

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

Raigamage Darmadasa Perera,
15/6, "Muditha",
Rukmal Mawatha, Paraththa,
Keselwatta.

Plaintiff

C.A. No. 308 / 2000 F

Vs.

D.C. Panadura No. 615/ L

Raigamage Jinadasa Perera,
15/6, "Muditha",
Rukmal Mawatha, Paraththa,
Keselwatta.

Defendant

AND

AND NOW BETWEEN

Raigamage Darmadasa Perera,
15/6, "Muditha",
Rukmal Mawatha, Paraththa,
Keselwatta.

Plaintiff Appellant

Vs.

Raigamage Jinadasa Perera,
15/6, "Muditha",
Rukmal Mawatha, Paraththa,
Keselwatta.

Defendant Respondent

BEFORE : UPALY ABEYRATHNE, J.
COUNSELS : T.R.S. Nanayakkara for the Plaintiff Appellant
H. Peiris for the Defendant Respondent
ARGUED ON : 17.01.2013
DECIDED ON : 18.03.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Panadura praying for a declaration of title to the land described in the schedule to the plaint.

On the date of trial the Appellant was absent in Court. The Counsel for the Appellant had informed Court that he had no instructions to appear and prosecute the case. Thereafter the learned trial Judge had dismissed the action of the Appellant. Thereafter the Appellant had made an application to vacate the said order of dismissal of the action. The Respondent had filed her statement of objection to the said application. The learned District judge had dismissed the said Application of the Appellant without giving him an opportunity to lead evidence to establish reasons for his non appearance. Being aggrieved by the said order of dismissal dated 19.05.1995 the Appellant had appealed to this Court.

The Court of Appeal set aside the said order of the learned District Judge and sent the case back to the District Court to fix the matter for inquiry on the petition and affidavit filed by the Plaintiff Appellant and to enable the Appellant to lead evidence.

Thereafter the said application has been fixed for inquiry and the Appellant has led evidence to establish his reasons for nonappearance on the trial date. Thereafter the learned District Judge has dismissed the Appellant's said Application to purge default. Being aggrieved by the said order dated 18.01.2000 the Appellant has preferred the instant appeal to this Court.

It appears from the proceedings of the case that at the aforesaid inquiry the Appellant has led evidence to prove that on the relevant date he could not come to Court due to his illness. In support of this fact the Appellant has produced a medical certificate marked P 1. Said medical Certificate has been proved by the evidence of the Doctor who had issued it. Said Doctor in his evidence has said that he had given treatments to the Appellant. The Respondent has not adduced any material to disbelieve the said evidence.

It is apparent from the alleged order that the learned District Judge has dismissed the Appellant's application considering some contradiction in the evidence with regard to the ailment of the Appellant. But he has not rejected the medical certificate produced by the Appellant upon the said contradictions. If the learned District Judge was of the view that the said contradictions were material contradictions then the said medical certificate should have been rejected. He has not done so.

In the said circumstances when I consider the said evidence it seems to me that the learned District Judge without paying his attention to the provisions contained in Section 87(3) of the Civil Procedure Code has dismissed the Appellant's said Application. It must be noted that Section 87(3) of the Code has

not laid down such a simple procedure when an action is dismissed under Section 87(1) of the Code. Subsection (3) of Section 87 read thus;

87(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.

According to Subsection (3) if the court is satisfied that there are reasonable grounds for the non-appearance of the plaintiff, then the court shall make order setting aside the dismissal. Hence the duty of the trial judge is to consider whether the evidence before him reveals reasonable grounds for setting aside the dismissal.

In the said circumstances I am of the view that the learned District Judge has erred in law in dismissing the action for non-appearance of the Appellant. Hence I set aside the order of the learned District Judge dated 18.01.2000 and allow the appeal of the Appellant without costs. I direct that this case be sent back to Panadura District Court to proceed with the trial expeditiously.

Appeal allowed.

Judge of the Court of Appeal