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

C.A. Case No. 1299/2000 F

D.C. Galle Case No. R.E. 426/97

Kariyawasam Haputanthri Gamage Mahinda Padmasiri

'Padmasiri', Niyagama,

Thalgaswala.

PLAINTIFF

-Vs-

M.G. Donald

Thalgaswala.

DEFENDANT

AND

M.G. Donald

Thalgaswala.

DEFENDANT-PETITIONER

-Vs-

Kariyawasam Haputanthri Gamage Mahinda Padmasiri

'Padmasiri', Niyagama,

Thalgaswala.

PLAINTIFF-RESPONDENT

AND NOW BTEWEEN

M.G. Donald

Thalgaswala.

DEFENDANT-PETITIONER-APPELLANT

-Vs-

Kariyawasam Haputanthri Gamage Mahinda Padmasiri

'Padmasiri', Niyagama,

Thalgaswala.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Shyamal A. Collure with A.P. Jayaweera and A. Adachi for the Defendant-Petitioner-Appellant L.A. Pathiravitana for the Plaintiff-Respondent-Respondent
Decided on	:	25.05.2018

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

The Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action against the Defendant-Petitioner-Appellant (hereinafter sometimes referred to as "the Defendant") praying *inter alia* for

a) ejectment of the Defendant and all those holding under him from the shop and premises more fully described in the schedule to the plaint and for delivery of vacant possession of the premises in suit to the Plaintiff;

b) recovery of arrears of lease rentals in respect of the subject-matter up to the end of May 1977 in a sum of Rs.23,300/-;

c) damages at the rate of Rs.500/- per month from 10.06.1997 until delivery of vacant possession of the property to the Plaintiff.

The Defendant filed answer denying a cause of action and prayed, *inter alia*, for a dismissal of the action.

When the case came up for trial on 01.10.1998, the Defendant was absent and Mr. Sarath Manamperi Attorney-at-Law on behalf of the instructing Attorney Sagara Manamperi informed Court that there were no instructions from the Defendant-see ***Senanayake v. Cooray*** 15 N.L.R 36-on the day fixed for the trial of this case, the Defendant was absent and his proctor on the record, who was present in Court, stated he had no instructions.

It was held that the physical presence of the proctor in the Court, coupled with what he said on the trial day, did not constitute an appearance for the Defendant which would give the proceedings the character of an *inter partes* trial which would enable the Judge to enter a final decree.

In the appeal before me, the learned District Judge began the *ex parte* trial and delivered his judgment awarding the reliefs prayed for in the plaint, after having heard the testimony of the Plaintiff.

Upon the *ex parte* decree being served on the Defendant, the Defendant moved Court to have the judgment vacated and the case fixed for trial *inter partes*. The Defendant had, along with his petition and affidavit dated 03.12.1999, submitted a copy of a medical certificate issued by an Ayurvedic physician. When the purge-default inquiry came up on 21.08.2000, the Defendant moved for a date to summon the Ayurvedic doctor who had issued the medical certificate.

There were submissions made on behalf of the Plaintiff namely, there was a failure to serve notice of the application on the Attorney-at-Law of the Plaintiff. There was also

an argument that the Defendant had not listed the Ayurvedic physician as a witness. The submissions have also been relied upon by the learned District Judge to refuse the application of the Defendant to summon the Ayurvedic physician to testify on behalf of the Defendant. As a result the Defendant alone gave evidence in order to discharge his onus to furnish reasonable grounds for his default on 01.10.1999-a requirement imposed by Section 86(2) of the Civil Procedure Code. It is not inapposite to repeat certain well-known principles that should guide purge-default inquiries.

1) An inquiry on an application to set aside an *ex parte* decree is not regulated by any specific provisions of the CPC. Such enquiries must be conducted consistently with the principles of natural justice and requirements of fairness. Section 839 of the CPC recognises the inherent power of the court to make an order as may be necessary for the ends of justice.

   De Fonseka v. Dharmawardene (1994) 3 Sri L.R. 49

2) Applications to set aside *ex parte* decrees are proceedings incidental to and not a trial proper. The inquiry must be conducted on principles of fairness.

   Wimalawathie and Others v. Thotamuna (1998) 3 Sri L.R. 1

3) a) the language used in Section 86(2) of the CPC does not seem to suggest that the Defendant is required to give notice of his application to the Plaintiff simultaneously with the filing of such application.

   b) the notice of the application can be given subsequently.

   Karunadasa v. Rev. Phillips (2003) 2 Sri L.R. 140

I must observe that if the learned District Judge of Galle had borne in mind the aforesaid principles, he would not have erred in refusing the application of the Defendant to summon the Ayurvedic physician who had allegedly issued the medical certificate. In fact, this refusal was urged by the Counsel for the Defendant as a ground to vitiate the judgment that the learned District Judge had delivered refusing the application to vacate the *ex parte* judgment and decree. But I pause to pose one poser.

No doubt, the testimony of the Ayurvedic physician, if at all, could have corroborated the evidence of the Defendant at the purge-default inquiry.

Despite the error of the learned District Judge, the question is how convincing the Defendant was in the first instance in furnishing reasonable grounds for his default in appearance.

It is axiomatic that the Defendant, in his application to set aside the *ex parte* decree, must give satisfactory reasons for his default. In a purge-default inquiry, it is incumbent on the District Judge to ascertain whether the reasons given by the Defendant are reasonable and satisfactory for the vacation of the *ex parte* decree. If the court is satisfied it would set aside the decree and permit the Defendant to proceed with this defence from the stage of default.

So the question is how qualitatively good the evidence of the Defendant was as to why he was unable to be present in court on 01.10.1998-the day the *ex parte* trial was held. It is not the number of witnesses that matters but the quality of evidence-*see* ***Mulwa v. State of Madya Pradesh*** AIR 1976 S.C 989 at para 18; ***Balraj v. State of Panjab*** (1976) Cr.LJ, 1471 at para 19; ***Vadivelu Thevar v. State of Madras*** AIR (1957) 614, (1957) Cri.LJ 1000 and ***P.P. Fatima v. State of Kerala*** (2004) SCC (Crim) 1. These cases are to the effect that *evidence has to be weighed but not counted.* Even in England this holds true exemplified in the legal maxim *testes ponderantur, non-numerantur -see* the English cases such as ***D.P.P. v. Hester*** (1972) 57 Cr.A.R. 212 at 242 per Lord Diplock; ***Wright v. Tatham*** (1838) 5 Cl & F. 670; Phipson, *Law of Evidence*, 13th Edition, para.32-01, p.717. A Court can and may act on the testimony of a single witness even though it is uncorroborated. Regardless of the nature of the trial, civil or criminal see also Section 134 of the Evidence Ordinance which embodies the above maxim to the effect that no particular number of witnesses shall in any case be required for the proof of any fact.

Defendant's testimony at the purge-default inquiry

The Defendant testified that on the day prior to the date of trial he had a fall which resulted in an injury to his foot and he was in an excruciating pain and owing to the mishap he could not attend court on 01.10.1998. He had to seek medical treatment from an Ayurvedic doctor on that day. He had travelled in a three wheeler with his wife and child for one and a half mile to seek the medical help. It was with a dislocation of his foot he saw the doctor in the morning of 01.10.1998. In the same breath the Defendant admitted that he visited the bookie that he was operating in the shop premises in the evening of the same date namely 01.10.1998.

In cross-examination the Defendant was shown a betting chit, which he admitted to have issued on 01.10.1998-the trial date (see page 45 of the appeal brief). When he was confronted with the betting chit, he remained silent (see page 47).

When the Defendant was asked as to when he issued the chit, he responded that it was in the evening of 01.10.1998-the date of the trial but yet he said he had been unconscious till evening and was lying at the doctor's clinic till evening. Come evening he had regained consciousness and began to work at his bookie. This is inherently improbable and does not inspire confidence in his testimony. Here was a witness who asserted that he had become unconscious owing to the fall and dislocation of his foot but in the evening he was seen engaging in issuing chits in the course of his betting business. This is also in stark contrast to his admission that he was aware that his case was coming up on 01.10.1998.

It is inconceivable that a literate person as the Defendant was could have forgotten to inform his Attorney-at-Law that a calamity had befallen him. He could have sought the assistance of his wife or child to convey the news of the sudden emergency so that the Attorney-at-Law could have moved for an adjournment of the trial. The Attorney-at-Law did intimate to Court that he had no instructions from the Defendant.

It is intrinsically imponderable that a person whose ankle was dislocated was able to visit his bookie and transact business when a person in his condition was wont to

suffer the consequence of immobilisation for a couple of days. I cannot fault the learned District Judge for having disbelieved the witness with regard to the reasons that he proffered for non-appearance on 01.10.1998.

The testimony of this witness could not have been improved by the evidence of the Ayurvedic physician. I take the view that the evidence of the Defendant does not afford any foundation to inspire confidence in his account, and I conclude that there were no reasonable grounds for his default so that the judgment and decree dated 01.10.1998 could be set aside.

I must advert to some legal submissions Mr. Shyamal Collure made in the course of his argument. He contended that the Plaintiff had not averred in the plaint that he was the owner of the premises in suit and also when and on what conditions he had entered into the alleged lease agreement. He had failed to establish his ownership of the premises. He also submitted that the alleged lease agreement was not before Court. The upshot of this argument was that the *ex parte* judgment dated 01.10.1998 and decree are based on no evidence and cannot stand in law.

It is indubitable that Section 85(1) of the CPC requires that the trial Judge should be satisfied that the Plaintiff is entitled to the relief claimed. In fact in ***Sirmavo Bandaranaike v. Times of Ceylon Limited*** (1995) 1 Sri L.R. 22, the Supreme Court declared that in an *ex parte* trial, the trial Judge must act according to law and ensure that the relief claimed is due in fact and in law and must dismiss the plaintiff's action if he is not entitled to it. In the same vein Kulatunga J. opined in ***Sheila Seneviratne v. Shereen Dharmaratne*** (1997) 1 Sri L.R. 76, that an *ex parte* judgment cannot be based on hearsay evidence and set aside the *ex parte* judgment and decree. Thus there was an invitation to exercise the revisionary jurisdiction to reach out to the *ex parte* judgment and decree and set it aside on the basis that there was no evidence at all to hold that the Plaintiff was entitled to his reliefs. *Ex parte* orders made by Courts have indeed been set aside in revision applications-*see* ***Sirmavo Bandaranaike v. Times of Ceylon Limited***

(supra); In fact Gamini Amaratunga J. held in ***Attorney General v. Cashian Herath*** C.A. Rev. 2060/2004, D.C. Colombo 6842/M, C.A. minute dated 12.11.2004):

> *"The existence of the appeal was not an impediment to the filing of a simultaneous revision application to canvass the ex-parte judgment on its merits."*

I am afraid that I would be slow to indulge in that exercise as I am disinclined to exercise the revisionary jurisdiction for the following reasons. Even in the purge-default enquiry, there was a tacit admission on the part of the Defendant that he had been in arrears of lease rentals for many years. His silence in the face of the question on arrears of lease rentals, is indicative of the fact that he had been defaulting in payment of rents which he owed the Plaintiff. Nowhere does the Defendant throw a challenge that he did not owe the rentals to the Plaintiff. Thus there was an implied acceptance that the Plaintiff was the landlord, if not the owner. It is trite law that a non owner of a building can be the landlord -*see* Sharvananda, C.J in ***Imbuldeniya v. De Silva*** (1987) 1 Sri L.R. 367.

The Plaintiff asserted in his evidence at the *ex parte* trial that he had leased the shop and premises to the Defendant who later fell into arrears. There was no denial of ownership nor was there a repudiation of the landlordship of the Plaintiff in the petition and affidavit that the Defendant filed in terms of Section 86(2) of the CPC in order to have the *ex parte* judgment vacated (see page 73 of the appeal brief). It would appear that even a letter dated 10.06.1997 marked as **P1** at the *ex parte* trial, that had been sent to the Defendant, quite clearly stated that the Plaintiff was the lessor who had let the premises to the Defendant and this letter sent through an Attorney-at-Law terminated the lease agreement.

Thus there was admittedly a relationship of lessor and lessee between the parties, which has not been repudiated by the Defendant. No hearsay evidence or inadmissible evidence has been led at the *ex parte* trial. Therefore, this is not a case that lends itself to the exercise of the revisionary jurisdiction of this Court.

Moreover, Section 116 of the Evidence Ordinance would estop the Defendant from denying the title of the Plaintiff *qua* an owner or a landlord of the premises. Section 116 of the Evidence Ordinance goes as follows:-

> *"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and*
>
> *No person who came upon any immovable property by the licence of the person in possession thereof shall be permitted do deny that such person had a title to such possession at the time when such licence was given."*

This provision embodies a case of estoppel by contract. The principle underlying the section was stated by Jessel, M.R in ***Shaw v. Jones Ford*** (1877) 6 C.D 1 at 9;

> *"He took possession under a contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord; and having taken it in that way, he is not allowed to say that the landlord did not have title."*

In the Indian case of ***Bilas Kunwar v. Desraj Ranjit Singh*** (1915) ILR 37 All 557, the Privy Council observed:

> *"A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord."*

Out courts too have endorsed the principle that in a suit against a licensee or a lessee, title is irrelevant-see the perceptive judgment of U. De Z. Gunawardana, J. in ***Ruberu and Another v. Wijesooriya*** (1998) 1 Sri L.R. 58.

Therefore the argument that the Plaintiff should have led evidence of ownership is bound to fail as there is evidence in the case to raise the irrebuttable presumption under Section 116 of the Evidence Ordinance.

In the circumstances I proceed to affirm the judgment dated 16.10.2000 and as a result the *ex parte* judgment dated 01.10.1998 would stand. Accordingly I dismiss the appeal of the Defendant-Appellant with costs.

JUDGE OF THE COURT OF APPEAL