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

C. A. Appeal No. 852/99 (F)

D. C. Kurunegale
Case No. 5088/P

Ratnayake Mudiyansalage Jothipala,
Dewamadde Korela,
Aluthgama.

7TH DEFENDANT-RESPONDENT-PETITIONER

Vs.

Ratnayake Mudiyansalage Kapuru Banda,
Aluthgama,
Bamunukotuwa.

PLAINTIFF-APPELLANT-RESPONDENT

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

COUNSEL : Jacob Joseph for the 7th Defendant-Respondent-Petitioner

R. J. Upali Almeida for the Plaintiff-Appellant-Respondent

WRITTEN SUBMISSIONS TENDERED ON : 13.06.2018 (by both parties)

DECIDED ON : **18.10.2018**

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M. M. A. GAFFOOR, J.

This is an appeal stemming from the judgment of the Learned District Judge of Kurunegala in respect of a Partition action bearing Case No. 5088/P. The Plaintiff instituted this action to partition the lands called 'Kadurulande' and 'Serugahamulawatte' which are depicted in Plan No. 717 dated 26th August 1974 prepared by Sarath Welagedara, Licensed Surveyor marked as 'X', produced and filed of record.

The Plaintiff filed his plaint on 24th July 1973 and the 1st, 2nd, 5th, 6th and 7th Defendants filed their amended statements on 18.08.1975, 04.12.1986 and 19.07.1989 respectively.

At the commencement of the trial, the admission was recorded as Kirihamy, Dingiri Appuhamy, Mudalihamy and their children are Kandyans. The Pedigree of the Plaintiff is not challenged by all Defendants and there was no dispute as to Kirihamy's share.

It is admitted by the contesting Defendants that said Mudalihamy by Deed of Transfer No. 232 dated 22.11.1923 transferred his interests to Ukkurala- his son and Bandi Menika his second wife. Bandi Menika's share devolved on Manikhamy whose children are the 5th, 6th, and 7th Defendants; Ukkurala's illegitimate son is Kapuru Banda- the Plaintiff.

At the end of the trial, the Learned District Judge pronounced his judgment dated 20.08.1993 and decided in favour of the Plaintiff. By the judgment and Interlocutory Decree entered in the action, the Learned District Judge directed that the corpus be partitioned among the co-owners referred to in the said judgment an the Interlocutory Decree was entered accordingly.

Thereafter, as required under the Partition Law, the final Decree was also entered giving effect to the scheme of partition approved by the Court.

Nearly six years after entering of the Final Decree, an application was made by the 5th, 6th and 7th Defendants seeking the amendment of the judgment and the Interlocutory Decree on the ground that, although Bandara Menika is referred to as the 2nd wife of Ukkurala, who was the father of the Respondent. In answering the issue 13 in the affirmative the learned District Judge has held that Bandi Menika who was the second wife of Mudalihamy.

The Judgment and the Interlocutory Decree have been entered on 20th August 1993. The application for amendment has been allowed on 14th July 1999. The order to amend the judgment and the decree has been made by the successor in office of the Learned District Judge who delivered the judgment after six years.

Being aggrieved by the said judgment, this appeal was filed by the Plaintiff praying to set aside the judgment of the Learned District Judge dated 14th July 1999.

This appeal was argued on 11.09.2012 but on that date, the Defendants were absent and unrepresented. The judgment was delivered on 06.05.2013 allowing the appeal of the Plaintiff.

Later on, an application had been preferred by the 7th Defendant-Respondent-Petitioner (hereinafter referred to as the 'Petitioner') on 31st August 2014 praying for an order to set aside the order dated 06.05.2013 under section 771 of the Civil Procedure Code, on the following grounds:

i. *The Petitioner received no notices of the date of argument of the Appeal and,*

ii. *Before the delivery of the order dated 06.05.2013, some of the parties to the appeal have died and no substitution was effected.*

In this case, the appeal had been listed *ex-parte* in the absence of the Petitioner and the judgment has been given against him, the procedure and the grounds on which that, order has to be set aside is contemplated in Section 771 of the Civil procedure Code. The section is as follows:-

> *"When an appeal is heard ex parte in the absence of the respondent, and judgment is given against him, he may apply to the Court of Appeal to rehear the appeal; and* ***if he satisfies the court that the notice of appeal was not duly served,*** *or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may rehear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him."*

However, by contrast, the Plaintiff-Appellant-Respondent (hereinafter referred to as the 'Respondent') filed his Statement of Objections to this application dated 22.01.2016. According to Respondent's version, the notice of appeal together with registered postal article were filed in the District Court of Kurunegala on 14.09.1999 and the address of the Petitioner is the same address given in the proxy filed on 01.06.1998.

This case was fixed for argument by this court and notices have been dispatched to all the parties on 20.10.2011. Some of the notices have been returned undelivered, but the notices in question served on the address given in the notice of appeal and of the proxy of the Petitioner.

However, the address given by the Petitioner in the application under Section 771 is Dewamedde Korela, Aluthgama. Since the notices served on Bamunukotuwa, Aluthgama was not returned undelivered to the Petitioner is deemed to have received such notice on that date. According to the journal entry dated 23.02.2012 the following entries have done:

> *"Matter is fixed for argument on 11.09.2012..."*

"Despite notices having been issued on the Respondents as their absent, the Registrar is directed (as a matter of courtesy) to inform the registered Attorney at Law of the Respondents of the date fixed for argument"

Therefore, this Court may presume that official act of posting and dispatch of letters to the addressee has been regularly performed.

Section 114, illustration -'d' of the Evidence Ordinance read as follows:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case."

Illustration – 'd'

"The court may presume that judicial and official acts have been regularly performed."

In ***Dharmatilake vs. Brampy Singho*** 40 N. L. R. 497, it was held that section 114 (d) of the Evidence Ordinance means that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to a case. It will therefore be apparent that there is no presumption that an act likes the act of the obtaining of consent of the child in an adoption case was done.

Our courts have applied this presumption in several contexts. As such no doubt exists in mind, as there is no other evidence to controvert that position of dispatch of letter, other than a bear denial, by the Petitioner of receiving same.

In ***Packiyanathan vs. Singarajah*** (1991) 2 S. L. R. 205, it was held that,

Relief will not be granted for default in prosecuting an appeal where -

a) The default has resulted from the negligence of the client or both the client and his attorney-at-law

b) The default has resulted from the negligence of the attorney-at-law in which event the principle is that the negligence of the attorney-at-law is the negligence of the client and the client must suffer for it.

As the applicant's default appeared to be the result of his own negligence as well as the negligence of his attorney-at-law the conduct of the appellant and his attorney-at-law cannot be excused. The appellant had failed to adduce sufficient cause for a re-hearing of the appeal.

It is necessary to make a distinction between mistake or inadvertence of an attorney-at-law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. The Court will in granting relief ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.

Considering the aforementioned facts and reasons it appears that the notices had been duly served by this Court on the parties before the date of argument.

The Petitioner's next ground of the appeal was that the **1st, 2A, 3rd and 9th Defendants** were dead at the time, the judgment dated 16.05.2013 was delivered by this court and no substitution in the room of the deceased parties had been effected before the delivery of the said judgment.

Therefore, the Petitioner produced the death certificates of the **1st, 2A, 3rd, 5th, 8th and 9th Defendants** and prayed under **Section 760A** of the Civil Procedure Code when the record became defective there should be substitution of a party who is dead and or undergone a change of status.

Section 760A of the Civil Procedure Code had been applied by this court and the Supreme Court in many cases. In ***Munasinghe and Another vs. Mohomed Jabir Navaz Carim*** (1990) 2 S. L. R. 163, the Plaintiff Respondent died in July 1980 during the pendency of an appeal lodged by the 17th and 18th defendant-appellants - petitioners on 14.11.1975. The appeal was argued on 27.01.1987 and dismissed on 27.03.1987. Counsel marked his appearance for the substituted plaintiff-respondent on 27.01.1987. Substitution had taken place on 20.11.1987 after the record was sent back to the District Court of Kalutara after the judgment of the Court of Appeal. Counsel could not have made his appearance in Court for the substituted plaintiff-respondent as no substitution had been made in terms of Rule 4 or Rule 5 of the Supreme Court Rules gazetted in Gazette Extraordinary of the Republic of Sri Lanka No. 44/23 dated 23.01.1974. The action of the counsel misled the Court and the parties to the action. Therefore, the court held that,

1. *The record was defective and the judgment delivered by the Court of Appeal was a nullity. Counsel had no status to appear for the substituted Plaintiff-Respondent as at that time no substitution had been made.*
2. *The Court has inherent powers to set aside its own judgment which is a nullity.*

In ***Karunawathie vs. Piyasena and Others*** (2011) 1 S. L. R. 171, it was held that,

> *"When a party to a case had died during the pendency of that case, it would not be possible for the Court to proceed with that matter without appointing a legal representative of the deceased in his place. No sooner a death occurs of a party before Court, his counsel loses his position in assisting Court, as along with the said death and without any substitution he has no way of obtaining instructions."*

However, I do not think that the above decisions are applicable to the instant application before this Court. I am of the view that the **5th-7th Defendants** are the only necessary parties to this appeal, since they were the only parties to whom shares were allotted of the subject matter of the present Partition action. Therefore, the death of 1st, 2A, 3rd, 8th and 9th Defendants do not make the present appeal defective.

Further, the Respondent had brought the attention of Court to the name of the 5th Defendant given in the caption ii the original appeal and of the application of the 7th Defendant is Ratnayaka Mudiyanselage Jayatilake and the death certificate of the 5th Defendant, the name of the deceased is Ratnayaka Mudiyanselage Jayatilake Banda. Therefore, the Respondent argued that the Petitioner has not proved that the 5th Defendant was dead before the delivery of the judgment. I am inclined to agree with this submission.

For the forgoing reasons, I am of the view that, the Petitioner has not proved that he had not been received the notice; and he failed to prove that the appeal is defective.

Therefore, I dismiss this application with Cost.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL