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

Warakapitiya Gamagedara Lalitha
Kumarihamy Wijewardana,
No.44 ,
Meda Mahanuwara.

CA 1032/2000 F
DC Kandy No 18807/L

Plaintiff

Vs.

1. Pihillalandegedara Gunaratne,
   Namadagala, Mada Mahanuwara.
2. Bandara Rambukwella,
   Darmaraja College, Kandy.
3. Mahinda Keppitipola,
   Kingswood College, Kandy.
4. Upali Dissanayake,
   Thennalanda Junior College,
   Meda Mahanuwara.
5. S. Perera,
   Kanda Karaliyadda, Teldeniya.
6. Vajira Ekanayake,
   Wewala, Moragahamula,
   Meda Mahanuwara.

Defendents

And Now Between

Pihillalandegedara Gunaratne,
Namadagala, Mada Mahanuwara.

1st Defendant-Appellant

Vs

Warakapitiya Gamagedara Lalitha
Kumarihamy Wijewardana,
No.44 ,
Meda Mahanuwara.

Plaintiff -Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : 1st Defendant Appellant – Absent and Unrepresented
Viran Fernando for the Plaintiff Respondent

ARGUED ON : 27.02.2013

DECIDED ON : 07.06.2013

UPALY ABEYRATHNE, J.

This is an appeal preferred by the 1st Defendant Appellant (herein after referred to as the Appellant) against the order of the learned Additional District Judge of Kandy dated 30.11.2000. By the said order, the learned Additional District Judge, has refused to vacate the Ex-Parte decree entered against the Appellant. The facts relevant to this appeal are briefly as follows;

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted an action against 1st to 6th Defendants in the District Court of Kandy praying for a declaration of title to the land described in the schedule to the plaint. The Appellant filed his answer denying the averments in the plaint and prayed for a dismissal of the Respondent's action. Thereafter the case has been fixed for trial against the Appellant. Since the 2nd to 6th Defendants were absent and unrepresented on the summons returnable date an ex-parte trial has been ordered

against them. Thereafter when the case was taken up for trial on 08.01.1998 the Appellant was absent from Court and the Attorney at Law for the Appellant has made an application for postponement of the trial. The learned Additional District Judge has refused the said application for a postponement of trial on the basis that the reasons for absent of the Appellant were not acceptable to Court. Accordingly the case has been fixed for an ex-parte trial against the Appellant.

After the service of ex-parte decree the Appellant has made an application to the District Court of Kandy seeking to vacate the ex-parte judgment and the decree entered against him. The learned Additional District Judge after inquiry has refused the said application of the Appellant.

It is apparent from the said proceedings that the learned Additional District Judge has fixed the case for an ex parte trial when the Appellant's Attorney At Law was present before Court. It seems that the learned Additional District Judge has misdirected himself in fixing the case for an ex parte trial after the refusal of the application for postponement made by the Attorney At Law of the Appellant. It is well settled law that when a party to a case has an attorney-at-law on record, it is the attorney-at-law on record alone, who must take steps, and also whom the Court permits to take steps. It is a recognized principle in Court proceedings that when there is an attorney-at-law appointed by a party, such party must take all steps in the case through such attorney-at-law. Further, the principle established in a court is that if a party is represented by an attorney-at-law such a party himself is not permitted to address Court. All the submissions of the party must be made through the Attorney-at-law who represents such a party.

In the light of the aforesaid circumstances it is my considered view that where an application for postponement of trial made by an Attorney At Law is

refused since such party is properly represented before court, the trial has to be proceeded inters parte. It is common ground that if a defendant applied for a postponement and it was refused then the trial would proceed *inter partes.* In the same breath if an Attorney At Law acts similarly the proceeding would be *inter partes.* This seems a startling proposition, and its only foundation is that an Attorney At Law holds a proxy from his client and therefore represents him.

In the case of Gargial Vs Somasundram Chetti 41 NLR 26 Where the defendant's proctor appeared on the day of trial and moved for a postponement on the ground that, owing to the absence of his client from Ceylon, he was unable to get ready for the trial, and on the District Judge refusing to grant the application, retired from the case and declined to take part in the proceedings, and the District Judge after hearing some evidence for the plaintiff entered judgment in his favour, the Supreme Court held that the proctor for the defendant must be taken to have appeared for his client at the trial and that the judgment must be considered as pronounced inter partes and not ex parte.

In the case of De Mel Vs Gunasekera 41 NLR 33 On the day fixed for trial an Advocate entered an appearance for the defendants and applied for a postponement, which was refused. The Advocate thereupon withdrew from the case, intimating that he had been instructed only to apply for a postponement. It was held that the proceedings were *inter partes.*

In the case of Andiappa Chttiar Vs. Sanmugam Chettiar 33 NLR 217 Macdonell CJ observed that "The presence in Court, when a case is called, of the proctor on the record constitutes an appearance for the party from whom the proctor holds the proxy, unless the proctor expressly informs the Court that he does not, on that occasion, appear for the party."

In the case of Don Gamini Abeysundara Vs. Malalage Gunapala (CA 676/2001 – CA Minutes dated 19.01.2004) Justice Amaratunga held that "When an action is dismissed in the presence of party's lawyer after refusing an application for a postponement it is not an order made for default. The order dismissing the action had been made inter partes. Such an order cannot be set aside under section 87(3). The remedy of the plaintiff is a final appeal."

In the present case before me the Attorney At Law for the Appellant was present in court. He has moved for a postponement. Thereafter the court has refused the said application and proceeded to hear the case. Accordingly said proceedings clearly demonstrate that the case has been heard inter partes. It is not an ex-parte order made under section 87(1) on default in appearing. Hence such an order cannot be set aside under section 87(3) of the Civil Procedure Code. The remedy of the Appellant is a final appeal.

In the said circumstances I am of the view that the application made by the Appellant under section 87(3) of the Civil Procedure Code seeking to set aside the judgment of the learned Additional District Judge was misconceived in law. For the forgoing reasons I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal