

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

In the matter of an appeal under
Section 754 of the Civil Procedure
Code.

Howpe Liyanage Edmund
Edirisinghe of Howpe,
Imaduwa.

Plaintiff

-Vs-

Ahangama Vithanage Sumanadasa
Kottamullahena,
Karagoda.

Defendant

C.A. No. 1394/99(F)

D.C.Galle No. 10587/L

AND

Ahangama Vithanage Sumanadasa
Kottamullahena,
Karagoda.

Defendant-Petitioner

-Vs-

Howpe Liyanage Edmund
Edirisinghe of Howpe,
Imaduwa.

Plaintiff-Respondent

AND NOW BETWEEN

Ahangama Vithanage Sumanadasa
Kottamullahena,
Karagoda.

Defendant-Petitioner-Appellant

-Vs-

Howpe Liyanage Edmund
Edirisinghe of Howpe,
Imaduwa.

Plaintiff-Respondent-Respondent

BEFORE : **M.M.A. GAFOOR, J.**

COUNSEL : Sandun Nagahawatta with T. Wimalasooriya for
the Defendant-Petitioner-Appellant.
K.A.D. Karasinghe for the Plaintiff-Respondent-
Respondent.

WRITTEN SUBMISSION

TENDERED ON : 05-04-2018 (by the Appellant)
11-05-2018 (by the Respondent)

DECIDED ON : 01st August, 2018.

M.M.A. GAFOOR, J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent") instituted an action in the District Court of Galle bearing case No. 10587/L on the 18th February, 1985, against the

Defendant-Petitioner-Appellant (hereinafter referred to as the "Appellant") for a declaration of title to the land in question. In the said case the learned District Judge made order to issue summons on the Appellant. Having received summons, the Appellant had filed a proxy through his Attorney-at-Law on 11.05.1988 and the order was made by the District Judge allowing the Appellant to file his answer after the Commission was executed.

When this case was called in open Court on 11.05.1992., an order was made granting the Appellant to file answer on the next date. Although the case had been called in open Court thereafter on several dates, the Appellant had failed to do so. Again on 15.11.1996, when the case was called in open Court, a final date had been given to file answer until 17.01.1997, but he had failed to file the same. Therefore, the learned District Judge delivered an ex-parte judgment in favour of the Respondent and the decree nisi was served to the Appellant on 30.09.1998.

Thereafter, the Appellant filed a petition together with an affidavit and moved Court to set aside the ex-parte judgment entered against him, dated 27.06.1997 and the inquiry in regard to that was fixed for 27.05.1999. The Appellant gave evidence explaining the reasons for his absence from Court on 17.01.1997. The Appellant stated that he had been assaulted by one U.G. Sumathipala on or about 04.04.1995 and was grievously hurt. The Appellant also stated that due to the injuries sustained by him, he had to take daily treatments from Karapitiya Hospital and he had attended the hospital on that particular day for treatments. The Appellant further stated that he was not in good mental condition due to the said injuries.

Having considered the evidence and the documents, the learned District Judge refused the application of the Appellant and affirmed the ex-parte judgment and decree by the order dated 27.05.1999.

Being aggrieved by the said judgment the Appellant has lodged this appeal before this Court. The Appellant had submitted several grounds of Appeal. The first ground of appeal is that the learned District Judge has failed to consider the fact that the Appellant had submitted in his answer on 18.06.1993 (at pg.04) But, according to the journal entry No. 48 the Appellant did not file the answer but moved for a commission. The second ground of appeal is that the learned District Judge has failed to evaluate the evidence elicited by the Appellant. According to the evidence in chief three documents were marked as P1, P2 and P3. But the Appellant has failed to prove those documents and call witnesses on that behalf. Therefore, those documents cannot be considered as proved documents. The third ground is that the learned District Judge has failed to evaluate the oral evidence given by the Appellant regarding his mental ill health. However, at page 79/80 the Appellant has stated that after taking treatments for his pain in head on 17.01.1997 he didn't go out for about a month's time . But the Appellant had given evidence in case bearing No.49042 at Magistrate's Court of Kottawa on 21.01.1997 and had admitted that also. The fourth ground of appeal is that the learned District Judge had failed to consider the fact that the Appellant had been present in Court almost on every occasion , when his presence was necessary. The journal entries of the case record, does not show any such entries are available. Considering the evidence of the Appellant it is obvious that the Appellant is not a credible witness and his evidence is not consistent.

The issues to be determine in this appeal is:

(1) Whether the Appellant had reasonable grounds for his default.

In the evidence in chief the Appellant stated that he has filed his answer on 13.01.1997 but he couldn't come to the Court that day.
(At page 72 of the brief)

Q. උත්තරය බඳිනු ලැබූව දිනය මතකද?

A. මතකයි.

Q. කවදද?

A. 1997-01-03.

Q. ඒ දිනයේ තමන් මේ අධිකරණයට ආවාද?

A. නැහැ.

But no such answer had been filed on that day.

At page 86 of the Appeal brief that the Appellant testified as:-

Q. තමන්ට උත්තර බඳින්න දිනයක් දුන්නේ නැද්ද අවසාන වශයෙන්?

A. මට දුන්නේ නැහැ.

Q. තමන් දන්නේ නැහැ උත්තර බඳින්න දිනයක් ලැබුනා?

A. නැහැ.

Q. කවදද උත්තර බඳින්න ලැබුනද කියා තමන් දන්නේ නැහැ?

A. නැහැ.

Q. 97.01.17 දින අධිකරණයට එන්න කියා දිනයක් ලැබුනේ නැද්ද?

A. නැහැ.

The Appellant further stated that he didn't come to Court on 17-01-1997 due to a metal sickness. (At page 73 of the brief)

Q. ඇයි මෙම නඩුවට නාවේ?

A. මට ඒ දවසේ සිහියක් නැහැ.

Q. ඇයි?

A. මට මැහුම් 32ක් ගහලා තියෙනවා මච්ච මට ඒක නිසා කල්පණාවක් නැහැ.

In the evidence in chief the Appellant stated that he did not know what happened to the case since he was unconscious due to an assault taken place on 04-01.1995. But he had given evidence on 21.01.1997 in the case bearing No.49042 and he also admitted that fact.

The Appellant had marked documents P1 (diagnosis ticket), P2 which was a hand written note in an exercise book but there was no doctor's signature on it. And although he had undertaken to call the doctor to prove those documents, he had failed to do so.

For the above reasons, it is clear that the Appellant is not a credible witness and his evidence is inconsistent. Therefore, it is unsafe to act upon the evidence of the Appellant.

(2) Applicability of Sec. 86(2) of the Code of Civil Procedure.

In the case of *Mallika V. Karunaratne* (Bar Journal 2012 Vol. XIX Patt II page 380). It was held that:

- a. A party who relies on Sec.86(2) of the Code to vacate an ex-parte decree should establish a reasonable ground for default.
- b. Negligence of lawyer amounts to the negligence of client.

- c. As long as a valid proxy is filed of the record and is in force there is a duty on the part of Counsel or registered Attorney to look after the interests of his or her client.

In Sanicoch Group of Company by its Attorney Denham Oswald Dawson V. Kala Traders (Pvt) Ltd. (Bar Journal 2016 Vo.XXII page 44) it was held;

- a. According to case law, inquiry on application to set aside an ex-parte decree is not regulated by any specific provision of the CPC but such inquiries must be conducted consistent with rules of natural justice and the requirement of fairness.
- b. Sec. 86(2) of the CPC requires the defendant to satisfy Court that the defendant had reasonable grounds for such default. This means that the defendant party needs to satisfy Court the expectation of desires that are accepted as adequate in the circumstances. What should or would be adequate needs to be only reasonable ground.
- c. Both Sections 86(2) and 87(3) have set the standard of proof as reasonable grounds for default.

In Sandamali V. Sanette Wijesiri C.A. 207/1998 (F) decided on 23.01.2012;

In an inquiry into an application to set aside an ex-parte decree the Court should ascertain whether there were reasonable grounds for default and should be mindful that in proceedings of this nature, the provisions of chapter XII of the Code are statutorily enacted proceedings where consequences of default and cure are enumerated independent of the main case based on rights of parties.

The Appellant has failed to satisfy the Court that he had reasonable grounds for his default. Therefore, the Appellant's action fails.

For the foregoing reasons, I dismiss the appeal without costs and uphold the order of the Learned District Judge of Galle dated 27th May 1999.

JUDGE OF THE COURT OF APPEAL
