

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

In the matter of an application for Revision
under and in terms of Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

1. W.D. Nandawathie Sumanasekera
2. D. Wijesooriya
3. W.D.A. Kanthi

All of Sethsevana, Gonagala
Gonagalpura, Induruwa.

Plaintiffs

C.A. Application No.CA (REV) 67/2007

D.C. Avissawella Case No. 808/L

Vs

A.S.M. Nizam
No. 290, Kegalle Road
Anguruwella.

Defendant

AND

A.S.M. Nizam
No. 290, Kegalle Road
Anguruwella. (deceased)
Defendant - Petitioner

- 1A. Shahul Hameed Hamsathul
Maleena
- 1B. Mohammed Nisham Fathima
Nisham
- 1C. Mohommed Nisham Mohammed
Fasil
- 1D. Mohammed Nisham Salmiya
Nisham
All of No. 290, Kegalle Road,
Anguruwella.
- 1E. Mohammed Nisham Fathima
Farhana (Minor)
No. 290, Kegalle Road
Anguruwella.

Mohammed Sehim Mohammed
Hamim, (Guardian of the Minor)
Kegalle Road, Anguruwella.

Substituted-Defendants
-Petitioners

Vs

1. W.D. Nandawathie Sumanasekera
2. D. Wijesooriya
3. W.D.A. Kanthi
All of Sethsevana, Gonagala
Gonagalpura, Induruwa.

Plaintiffs - Respondents

AND NOW

- 1A. Shahul Hameed Hamsathul
Maleena
- 1B. Mohammed Nisham Fathima
Nisham
- 1C. Mohommed Nisham Mohammed
Fasil
- 1D. Mohammed Nisham Salmiya
Nisham
All of No. 290, Kegalle Road,
Anguruwella.
- 1E. Mohammed Nisham Fathima
Farhana (Minor)
No. 290, Kegalle Road
Anguruwella.

Mohammed Sehim Mohammed
Hamim, (Guardian of the Minor)
Kegalle Road, Anguruwella.

**Substituted - Defendants-
Petitioners - Petitioners**

Vs

1. W.D. Nandawathie Sumanasekera
2. D. Wijesooriya
3. W.D.A. Kanthi
All of Sethsevana, Gonagala
Gonagalpura, Induruwa.

**Plaintiffs - Respondents
-Respondents.**

BEFORE

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

COUNSEL

: Harsha Soyza P.C. with

Anuruddha Dharmaratne for

The Substituted-Defendants

Petitioners-Petitioners

Rohan Sahabandu P.C. with

Sureka Withanage for the

Plaintiffs-Respondents-

Respondents.

ARGUED ON

: 08th September, 2015

DECIDED ON

: 23rd February, 2016

Deepali Wijesundera J.

The petitioners have filed this application to revise and set aside the order of the District Court of Avissawella in case No. 808/L delivered on 18/10/2006 (marked P16) and also to set aside and revise the judgment and Decree entered in the said case delivered on 02/10/1996.

The plaintiffs-respondents-respondents have filed an action in the District Court of Avissawella seeking a declaration of title and eviction of

the defendant from the premises described in the schedule to the plaint. The trial was commenced and evidence was given by one witness and he was cross examined by the defendant-petitioner counsel and trial was postponed to 04/07/1996. On this date the defendant was absent and the counsel who appeared for the defendant-petitioner has informed court that he has no instructions to appear and that he is not appearing for the defendant. The plaintiff has proceeded with his case and concluded the same. The learned District Judge had fixed the judgment for 09/09/1996. On this date the District Judge had observed that the plaintiff had not produced the documents to prove his title and granted a date to tender the said documents. The plaintiff had filed a motion to call the case on 02/10/1996 with notice to the defendant who had accepted notice subject to his objections. On 02/10/1996 when the case was taken up though notice had been given defendant had been absent and unrepresented. The plaintiff has informed court tendering document P1 that he is restricting his claim to prayer (b) (c) and (d) in the plaint and court has delivered judgment as prayed for in prayers (b) (c) and (d) in favor of the plaintiff. The defendant did not appeal against this order until he filed the instant application eleven years later to revise a subsequent order given by the District Court refusing to correct an order given by another District Judge on the principle of *per incuriam*.

The learned counsel for the defendant-petitioner argued that the plaintiff's action should have been dismissed for failure to prove title and cited the judgment in **Dharmadasa vs Jayasena 1997 3 SLR 327**, **Wanigaratne vs Juwanis Appuhamy 65 NLR 167**, **Loku Manika and others vs Gunasekera 1997 2 SLR 287**. He further stated that the plaintiff is not entitled to any relief without proving his title.

The defendant-petitioner stated that the proceedings in the District Court after 04/07/1996 are ex parte since the counsel informed court that he no longer appeared for the defendant since the case proceeded ex parte the judgment and decree had to be served on the defendant to afford him an opportunity to purge his default and cited the case of **W.Johanis Appuhamy vs Carlin Singho 67 NLR 144**. The counsel for the petitioner stated the District Judge has not acted in conformity with *Sec. 85 (4) of the Civil Procedure Code*.

The petitioner's counsel further submitted that the order of the District Judge where he has stated if the plaintiff does not prove his title by producing the marked documents his application will be rejected, was never vacated, therefore the subsequent order is not valid.

The learned counsel for the plaintiffs-respondents submitted that on 09/09/1996 the court observed that the plaintiff had not produced the documents to prove his title and a date was granted to do so and has said if he failed to do so his action will be dismissed, and that on his own motion the case was taken up on 02/10/1996 though defendant was given notice he did not come to court. The respondents stated that on this day the prayer to the plaint was restricted to (b) (c) and (d) and the relevant document P1 was tendered to court and judgment was delivered allowing prayers (b) (c) and (d).

The plaintiffs-respondents stated that the petitioner has not explained why he waited eleven (11) years to file a revision application against this judgment. He cited the judgment in **Don Levis vs Dissanayake 70 NLR 8** where it was said that it was not the function of the Supreme Court to relieve parties of their own folly, negligence and laches.

The respondents further stated that when the defendant's counsel informed court that he has no instructions on a resume date of the trial and the District Court by order dated 09/09/1996 had observed it was an interparte order which was not challenged by the petitioner.

The respondents further submitted that the petitioner is seeking to challenge the procedural steps but had not shown that he has a right in respect of the land in question and that he is under a duty to show in the revision application the right title and interest that he has, but failed to do so.

The trial in the District Court can not be considered as an *ex parte* trial since the defendant-petitioner was present when the trial commenced. The defendant-petitioner had been in court when evidence was led and cross examined and the trial was re fixed to be resumed, on another date. The defendant-petitioner was aware of the District Court case therefore there was no necessity to act under *Sec. 85 (4) of the Civil Procedure Code* and serve decree on the defendant-petitioner.

The defendant had been given notice by the plaintiff on the amendment of the prayer to the plaint but he has not come to court.

Defendant-petitioner can not say the learned District Judge did not vacate the earlier order which is not necessary since the District Judge has accepted document marked **P1** on the plaintiff's title when the case was called on the plaintiff's motion with notice to the defendant.

The petitioner who has been sleeping on his rights can not get any relief from this court regarding a judgment given eleven years ago. The consequent order which he moves to set aside by way of revision can not be set aside since it is a perfectly legal order. The learned District Judge has given reasons as to why he is refusing the petitioner's application.

For the afore stated reasons the application of the petitioner is refused with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL