this court is directed to forward the record of this case along with this order to the relevant Registrar of the District Court forthwith.

JUDGE OF THE COURT OF APPEAL