

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

Deniyegedara Nandasena
Aththanayakadawala,
Paranagama

Defendant-Appellant

**C.A.No.638/96 (F)
D.C.Polonnaruwa No.3367/L.**

S.M.Podinilame
Aththanakadawala,
Paranagama,
Konduruwawa.

Plaintiff-Respondent

BEFORE : M.M.A.Gaffoor,J. and

S.Devika de L. Tennekoon ,J.

COUNSEL : W.Dayaratne P.C. with R.Jayawardena
and Nadeeka K.Arachchi for the
Defendant-Appellant.

Rohana Deshapriya for the Plaintiff-
Respondent

ARGUED ON : 25.07.2017

WRITTEN SUBMISSIONS
FILED ON : 23.10.2017

DECIDED ON : 22.01.2018

M.M.A. Gaffoor J.

This is an appeal preferred by the Defendant-Appellant in respect of an order given by the District Court of Polonnaruwa.

The fact of this case unspools in the following manner.

The original Plaintiff instituted action in the District Court of Polonnaruwa against the Defendant-Appellant seeking for a declaration of title to the land described in the schedule to the plaint, ejectment of the Defendant- Appellant his agents, restoration of possession, damages and such other relief.

The case proceeded to trial on 14.09.1988 on 6 issues , 3 issues by the Plaintiff and the Defendant respectively.

The case was fixed for trial 25.11.1992 on which date the Defendant-Appellant was absent and unrepresented(vide entry 29 appeal brief.)

Accordingly the case was fixed for ex parte trial. P1 and P2 were marked and the trial was concluded.

The learned District Judge decided the case in favour of the Substituted – Plaintiff- Respondent.

On receipt of the ex- parte decree Defendant-Appellant filed an application dated 20.03.1994 with petition and affidavit seeking to set aside the said ex- parte order and to re-fix for trial inter parte. The said affidavit and petition stated that the Defendant-Appellant was absent on the day of the trial as he was not well and in order to substantiate this fact the medical certificate V1 was also filed. The case was thereafter fixed for inquiry for the vacation of the ex parte order. The Defendant – Appellant and Ayurvedic Doctor had given evidence. The learned Trial Judge by order dated 4.9.1996 rejected the application of the Defendant-Appellant.

This Courts is referred to Section 86 (2) of the Civil Procedure Code by parties.

According to Section 86 (2) the jurisdiction of the District Court to set aside the default decree depends on three conditions ; namely

1. That the application is made within 14 days of the service of the default decree.
- 2.The application must be made with notice to the other party and
- 3.That the defaulting party must give satisfactory grounds for his default to the satisfaction of the Court.

According to this Section and the facts of the case the Defendant-Appellant has to satisfy Court during the inquiry and give reasonable and satisfactory reasons for the vacation of the ex pate decree. If the Court is not

satisfied with the reasons given the ex parte decree will stand.

In the case in point the Defendant-Appellant has given one reasons for his absence, that is that he was mentally ill and was taking treatment from an Ayurvedict Doctor. The said Doctor was called to give evidence.

The fact that the Defendant-Appellant was a mentally ill person is another matter that has to be taken into consideration by a Court in deciding the capacity of a person who is a party to a case. The Civil Procedure Code speaks of several provisions which deals with mentally ill persons. Be that as it may, the trial Judge has analyzed the evidence of the Defendant-Appellant and had concluded that the Defendant-Appellant had not given reasonable and satisfactory reasons to purge his default.

In the case of ***David Appuhamy Vs. Yasassi Thero 1987 (1) SLR 253*** the Court observed thus,

“ An ex parte order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default.”

It is also to be noted that the new subsection 68 (2) (A) which was introduced by Act No.53 of 1980 has not been made use of by the Defendant-Appellant.

The fact that the trial Judge had the opportunity of seeing the demeanor and the veracity of the evidence adduced at the inquiry does not permit this Court to interfere with the facts of the case adduced at the inquiry.

The Apex Courts have on various occasions cited plethora of Judgments and had observed that

“ It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal”

In the light of the above this Court sees no valid reason to interfere with the ex-parte judgment given by the learned District Judge. Hence the appeal stands dismissed.

JUDGE OF THE COURT OF APPEAL

S.Devika de L. Tennekoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL