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

Sithy Manjuma Perera

Nee Sithy Manjma Sydeen

No.9, Nanda Mawatha.

Nugegoda.

Defendant-Appellant.

C.A.No.644/97 (F)

D.C. Mt.Lavinia .731/96/L **Vs.**

Sithy Niloufer Ratnavibushana

Nee Sithy Niloufer Sydeen

No.120/1, Sri Somaratne Mawatha,

Bellanwila, Boralesgamuwa.

Plaintiff-Respondent.

Before : M.M.A. Gaffoor,J. &

S. Devika de L.Tennekoon,J.

Counsel : Rohan Sahabandu P.C. with Samithri Kumarawadu for the Defendant-Appellant

Dhammika Gabadage for the Plaintiff-Respondent

Argued on : 04/04/2017

Written Submissions of the Appellant on : 28/04/2017

Written submissions of the Respondents on : 14/06/2017

Decided on : 11.09.2017

M.M.A.Gaffoor,J.

This is an appeal against the Judgment of the Learned Additional District Judge of Mt. Lavinia dated 25.07.1997. Being aggrieved by the said the judgment the Defendant- Appellant instituted this appeal on the following grounds :-

1) the said judgment dated 25/7/1997 is wrong and contrary to the law;

2) the rejection of the medical certificate submitted on behalf of the Defendant-appellant was wrong and contrary to law;

3) the reasons adduced by the learned Additional District Judge in refusing a postponement of the trial is wrong and contrary to law.

4) the defendant-appellant has been deprived of a fair trial in that the case was taken up for trial on 16.06.1997 in the absent of the defendant-appellant and her counsel;

5) the trial has been conducted in violation of principles of natural justice and therefore the judgment dated 25/7/1997 is null and void.

The plaintiff-Respondent instituted the action seeking a declaration that Deed No.170 dated 03.09.1996 be declared null and void. The plaintiff's position was that, the corpus in question was originally owned by her and the defendant's mother – and the house that stood on the corpus was built by her and the mother, and by Deed No. 64 dated 05.03.1993 the mother had transferred the land to her sister – the defendant subsequently the sister gifted a portion of the main land by Deed No 11 dated 25.09.1993 (lot 1 A 1 B) and that the said Deed was irrevocable Deed of gift- and that in August, 1990 which she attempt to construct a boundary wall separating Lot 1A and 1B- a dispute arose and her sister – the Defendant cancelled the Deed of gift by Deed No. 170 dated 03.05.1996 . The Plaintiff and the Defendant are sisters and are Muslims. The defendant filed answer, and stated that, originally the land was owned by her mother and was given to her and as the

plaintiff was seeking to obtain a loan – and at her request half share of the land was gifted to her on the understanding that the plaintiff would be transfer the property to her and as this did not happen she executed the Deed of revocation No.170 dated 25.09.1993 lawfully and specifically stated that possession of the property was never handed over to the plaintiff and on those grounds sought the dismissal of the Plaintiff's action . No replication was filed by the Plaintiff. The Defendant's position was under the Muslim law as possession of the land was with her, she had the legal right to cancel the gift. On 16.06.1997 the trial date the Attorney-at-Law for the Defendant tendered a medical certificate stating that, the Defendant was sick the court rejected the application for an adjournment and issues were raised by the plaintiff. The plaintiff gave evidence according to her pleadings and the learned District Judge in his Judgment re iterating the evidence of the plaintiff without any evaluation or analysis granted the reliefs prayed for the plaintiff.

The defendant appealed the principal issue raised by the Defendant was whether Deed No.170 dated 03.09.1996 could be revoked unilaterally.

(This Deed was not produced by the plaintiff) and whether the judgment is valid on the basis that, it is a perfunctory judgment with no evaluation on analysis of the evidence led.

I am of the view that if the Learned District Judge needs any clarification about the Medical Report he has to issue commission to JMO and probe about its validity. This practice was adopted in the case of *D.K.Ranasinghe Vs.N.A. Algin 74 NLR 446.*

In the said case it was held as follows:

"after several dates, when the case came up for trial on the 3rd of October,1968, the 1st defendant was absent and her proctor moved for a date tendering a medical certificate from an Ayurvedic Physician. He did not say that in the event of his application being refused he would be unable to carry on with whatever evidence he had, or that he was not appearing.

When the genuineness of the medical certificate was challenged, the Court issued a commission to the J.M.O. to examine the 1st defendant. Such

a step is really effective only if the J.M.O's finding can be ascertained on the very same day. There was no agreement as to what should take place if it was found at some future date that the medical certificate was in fact a frivolous one.

The learned District Judge having issued this commission, held an inquiry on the 13th of November 1968, and by his Order dated 20th November, 1968, held that the medical certificate tendered by the 1st defendant was not a genuine one. He then fixed the case for ex-parte trial.

In the circumstances of this case we are unable to say that the 1st defendant agreed either expressly or by implication to her defence being struck off in the event of her application for a postponement being refused. We set aside the order setting down the case for ex-parte trial. The case can now be fixed for trial on a date as early as possible, as this is a very old case.

In the light of the foregoing judgment it is evident that the learned District Judge has failed to issue commission in the present case before us.

Further, the learned Judge had option to impose cost. However, he had failed to adopt that option. It was held in the case of B.V.Perera Vs. P.Ambalavanar (70 NLR 563) that on the first date of trial, counsel appearing for the 1st defendant filed a medical certificate to the effect that ''Mr. B.V.S. Perera is suffering from Fibrositis of the pectoral muscle on the left side. He will not be fit to attend Court tomorrow and for about one week thereafter'', and moved for an adjournment. Counsel for the plaintiff objected, stating that he did not admit the genuineness of the medical certificate. The trial Judge refused the application for an adjournment, whereupon counsel for the 1st defendant withdrew from the case. The trial was held immediately thereafter as against the 1st defendant.

I do not understand why the trial Judge acted so precipitately. The medical certificate has all the appearances of genuineness, and, if the statement made in it was correct, the 1st defendant was not fit to attend court. When plaintiff's Counsel objected to the grant of an adjournment and challenged the genuineness of the certificate, the simple and proper course for the Court was to require the 1st defendant's counsel to prove the authenticity of the certificate. If the Judge in his discretion considered that

the costs of the day should be borne by the 1st defendant, an order to that effect could have been made. Instead, the Court proceeded to trial and to judgment without the 1st defendant having any chance to establish that his request for a postponement was made on proper grounds.

The judgment and decree are set aside, and a fresh trial will be held on a date to be fixed by the District Judge. The costs of this appeal will abide the final result of the action.

In the case of *Weerasinghe Vs. Barlis 44 NLR 466* also the Court held as follows. ‘‘ In view of the medical certificate I allow a date. Defendant to pay Rs.105 as plaintiff's costs of the day’’.

Besides, the conduct of the learned District Judge indicates that he did not consider the principle of natural justice specially *Audi alteram partem* means ‘‘ listen to the other side’’, or ‘‘let the other side be heard as well’’. It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

It is argued on behalf of the appellant the rejection of the medical certificate by the learned District Judge deprived of her fair trial. The Court taking into consideration following facts in the appeal :-

a) The postponement was requested on the first date of trial.
b) The medical certificate tendered had indicated that the appellant was sick and unfit to attend court.
c) The court further note that the medical certificate does not indicate the appellant was unfit to attend court.
d) The Court is mindful of the fact an adjournments are discouraged by the reasons circular of the Hon. Chief Justice substantiate this position.
e) It is an accepted fact that the Judge has a discretionary power in considering an adjournment it is also true this discretion has to be used judicially.

Ex-parte order to proceed with the trial in the absence of the appellant is vital issue that has to be taken into consideration. We have taken into consideration the cumulative effect of the above factors and Court further observed that the ultimate aim of litigant to face fair trial and call for justice.

The (*maxim "actus curiae neminem gravabit"* which means and act of the Court will prejudice no one. Further the (*maxim actus legisneminiest damnosus*) which means and act of Law prejudices no ***one audi alteram partam*** which means hear the other side no one should be condemned or heard.

There are some essential rules of procedure in administrative law. Decisions or action taken in violation of these rules and rendered invalid on the basis of 'procedural ultra vires' – or doing the right thing in the wrong way. Impropriety in procedure should be avoided since it can negatively affect the final outcome of an administrative action or a decision. Natural Justice is a fundamental procedural requirement. The essence of natural justice is the notion of ''fair play in action'' – that an administrative official or tribunal exercising a quasi – judicial power must adhere to its two rules, namely 1) in a dispute both parties must be given a hearing (audi alteram partem) and 2) no person can be judge in his own cause (nemo iudex causa sua). (Peiris 2013, 171, 226)

In Mundy V. Central Environmental Authorities and others (SC app.58/2003) where the appellants were adversely affected by the deviation

from the original trace of the Southern Expressway the court recognized that the appellants were therefore " entitled to a hearing , under the *audi alteram partem* rule as well as article 12(1). It was stated that :

If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before is compelled to sacrifice a modest plot of land and a little hut because they are of ' extremely negligible ' vale in relation to a multi-billion rupees national project, it is nevertheless not equitable to disregard totally the infringement of his rights : the smaller the value of his property, the greater his right to compensation.

The reason judgment of this Court C.A.No.67/2012 dated 12.09.2016 *Duglus PLC Vs. Director General of Customs* the Justice Chithrasiri referred the case of *Cooper Vs. Wands Worth Board of Works (1863) E.R.141* Even God did not pass sentence upon Adam, before he was called upon to make his defence.

Taking into consideration of all these matters, we are of the opinion that the appellant had been deprived of fair trial and fair hearing. In these

circumstances, the original Court may impose a cost and allowed the parties to participate in the trial.

On foregoing adumbrated reasons we decided to set aside the order of the learned District Judge and order a trial *de novo*.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon,J.

I agree.

JUDGE OF THE COURT OF APPEAL