

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

C.A. 992/99(F)

D.C.Gampaha 38571/L

N.G.S. Rajaratne

Mukalana Junction, Kanduboda

Delgoda

Defendant-Appellant

Vs

Leena Abeywickrema

Muthuwella Mawatha

Colombo 15

Respondent-Respondent

BEFORE: A.W.A. Salam J.,

Sunil Rajapakse J.,

COUNSEL S.Gunawardena with A.Liyanage for the Appellant

**Rohan Sahabandu, P.C with Ms.S.Kumarawadu for the
Respondent**

ARGUED ON 8,03.2013

DECIDED ON 12.11.2013

Sunil Rajapakse J.,

The Plaintiff Respondent instituted action in the District Court of Gampaha against the Defendant-Appellant seeking to eject the Defendant Appellant from premises 3A in extent 18 perches. The Appellant Respondent failed to file his answer on 14.08.1997. Thereafter an exparte trial was held and the learned District Judge entered judgment against the Appellant Respondent on 06.05.1998. The Court has granted relief prayed for by the Plaintiff. Thereafter decree was served on the Defendant Appellant by the Fiscal on 02.11.1998 and the Respondent filed petition and affidavit to have the said exparte judgment and decree of the District Judge set aside. At the inquiry on 14.06.1999 the Appellant Respondent had given evidence and thereafter the Appellant filed his written submissions. The Court has pronounced its order on 24.11.1999 refusing the application of the Defendant to purge the default. Being aggrieved with the said order the Defendant had filed this appeal.

I am of the view that Section 86(2) of the Civil Procedure Code is the provisions which confers jurisdiction on the District Court to set aside a default decree.

Section 86(2) states as follows :*"Where within 14 days of the service of the decree entered against him for default, Defendant with notice to the*

Plaintiff makes application to and thereafter satisfies court that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the Defendant to proceed with his defence as from the stage of the default upon such terms as to cost or otherwise as to the court shall appear proper.

In this case I note when the matter was fixed for Answer on 14.8.1997 the Defendant Appellant was absent and unrepresented and on an application made by the Plaintiff Respondent the matter was fixed for exparte trial. After the exparte trial Judgment was entered in favour of the Plaintiff Respondent. In this case the Defendant Appellant seeks to set aside exparte judgment on two grounds.

- (i) That his Attorney at Law has not filed his answer though instructed;*
- (ii) The Appellant could not come to court as he was sick;*

The Defendant in his application to set aside the exparte decree must satisfy the District Judge for his default. If the learned District Judge is satisfied with the reasons given by the Appellant he has powers to vacate the exparte decree. At the inquiry to set aside the judgment the reasons given by the Appellant's for his default in filing answer was the negligence of the Appellant's

Attorney at Law and illness of the Appellant. The learned District Judge correctly not satisfied with the reasons given by the Appellant and delivered his Order refusing the application of the Appellant to have the ex parte judgment set aside. This matter was taken up for inquiry on 14.06.1999 after notice to the Plaintiff. The Defendant Appellant testified at this inquiry. No other witnesses were called on behalf of the Defendant. At the inquiry the position taken up by the Appellant was that the failure to file his answer on the due was his ill health. But the Appellant failed to prove this argument in the District Court. I note at the default inquiry that the Appellant did not tender a medical certificate to Court. Further the Appellant has failed to call the doctor who treated him for his illness. Appellant has given 3 days to file his answer. But the Appellant had not taken steps to file his answer. Proceedings reveal that the Appellant or his registered Attorney at Law were not present in court on the day the case was called for answer. Appellant's second argument in the District Court was due to the negligence of the Attorney at Law, to represent him at that stage was one of the reasons for failure to file his answer.

In this regard I cite the following authorities.

The Attorney General vs Herath and another - 2003 2 SLR 162, it was held that mistake could be excused, negligence of counsel is not a reasonable ground to set aside the proceedings.

Schanenquivel vs Orr 28 NLR 302 it was held that the Plaintiff must suffer for the proctors negligence.

Ekanayaake vs Gunasekera - 1986 2 SLR page 253 – it was held that even if the Defendant had succeeded in establishing that the Defendant was attributable to the negligence of his Attorney at Law, the application to have the exparte judgment set aside must fail.

Ramasami vs Kanawade – 1986 2 CALR 250 - Negligence of the Attorney at Law was held to be negligence of the party in default.

David Appuhamy vs Yassasi Thero – 1987 1 – 253 it was held certainly the negligence of the Attorney at Law is not a valid excuse.

Section 86(2) of the Civil Procedure Code requires a Defendant *“to satisfy the court that he had reasonable grounds for the default”*. But I observed that the Defendant Appellant has not made any submission to support his position.

The Appellant has not satisfied the court that he had reasonable grounds for the default.

After considering the submissions made by Respondent Plaintiff, I am of the view that THE learned District Judge has acted on the available evidence and has correctly refused the application to have the *exparte* judgment and decree set aside.

For the aforementioned reasons, I don't propose to interfere with the Order of the learned District Judge, of Gampaha, dated 24.11.1999.

The Appeal is dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Salam J.,

I agree.

JUDGE OF THE COURT OF APPEAL