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

Kuttapitiye Gedera Kiri Mudiyanse,

CA No. 567/97(F)

Of Hunuwela, Openayake

DC Ratnapura

70080

Case No. 3249/L

2nd ,3rd & 4th Defendants/

Appellants

Vs

Jagath Lakshmal Sirisena,

Of Hunuwela

Opanayake – 70080

1B Plaintiff / Respondent

BEFORE	:	**P.W.D.C. JAYATHILAKE, J**
COUNSEL	:	S.A. Kulasuriya for the 2nd – 4th Defendant Appellants. Harindi Seneviratne for the 1 B Plaintiff Respondent.
ARGUED ON	:	03.07.2014
DECIDED ON	:	18.06.2015

P.W.D.C. Jayathilake, J

The Plaintiff Respondent instituted this action against the Defendant Appellant in the District Court of Rathnapura by plaint dated 28.12.1978 seeking *Inter alia* a declaration of title to the land called Wawe Liyadda, Godahena.

It has taken 17 years for pre trial proceedings. When the case has been taken up for trial on 15.06.1995 the Defendants were absent. The Registered Attorney of them has informed court that he had not received instructions to appear. The case has proceeded for exparte trial and has entered the judgment in favour of the Plaintiff as prayed for in the amended plaint. An application has been made by the Defendant Appellant under Sec.86 (2) of the Civil Procedure Code to set aside the Exparte Decree on the basis that they were unable to be present in court on the trial date as they had taken down a wrong date. The District Judge of Rathnapura by order dated 28.07.1997 refused the application of the Defendant Appellants. This is an appeal against the said order preferred by the Defendant Appellants.

By submitting that the taking down a wrong date was a human error, the counsel for the appellant submits that the Exparte Judgment can be impeached as it has failed to come to a crucial finding of fact when and how the alleged disposition occurred and by whom. The learned counsel emphasized this matter as lacking judicial determination and a manifest failure of Justice.

On perusal of trial proceedings dated 15.06.1995 it appears that following the leading evidence of the Plaintiff the judgment has been delivered at the same time. Obviously the judgment is only a formal declaration which implicates that

the case had to be decided in favour of the Plaintiff for the reason of absence of the Defendants. Seven documents have been marked in the evidence for the Plaintiff's case. First two documents namely X 1 and X 2 are a surveyor plan and a report belonging to a District Court case. P 1 is a photo copy of copy of a Plan. The Plan marked as P 2, Decree marked as P 3 and two deeds marked as P 4 and P 5 are not available in the case record. The last mentioned document P 5 has been marked claiming as the deed from which the Plaintiff got the title. The date of the said deed is 10.01.1978. The case has been filed on 08.01.1979. The 1 A Plaintiff has stated in her evidence that the Defendant Appellant had forcibly entered the land in January 1978. The year of this date is not clear in paragraph 8 of the second amended plaint dated 08.06.1993 due to a typographical mistake. However the learned District Judge when delivering the Exparte Judgment has not paid any attention over these matters. Therefore I am of the view that there is no proper Judgment delivered after Exparte Trial.

Whether it is Exparte or Interparte the Judge must adjudicate the matter in dispute on being satisfied with the evidence available before court. If the learned Judge had followed the evidence of the witness he should have noticed the date of P 5 and undefined date of the course of action. Though the learned District Judge in his Exparte Judgment, has stated *"having considered the evidence led for the prosecution the documents P 1 to P 5 and X 1 and X 2*

being satisfied with the evidence.....", none availability of P 2 to P 5 is evident that the learned Judge has not bothered in examining any of the documents.

This is a final appeal preferred against the order in respect of the application of the Defendant Appellant to purge default. The duty of the District Judge was to see whether there had been a valid excuse for the default. In this case the learned District Judge was not satisfied with the bogus reason put forward by the Defendant Appellant. On perusal of proceedings of the inquiry this court is in agreement with the learned District Judge in refusing the application for purge default.

In Mrs. Sirimavo Bandaranayake Vs Times of Ceylon Ltd[1] the question of whether the Court of Appeal has jurisdiction in revision to reverse or vary an Exparte Judgment entered against the Defendants upon default of appearance has been discussed. It has been held that "the Revisionary Jurisdiction of the Court of Appeal in article 138 of the Constitution extends in revising or varying an exparte judgment against the Defendants upon default of appearance on the ground of manifest error perversity or the like. A default judgment can be canvassed on the merits in the Court of Appeal in revision, though not in Appeal and not in the District Court itself.

The Revisionary Jurisdiction of the Court of Appeal sets out by article 138(1) of the Constitution

"The court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitution in integrum, of all cause, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance.

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

The question whether this revisionary power has been excluded by virtue of Sec. 85, 86 and 88 of the Civil Procedure Code and if not excluded the grounds on what they may be exercised have been considered in the above mentioned Mrs. Sirimavo Bandaranayake case. It is concluded by M.D.H. Fernando J in that judgment the default judgment can be canvassed on the merits in the

Court of Appeal in revision, though not in appeal. His Lordship emphasized the power vested by Sec.753 of the Civil Procedure Code in this regard.

"The Court of Appeal may call for and examine the record of any case, whether already tried or pending trial, in any court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such court, and may upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been brought before it in due course of appeal instead of by way of revision."

When the case is before the Court of Appeal and the error occurred has been noticed should the practice be adapted in ignoring it or applying the remedy provided as available in substantive or procedural law to avoid the miscarriage of justice. I am of the view that the latter cannot be avoided once the court noticed the error.

What has happened in this case was the Defendant Appellant was absent on the trial date. The Attorney at Law for the Defendant Appellant informed the court that he has no instructions to appear for the defendants. The District Judge has taken up the case for Exparte Trial. The counsel for the Plaintiff had led evidence of one of the substituted Plaintiffs. Three documents out of

marked seven documents were available before the Trial Judge. The Trial Judge has delivered the Exparte Judgment without going into merits of the evidence.

If this court sets aside the Exparte Judgment exercising the revisionary jurisdiction and directs the District Judge to deliver the judgment on evidence available as it appears, District Judge will not be able to decide in favour of the Plaintiff without the deeds marked in Plaintiff's evidence.

There is no reason for this court to order a trial exparte as there is no irregularity taken place in that procedure. In Amarasekara Vs Mohamadu Uduma[2] Dalton J has set aside the Exparte Judgment for the reason that the judgment by default cannot be entered against the Defendants without Primafacie Proof of the Plaintiff's case. In the said case following Meedin Vs Meedin[3] as a precedent, the case has been sent back for the admission of defendant's answer. In Sheila Senevirathna Vs Sherine Dharmarathne[4] the Supreme Court affirmed the decision of Court of Appeal in setting aside the Exparte Decree entered by the District Judge and directing a trial of Inter parte. I therefore decide to follow those judgments and hold that the Exparte Decree entered in this case is erroneous and shall be set aside. When Exparte Decree set aside I hold at the remedy available in the circumstances is none other than

the retrial. Therefore I direct that this case to be sent back to the District Court for re-trial.

Revisionary power exercised Exparte Decree set aside.

Retrial Ordered.

JUDGE OF THE COURT OF APPEAL

1.(1995 1 SLR 22)

2. (31 NLR 36)

3. (5 ACR 42)

4. (1997 1 SLR 76)