

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

Srimathie Mallika Edirisuriya,
Edirigiri, Kebellawala South,
Bandarawela.
Defendant-Appellant-Petitioner

CASE NO: CA/307/1996/F

DC MONARAGALA CASE NO: 1494/L

Vs.

Edirisuriya Mudiyanseage Kiri
Banda Edirisuriya,
Kebellawala South,
Bandarawela.
Plaintiff-Respondent (Deceased)

Ananda Vipulasena Edirisuriya,
Edirigiri, Kebellawala South,
Bandarawela.

Nihal Gotabhaya Edirisuriya,
Haputale Road,
Malwaththawela,
Wellawaya.

Iranganie Vichithra Edirisuriya,
Edirigiri, Kebellawala South,
Bandarawela.

Chintha Chandrani Edirisuriya,

Badulla Road, Kumbalwela,
Bandarawela.

Substituted Plaintiff-Respondent-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandarathne, P.C., with Anil Rajakaruna
for the Defendant-Appellant-Petitioner.

Buddhika Gamage for the Substituted Plaintiff-
Respondent-Respondents.

Decided on: 01.11.2018

Samayawardhena, J.

The defendant-appellant has filed this appeal against the order of the learned Additional District Judge of Monaragala dated 07.02.1996 whereby the application of the defendant to set aside the *ex parte* Judgment entered against her was dismissed.

Before the matter was taken up for argument, the appellant made an application in terms of section 773 of the Civil Procedure Code to adduce fresh evidence in appeal. The fresh evidence is to tender some documents to show that, with regard to the same subject matter, there was a subsequent litigation between the same parties, and it was finally decided in favour of the appellant.

Even if this is correct, it has nothing to do with the instant appeal, which is, as I stated earlier, against the refusal to vacate the Judgment entered *ex parte*.

At this stage, the Court will only consider, in terms of section 86(2) of the Civil Procedure Code, whether there were reasonable grounds for such default. The merits of the case of the appellant will not be considered at this stage.

It is well settled law that an *ex parte* Judgment cannot be canvassed on merits before the District Court or before this Court on appeal, except in a revision application filed before this Court. In fact, if the defaulter is successful in purging default, the Judgment will automatically be set aside regardless of its merits. (*Vide Mrs. Sirimavo Bandaranayake v. Times of Ceylon Limited* [1995] 1 Sri LR at 34-35, *Arumugam v. Kumaraswamy* [2000] BLR 55)

In *Ladd v. Marshall* (1954) 3 All ER 745 at 748 Lord Justice Denning stated as follows:

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

This test has consistently been adopted and applied by our Courts when deciding whether or not fresh evidence shall be allowed in appeal. (*vide Ratwatte v. Bandara* (1966) 70 NLR 231, *Beatrice Dep v. Lalani Meemaduwa* [1997] 3 Sri LR 379, *Rev. Kiralagama Sumanatissa Thero v. Aluwihare* [1985] 1 Sri LR 19,

Wijeyakoon v. Wijeyakoon [1986] 2 Sri LR 325, Ekanayake v. Ratranhamy [2012] BLR 19, Jayasekera v. Appuhamy CA No.250/1997(F) decided on 14.10.2011, Agnes v. Piyasena CA No.731/1993(F) decided on 27.09.2007)

There is no doubt that the appellant is unable to satisfy the second requirement.

If the appellant thinks that the subsequent litigation finally decided the rights of the parties in respect of the same subject matter and therefore this appeal is redundant, the appellant can simply withdraw this appeal without further ado.

For the aforesaid reasons, the application of the appellant dated 10.03.2018 to adduce fresh evidence in appeal is dismissed with costs.

Judge of the Court of Appeal