

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

CA Writ Application No. 1483/2006

In the matter of an application for orders in the nature of  
writs of certiorari, mandamus and prohibition under  
Article 140 of the Constitution

Gamini Rajapakse,  
8/12, Gemunu Mawathe, Sri Subuthipura, Battaramulla.

**Petitioner-Petitioner.**

**Vs,**

1. S.A.C.S.W.Jayathilake,  
Director General of Customs  
Department of Customs, Colombo 1.
- 2, Tharaka Seneviratne  
Deputy Director of Customs  
Department of Customs, Colombo 1,
- 3 P.W Amaradiwakara,  
Director of Customs, (Bonds Division)
4. K.Sunil De Silva.  
Superintendent of Customs
5. S. Sundaralingam  
Superintendent of Customs.
6. G.J.S Fernando  
Assistant Superintendent of Customs  
All of Department of Customs  
Colombo 1.
7. Elan Garments,
8. Citizen Garments.
9. Artex Garments.
10. Monte Carlo Garments.

11. Padma Shirt Industries.

12. Jaxwin Apparels.

13. Nehila Garments.

All of the

Nehila Group of Companies.

95<sup>th</sup> 2<sup>nd</sup> Cross Street, Colombo 01.

14. Hon Attorney General.

Attorney General's Department, Colombo 12.

**Respondents-Respondents.**

1. Mr. Jagath P.Wijewerra.

Director General of Customs,

Department of Customs, Colombo 1.

**1<sup>st</sup> Added Respondent- Respondent**

**Before** : K.T. Chitrasiri J.

L.T.B. Dehideniya J.

**Counsel** : M.K.Arulanandan P.C. with Lakmi Silva for the petitioner.

Milinda Gunathilake D.S.G. for the 1<sup>st</sup> to 6<sup>th</sup> Respondents.

Riad Ameen with Malka Ekanayake for the 7<sup>th</sup> to 13<sup>th</sup> Respondents.

**Argued on** : 02.07 2015

**Written Submissions of the Petitioner on** : 05.08.2015

**Written Submissions of the Respondent on** : 12.08.2015

**Decided on** : 08.09.2105

**L.T.B. Dehideniya J.**

This is an application for relisting. The facts of this application are briefly as follows:-

As per journal entry 31.03.2014, when this case was called in the open Court, the Counsel for the Petitioner informed Court that they are revoking the proxy. The Petitioner was present in person before Court on that date and moved for a further date to file a fresh proxy. Accordingly, the Court has granted time till 10.06.2014. On 09.06.2014, the registered Attorney at Law for the Petitioner filed the revocation papers and was journalized on the same date. When this case was called on 10.06.2014, there was no registered Attorney-At-Law on record, and the Petitioner was also absent. Since the Petitioner was absent and unrepresented, the case has been dismissed by this Court on 10.06.2014. Thereafter the Petitioner presented this application to re-list the application on the ground that the Petitioner had taken down the date as 10.07.2014 instead of 10.06.2014 by mistake.

On 31.03.2014, the Petitioner was represented by an Attorney-at-Law in Court. There was a valid proxy in force. Therefore, it was not mandatory for the Petitioner to be present in Court, but there is no prohibition for the Petitioner to be present in Court. In law, as of a right, he is entitled to be present in Court. (Article 106 of The Constitution Of The Democratic Socialist Republic Of Sri Lanka)

On 31.03.2014, in the presence of the Petitioner, his counsel informed Court that the proxy for the Petitioner will be revoked. The Petitioner has taken notice of this information and responded by making an application for a postponement to enable him to retain another Attorney-at-Law. The Petitioner cannot deny that he had due notice of the intention of his registered Attorney-at-Law to revoke the proxy. Thereafter, the Petitioner had signed the revocation papers on 09.06.2014, that is one day prior to the next mention date. As such, the Petitioner had the knowledge of the intention of the registered Attorney-at-Law to revoke the proxy as well as the actual revocation before the case is called on 10.06.2014.

The excuse given by the Petitioner for not appearing in Court on 10.06.2014 is that he has taken down the date as 10.07.2014, mistakenly. When he signed the revocation papers on 09<sup>th</sup>, he took the burden on himself to prosecute the application before Court. Therefore, he should have taken due precautions to prosecute the case diligently. But he failed to appear in

Court on 10<sup>th</sup> and not made any arrangement for representation on his behalf too. He has failed to prosecute with due diligence. The defaulter is the Petitioner and the burden is on him to justify his absence.

The Petitioner says that he has taken down the date as 10<sup>th</sup> July instead of 10<sup>th</sup> June. If the date is announced in Sinhala language, one can say that there is a similarity in pronouncing the words June and July in Sinhala language. But in this Court, the language of the Court is English. Therefore, there cannot be any confuse as to name of the month because the pronunciation is so clearly different. The Petitioner doesn't say that he has any hearing defect. The only assumption that the Court can come into is that the Petitioner acted negligently when he took down the next date.

The Petitioner has not taken any interest to check the next date when he signed the revocation papers. When a person (a prudent person) taking the burden of prosecution on himself, he must make sure what is the next date and the step of the action. Failure to do so constitutes the negligence of that person.

Can negligence of a party in an action be excused? Re-listing of an application has been extensively discussed by Amarasinghe J. in the case of Jinadasa and Others Vs. Sam Silva and Others [1994 ] 1 Sri L.R 232.

It has been held in the said case that the Court can exercise its inherent power in granting relief in a re listing application. At page 250 it was held that;

*Since there is no legislation governing the matter, under what authority could the court have ordered the relisting of the application? I think the court had the power to restore the application to the list in the exercise of its inherent jurisdiction. (Cf. Issarsing v. Udhavdas and Others (13)).*

To invoke the inherent power of this Court, the petitioner must show a sufficient cause for his absences. It has been further held in the said case at page 252 that;

*I have pointed out later on in my judgment that a court ought not to be too severe and rigorous in exercising its powers relating to reinstatement, but rather, that it should be generous. Yet, it is an entirely different matter to hold that a court must be prepossessed with a favourable opinion with regard to an absent party. The burden of alleging and proving the existence of facts, on the basis of which a court may decide that there is good cause for absence, rests on the absent party who seeks reinstatement. The burden of adducing evidence of sufficient cause is not displaced by any presumption in his favour. I have no hesitation in rejecting Mr. Wettasinghe's submission that sufficient cause should be inferred in favour of an absent party.*

In the present case the only excuse given by the petitioner is that he has taken down the date incorrectly, without any reason. It cannot be considered as a sufficient cause to excuse the absences.

I have pointed out earlier that the petitioner was negligent and the reason given for non appearing cannot be accepted. It has been held in *Packiyathan v. Singarajah* [1991] 2 Sri L R 205 that;

*To sum up the position in the light of the above decisions, it seems that relief may not be granted \_\_*

- (a) where the default has resulted from the negligence of the client or both the client and his Attorney-at-Law;*
- (b) where the default has resulted from the negligence of the Attorney-at-Law in which event the principle is that the negligence of the Attorney-at-Law is the negligence of the client and the client must suffer for it.*

*However, it is necessary to make a distinction between mistake or inadvertence of an Attorney-at-Law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend upon the facts and circumstances of each case; and where the conduct of Counsel is involved the Court will, in granting relief, ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.*

The next question is whether the petitioner acted *bona fide* in making the re listing application. In his petition, in paragraph 10(a) he says that he was never been absent prior to this date. This is an incorrect statement. On 8.11.2011 the petitioner was absent and unrepresented. The Court has not dismissed the application because it has considered that the petitioner has taken the required step before that date, but still the fact that the petitioner was absent and unrepresented on that date, remains.

The petitioner in his petition says that he took down the date as 10.7.2014. In proof of this fact, he has tendered a photo copy of his diary marked as X2A where he has written that the next date as "10-07/-2014". A letter send to the Director General of Customs by the petitioner is marked as X2 and produced by the petitioner with his petition. In that letter X2, he does not say that he took down the date incorrectly. He says that he forgot the date and what he remembered is that the date is 10.07.2014. Writing an incorrect date in the diary and forgetting the correct date are not the same. Under these circumstances, the petitioner has not acted *bona fide* in making this application.

For the foregoing reasons, I hold that the petitioner's application for re listing cannot be allowed. I dismiss the application.

I make no order for costs.

Judge of the Court of Appeal

**K.T.Chitrasiri J.**

I agree.

Judge of the Court of Appeal