

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

Kankanamge Dayananda  
of Punchihewagawatta,  
Gedagama, Matara.

**DEFENDANT-APPELLANT**

C.A. 289/1997

Vs.

Wijesekera Liyanage Piyasena  
of Kadaweddiwa,  
Palatuwa, Matara.

**PLAINTIFF-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Defendant-Appellant is absent and unrepresented  
W. Wanigasekera for the Plaintiff-Respondent

**ARGUED ON:** 28.9.2011

**DECIDED ON:** 30.9.2011

**GOONERATNE J.**

This is an appeal from the order of the learned District Judge, refusing to vacate an ex-parte judgment (Section 88(2)) entered upon default. Plaintiff-Respondent filed action in the District Court of Matara to vindicate his title to the land described in the schedule to the plaint and eviction of the Defendant-Appellant from the above premises. Plaintiff indicates that the Defendant-Appellant was a lessee of an over holding premises. Journal Entry No. (1) of 21.2.1995 indicates that Defendant had tendered proxy to court on the said date through his Proctor Mr. Hithayathulla. Date for filing of answer was given by court for 29.5.1995. Journal Entry No. (2) of 29.5.1995 shows that answer was not filed on the said date and case had been set down for ex-parte trial, on 1.9.1995. The journal entry No. (4) of 29.8.1995 indicated that Proctor Hithayathulla has tender an answer to the District Court. It was filed (without vacating the order to fix the case for ex-parte trial) On 01.9.1995 (J.E. 5) ex-parte trial was held and judgment delivered and court directed to enter decree.

On 12.9.1995 (J.E 6) the Defendant-Appellant with notice to Plaintiff filed petition and affidavit and moved court to set aside the ex-parte judgment. Inquiry was thereafter fixed by the District Judge and journal

entries indicate that Defendant-Appellant had tried to resolve the matter but there was no settlement and parties proceeded to inquiry on 12.9.1996. Order refusing to vacate the ex-parte decree and judgment is dated 18.6.1997. At the inquiry the Defendant and the Proctor's Clerk gave evidence.

The gist of the evidence is that the Proctor's Clerk who was present in court when the date for answer was given took down the date for answer to be 7.11.1995 and that he heard it as 7.11.1995. In other words he has taken down the wrong date. The learned District Judge very correctly does not accept the above position to be an acceptable excuse. The date was entered by the clerk on a calendar hung on the wall. District Judge observes that such calendar was not produced in court. The brief order of the learned District Judge cannot be faulted in any way. The trial Court Judge's views to reject the position of the Defendant-Appellant is justified in all circumstances of this case. It is the trial Judge who saw, heard and observed the actions, reactions of the witnesses. As such the Appellate Court would not without any fault interfere with the judgment of the original court. More particularly this court will not interfere with primary facts of this case. 1993(1) SLR 119; 20 NLR 332; 1955 (1) All. ER 326.

An ex-parte order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default. *David Appuhamy vs. Yassasi Thero* 1987(1) SLR 253. Onus is on the Defendant to give a reasonable excuse for his default. This burden has not been discharged properly by the Defendant-Appellant. In all the circumstances and facts of this case Appellant would not be entitled for any relief. This appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL