

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

Maththaka Gamage Chandrawathie,
Bambarawana Janapadaya,
Heenpanvila Road,
Maththaka.

Plaintiff

C.A. No. 507 / 2000 F

Vs.

D.C. Balapitiya No. 1541 / M

K. P. Mahindapala,
Bambarawana Janapadaya,
Maththaka.

Defendant

AND

Maththaka Gamage Chandrawathie,
Bambarawana Janapadaya,
Heenpanvila Road,
Maththaka.

Plaintiff Petitioner

Vs

K. P. Mahindapala,
Bambarawana Janapadaya,
Maththaka.

Defendant Respondent

AND NOW BETWEEN

Maththaka Gamage Chandrawathie,
Bambarawana Janapadaya,
Heenpanvila Road,
Maththaka.

Plaintiff Petitioner Appellant

Vs.

K. P. Mahindapala,
Bambarawana Janapadaya,
Maththaka.

Defendant Respondent- Respondent

BEFORE : UPALY ABEYRATHNE, J.
COUNSELS : Nagitha Wijsekera with Ms. G.
Wijewardena for the Plaintiff Appellant
Defendant Respondent is absent and
unrepresented
ARGUED ON : 05.02.2013
DECIDED ON : 18.06.2013

UPALY ABEYRATHNE, J.

The Plaintiff Petitioner Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendant Respondent-Respondent (hereinafter referred to as the Respondent) in the District Court of Balapitiya praying for a judgment to recover from the Respondent a sum of Rs 375,000/- as damages caused to her.

On the first date of trial namely on 31.08.1999 the Appellant was absent and unrepresented. The Counsel for the Respondent has made an application to dismiss the action of the Appellant. Upon the said application the learned trial Judge has dismissed the Appellant's action. Thereafter the Appellant has made an application to vacate the said order of dismissal of the action. The

Respondent has filed a statement of objection to the said application. After an inquiry the learned District Judge has dismissed the said Application of the Appellant. Being aggrieved by the said order of dismissal dated 22.08.2000 the Appellant has appealed to this Court.

It appears from the proceedings of the case that at the aforesaid inquiry the Appellant has led evidence to establish that on the relevant date she came to Court late due to transport difficulties. She further said in evidence that she left her house at about 4.30 to 5.00 in the morning and she had to travel about 29 miles from her residence to Court.

It is apparent from the said evidence that the reasons for the delay in appearing in court at the time of calling the case was not due to her mistake or negligence but due to unavoidable circumstances which were beyond the control of the Appellant. Hence I am of the view that the reasons adduced by the Appellant were sufficient to vacate the order of dismissal.

When I consider the said evidence it seems to me that the learned Additional 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. Section 87(3) of the Code stipulates that;

“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.”

It seems from Subsection (3) that 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 Additional District Judge has erred in rejecting the evidence of the Appellant and dismissing the application to vacate the dismissal of the action of the Appellant. It appears that the learned trial judge has embarked on a voyage of discovery in finding the shortcomings of the evidence of the Appellant.

In the said circumstances I set aside the order of the learned District Judge dated 22.08.2000 and allow the appeal of the Appellant with costs. I direct that this case be sent back to the District Court of Balapitiya to proceed with the trial. The learned District Judge of Balapitiya is directed to hear and conclude this case expeditiously according to law.

Appeal allowed.

Judge of the Court of Appeal