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

W.P. Karunatilleke,
No. 239, High Level Road,
Maharagama.

**Plaintiff.**

C.A. Appeal No. 494/82(F)

D.C. Badulla Case No. 10417/RE

Vs

G.R. Solomon,
No. 130/1, Spring Valley Road,
Badulla.

**Defendant**.

And Between

G.R. Solomon,
No. 130/1, Spring Valley Road,
Badulla.

(Deceased)

**Defendant-appellant.**

Clement Malkiyon Paul,
No. 130/1, Spring Valley Road,
Badulla.

**Substituted Defendant – Appellant.**

Vs

W.P. Karunatilleke
No. 239, High Level Road,
Maharagama.

**Plaintiff – Respondent.**

Before : E.A.G.R. Amarasekara J.

Counsel : Kuwera de Zoysa P.C. with Piumme Kulatilaka AAL for the Plaintiff – Respondent.

Dr. Sunil F.A. Coorey AAL for the Substituted – Defendant-Appellant.

Decided on : 2018.10.19.

**E.A.G.R. Amarasekara J,**

The Defendant- Appellant (hereinafter sometimes referred to as the Defendant) filed this appeal by the petition of appeal dated 06.09.1982 seeking inter alia the following reliefs;

1. To set aside the ex parte Judgement in the D.C. Badulla case No. 10417/RE dated 05.08.1980.
2. To permit the Defendant to file answer and defend the action.
3. To set aside the order dated 16.07.1982 delivered by the learned District Judge affirming the ex parte Judgement in the aforesaid District Court case.

However, the Defendant- Appellant had died on 06.07.1988 pending this appeal. Since, it was not brought to the notice of this Court, this court dismissed this appeal by judgment dated 08.07.1991 without substituting a legal representative in the place of the deceased Defendant-Appellant. Anyhow, later on, the grandson of the Defendant- Appellant was substituted and the appeal was relisted for argument.

Both the parties informed this court that this matter can be disposed by way of written submissions and accordingly written submissions were tendered on behalf of the substituted Defendant- Appellant as well as the Plaintiff- Respondent.

The Plaintiff Respondent (hereinafter sometimes referred to as the Plaintiff) filed the aforementioned District Court action against the Defendant for the ejectment of the Defendant from the premises No. 130/1, Spring Valley Road, Badulla on the basis of the breach of an alleged settlement entered into by them at the Badulla Conciliation Board by non-payment of rent.

As per the Journal entry dated 22.02.80, at page 11 of the appeal brief, the summons was served on the Defendant and on the default of the Defendant to

appear, the learned District Judge fixed the said case for ex parte trial, but of consent of the parties the learned District Judge set aside the order fixing for ex parte trial and a date was given to file an answer (vide Journal entry dated 23.05.1980). On 30.06.1980, another date was given to the Defendant to file answer subject to a condition that he should pay a cost of Rs.157.50 prior to filing the answer. Accordingly, the case was called on 14.07.1980 but the Defendant-Appellant failed to file his answer and pay costs as directed by the Court on the previous occasion. Furthermore, the counsel who appeared for the Defendant had informed that he would not appear for the Defendant. The court fixed the case again for ex parte trial.

On 05.08.1980, the Plaintiff led his evidence ex parte and a Judgment was entered in favour of the Plaintiff.

Pursuant to ex parte decree being served, the Defendant filed an affidavit in court to get the ex parte decree vacated and also sought permission of the District Court to file an answer. However, the Learned District Judge by order dated 16.07.1982 refused to allow the application of the Defendant which sought to set aside the ex parte Judgment.

Hence, the Defendant filed this appeal praying for reliefs mentioned before in this judgment.

The Defendant relied on the following grounds in the affidavit filed in the district court to vacate the ex parte Judgment.

1. The Plaintiff failed to comply with the provisions of Section 55(1) read with Section 49(1) of the Civil Procedure Code, which provisions require the Plaintiff to serve a copy of the Plaint or a concise statement of the Plaint translated into the Language of the Defendant.
2. The Plaintiff had not served a Notice of Termination of the Tenancy on the Defendant. Hence, no order for ejectment could be made against the Defendant.
3. The Plaintiff failed to reveal a cause of action in his plaint.

   Other than aforesaid 3 grounds the Defendant-Appellant in his appeal rely on the following new ground too.
4. Though the Plaintiff filed action before the District Court on the basis of an alleged settlement between the Plaintiff and the Defendant that took place at the Conciliation Board, no certificate of settlement issued by the Conciliation Board had been produced with the Plaint. Therefore, the learned District Judge did not have jurisdiction to entertain the Plaint or enter Judgment against the Defendant.

This Court observes that the Defendant had purged his default only by submitting an affidavit, but as per Section 86 (3) of the Civil Procedure Code, an application to purge default shall be made by a Petition supported by an affidavit. Hence the application to purge default in the District Court itself is defective.

The Defendant depends heavily on the aforementioned provisions in Section 49(1) and 55(1) of the Civil Procedure Code.

Section 49(1) of the Civil Procedure code reads as follows;

> "The Plaintiff shall endorse on the Plaint, or annex thereto, a memorandum of the documents, if any, which he has produced along with it; and if the Plaint is admitted, shall present as many copies on unstamped paper of the Plaint as there are Defendants, ***translated into the language of each Defendant whose language is not the language of the Court***: unless the Court, by reason of the length of the Plaint or the number of the defendants or for any other sufficient reasons, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required in the action, in which case he shall present such statements."

Section 55(1) provides for the issues of summons upon the Plaint being filed and copies of the concise statements required by aforesaid Section 49 presented.

The aforesaid sections provide that, when the language of the Defendant is a language other than the language of the court, a translated copy of the Plaint or concise statements of the nature of claim made to be served on the Defendant. However, this does not mean that failure to serve a translated copy itself is an incurable defect. There may be occasions when the Plaintiff is unaware of the language of the Defendant. The race of the Defendant is not definitive, though it

may be indicative, of the language of the Defendant. For example, a Tamil or a Sinhalese born and bred in a foreign country may consider the language of that country as his language and may not be familiar with Tamil or Sinhalese. It was held in Ratnasekara Vs. Miller and Co. Ltd. 44 NLR 520, that the words "Language of the Defendant" in Section 55 of the Civil Procedure Code mean the Language the Defendant understands and they do not necessarily mean the language of the race to which the Defendant belongs.

It is my considered view that, if there was a defect in serving summons without a translation of the Plaint it could have been corrected by bringing it to the notice of the District Court. Though the Defendant appeared in Courts and gave a proxy to a Lawyer, neither he or his Lawyer has complained that he could not understand the language of the Plaint. There is nothing on record to show that he or his registered attorney was unable to understand the contents of the Plaint. However, the counsel for the Plaintiff – Respondent has brought this Court's attention to the fiscal report dated 18th February 1980 (vide page 98 of the appeal brief) where it is specifically stated that the Defendant was served with a copy of the Plaint as well as a translated copy of the same on the date the summons was served by the fiscal. No evidence was led before the learned District Judge to show that this fiscal report is false and untrue. Even the learned District Judge has referred to this fiscal report in his order dated 16.07.1982. This Court further observes that, on a previous occasion too, an order fixing the case for ex parte trial was vacated on the request of the Defendant and he was permitted to file an answer which he failed to do. He further has failed to pay the costs ordered to pay prior to filing of the answer.

One of the contentions of the Defendant is that he was not served with a Notice of Termination of Tenancy before filing the action in the District Court. Whether the Defendant was served with a Notice of Termination of Tenancy is a matter of fact that has to be adjudicated by a court of first instance. If the Defendant wanted to challenge the Plaint on this ground he should have filed an answer and challenge. On the other hand, the Plaintiff has filed his action on arrears of rent based on a breach of an agreement arrived at the Conciliation Board. As per the Plaint the Defendant had agreed to be ejected when he was in arrears of payment. The Defendant has not taken steps to file answer and challenge the validity of this agreement before the learned District Judge.

Though the Defendant took up a position that the Plaintiff had failed to reveal a cause of action in her affidavit filed in the District court to get the ex parte Judgement vacated, it is clear from the averments in the Plaint that there is a cause of action revealed on the grounds of a breach of agreement entered at the Conciliation Board and nonpayment of rent to the premises referred to in the Plaint.

The Defendant in his appeal contends that even though the Plaintiff filed an action before the District Court on the basis of a settlement arrived at the conciliation Board, the Plaintiff has failed to produce a certificate issued by the Conciliation Board.

This Court observes that this is not a ground raised before the District Court to purge default. Whether the Plaintiff produced a certificate or not is a question of fact which has to be attended by the original Court. Therefore, in a way this is a new ground based on facts raised for the 1st time in appeal. The Plaintiff Respondent has brought this Court's attention to the decisions in Somawathie Vs Wilmon and others 2010(1) SLR 128, Talagala Vs. Gangodawila Co-operative Stores Society Ltd 48 NLR 472, Gunawardena Vs. Deraniyagala and others S.C (application) No. 44/2006 which confirm the view that a new ground, which is not a pure question of law, cannot be considered for the first time in appeal unless it has been put forward as an issue in the Court below.

However, Section 14 of the conciliation Board act No. 10 of 1958 reads as follows;

> "14 (1) where a panel of conciliators has been constituted for any Conciliation Board area,
>
> (a) No proceedings in respect of any dispute referred to in paragraphs (1),(b) and (c ) of Section 6 shall be instituted in, or be entertained by a civil Court unless the person instituting such proceedings produces a certificate from the chairman of such panel that such dispute has been inquired into by a conciliation Board and it has not been possible to effect a settlement of such dispute by the Board, or that a settlement of such dispute made by a conciliation Board has been repudiated by all or any of the parties to such settlement in accordance with the provisions of Section 13."

Section 13 provides for repudiation of a settlement if one does not wish to honour it. Aforesaid Sections show that the certificate is needed only when;

a. Proceedings are in respect of any dispute referred to in paragraphs (a), (b) and (c) of section 6 of the said act and
b. It has not been possible to settle the dispute or
c. The settlement has been repudiated by a party who does not want to honour it.

This matter does not fall within the aforementioned category (b). On the other hand, the Plaintiff has been trying to enforce the terms relating to non- payments of rent. If there was anyone who wanted to dishonour the settlement and repudiate it, it was the Defendant not the Plaintiff and as per the provisions in the Conciliation Board Act, he had to do it within 30 days from the date of settlement. On the other hand, It was the duty of the chairman of the Conciliation Board to transmit the settlement to the relevant court which shall consider it as a decree of that court( Vide section 13 of the said Act).In such a situation the only defence that could have been taken in the answer was that either he complied with the terms of settlement or there was no such settlement before the Conciliation Board that had been transmitted to the relevant court. Therefore, I do not see any merit in the argument based on the new ground raised in this Appeal. On the other hand, as per the decision in Rodrigo V Raymond (2002) 2 SLR 78, which was decided in respect of the absence of a certificate of non-settlement from a Mediation Board, such a lapse only give rise to a latent lack of jurisdiction. In such a situation the Defendant should have first raised an objection to the jurisdiction of the District

Court there itself. Now he cannot challenge the jurisdiction for the first time in appeal as it is not a patent lack of jurisdiction.

For the foregoing reasons, I do not see any merit in this appeal to interfere with the Judgment and Order dated 16.07.1982 of the learned District Judge of Badulla.

Hence this appeal is dismissed with costs.

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E.A.G.R. Amarasekara
Judge of the Court of Appeal.