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

CA 1158/96 (F)

DC Kalutara Case No. 4076/L

Donsimange Kanchana,
Katukurundugahalanda,
Potuwila,
Paiyagala.

Substituted Defendants-Appellants.

Vs.

Diyapaththugama Vidanelage
Sirisena Samarasinghe,
Katukurundugahalanda,
Potuwila,
Paiyagala.
Plaintiff-Respondent.

BEFORE : A.W.A SALAM, J.

COUNSEL : Avindra Wijesundare for the Defendant-Appellant.

N.R.M. Daluwaththe PC for the Plaintiff-Respondent.

ARGUED & DECIDED ON : 11.07.2012.

A.W.Abdus Salām, J.

This is an appeal filed by the Defendant-Appellant to have the order made by the learned District Judge dated 19.11.1996 vacated *inter alia* on the ground that he was suffering from hypertension immediately prior to 4 to 5 days before the answer was to be filed.

At the inquiry held by the District Judge into the application to purge default the defendant-appellant testified to the fact of his having fallen sick and the learned district judge thereafter delivered the impugned order

rejecting the explanation offered by the defendant while categorically admitting that an answer had already been filed.

When submissions were made after the inquiry, the learned counsel for the defendant-appellant has specifically taken up the position that the order fixing the matter for ex-parte trial has been entered *per incurim.* On a perusal of the impugned order, it is quite apparent that the learned district judge has failed to appreciate this submission which he should have seriously considered on the principle *actus curiae neminem gravabit* which means that an act of Court shall prejudice no one. This maxim is founded upon justice and good sense and affords a sage and certain guide for administration of the law.

As was pointed out by the learned Counsel for the appellant the defendant has filed his answer on 2nd February 1993 and thereafter the learned district judge has directed that the case be mentioned to fix for trial and it was so fixed for trial for 11th of July 1994. On that day when the matter came up for trial upon an application being made on behalf of the plaintiff to have a commission issued to a surveyor, the case was taken off the trial roll to facilitate the plaintiff to take steps. Subsequently, to execute the commission considerable time has been taken and in the meantime another incidental application had been made for an interim injunction and enjoining order. The application for interim injunction has been finally settled between the parties on 21st of October 1994. Thereafter, the long awaited commission had been returned as per journal entry dated 2nd August 1995 (J.E 30). According to the journal entries, on this day none of the parties had attended court nor have they been represented by lawyers.

The learned district judge having lost sight of the fact that an answer has already been filed and under the misconception that an answer was due fixed the matter for answer for 04th October 1995.

Section 93 of the Civil Procedure Code permits pleadings to be amended including the answer. Mr. Daluwatte PC on behalf of the plaintiff respondent submitted that the answer due on 4th October 1995 could be construed as an answer which is "subsequently due" as contemplated in section 84.

I regret my inability to endorse the view expressed by the learned President's Counsel for the simple reason that once pleadings are filed by a particular party it can be allowed to be varied or altered only by way of amended pleadings upon an application made in that behalf. The defendant appellant has not made any such. Therefore when the learned district judge fixed the matter for answer on the 2nd August 1995, it cannot be considered as an opportunity granted to amend the answer, but it is merely an order made by inadvertence. In the circumstances, the defendant need not have offered any explanation as to his absence to get the order made by the learned district judge fixing the matter for ex-parte trial set aside, as this is an order made Per incuriam being unaware of the fact that the defendant had already filed the answer.

Learned President's Counsel also contended that once an order fixing the matter for ex-parte trial is made it is an appealable order and therefore the present appeal as is now constituted should fail *inlimine.* In terms of section 85 of the Civil Procedure Code the order fixing a matter for ex-parte trial is not appealable and it can be vacated under section 86 with the consent of the plaintiff, if a proper application is made. However an order

made on the application to vacate a judgment and decree entered after ex-parte hearing, is appealable under section 88(2) of the Civil Procedure Code.

In the circumstances, the question as to whether the defendant appellant had any reasonable ground to keep away from court on the day in question does not strictly arise. The learned trial judge could not have ignored the fact that the defendant has been unduly prejudiced by the act of Court in fixing the case for exparte trial for no fault on the part of the defendant. In my opinion he should have been granted the relief asked for.

In any event as was suggested by the learned counsel for the defendant appellant on 4th October 1995, when the court fixed the matter for ex-parte trial it has been done without jurisdiction since none of the ingredients spelt out in section 84 had given rise to the matter being fixed for ex-parte trial.

Taking all these matters into consideration to mete out Justice, the only way in which the Appellate Court can now undo the damage caused to the defendant appellant is by

1. setting aside the order dated 2nd August 1995 directing the defendant to file answer.
2. setting aside order dated 4th October 1995 directing that the ex-parte trial be taken against the defendant and
3. directing the learned district judge to expunge the rest of the proceedings.

Accordingly the district judge is now directed to give effect to this order and duly notice the parties and fix the matter for interpartes hearing on the

answer already filed. The defendant appellant is entitled to costs of this appeal.

JUDGE OF THE COURT OF APPEAL.

NR/-