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

In the matter of an application for revision and or restitutio in intergrum in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Aganpodi Gauthamadasa Mendis Gunasekera, "Navodaya", Wijeratna Mawatha, Rathgama.

Plaintiff-Petitioner

Case No. : CA/RII/0010/2018

Vs

DC Moratuwa, Case No. 212/16/RE

Rathnaseeli Perera, No. 63, Medhananda Mawatha, Lakshapathiya, Moratuwa.

1st Defendant-Respondent

And two others

Before: Hon. D.N. Samarakoon, J.

Hon. Neil Iddawala, J.

Counsel : Ranga Dayananda with Yashoda Ramanayake for Plaintiff Petitioner.

S. A. D. S. Suraweera for the 1st Defendant-Respondent.

Argued on: Parties agreed to dispose the case on Written submissions.

Written submissions tendered on: 18.05.2023 by the Petitioner

11.05.2023 by the 1st defendant-Respondent.

Decided on: 05.07.2023

D.N. Samarakoon, J.

Judgment

Tie a Yellow Ribbon Round the Ole Oak Tree Lyrics

Im coming home ive done my time

Now I've got to know what is and isn't mine

If you received my letter telling you I'd soon be free

Then you'll know just what to do, if you still want me…

According to the song, the singer has asked his wife to tie a Yellow ribbon round the ole Oak tree, if she still wants him. When the bus comes to the Oak tree, he sees "A hundred yellow ribbons round the ole oak tree!"

According to the plaintiff petitioner in this case, when he came home after serving a jail term of 19 years in Thailand, from 1997 to 2016, he saw his wife, the 1st defendant having married another person and given birth to a child and that the house has been leased to the 2nd and 3rd defendants.

He instituted case No. RE 212/2016 to eject defendants. The 1st defendant said that she has contributed one half to build the house. The 2nd defendant wanted him to be discharged from proceedings. The 3rd defendant took up the position that he is in occupation under a lease agreement.

The third date of trial was for 01st November 2017. The trial was at Moratuwa. The plaintiff was coming from Balapitiya. He was not there in Court when the case was called. But his Counsel appeared.

This is how the 1st defendant respondent described what happened in her written submissions before this Court,

> "7. Thereafter when the case was taken up for trial on 01.11.2017, the counsel for the petitioner had been present in Court but the petitioner has been absent and the learned counsel has informed the trial Court that plaintiff was absent and he is unable to inform as to the reason for his absence and also had informed Court that as his instructing Attorney at Law was on Maternity leave he could not obtain instructions from the said instructing Attorney at Law and hence had further informed the trial Court that in any event he is only ready to frame issues in the case and moved for a postponement of the trial on the said grounds".

The defendants objected and the learned District Judge dismissed plaintiff's action. The plaintiff petitioner asks for the setting aside of that order by the present application.

It is also stated in the above written submissions of the 1st defendant respondent,

> "15. It is very respectfully submitted that on perusal of the proceedings dated 01.11.2017, it will be observed that on the said date of trial, the plaintiff was absent but an Attorney at Law had appeared in the case.
>
> 16. Under the said circumstances, it is pertinent to arrive at a conclusion as to whether there was a proper representation on behalf of the plaintiff on the said date before the trial Court and the said fact plays a very vital role in the instant case".

The plaintiff petitioner cites the following case,

Andiappa Chettiar vs. Sanmugam Chettiar 33 NLR 218,

Divisional Bench, Macdonell C. J.,

> "the presence in Court, when a case is called, of the Proctor on record constitutes an appearance for the party from whom the Proctor holds the proxy, unless the Proctor expressly inform Court that he does not, on that occasion, appear for the party".

Hence, when a lawyer appears, unless he says that (1) he has no instructions and (2) he does not appear it constitutes an appearance and the party is not at default which could not be dismissed under section 87(1) of the Civil Procedure Code.

However, in the above case, it was the Proctor of record who appeared. In the present case, it was the Counsel. Would that make a difference?

The Registered Attorney at Law was on Maternity leave. That does not make her proxy invalid because it is only a temporary inability to appear. The fact that Counsel has appeared signifies that he had instructions given earlier to appear, for otherwise he would not have appeared. His inability to proceed with the trial was, because, a trial usually needs the calling of witnesses and neither the plaintiff, nor any of his witnesses were present. But his indicating that he can record admissions and issues means that he had instructions (notwithstanding his saying that he could not get instructions from the Registered Attorney at Law on Maternity leave) to "appear". Hence, it was an appearance and the action could not have been dismissed under section 87(1) which says,

> "87(1) Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action".

Furthermore, since there was an "appearance" the dismissal was inter partes.

Gamini Amarathunga J., held that,

> "When an action is dismissed in the presence of a party's lawyer after refusing an application for a postponement it is not an order made for default. The order dismissing the action had been made inter partes. Such

an order cannot be set aside under section 87(3). The remedy of the plaintiff is a final appeal....*Don Gamini Abeysundara vs. Malalage Gunapala, C. A. No. 676/2001, C. A. minutes dated 19.01.2004*.

Therefore, the petitioner could not have made an application under Chapter XII section 87(3).

Hence what is said in 1st defendant respondent's written submissions at paragraph 21 cannot be accepted.

> "21. It is further submitted that in view of the above submissions, the plaintiff ought to have proceeded with his application to vacate the order of the learned trial judge dated 01.11.2017 under the provisions of Chapter XII of the Civil Procedure Code instead of preferring the instant application to Your Lordships Court as there is an alternative remedy available to him".

The remedy under section 87(3) was not available. What was available was a final appeal. The plaintiff has not appealed. But a revision is an available remedy. According to the caption the plaintiff petitioner moves this Court under revision and restitutio in integrum.

The 1st defendant respondent further submits,

> "10. On perusal of the journal entries in the case, it will be observed that on 21.02.2018, the plaintiff had preferred an application under the provisions of Chapter XII of the Civil Procedure Code read with section 839 seeking to set aside and or to vacate the order dated 01.11.2017 dismissing the case of the plaintiff and fixing the case for ex parte trial on the claim in reconvention of the 1st defendant".

The above judgment shows that there cannot be an application under Chapter XII, in respect of default, as there was no default. Although there could be an application under section 839 on inherent powers, it is no bar for an application for revision and restitutio in integrum.

Hence the following submission for the 1st defendant respondent cannot be accepted,

> "25. Therefore, it is very respectfully submitted that the instant application in Restitutio in integrum is made premature and for the reasons adduced in the preceding paragraphs of this written submission, the plaintiff is guilty of laches and has preferred the instant application without any merit whatsoever".

Plaintiff cannot be guilty of laches and making the application premature at the same time. What is referred to as laches, according to the said written submissions, is preferring the application under section 839 after three months. In the circumstances, it is not lashes. As reasons given above would show, this application is not premature.

If there is any requirement of an "exceptional" circumstance, the order of dismissal of the learned district judge is such. She did not have to dismiss the action since the Counsel was ready to record admissions and issues. Her fixing the case ex parte on the claim in reconvention of the 1st defendant respondent was also wrong, because it was inter partes.

In revision and restitutio in integrum the objective is correction of errors. In **Marian Beebee vs. Seyed Mohamed and others 69 C. L. W. 34 at 36 (also 68 NLR 36 at 38)** which is a decision of five Judges, Chief Justice Melanie Claud Sansoni said,

> " "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, **sometimes committed by this court itself,** in order to avoid miscarriage of justice. **It is exercised in some cases by a Judge of his own motion,..."**

Although this case is no "non appearance" since it has been dealt with so, what was said by Dr. A. R. B. Amerasinghe J., in the Supreme Court in *Jinadasa and another vs. Sam Silva and others 1994 (1) SLR 232*, which is a case which has referred to 153 cases will also apply,

> "5. Where a party has established that he had acted bona fide and done his best, but was prevented by some emergency, which could not have been anticipated or avoided with reasonable diligence from being present at the hearing, his absence may be excused and the matter restored. The Court cannot prevent miscarriages of justice except within the framework of the law: it cannot order the reinstatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds**. Inasmuch as it is a serious thing to deny a party his right of hearing, a court may, in evaluating the established facts, be more inclined to generosity rather than being severe, rigorous and unsparing".**

Therefore, in exercising the powers of revision and restitutio in integrum in this Court, the order of the learned district judge dated 01.11.2017 is set aside and the plaintiff petitioner's case is restored back to the roll of calling cases.

The learned district judge is directed to go on with the action according to law.

The application is allowed. There is no order on costs.

D.N. Samarakoon

Judge of the Court of Appeal

I agree

Niel Iddawala

Judge of the Court of Appeal