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

CA 345/96 (F)

D. C. Horana Case No. 4891/L

Ambawalage Alawathie
Venivelpitiya, Godaudawatta,
Halthota

Plaintiff

Vs.

1. Alankarage Kusumawathie
2. Alankarage Leelaratne

Defendants

AND NOW

1. Alankarage Kusumawathie
2. Alankarage Leelaratne

Both of No. 73, Raigam
Thuduwa, Badaragama

Defendant-Appellants

Vs.

Ambawalage Alawathie
Venivelpitiya, Godaudawatta,
Halthota

Plaintiff-Respondent (Deceased)

Ambawalage Leelaratne
No. 432/B/2, Seven Acres,
Batagoda,
Galgama

Substituted Plaintiff-Respondent

BEFORE	:	**M. M. A. GAFFOOR, J.**
COUNSEL	:	Bimal Rajapakse for the with Amrit Rajapakse for the Defendant-Appellants Thamali de Alwis with Sanjaya Kannangara for the Substituted Plaintiff-Respondent
ARGUED ON	:	12.06.2018
WRITTEN SUBMISSIONS TENDERED ON	:	12.07.2018 (by both Parties)
DECIDED ON	:	**15.11.2018**

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M. M. A. GAFFOOR, J.

This an appeal preferred by the Defendant-Appellants (hereinafter referred to as the "Appellants") against the judgment pronounced on 22.12.1994 by the learned District Judge of Horana in case bearing No. 4891/L in respect of a land and premises in suit.

The Plaintiff-Respondent (now deceased) instituted an action by her plaint dated 16.07.1996 praying *inter alia* that for:

1. A declaration that she is the owner of the land and premise described in the schedule of the plaint namely the land called Pelawatta alias Gonnagahawatta, Lindamulawatta and Upasakayawatta containing in extend about 6 Acres including a thatched house with two rooms occupied by the Defendants;

2. Ejectment of the Defendants; and
3. Damages and other incidental reliefs.

It is seen from the journal entries of the District Court Case that the Appellants had filed a proxy and moved time to file their answer on four occasions but they had failed to do so. On the 4th day, as per journal entry No. 08 (page 10 of the appeal brief) the learned District Judge has generously given a further final date to do the same. Even on the last occasion, they had not taken any steps to file answer and instructing Attorney for the Appellants also informed the Court that he had not been given any instructions. Therefore, the action was fixed for *ex-parte* trial on 06.12.1994. When the case was taken up for trial, the Appellants were absent and the *ex-parte* evidence of the Plaintiff-Respondent (hereinafter referred to as the "Respondent") had been led and the judgment was reserved for 22.12.1994. On 22.12.1994 the learned District Judge had delivered his judgment in favour of the Respondent

Consequently, the 1st Appellant filed an application by way of petition and affidavit dated 28.09.1995 to purge her default. At the inquiry held regarding the same, only the 1st Appellant testified and she led no corroborative evidence and no documents were marked (*page 41-49 of the appeal brief*). The 1st Appellant at the above said inquiry did not satisfy the Learned District Judge and hence the learned District Judge by his Order dated 25.04.1996 dismissed the application of the 1st Appellants. Thereby, the Appellants have preferred this appeal against the said Order.

In this appeal, this court observed that even the Appellants had obtained several dates to file their answer they had failed to do so. Therefore, I am of the view that the Appellants had not diligently pursued their case. The learned District judge had been too lenient on the Appellants by granting five dates to file their answer.

The learned Counsel for the Appellants submitted that *despite the fact, the ex-parte judgment cannot stand since, the Appellants being admittedly the licensees of the Respondent; the Respondent has failed to produce a document (letter) by which she (the original Plaintiff-Respondent) terminates the leave and license given by her to the Appellants thus, it was further submitted by the Appellant, that on this sole ground the ex-parte judgment was defective and must be vacated and the Appellants must be allowed to re-open the Case.*

However, I am of the opinion that the above mentioned argument is a question of fact and it was not a solid ground to interfere with the finding of trial court. Therefore, this Court further observed that the litigation on these types of actions should not be protracted, which leads to unfairness on the part of the Plaintiff (Respondent), and may result in loss of confidence in the system. *S. G. Norton* had observed that (these types of trials) indefinitely prolonged results in great detriment to the public and the vexation and expenses of suitors.

It is to be stressed that the observations of G. P. S. De Silva, C. J. in ***Alwis vs. Piyasena Fernando*** (1993) 1 S. L. R 119, when he emphasized that:

> *"It is well established that findings of primary facts by a trial Judge who hears and sees witness are not to be lightly disturbed on appeal"*

In ***Fradd vs. Brow and Co. Ltd.*** 20 N. L. R 282 it was held that,

> *"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present..." (Page at 283)*

In the above back drop, this Court in position that there is no valid reason to interfere with the above *ex-parte* Judgment of the Learned District Judge of Horana.

Therefore, I dismiss this appeal without Costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL