

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

1. Rupika Shyamali Thilakaratne,
2. Chittrananda Thilakaratne,
Both of No. 608/2,
Peradeniya Road, Kandy.

Plaintiffs

C.A. No. 163 / 2000 F

Vs.

D.C. Kandy No. 18798/ L

Mapa Seneviratne Adikaram
Mudiyanselage Tikiri Banda,
No. 642/3, Peradeniya Road,
Kandy.

Defendant

AND

1. Rupika Shyamali Thilakaratne,
2. Chittrananda Thilakaratne,
Both of No. 608/2,
Peradeniya Road, Kandy.

Plaintiff Petitioners

Vs

Mapa Seneviratne Adikaram
Mudiyanselage Tikiri Banda,
No. 642/3, Peradeniya Road,
Kandy.

Defendant Respondent

AND NOW BETWEEN

1. Rupika Shyamali Thilakaratne,
2. Chittrananda Thilakaratne,
Both of No. 608/2,
Peradeniya Road, Kandy.

Plaintiff Petitioner Appellants

Vs.

Mapa Seneviratne Adikaram
Mudiyanselage Tikiri Banda,
No. 642/3, Peradeniya Road,
Kandy.

Defendant Respondent-Respondent

BEFORE : UPALY ABEYRATHNE, J.
COUNSELS : Shantha Jayawardane with Dulika
Imbuldeniya for the Plaintiff Petitioner
Appellants
Kaushalya Molligoda for the Defendant
Respondent-Respondent
ARGUED ON : 28.02.2013
DECIDED ON : 29.08.2013

UPALY ABEYRATHNE, J.

The Plaintiff Petitioner Appellants (hereinafter referred to as the Appellants) instituted the said action against the Defendant Respondent-Respondent (hereinafter referred to as the Respondent) in the District Court of

Kandy praying for a declaration of title to the land described in the schedule to the plaint. The Respondent has filed an answer praying for a dismissal of the Appellants' action.

When this case was taken up for trial on 14.08.1998 the Appellants and the Respondent were absent before Court. The Counsel for the Respondent had informed Court that he had no instructions to appear. Thereafter the learned trial Judge had dismissed the Appellants' action. Thereafter the Appellants had made an application to vacate the said order of dismissal of the action. The Respondent had filed a statement of objection to the said application. After an inquiry the learned Additional District judge had dismissed the said Application of the Appellants. Being aggrieved by the said order dated 03.02.2000 the Appellants have appealed to this Court.

It is apparent from the proceedings of the case that at the inquiry in to the Application to purge default the Appellants have led evidence to establish that on the alleged date of trial they could not come to Court due to the reason of entering a wrong date in the 2nd Appellant's diary. In support of this fact the Appellants have produced said diary marked P 1 and the relevant page marked P 2. With regard to the entering a wrong date in his diary, the 2nd Appellant in his evidence has stated that on the previous date of trial namely 27.03.1998, the learned Additional District Judge was on leave and the 2nd Appellant was directed to be present in main court room which was presided over by the learned District Judge. The 2nd Appellant has further testified that on that date there were a lot of cases and no cases were taken up for trial and all the cases were put off for 14 and 28. Accordingly he took the date as 28 and entered it in his diary. The Respondent has not adduced any evidence to contradict the said position of the Appellants.

It is apparent from the alleged order that the learned Additional District Judge having examined the bench roll has arrived at a conclusion that as complained of by the Appellants if the case was fixed for trial on 28.08.1198, that dated should have been entered in the bench roll and since there had been no such entry in the bench roll it was not worthy of accepting the evidence of the Appellants. It seems that the learned trial judge has not given his mind to the fact complained of by the Appellant in his evidence. It was the legal duty of the learned Additional District Judge to examine that whether there had been any complication over the matter of calling the cases in a different court room on 27.03.1998.

In this regard I have examined the Journal Entry No 07 dated 27.03.1998. It is apparent from the said Journal Entry that the case had been fixed for trial on 14.08.1998. But the said Journal Entry does not reveal anything other than that. The learned District Judge who made the said Journal Entry had not at least recorded whether the parties were present before court and / or represented by counsel. He has not recorded the reason for the postponement of the trial. He has just written "Trial – 14.08.1998". It seems from the said Journal Entry that the learned District Judge, having no concern about the case before him has rashly and negligently postponed the trial to another date. A duty bound judge, in a case before him should not act in irresponsible manner and should not make rash and negligent orders. He must record the presence of the parties and the reasons for the postponement.

In the said circumstances when I consider the evidence of the Appellants 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 to purge default. 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 of the case reveal reasonable grounds for setting aside the dismissal. It seems to me that the evidence adduced by the Appellants clearly reveal reasonable grounds for setting aside the order of dismissal of the Appellants' action.

In the said circumstances I am of the view that the learned Additional District Judge has failed to consider the evidence in regard to the non-appearance of the Appellants on the date of trial. Hence I set aside the order of the learned Additional District Judge dated 03.02.2000 and allow the appeal of the Appellants without costs. I direct the Registrar of this Court that this case be sent back to the District Court of Kandy to proceed with the trial expeditiously.

Appeal allowed.

Judge of the Court of Appeal