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

Court Appeal Case No.
CA 1185/99 (F)

District Court of Ratnapura
Case No. 13380/RE

In the matter of an application (for rehearing the appeal) under Section 771 read with Sections 769 and 839 of the Civil Procedure Code.

Kuruwita Multi-Purpose
Corporative Society Ltd.
Kuruwita

PLAINTIFF

VS.

J. Shaul Hameed
No. 07, Main Street
Kuruwita

DEFENDANT

AND NOW

Kuruwita Multi-Purpose
Corporative Society Ltd.
Kuruwita

PLAINTIFF-APPELLANT

VS.

J. Shaul Hameed
No. 07, Main Street
Kuruwita

DEFENDANT RESPONDENT

BEFORE	:	**M. M. A. GAFFOOR, J.**
COUNSEL	:	Upul Kumarapperuma with Bhagya Peiris for the Plaintiff-Appellant T.D. Aluthnuwara for the Defendant-Respondent
WRITTEN SUBMISSIONS TENDERED ON	:	Plaintiff-Appellant - 24.01.2018 Defendant-Respondent – 11.06.2018
DECIDED ON	:	**16.10.2018**

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M. M. A. GAFFOOR, J.

This is an Appeal against the Order (dated 09.11.1999) of the Learned District Judge of Ratnapura. The Plaintiff-Appellant, Kuruwita Multi-Purpose Co-operative Society Ltd. (hereinafter referred to as the 'Appellant') instituted an action in the District Court against the Defendant-Respondent (hereinafter referred to as the 'Respondent') in September, 1996 to eject the Respondent from the premises more fully described in the schedule to the Plaint.

According to the Appellant, the said Land and premises in question had been rented out by the Appellant Society to the Respondent's father in 1978 and the Respondent later became the successor to his father and occupied the said premises at the time of institution of the above mentioned action. It is the claim of the Appellant Society that the said rent agreement between the former management of the Society and the Respondent was illegal.

The case was called in the District Court of Ratnapura on several occasions. When it was taken up for trial and on 16th July 1998, the Appellant Society was not present before the Court, the Counsel of the Appellant informed the court that **he had no instructions**. Then counsel for the Respondent moved court to dismiss the case. Accordingly, the learned District Judge dismissed the above action on the ground of non-appearance of the Appellant. *(Vide page 09 in the appeal brief)*

Thereafter, the Appellant filed a Petition dated 30th July 1998 along with an affidavit *(vide page at 33-34 in the brief)* and made an application to the District Court in terms of section 87(3) of the Civil Procedure Code to set aside the order dated 16.07.1998 and restore the Appellant's action.

After inquiry, on 09.11.1996 the learned District Judge has rejected the Appellant's application on the basis that the Appellant has failed to satisfy the Court that there were reasonable grounds for the non-appearance of the plaintiff. *(Page 54-59)*

Being aggrieved by the said judgment the Appellant Society mad an appeal before this court to **vacate the order of the learned Judge dated 09.11.1999 and to re-list the said matter for trial.**

The matter was already taken up before His Lordship H.N.J. Perera, J. and the order was reserved by him, pending that order His Lordship was elevated to the Supreme Court. Therefore counsel for the Respondent pleaded that the matter be relisted for arguments. Accordingly, the matter was reargued on 29th November 2017 and granted permission to file written submissions.

The Written Submission on behalf the Appellant and the Respondent were filed on 24.01.2018 and 11.06.2018 respectively.

In this appeal, the Appellant's position was that representative of the Appellant's Society (*General Manager, Mrs. Padma Gamlath*) could not attend in the District Court trial as she had to attend a domestic inquiry on the same day which was held upon the direction of an order made by the High court in case No. HCR/AR 203/97. The Appellant further submitted that on the date of the trial (16.07.1998) the Attorney for the Appellant appeared before the learned District Judge and informed that he had no instruction from the Appellant.

Therefore, Appellant further argued that the appearances of the Instructing Attorney has to be counted not because his appearance or but because of being the proxy holder of the relevant party.

But the Respondent has taken up his position that the representative of the Appellant could not appear in court on the day of trial because she forgot the date and time of the trial; therefore, counsel for the Respondent argued that Appellant's non-appearance was solely due to their negligence.

The Counsel for the Respondent further submitted that,

- The High Court order in case No. HCR/AR 203/97 did not refer that the inquiry should be held on the specific date and it was at the sole discretion of the Appellants to decide the dates of such inquiry.

- The Appellant has forgotten the District Court trial altogether and has not acted in due diligence on the date of the trial.

- The appellant had a choice to attend the court if she really wanted to. And even after she remembered the trial, she has given priority to the domestic inquiry – non judicial forum over the District Court trial. *(Vide Written Submissions of the Respondent)*

Learned District Judge also had agreed with these submissions and took two main views for his discernment,

1. The Plaintiff-Appellant was not acted in a serious manner to attend the trial or she neglected.
   (Vide pages 55 & 56 in the appeal brief - Judgment)

2. She did not give any instruction for her counsel hence the Counsel for the Appellant appeared before the learned District Judge and addressed that he had no instruction from the Appellant.

Therefore the learned District Judge came to a conclusion that there are no reasonable grounds for the non-appearance of the Appellant.

The relevant provision with regard to non-appearance of a Plaintiff is contained in Section 87 of the Civil Procedure Code. It's vital to consider the entire sections of non-appearance though in this problem attention need to be focused only to Section 87(3) of the code. Section 87 reads thus:

> *(1) Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action.*
>
> *(2) Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.*
>
> *(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, 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 upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.*

The requirement as in Section 87(3) of the Code is to apply to court within a reasonable time and satisfy court that ***there were reasonable grounds for non-appearance***. Then the standard of proof as in Section 87(3) is only reasonable grounds unlike **'sufficient cause' or 'good cause'.**

On this rudimentary scenario, I would like to examine the evidence at the inquiry and the order of the learned District Judge that whether the Appellant has a reasonable cause or not.

The Appellant in her evidence (examination in-chief) stated that, she knew that she had to come to court that day and the domestic inquiry started at 8.30am on 16.07.1998 and that she intended to come to court after testifying before the domestic inquiry. She further stated that that it was due to any sort of negligence on her part. Nevertheless, in her cross examination it was revealed that she actually forgot that she was to be present in court that day and she remembered it only around 9.00am.

The learned District Court judge was attentive on this. *(Page - 03 of the judgement, 56 of the appeal brief)*

ප්‍ර: මොකක්ද ?

උ: ප්‍රමාද වෙලා මතක් වුනේ.

ප්‍ර: මොකක්ද, නඩුව තිබෙන බව, එතකොට ආවේ නෑ. එහෙම ආවේ නැත්තේ අමතක වීම නිසා. ආවේ නැත්තේ අමතක වී නිසා නේ ද ?

උ: ඔව්.

ප්‍ර: එක ඇයි තීවේ නෙත්තේ මේ දිවුරුම් පෙත්සමේ ?

උ: විනය පරීක්ෂණයට සහභාගි වූ නිසා, එන්න බැර්වුනා කියා කිව්වා.

According to her evidence, it's crystal clear that even after she remembered the trial, she has given priority to a non - judicial forum (domestic inquiry) over the District Court trial. Also it's seems to me that if she care / attentive on the trial she could arrange or authorise another person on behalf of her.

Further the learned District Judge carefully considered that whether the Appellant's non-appearance was actually due to the reasons stated in the petition and affidavit or not. It's obviously clear from the judgment of the District Court that the evidence of the General Manger of Cooperative Society herself and the Education Officer, both of whom were witnesses of the Appellant, contradicted the position taken up by the appellant in the petition and the affidavit. *(Vide page 58 of in the brief)*

Even, The Appellant is in a position with the decision of ***Isek Fernando Vs. Ritta Fernando and others*** (1999) 3 S.L.R. 29 that there was an appearance by the Registered Attorney-at-Law for the Appellant and has marked his appearance as the Attorney-at-Law for the Appellant. In my view the present case not only questioned the appearance of an Attorney or the Appellant; the Appellant did not give any instruction or any other excuse through the attorney; The Attorney-at-Law informed court just as **"I have no instruction from the Plaintiff (Appellant)"**.

As held in ***Packiyanathan vs. Singarajah*** (1991) 2 S.L.R. 205, *If the act of an attorney or plaintiff is mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend upon the facts and circumstances of each case.*

In ***Kathirasu Vs Sinniah*** 71 N.L.R. 450: HNG Fernando, C. J. observed that, where a Proctor and his client (the plaintiff) were absent on the trial date because the Proctor had by mistake taken down the date of trial as 18th of August, when in fact the trial was fixed for 10th of August. *The Supreme Court held that the*

decree nisi which was entered in this case on account of the non-appearance should be set aside.

However, I am in a view that the facts of the instant case are not favourable to the Appellant than that of the above case. The conduct of the Appellant and his Attorney-at-Law cannot be excused and the appellant had failed to adduce sufficient cause for a rehearing of the appeal.

Furthermore, there does not seem to be a material defect or error in the order of the learned District Judge. The Trial Court Judge's finding on very many primary facts need not be altered by this court. As held in ***Alwis vs. Piyasena Fernando*** (1993) 1 S.L.R. 119, generally an Appellate Court would not interfere with primary facts unless such findings are highly unacceptable or without proper reasons.

In all the above circumstances and for the above reasons, I affirm the Judgment of the learned District Judge dated 09.11.1999; and dismiss the appeal with cost.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL