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

Kasun Jeewantha Ratnayake
No. 37, Millaththawa.
Girandurukotte.

Minor

R. M. Jayasekera
No. 37, Millaththawa.
Girandurukotte.

Next friend of Minor Plaintiff

PLAINTIFF

C. A 351/1998 (F)
D.C Badulla 1833/M

Vs.

W. S. Senaratne
1431, Canal 31
Kolongoda, Hasalaka.

DEFENDANT

And

W. S. Senaratne
1431, Canal 31
Kolongoda, Hasalaka.

DEFENDANT-APPELLANT

Vs.

Kasun Jeewantha Ratnayake
No. 37, Millaththawa.
Girandurukotte.

Next friend of Minor Plaintiff
R. M. Jayasekera of
No. 37, Millaththawa.
Girandurukotte.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Nimal Jayasinghe with Nawaratne Banda for the Appellant
Chula Bandara for the Respondent

ARGUED ON: 18.11.2011

DECIDED ON: 24.11.2011

GOONERATNE J.

Ex-parte Judgment was entered in the District Court of Badulla on 9.5.1995. This is an appeal from the order of the learned District Judge dated 19.1.1998 refusing to set aside the ex-parte judgment entered in

default of the Defendant-Appellant (Section 88(2) of the Civil Procedure Code), after an inquiry to vacate the ex-parte judgment.

At the ex-parte trial two witnesses inclusive of an eye witness had given evidence. Plaintiff was a minor, his father who was appointed 'next friend' gave evidence. Though this court need not consider the merits of the case, and only whether the question of reasonable grounds for default, (as in Section 86(2) of the Civil Procedure Code) had been established at the inquiry need to be considered in this appeal, very briefly I state, the action was as a result of Plaintiff (minor) being run over by a bus bearing No. 30 Sri 4390 along with other school children and action was instituted in the District Court to recover damages.

It was the position of the Appellant in the original court and as well as in this appeal that he never received or was served with summons by court. Learned counsel for Appellant also submitted that an affidavit has not been filed as required, moving for substituted service of summons (this matter was not urged in the original court). At the inquiry the process server one Ekanayake Banda gave evidence and had testified that the Defendant in case Nos. 1833 & 1834 was Senaratne and after having found out from the neighbours about the residence of the Defendant he duly effected substituted service of summons by pasting the summons on the door of the premises. In

cross-examination the process server confirm that he pasted the summons on the door on 1.11.1994 after having got information from the neighbours in the area and that he had done so even in other cases. He submitted report 'X'.

The Appellant in his evidence states he never received summons and that if he received summons he would submit same to the Insurance Corporation who would settle the claim. He also state that he does not have the means to settle the amount in the decree. Appellant has admitted receipt of letter of demand and that he handed it over to the Insurance Corporation. The following from his evidence to be noted (at folio 37 & 38 proceedings of 28.7.1997)

මට ඒ ස්ථානයට මේ තින්දු ප්‍රකාශය ලැබුනා කියා මම පිලිගන්නවා. ඒ ලිපිනය ලියාපදිංචි තැපැලෙන් නිතිඥ මහතා එවපු එන්තරවාසියක් ලැබුණා කියා මම පිලිගන්නවා. මා තින්දු ප්‍රකාශය බාර ගත්තේ නුවරට ගිහින්. ඒ නිලධාරියා තින්දු ප්‍රකාශය බාරදෙන්න එන වෙලාවේ මම සිටියේ නැහැ. පසුව ඔහු මට නුවරට එන්න කියා ගෙදරට තුන්ඩුවක් දිලා ගිහින් තිබෙනවා. මම ගරු අධිකරණයට කියා සිටින්නේ සිතාසියේ තිබෙන ලිපිනයට සොයාගෙන ඇවිත් ගෙදරට තුන්ඩුවක් දිලා ගියා. ඒ වෙලාවේ මම ගෙදර සිටියේ නැති නිසා මම එය ගිහින් බාරගත්තා කියා. කොහොම උනත් මට මේ දෙකම ලැබුනා.

The order of the learned District Judge cannot be unnecessarily interfered with by this court. The trial Court Judge has given cogent reasons in the order which cannot be attacked by the Appellant and the Appellant has not been able to demonstrate that he had reasonable grounds for his default. Learned District Judge has not erred in her order and has arrived at a proper factual conclusion. Original court has dealt correctly with all primary facts. Appellant Court should not disturb findings of primary facts 1993 (1) SLR 119; 20 NLR 332. The following extract from the judgment may be noted which clearly explain Defendant-Appellant's default.

මෙම විත්තිකරුගේ සාක්ෂි අනුව පැහැදිලිව පෙනි යන්නේ ඔහු ආදේශය ක්‍රියාත්මක කරගෙන දොරේ ඇලවූ සිතාසිය සතු ලිපිනයේ පදිංචි බවය. මන්ද යත් ඔහු තින්දු ප්‍රකාශය මහනුවර ගොස් ලබාගෙන ඇත්තේද ගෙදර තබා තිබූ තුන්ඩුව සැලකිල්ලට ගෙනය. ඒ අනුව තුන්ඩුව ලැබී ඇත්තේ ඔහු පදිංචි මෙම නිවැරදි ලිපිනයේ බව් සනාථ වී ඇත. තවද එන්තරවාසිය ලියාපදිංචි තැපැලෙන් ලැබී ඇත්තේද මෙම අදාල අංක 1431 දරණ ලිපිනයේ බව් ඔහුගේ සාක්ෂි තුලින් පෙනි සනාථ වී ඇත.

I have also perused the affidavit of 23.91994 contained in the original case record 1834/93 (Folio 23). This confirm the requirements to move for substituted service. This affidavit is sufficient for both cases being

the same Defendant. The Journal Entry of 94.09.23 refer to substituted services. (1833/93)

An ex-parte order made in default of appearance of a party will not be vacated if the party fails to give a valid excuse for his default. 1987 (1) SLR 253. I cannot find any valid ground to excuse the Defendant-Appellant for his default. Appellant has failed to adduce valid reasons for default nor has he established reasonable grounds for default or in terms of Section 86(2) of the Civil Procedure Code. In all the above circumstances I affirm the order of the learned District Judge and dismiss this appeal with costs.

JUDGE OF THE COURT OF APPEAL