

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

CA DC : 1104/ 00

H.Piyadasa Perera

Petitioner

B.G.Coory

Respondent

CA 1104/00 (F)

DC-Mt. Lavinia-2286/L

Before : **A.H.M.D. Nawaz, J.**

Counsel : Lakshman Rohan Welihinda for the Plaintiff
Petitioner Appellant

Defendant-Respondent-Respondent absent and
unrepresented

Argued &

Decided on : 17.03.2017

A.H.M.D. Nawaz, J.

This case throws up the usual occurrence of a dismissal of an action for non appearance of the plaintiff and the ensuing litigation all the way to the Court of Appeal to have the lis restored back to the trial roll. As one goes back in time, the Plaintiff's case was dismissed for non appearance as far back as 08.10.1997. Though the plaintiff who was living overseas in the United States was absent on 08.10.1997-a date specially fixed for trial, there was present in court his counsel along with the instructing attorney and the counsel dutifully made submissions as to why the plaintiff was not present on the day in question. The counsel for the plaintiff had submitted that there was a long

distance call made to the instructing attorney by the plaintiff from the United States, wherein the plaintiff had informed the instructing attorney that he was not in a proper state of health to travel the long distance by air and the counsel implored Court that if the plaintiff was granted reasonable time he would be able to produce a medical certificate to this effect. The counsel further submitted before the learned additional District Judge of Mt. Lavinia that a material witness Mr. Alex Jayasekera could be led on the day and thereafter they could lead evidence of the plaintiff.

The learned counsel for the plaintiff in other words suggested to the learned additional District Judge that he was left with two alternatives. Firstly, he would lead the evidence of Mr. Alex Jayasekera on the day in question and thereafter the plaintiff would be led or otherwise he would move for a date to lead the evidence of the plaintiff on the next date. It was in those circumstances that an application for a postponement was made on the trial date. However, this application did not find favor with the learned Additional District Judge of Mt. Lavinia as he rejected the application for the postponement and dismissed the plaintiff's action on 8.10.1997.

The thrust of the reasoning of the learned Additional District Judge to dismiss the plaint seems to be that the sudden illness of

the plaintiff could not be established before court. The learned District Judge seems to have been influenced in his decision to take up the case immediately on the premise that the case had been fixed for two days on the application of the counsel for the plaintiff and also because the counsel for the defendant objected to the application of the plaintiff's counsel for a date. It has to be noted that when a Registered Attorney or an attorney at law instructed by the Registered Attorney represents a party to an action in court, it has to be treated as if that particular party is present in court, because the representation of a party in court by an attorney at law is in a representative capacity as the proxy filed on behalf of the party clearly demonstrates the principal-agent relationship between them and it is trite law that an agent is authorized by the instrument of authorization (proxy in this case) to act on behalf of a principal. Section 24 of the Civil Procedure Code makes this position quite clear-See the comparable observation to this effect of Gamini Amarathunga, J. in **Alima Umma Vs. Siyaneris** 2006 1 Sri.LR 32.

Though there exists no right of appeal against any judgement entered upon default in terms of Section 88 (1) of the Civil Procedure Code, the order setting aside or refusing to set aside the judgement entered upon default is liable to an appeal in terms of Section 88 (1) of the Civil Procedure Code.

When this case was dismissed by the learned Additional District Judge of Mt. Lavinia, the plaintiff filed an application by way of a petition and affidavit to have the dismissal set aside on 06.11.1997-Vide Pages 201-209 of the appeal brief. This court also takes note of the fact that the motion accompanying the petition and affidavit dated 06.11.1997 is day stamped by the Registry of the District Court of Mt. Lavinia on 06.11.1997 itself. The motion clearly moves that the substituted defendant be noticed for the inquiry to be held under Section 87 (3) of the Civil Procedure Code. The inquiry to purge default was held on 26.01.2000. At the inquiry held on 26.01.2000, the plaintiff gave evidence testifying as to why he could not come for the trial on 08.10.1997. At the inquiry, the plaintiff stated that he was expecting to fly to Sri Lanka from the United States on 06.10.1997. But he met with a serious accident on 04.10.1997 and as a result of this accident, he was unconscious for nearly 3-4 days. The plaintiff also produced an air ticket which he had purchased to travel to Sri Lanka-vide page 210 of the appeal brief.

However, the learned District Judge of Mt. Lavinia delivered his judgement on 12.12.2000 refusing to set aside the judgement that had been entered upon default. It has to be noted that the Section 87 (3) of the Civil Procedure Code states that if 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.

In the course of rejecting the application to set aside the order made upon default, I must observe that the learned District Judge misdirected himself on the law and facts. In the case of **Rev. Sumanathissa Vs. Harry** 2009 1 Sri.LR 31, this Court has laid down that the Court must apply a liberal approach in determining whether the plaintiff has satisfied court in adducing reasonable grounds for non appearance. In other words the court alluded to the yardstick of a subjective test rather than a less flexible objective test in determining what is reasonable. The District Court has misdirected itself in not having considered the fact that the plaintiff had given evidence on an earlier occasion when this case was taken up at an ex-parte trial owing to the absence of the defendant. This salient feature demonstrates the diligence manifested by the plaintiff to prosecute his action against the defendant and there was an *ex parte* judgement and decree entered in favour of the plaintiff in the case until the decree was set aside upon an application made by the defendant.

Before a District Judge proceeds to dismiss an action filed by the Plaintiff, he has to have regard to the past conduct of the Plaintiff such as his presence in court on earlier occasions. The Court should not visit the plaintiff with a stringent sanction

such as a dismissal of his plaint if there had been due diligence shown on previous occasions but the plaintiff gets absent thereafter on a solitary occasion. The fact that the plaintiff has not exhibited a blatant or wilfull disregard for the process of court is a salient factor that the learned District Judge must take into account before he mechanically and routinely dismisses an action filed by the plaintiff. In an appeal under Section 88(1) of the Civil Procedure Code it is open to this court to have regard to the circumstances in which the court dismissed the plaintiff's action.

This is a case in which the learned District Judge couldn't have dismissed the plaintiff's action at all when his counsel instructed by an attorney at law was present in court and suggested alternatives such as leading evidence of a material witness for the plaintiff. In such a situation, the learned District Judge should have framed the issues and begun the trial or if the plaintiff was necessary he should have granted a date to the plaintiff's Counsel.

In this context what Justice Mark Fernando stated in regard to Section 91 (a) of the Civil Procedure Code in **ABN AMRO Bank Vs. Conmix (Private) Limited and Others** (1996)1 Sri.LR 08 is apposite. In this case, the learned Judge suggested that Section 91(a) empowers court to grant further time to a defendant and this is so

even if the plaintiff objects. This rationale has to be borne in mind by Judges of the original court before they proceed to dismiss actions or fix cases *ex-parte* in situations when such orders could not be made at all.

In the circumstances, this court is of the view that the judgement dated 12.12.2000 of the learned District Judge of Mt. Lavinia refusing to set aside the order made upon default has to be set aside. The initial order dismissing the plaintiff's action on 08.10.1997 was *per incuriam* as the Counsel for the plaintiff was present and moved for a date or even indicated that he was willing to lead the evidence of a witness. In such a situation the plaintiff could not have been treated as if he was in default. In those circumstances the District Court could not have made an order of dismissal. The order was a nullity and though the plaintiff erroneously invoked Section 87 (3) of the Code, those proceedings too were a nullity and therefore the order of the learned District Judge of Mt. Lavinia dated 12.12.2000 refusing to set aside the order of dismissal dated 8.10.1997 is also null and void and is of no force or avail in law.

"If an act in law is *void*, then it is in law a *nullity*... There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so.

And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."-see Lord Denning in the Privy Council, **McFoy v United Africa Company Ltd**, (1961) 3 AER 1169, 1172.

In the circumstances I proceed to set aside the impugned order of the learned District Judge of Mt. Lavinia dated 12.12.2000 and I make further order restoring this case back to the trial roll to be taken up in the District Court of Mt. Lavinia.

The learned District Judge of Mt. Lavinia is directed to recommence the trial from the stage where it was dismissed namely by framing issues and permitting the plaintiff to place his case before Court.

The Registrar is directed to transmit a copy of this order along with the original record forthwith to the District Court of Mt. Lavinia. Having regard to the circumstances of this case, I make no order as to costs.

The appeal is therefore allowed.

JUDGE OF THE COURT OF APPEAL