IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

L.P. Wijesinghe,
No. 10,
Ganthera Mawatha,
Watapuluwa,
Kandy.
Defendant-Appellant

CA CASE NO: CA/1089/2000/F

DC POLONNARUWA CASE NO: 5662/M

Vs.

P.G. Gunapala,
C/O T. Somalia,
2nd Mile Post,
Hingurakgoda.
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Kumar Dunusinghe for the Appellant.
Dr. Sunil Cooray with Kennath Perera for the Respondent.

Argued on : 13.06.2018
Decided on: 31.07.2018

Samayawardhena, J.

The defendant-appellant filed this appeal against the order of the learned District Judge of Polonnaruwa dated 07.11.2000 whereby the application of the defendant to vacate the *ex parte* Judgment entered in favour of the plaintiff-respondent was refused.

The plaintiff filed the action against the defendant seeking recovery of a sum of Rs. 120,000/= and the case has been taken up for *ex parte* trial as both the defendant and his lawyer were absent on the trial date.

At the inquiry before the District Court into purging default, the defendant has first given evidence to say that he was ill on the said trial date, and to substantiate it has produced a medical certificate V1, which was marked subject to proof. His illness on the trial date was said to be vomiting, fever and diarrhoea.

If he were ill on the trial date, as any prudent man would do, he would have taken steps to inform it to his lawyer over the phone or by any other means for the lawyer to represent him in Court. This has not been done. His physical presence on the trial dates is not required if he was represented by his lawyer.

On the other hand, if he were ill on the trial date and obtained treatment from a doctor, he would have told it to the doctor and obtained the medical certificate on that day itself. This has not been done.

If he had at least met the lawyer soon after the trial date, which any prudent man would have done, the lawyer would have advised him to immediately obtain a medical certificate from the doctor

who treated him. It is clear that he has not met the lawyer soon after the trial date.

The defendant has obtained the Medical Certificate more than two months after the date of the default of appearance.

The District Judge has disbelieved the evidence of the defendant *inter alia* that there was no apparent reason for the defendant with such symptoms to go from his place of residence to a far away hospital at Manikhinna than go to the closer hospital at Katugastota.

The doctor who issued V1 has been summoned to give evidence. The learned Judge has not accepted his evidence by giving a number of reasons.

Notwithstanding the defendant is alleged to have gone for treatment as an outdoor patient on 04.01.1996, the Medical Certificate V1 has been issued on 05.03.1996 stating that the defendant was unfit to attend Court for three days not from 04.01.1996 but from 03.01.1996.

The doctor has produced the relevant page of the OPD Register as P3 to say that the defendant obtained OPD treatment on 04.01.1996. In P3, in front of the OPD number 541, "*Wijesinghe 40*" is mentioned. It is the position of the defendant that it refers to him. Defendant's name is L.G. Wijesinghe. However the doctor himself has admitted in evidence that the name "Wijesinghe" has been tampered with and the last part of that name has been struck off or scratched. The numerical "40" there refers to the age of the patient, but the age of the defendant when he gave evidence after more than 4 years was still 38. The District Judge has cast doubts about these things.

According to the evidence of the doctor he does not know the defendant. He has stated in evidence that he prepared the medical certificate V1 after two months by looking at the records. The only record produced before Court was the aforementioned P3 and there is no reference about the illness or treatment in P3 except "*541 Wijesinghe 40*". The District Judge has stated that it is unbelievable that the doctor remembered the symptoms of the unknown patient after two months when he prepared V1. There cannot be any other hospital records such as BHT as he was alleged to have been treated as an OPD patient.

The order appealed from is based on pure questions of fact and not of law. The whole evidence was led before the same Judge by whom the order was delivered. His findings are not at all perverse but stand to reason. They have been arrived at upon proper analysis of evidence led before him, who had the priceless advantage of observing the demeanour and the deportment of the witnesses when giving evidence, which this Court does not have.

Court of appeal is slow to disturb the findings of fact of the trial Judge unless there are compelling cogent reasons to do so. (*Fradd v. Brown & Co. Ltd.*[1], *Neville Fernando v. Chandrani Fernando*[2], *Alwis v. Piyasena Fernando*[3], *Abdul Azeez v. Meera Lebbe*[4], *Ariyadasa v. Attorney General*[5]) No such compelling reasons are to be found in this case.

Appeal is dismissed with costs.

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[1] (1918) 20 NLR 282 (PC)
[2] [2007] 1 Sri LR 159 at 163
[3] [1993] 1 Sri LR 119
[4] [2009] BLR 149
[5] [2012] 1 Sri LR 84

Judge of the Court of Appeal