

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

D. G. Mallika  
No. 165, Hospital Road,  
Hekiththa, Wattala..

**PLAINTIFF**

C.A 358/1998 (F)  
D.C. Colombo 4640/SPL

Vs.

1. D. G. Karunaratne  
No. 12, Delgahakumbura,  
Madawela Bazaar
2. H. D. V. Deepani  
No. 185'1, Kotikawatta,  
Mulleriyawa, Nawanagaraya.
3. Manager,  
Rural Bank,  
Wattegama, Kandy.
4. Commissioner of Motor Vehicles,  
Office of the Motor Vehicles,  
Narahenpita.

**DEFENDANTS**

2. H. D. V. Deepani  
No. 185/1, Kotikawatta,  
Mulleriyawa, Nawanagaraya.

**2ND DEFENDANT- PLAINTIFF**

Vs.

D. G. Mallika  
No. 165, Hospital Road,  
Hekiththa, Wattala..

**PLAINTIFF-RESPONDENT**

2. H. D. V. Deepani  
No. 185/1, Kotikawatta,  
Mulleriyawa, Nawanageraya.

**2ND DEFENDANT- PLAINTIFF-  
APPELLANT**

Vs.

D. G. Mallika  
No. 165, Hospital Road,  
Hekiththa, Wattala..

**PLAINTIFF-RESPONDENT-  
RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** J.P. Gamage for the Defendant-Appellant  
Respondent is absent and unrepresented

**ARGUED ON:** 17.01.2012

**DECIDED ON:** 10.02.2012

**GOONERATNE J.**

This is an appeal from the order of the learned District Judge dated 20.5.1998 refusing to set aside the judgment entered upon default of 2<sup>nd</sup> Defendant–Appellant. Ex-parte trial against the 2<sup>nd</sup> Defendant was held on 2.6.1997 and judgment was entered on the same date. The position of the 2<sup>nd</sup> Defendant-Appellant at the inquiry before the District Court was that she could not attend court on 2.6.1997 (the trial date) as she was unwell and in support of her case produced medical certificate P1 and in addition to her oral testimony, she also called the Medical Practitioner who issued medical certificate P1 to give evidence on her behalf.

I would deal with views expressed by the learned District Judge. It is stated in the order that the Appellant had been unwell from about 7.00 a.m and she went to the Physician with her sister at about 9.00 a.m to take treatment and that she unsuccessfully attempted to contact her registered Attorney on the mobile phone and could not reach her registered Attorney. However as transpired in evidence the Appellant met her registered Attorney only after about 1 ½ months after that date and only after the registered Attorney informed her about the judgment entered against her.

It is also stated in the order that the Physician who issued the medical certificate P1, gave evidence and confirmed the issuance of the medical certificate to the Appellant but he could not produce the register maintained by him recording details of patients. The trial Judge refer to this fact probably due to the fact that the Register would corroborate details of sickness, names dates etc. The other point referred to by the trial Judge is the non-compliance of the requirement of the filing list of documents and witnesses within time as requirement by the Civil Procedure Code (15 days prior to trial). As such trial Judge takes the view that the Appellant was not ready for trial. This no doubt indicates that the 2<sup>nd</sup> Defendant-Appellant was not ready for trial, or that she failed to exercise due diligence in the preparation of pre trial steps. However I wish to observe that the above points referred to by the Judge need to be considered and adopted to demonstrate the lack of enthusiasm of the party concerned, Further fortunately or unfortunately our law proceeds on the footing that negligence of lawyer amounts to the negligence of client. But I would take the view that though the above points would operate against the position maintained by the Appellant still what the law required is to provide material to establish a reasonable grounds for absence or default. I am not critical of the learned District Judge's above views and

under very normal circumstances a court would have to consider such standards, but still there is room to establish a reasonable, requirement for default. (vide Section 86). Certainly it would corroborate (District Judge's views above) the version of the opposing party/respondents.

The trial Judge refer to the conduct of a normal human being and state that under those circumstances any normal person would immediately after being cured of an illness would have contacted the Attorney and not 1 ½ months later. That is correct but one should not loose sight of the fact that the stage at which the defendant could have come into court is set out in Section 86(2) and precisely in terms of Section 86(2) the 2<sup>nd</sup> Defendant. Appellant made the application to court. Sejnath Umma Vs. Rajabdeen 1997(2) SLR at 136.

The other matter suggested in the order of the learned District Judge is the failure of the appellant to lead the evidence of her sister who accompanied the Appellant to the dispensary on the date in question. I do not think it is essential to lead that evidence or that there is a lapse on the part of the Appellant which led to disbelieve the version of the Appellant. Evidence of a sole witness is sufficient but corroboration of the Appellant's story in the circumstances of this inquiry may not assist the 2<sup>nd</sup> Defendant since the medical certificate P1 though marked subject to proof was lead in

evidence and the Physician also testified to it's contents. Further at the close of the Appellant's case document P1 was read in evidence and there was no objection for same. Therefore document P1, is evidence for all purposes of the law and the inquiry in hand. This is held to be the *cusus curiae* of the District Court. Sri Lanka Ports Authority and another Vs. Jugolinija – Boal East 1981 (1) SLRpg. 18 at 23 to 24) 18 NLR 85; 31 NLR 385; 58 NLR 246; 1998(2) SLR 16; 2016 BLR 249; 1997(2) SLR 101.

What is significant in terms of law more particularly to Section 86(2) of the Code is to ascertain whether in fact Plaintiff-Appellant was prevented from attending court due to illness. As stated above the certificate P1 confirm the illness, date of illness, patient's name and No. in register (though register was not produced), recommendation regarding whether patient could appear in court on 02.6.1997. P.1 also contain the Physician's signature and that of the patient. These are all admitted facts and evidence for all purposes of the case and law. There is no room for anyone to state that P1 was either fabricated, bogus or an unacceptable document whether it was issued by a western or Ayurvedic Practitioner provided evidence in rebuttal was led. I do not deny that the Appellant has no duty to maintain a register. It must be maintained. Merely because it was not produced the evidential value attached to medical certificate P1 would not diminish. On

the other hand the learned District Judge does not reject P1. He could have done so, if he thought it fit to do so. There is not much comment on P1 or no comment about it at all.

It is unfortunate that the registered Attorney at Law did not enter an appearance on the trial date. As long as a valid proxy is filed of record and is in force there is a duty on the part of counsel or registered Attorney to look after the interest of his or her client. Even informing court that the Attorney at Law has no instructions would not suffice, unless there is a withdrawal of appearance for the particular party and it is said so in very clear and precise words in its true sense followed by an application for revoking of proxy. There is always a duty to court and to ones client. Other considerations do not matter to court.

In all the above circumstances I am of the view that the trial Judge has erred on a very material and significant points i.e to ascertain correctly whether the Appellant was prevented from attending court due to illness, and give his mind to the question of reasonable grounds for default. I am not critical of some of the observations of the trial Judge. He may appear to be sound in some of them, but what is material to this application has not been correctly approached and the Judge has erred.

I set aside the order of the District Judge dated 20.5.1998 and allow this appeal with costs. Inter partes trial as far as the 2<sup>nd</sup> Defendant-Appellant is concerned should be held in the District Court.

JUDGE OF THE COURT OF APPEAL