

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

C.A. 1282/96 F
D.C. Embilipitiya 2194/L

M B Leelawathie, Thimbolketiya,
Kolambageara

**SUBSTITUTED DEFENDANT-
APPELLANT**

S H L Gunaseeli De Silva,
Thimbolketiya, Kolambageara

**SUBSTITUTED-1B DEFENDANT-
APPELLANT**

Vs

L Wijeratna, Thimbolketiya,
Kolambageara

**SUBSTITUTED-PLAINTIFF-
RESPONDENT**

BEFORE : A W A SALAM, J

COUNSEL : B O P Jayawardena for the substituted 1B
defendant-appellant and Dharshana Kuruppu for the plaintiff-
respondent.

ARGUED ON : 17.11.2011

DECIDED ON : 25.07.2012

A W Abdus Salam, J

This is an appeal against the order of the learned district judge
refusing to vacate the judgement entered against the defendant
ex parte. The facts and the circumstances that led to the *ex parte*

000191

trial are somewhat peculiar in nature and needs to be set out briefly. The plaintiff filed action against the defendant to regain possession of the subject matter of the action which he alleged the defendant forcibly entered and cut a road dividing the land into two. The defendant filed answer denying the principal averments and moved for a dismissal of the plaintiff's action. The matter of the dispute was set down for trial. On the date of the trial the defendant was absent but represented by an attorney-at-law who made an application for an adjournment of the trial without assigning any reason. As the plaintiff objected to the application the learned district judge took up the trial *ex parte* against the defendant on the same day and immediately delivered his judgment.

Subsequently, the *ex parte* judgement having been served on the defendant, an application was made by the defendant to purge his default. Pending the determination of the application to purge default the defendant passed away and his wife was nominated as the substituted defendant. At the inquiry into the application to purge default the substituted defendant-appellant gave evidence and the learned district judge not being satisfied as to the excuse offered for the absence of the defendant (deceased) dismissed the application to purge default. This appeal has been preferred against the said judgement.

As far as the present action is concerned I do not propose to delve into the question as to whether the defendant had offered a reasonable explanation for his absence, as it was not strictly arise from the proceedings had before the learned district judge. The learned district judge on the date of the trial, when application was made for an adjournment had taken up the trial *ex parte* against the defendant, despite an appearance having been entered for the defendant. On a perusal of the proceedings, it appears that the learned district judge has not granted an opportunity to the

Attorney-at-Law who marked his appearance for the defendant to cross examine the plaintiff. Although the proceedings of 12th January 1995, immediately after the refusal of the application for an adjournment should have been taken *interpartes*, the learned district judge heard the case against the defendant *ex parte* despite the fact he had no authority or jurisdiction to adopt such course of action.

In terms of section 84 of the CPC, the court is empowered to consider the defendant as having faulted in appearing only if he fails to appear on the day fixed for the hearing of the action. As there has been an appearance entered for the defendant on the trial date learned district judge was not authorised under section 84 read together with section 24 of the Civil Procedure Code to treat the defendant as being in default. It is to be noted that as a result of the learned district judge having adopted a wrong procedure misdirecting himself thereby on an important procedural law affecting the right of being heard, the defendant has lost the opportunity of presenting his case. Even otherwise by reason of this misdirection the defendant has lost the opportunity to prefer an appeal within the time frame fixed by law, as the defendant was made to believe that the court had authority to take proceedings against him *ex parte*.

In the case of Isek Fernando Vs Reeta Fernando 1999 3 SLR 29, it was held by this court on an appeal representing almost similar facts, that the trial judge erred in law by deciding to hold an *ex parte* trial offending section 84 read with section 24 of the Civil Procedure Code when the Counsel for the defendant entered an appearance and moved for an adjournment, which application the learned district judge refused.

In the circumstances, I am of the view that the rights of the

defendant has been greatly prejudiced by the wrong procedure adopted by court and therefore the impugned order should stand corrected. In passing, it is appropriate to observe that the learned district judge at the end of the inquiry into the application to purge default, should have on his own volition expunged all the proceedings taken against the defendant by reason of the court having followed a wrong procedure offending section 84 and 24 of the Civil Procedure Code.

For reasons stated above, I am of the opinion that this appeal is most deserving to be considered favourably and I accordingly allow the appeal and set aside the proceedings and direct the Registrar of this court to send the case back to the original court for retrial *interpartes*. There shall be no costs.

Judge of the Court of Appeal.

CR/-