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

In the matter of an Application for Restitutio in Integrum and/or Revision in terms of Article 138 of the Constitution.

CA RII No/ 134/14

DC Moratuwa
Case No: 227/SPL

Lal Amarasinghe
113/9, Duwawatte Road,
Moratuwa

Plaintiff

Vs.

1. Shashika Wickremasinghe,
   113/8, Duwawatte Road,
   Moratuwa.

2. Moratuwa Municipal Council,
   Moratuwa.

Defendants

AND NOW BETWEEN

Shashika Wickremasinghe,
113/8, Duwawatte Road,
Moratuwa.

1st Defendant- Petitioner

Vs.

1. Lal Amarasinghe
   113/9, Duwawatte Road,
   Moratuwa.

Plaintiff- Respondent

2. Moratuwa Municipal Council,
   Moratuwa

2nd Defendant- Respondent-Respondent

AND NOW BETWEEN

Shashika Wickremasinghe,
113/8, Duwawatte Road
Moratuwa.

1st Defendant-Petitioner-Petitioner

1. Lal Amarasinghe
   113/9, Duwawatte Road,
   Moratuwa.

Plaintiff- Respondent- Respondent

2. Moratuwa Municipal Council,
   Moratuwa.

2nd Respondent- Respondent

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Upul Kumarapperuma with Shellamy Gunarathna for the 1st Defendant- Petitioner
Dilan Perera for the Plaintiff- Respondent

Written Submissions On : 06.09.2022 (by the Petitioner)
06.09.2022 (by the Plaintiff- Respondent-Respondent)

Argued on : 28.07.2022

Decided on: 26.09.2022

B. Sasi Mahendran, J.

The 1st Defendant-Petitioner-Petitioner (hereinafter referred to as "the 1st Defendant") by Petition dated 08th May 2014, prays for this Court to exercise its restitutionary jurisdiction in terms of Article 138 of the Constitution to set aside the Order of the learned Additional District Judge of Moratuwa dated 21st June 2011 (as per Journal Entry No. 19) to hear the matter ex parte on the ground that he mistakenly applied Section 84 of the Civil Procedure Code.

The substantial point for consideration is when the Registered Attorney informs the Court that she has no instructions then what is the Order the learned Trial Judge could make? Should it be an Order to hear the case ex parte or inter-partes?

The facts of this case, in brief, concern an action instituted by the Plaintiff-Respondent-Respondent (hereinafter referred to as "the Plaintiff") against the 1st Defendant and the 2nd Defendant-Respondent-Respondent to restrain the 1st Defendant from constructing a house on premises, adjacent to that of the Plaintiff's, and within a 120 feet radius from the Bolgoda River, above the height of 27 feet. In terms of Circular No. 17 dated 29th November 2006 (marked "A2") issued by the Urban Development Authority, any building constructed within an 80 to 120 feet radius of the riverbank cannot exceed 27 feet. Upon the Plaintiff's application for interim relief being supported

ex parte, a notice of interim injunction was issued on the 1st Defendant. The 1st Defendant filed his statement of objections stating that requisite approvals from the Urban Development Authority and the Municipal Council to construct to a height of 39 feet had been obtained.

The trial was to take place on 15th November 2010, but it was postponed on personal grounds of the Counsel for the 1st Defendant. On the next date of trial (i.e. 22nd February 2011), the case was re-fixed for 20th May 2011 since there was a possibility of a settlement. On 20th May 2011, the Court was informed that no settlement was forthcoming, and the trial was fixed for 21st June 2011. On that day, the case was re-fixed for ex parte hearing on 18th July 2011 as the Registered Attorney for the 1st Defendant informed Court that she had not received instructions. The case was tried ex parte on 14th October 2011. The Plaintiff gave evidence. On being satisfied that the Plaintiff was entitled to the relief claimed, the learned Additional District Judge entered judgment on 11th November 2011 in favour of the Plaintiff. Consequently, a copy of the decree was served on the 1st Defendant.

The 1st Defendant then filed a Petition (dated 04th April 2012 – marked "A8") in terms of Section 86(2) of the Civil Procedure Code to vacate the judgment and decree. The 1st Defendant claimed that a serious illness prevented him from participating in the trial and giving instructions to his Attorney-at-Law. An inquiry was conducted, at which the 1st Defendant, a Radiologist, and an X-Ray Technician gave evidence. On 31st March 2014, the learned Additional District Judge refused the application to vacate the judgment and decree.

The 1st Defendant is thus before this Court seeking restitutio-in-integrum on the basis that the learned Trial Judge misconstrued the law by, among other things, deciding to hold an ex parte trial.

Section 84 of the Civil Procedure Code which deals with the default of a Defendant reads:

If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to ***appear*** *on the day fixed for the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day*

fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex pane forthwith, or on such other day as the court may fix. [emphasis added]

On the day in question, the Journal Entry notes that the Registered Attorney appeared on behalf of the 1st Defendant. However, the Registered Attorney informed Court she had no instructions. The Journal Entry reads:

"1 වන විත්තිකරු උපදෙස් නොමැති බව නීතී. ගංගා මිය කියා සිටී. 1,2 විත්ති නැත.

ඒ අනුව ඒ.ප.වි. නියම කරමි.

ඒ.පා.වි . 18.07.2011"

The term "appear" must be interpreted to mean an appearance by the Registered Attorney of the 1st Defendant. As a result, the appearance of the Registered Attorney for the 1st Defendant alone in the absence of the 1st Defendant itself constituted a valid appearance. This is buttressed by the following line of authorities:

In Perumal Chetty v A. Goonetilleke 4 Balasingham's Reports 2, his Lordship Hutchinson C.J. treated an appearance of the Proctor as the appearance of the Defendant.

In Cannon v. Telesinghe 30 NLR 372 his Lordship Akbar J. held:

"Prima facie, therefore, the words "the defendant shall not appear or sufficiently excuse his absence" can only mean the defendant shall not appear in person or by Proctor or sufficiently excuse his absence when he does not so appear.

Mr. Ranawaka, however, referred me to a case reported in 3 Browne's Reports 1. It is true that Browne A.J. construed the word "appearance" as meaning "being personally present," but it will be seen from his judgment that his remarks are really obiter. I, therefore, prefer to follow the later judgment of Hutchinson C.J. reported in 4 Balasingham's Reports 2, where he expressly held the contrary."

In Alima Umma v. Siyaneris [2006] 1 SLR 22, his Lordship Amaratunga J. held:

"In terms of Section 24 of the Civil Procedure Code, the registered attorney or an attorney at law instructed by the registered attorney can represent a party to the action in Court. If the registered attorney is in Court and represents the party in Court, that is an appearance for the party even if the party is not physically present in Court. Andiappa

Chettiar vs Sanmugam Chettiar. In such a situation a Court cannot dismiss the action for the absence of the party."

In Kandasamy v. Kandasamy [2006] 2 SLR 260 his Lordship Wimalachandra J. held:

"However, on the trial date if the defendant does not appear but an Attorney-at-Law appears on his behalf and acts and pleads on his behalf, the defendant is deemed to have duly appeared before Court……

When sections 84 and 144 of the Civil Procedure Code are read with section 24 of the Code, it appears that it is not necessary for a defendant to be present in person, but he is deemed to have duly appeared before Court when he is represented by the registered Attorney-at-Law or an Attorney-at-Law on the instructions of his registered Attorney-at-Law."

The reason Courts have given such an interpretation is because of **Section 27 of the Civil Procedure Code** which deals with the appointment of a Registered Attorney. This Section reads:

1) *The appointment of a registered attorney to make any appearance or application, or to do any act as aforesaid, shall;*

   …….

   …….

   …….

   …….

2)

a) *Where a party who appoints a registered Attorney is a natural person, a memorandum nominating a legal representative for the purpose of the legal proceedings in the event of the death of such party before the final determination of the proceedings, shall also submitted.*

b) *The memorandum referred to above shall, substantially be in the form specified in From No. 7A of the First Schedule hereto.*

c) The Provisions of Section 393 shall apply in regard to the nomination of such legal representatives and filling of such memorandum.

3) When an appointment under subsection (1) is filed, an appointment of a registered attorney shall be in force until-

a) Revoked by the client in writing with the leave of the court and after notice to the registered attorney in writing signed by the client and filed in court;
b) Revoked by the registered attorney;

i. In writing signed by the client and filed in Court;
ii. With leave of the court having given thirty days' notice to the client;

c) the client dies;
d) the death or incapacity of registered attorney; or
e) All proceeding in the action are ended and judgment satisfied so far as regards the client.

This Section was analysed in the case of Manamperi Somawathie v. Buwaneswari [1990] 1 SLR 223. His Lordship H.W. Senanayake J. held:

"*A consideration of section 27 (1) shows that the appointment of a registered attorney to make any appearance or application or to do any act as aforesaid shall be in writing signed by the client and shall be filed in Court; when filed it shall be in force until revoked with leave of the Court, after notice to the registered attorney by a writing signed by the party and filed in Court. The proxy so filed is binding on the party until the party dies or until all proceedings in the action are ended and judgment satisfied so far as regards the party*."

His Lordship further held:

"It is therefore clear from these provisions of the Code, that once a registered attorney is on record the party could necessarily act only through the registered attorney. Any other interpretation would cause confusion in the original Courts and in the administration of justice. If a party is permitted to file legal documents and motions when his registered attorney was on record, this would disrupt the smooth working in Courts. I am of the view that it was not the intention of the legislature to allow the party to

personally present the notice of appeal and sign the petition of appeal when the registered attorney was on record. It is my considered view that a party appellant is entitled to present and sign the relevant notice and petition of appeal respectively, only when there is no registered attorney on record at the time tendering the notice of appeal and petition of appeal."

His Lordship cited with approval a passage from the judgment in Seelawathie v. Jayasinghe [1985] 2 SLR 266 in which his Lordship Seneviratne J. held:

"When a party to a case has an attorney-at-law on record, it is the attorney-at-law on record alone, who must take steps, and also whom the Court permits to take steps. It is a recognised principle in Court proceedings that when there is an attorney-at-law appointed by a party, such party must take all steps in the case through such attorney-at-law. Further, the principle established in a court is that if a party is represented by an attorney-at-law such a party himself is not permitted to address Court. All the submissions of the party must be made through the Attorney-at-law who represents such a party."

This was made clear by his Lordship Dr. Amerasinghe J. in Fernando v. Sybil Fernando [1997] 3 SLR 1:

"A litigant has a statutory right to act for himself unless the law provides otherwise: (section 24 CPC). Therefore, there is no difficulty in understanding why, in section 755 (1), it is stated that a notice of appeal may be signed by the appellant or his registered attorney: if he had been acting for himself at the trial, he may himself sign the notice of appeal. A litigant may, however, elect to act through a registered Attorney-at-Law. If he elects to act through a registered Attorney-at-Law, he must formally appoint such an attorney in writing and file the instrument of such appointment in court: (section 27(1) (CPC). When so filed, such an instrument shall be in force, unless revoked, or until the" client or registered attorney dies or becomes incapable to act or until all proceedings in the action are ended and judgment satisfied so far as regards the client: (section 27 (2) CPC).

So long as such an instrument of the appointment of a registered Attorney-at-Law is in force, a litigant who has executed such an instrument must act through his registered attorney until all proceedings in the action are ended and judgment satisfied so far as regards that litigant: While the proxy is in force, he cannot himself perform any act in court relating to the proceedings of the action:" [emphasis added]

As a result, his Lordship held that when there is an Attorney on record the notice and petition of appeal must be signed by such Attorney and by no one else. The rationale as explained by his Lordship is:

"*The protective character of the laws of civil procedure, among other things, requires orderliness so that there might be clarity and certainty and no confusion. If a party is dissatisfied with his registered attorney, he is at liberty to revoke the proxy filed in court and either appoint some other attorney or act for himself. If the registered attorney dies, or is removed or suspended or otherwise becomes incapable, he may either appoint some other attorney or act for himself. However, that must be done in the manner prescribed by sections 27 and 28 of the Civil Procedure Code, for justice, in my view, requires that the work of a court must be conformable to laws, including civil procedure laws."*

Thus, the appointment of a Registered Attorney to make an appearance or application or do any act on behalf of the party appointing the same by way of a valid proxy the legislature in its wisdom has envisaged for this bond to be broken only in limited circumstances, as set out above. In the absence of such circumstances then such party must take all steps in the case through such party's Registered Attorney.

The issue then is whether the presence of a Registered Attorney in Court who merely says she has no instructions should be treated as an "appearance" or should the Registered Attorney explicitly state that she is not appearing for her client? This question was considered in the following cases.

In Porolis Silva v. Porolis Silva (reported in the Times of Ceylon Law Reports Vol. 1 Part 1V at p. 20) the Defendant's Proctor, on the date of trial, said he has no instructions, and judgment was entered for the Plaintiff. The Defendant moved the Court to set aside the judgment. The learned District Judge held that he could not set aside the judgment made inter partes. On appeal, it was urged that the judgment was not inter partes as the appearance of the Proctor was merely a casual one. His Lordship Ennis J. held that such an appearance in which the Proctor on the record said he had no instructions is not merely a casual one. The judgment for the Plaintiff is a judgment inter partes.

A four-bench division of the Supreme Court in Andiappa Chettiar v. Sanmugam Chettiar 33 NLR 217 clarified the ambiguous position. His Lordship Macdonell C.J. held:

"Consequently it seems but reasonable that the proctor should have the right to inform the Court that, though he is physically present, he does not on this occasion appear for the defendant whose case has just been called. ***But it seems to me that it is his duty to make it clear that he does not on this occasion appear for that client, and that if he does not so make it clear, his presence in Court will ipso facto be an appearance for that client****. A few words only will be necessary, provided that they make it clear that he does not on this occasion appear for his client, and he can add, if he so desires, the reason why, which in the great majority of instances will be that he is without instructions,* ***but those few words making it clear that on this occasion he does not appear for his client are necessary and must be uttered, otherwise his presence in Court must be reckoned an appearance for his client****." [emphasis added]*

His Lordship further held:

"The substance of what he says will of course be entered forthwith in the journal of the case. This rule, if adhered to, will be a minimum of extra trouble to proctors, and to the secretary of the Court alike, but it is a rule necessary to be observed in all such cases- i.e., proctor present when case is called but defendant absent-since the Court must be informed whether the proctor though present yet is not appearing for defendant on that occasion, and it is a rule which must be observed to prevent dispute arising thereafter as to whether there was or was not, when the case was called, an appearance for defendant therein."

In Isek Fernando v. Rita Fernando [1993] 3 SLR 29 his Lordship Jayasinghe J. held:

"Section 84 read with section 24 defines what constitutes appearance. What it says by "appearance" is that an appearance may be by the party in person or by his counsel or his Attorney and therefore where the defendant is absent but is represented by counsel or by Attorney-at-law and the Court is satisfied on the evidence adduced by the plaintiff, Court must enter a final judgment and not an order nisi as in the earlier instant. Judgment must be considered as being pronounced inter-partes and not ex parte."

In Jayawardana v. V.A.K. Cicilin Nona alias Pesonahamy (CA Appeal No. 249/1999(F) decided on 27.01.2012 reported in 2012 BLR 361) his Lordship Anil Gooneratne J. held:

"The Attorney-at-Law on record for the Defendant was duly appointed in terms of Section 24 of the Civil Procedure Code. As such law requires the Attorney-at-Law to

appear, unless one could prove the converse of the dicta in the case of Andiappa Chettiar Vs. Sanmugam Chettiar. The proceedings of the day does not indicate that the Attorney at Law in no uncertain terms informed court that he is not appearing for the Defendant. The dicta in the above cases requires the Proctor to very clearly express such view or make such application, to enable the Original Court Judge to decide either way……. It is unfortunate that for reasons best known to the learned Attorney at Law on the date of trial, informs court that he has no instructions, but continued to look after the interest of his client on all subsequent stages of the case. This attitude of Attorney at Law might lead the court to be mislead and also his client."

This judgment was affirmed by the Supreme Court in SC Appeal 190/2012 decided on 05.05.2016, relied on by the learned Counsel for the 1st Defendant. His Lordship K.T. Chitrasiri J. held:

"Both in the journal entry and in the proceedings recorded on 27.05.1997 show that Mr. Junaideen Attorney-at-law, on that date, he being the proxy holder had marked his appearance on behalf of the respondent. Even the answer of the respondent had been filed under his name. Having marked his appearance for the respondent, he has merely submitted that the respondent had not given him instructions to appear on that particular date.

Authorities referred to above show that the trial judge, under those circumstances should have taken up the matter considering it as an inter-partes trial and allowed the counsel to cross examine the witness."

Her Ladyship Eva Wanasundera P.C. J. in SC Appeal 147/16 decided on 24.11. 2017 observed:

"The learned High Court Judges have concluded in the case in hand that, "the learned Attorney at Law who appeared for the 1st Defendant on 25.08.2006 ***had clearly said that he does not appear. Therefore the 1st Defendant was neither present nor represented on that occasion which being the date for hearing, the court had every right to fix the matter ex parte against him." I agree with that finding of the High Court*** *which has come to that conclusion after having considered the two judgments in the cases of Andiappa Chettiyar Vs Shanmugam Chettiyar 33 NLR 217 and Isek Fernando Vs Rita Fernando and Others 1999 3 SLR 29."* [emphasis added]

His Lordship A.H.M.D. Nawaz J. in CA Case No. 994/1997(F) decided on 21.11.2018, summarised this position of law thus:

"It is thus acknowledged in this country that a mere statement from the bar that a particular counsel or registered attorney has no instruction is not enough to constitute a non appearance of the party. It is yet an appearance of the party. If it is intended that the recognized agents I have mentioned above do no longer appear for the party, they must inform Court that they do not appear for the party."

The Registered Attorney present in Court at the time when the case is called must clearly state that she is not appearing for the party concerned. Merely stating that the Registered Attorney has no instructions will not suffice. A clear utterance that the Registered Attorney is not appearing is what a plethora of case law has time after time held to be the requirement.

In terms of Section 88(2) of the Civil Procedure Code, there is a statutory right to appeal against an order refusing to vacate the ex parte judgment and decree. However, when the original order of the learned District Judge to hear the matter ex parte is erroneous and goes to the root of the case it is a nullity. Consequent orders would be nullified as well. As his Lordship A.H.M.D. Nawaz J. in CA Case No. 994/1997(F) (supra) put it: "*If there was no default to purge, there could not be a purge default inquiry*."

When injustice and grave prejudice has occurred to the party applicant as a result of the Court's erroneous application of the law this Court can exercise its restitutionary jurisdiction to remedy that injustice caused.

Therefore, we set aside the entire proceedings from the 21st of June 2011 and direct the learned District Judge to recommence the trial inter-partes and further direct that this matter is tried expeditiously. We make no order for costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL