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

C.A. Case No. 994/1997 (F)
D.C. Galle Case No. 11633/L

Mihindukulasuriya Waduge Robert Fernando
of Thunhaulehena, Kottawagama.
PLAINTIFF

-Vs-

Kottawa Iniyage Wilbert
of Kottawa, Kottawagama.
DEFENDANT

AND

Mihindukulasuriya Waduge Robert Fernando
of Thunhaule Hena, Kottawagama.
PLAINTIFF-APPELLANT
Udalamathtaga nage Karunawathi,
Thunhaule Hena, Kottawagama
SUBSTITUTED PLAINTIFF-APPELLANT

-Vs-

Kottawa Iniyage Wilbert
of Kottawa, Kottawagama.
DEFENDANT-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	S.N.Vijith Singh with Chitralal Liyanage for the Plaintiff-Appellant
		Upul Kumaraperuma with Chandrika de Silva for Defendant-Respondent.
Decided on	:	21.11.2018

A.H.M.D. Nawaz, J.

This appeal engages the all too familiar question that crops up in day to day district court practice. What is the consequence when an Attorney-at-law informs Court that he has no instructions from the Plaintiff? Is dismissal of the plaint an automatic consequence in those circumstances? If this intimation to Court happens on an adjourned date, how does the District Court treat this notification? What is the interrelationship of Section 144 of the Civil Procedure Code(the Code) vis-à-vis the provisions found in Chapter XII of the Code in the event of a default?

The appeal also pertains to the question of propriety of the subsequent order made by the Additional District Judge of *Galle* on 31.01. 1997, refusing to set aside his order of dismissal of the Plaintiff's action made on 15.07.1996. Let me narrate the progress of the trial prior to the date on which the learned Additional District Judge dismissed the plaint.

The Plaintiff-Appellant (hereinafter sometimes referred to as the Plaintiff), who was suing the Defendant-Respondent (hereinafter sometimes referred to as the Defendant) for a declaration of a right to possess a state land based on an annual permit and ejectment of the Defendant therefrom, had testified on four trial dates and another witness a colonization officer had just concluded his evidence on behalf of the Plaintiff when the matter was re-fixed for further trial to be had on 03/04/1994. Both the Plaintiff and his witness had been subjected to long-drawn out cross-examination but the

Plaintiff had not closed his case when the case came up for further hearing on 03.04.1994 on which date the Additional District Judge of *Galle* was on leave. On the following date namely 18.09.1995 the learned Judge was on furlough again but it has to be noted that the journal entries and minutes of proceedings indicate that both the Plaintiff and Defendant had been present in Court on all the aforesaid dates.

When the further trial came up on 26.02.1996 before a succeeding judge, he adopted the evidence led on previous dates and adjourned the further trial for 15.07.1996. On 15.07.1996, the Plaintiff was not present in Court and the proceedings dated 15.07.1996 do not make it clear whether or not the registered Attorney-at-law was present. But the Counsel for the Plaintiff Mr. Sarath Bandara notified to Court that he had no instructions from the registered Attorney-at-Law. Thereupon Mr. Gange the Attorney-at-Law for the Defendant moved Court to have the action of the Plaintiff dismissed subject to costs.

It is on this application that the learned Additional District Judge of *Galle* dismissed the case of the Plaintiff ordering costs against him. Let me repeat that by the time when the dismissal of the action took place on 15.07.1996, the Plaintiff and his witness had been extensively cross-examined but the plaintiff's case had not been closed. In other words the Defendant was yet to commence his case. The dismissal of the action took place on an adjourned date and the question arises-would the absence of the Plaintiff on the adjourned date, though his counsel was present, attract automatically the sanction of a dismissal of the case? Does the intimation to court by Counsel for the Plaintiff " no instructions from the registered Attorney-at-law" entail the automatic consequence of a dismissal? This appears to be the quintessential issue in this case to which I will revert after briefly adverting to the subsequent order at the purge-default inquiry.

Purge-Default Inquiry

At the purge-default inquiry that took place on 31.01.1997, the Plaintiff testified putting forward the cause, as is the wont under Section 87(3) of the Code, that he was prevented

from attending Courts on 15.07. 1996, since he had met with an accident which resulted in the Plaintiff receiving treatment.

But the learned Additional District Judge was not satisfied that there were reasonable grounds for the non-appearance of the Plaintiff on 15.07.1996 and he refused to set aside the order of dismissal by his judgment dated 31st January 1997. It was in this backdrop that this appeal has been preferred against the judgment dated 31st January 1997.

Mr.Vijith Singh for the Plaintiff-Appellant put forward two frontal arguments in order to assail the judgment dated 31st January 1997, which had refused to set aside the order of dismissal made against the Plaintiff. He argued that the learned Additional District Judge of *Galle* could not have dismissed the action of the Plaintiff since it is section 144 of the Code that would govern this situation and there was a failure to utilize the power given in section 144.

Mr Upul Kumaraperuma contended that since the Plaintiff did not prefer an appeal against the omission of the Additional District Judge to resort to section 144, such omission cannot be impeached in an appeal that focusses on whether the Plaintiff has satisfied the court as to the reasonableness of his grounds for non-appearance on 15.07.1996. In other words the gravamen of Mr Upul Kumaraperuma's submissions was that the Plaintiff would perforce be confined only to the refusal of the Additional District Judge to set aside the order of dismissal and no other omission on the part of the Additional District Judge could now be impeached.

So these rival arguments engage one significant question to pose. What is the relevance of Section 144 of the Code if at all a default occurs in appearance on the part of a Plaintiff or a Defendant? Both Counsel made submissions on the basis that there was indeed a default on the part of the Plaintiff. Was there a default at all in this case when the Attorney-at-law said that he had no instructions? Right at the outset let me state that I conclude in the end that there was no default at all in appearance on the part of the Plaintiff and if there was no default, Section 144 of the Code would have no application to this case and this case has to be disposed of having regard to another provision of the

adjectival law namely Section 24 of the Code and a plethora of case law that surrounds this issue. I will deal with this aspect of no default presently.

Section 144

But I do consider it apposite to make a few observations on Section 144 of the Code since it was referred to by Mr Vijith Singh in the course of his argument. The provision is inextricably interwoven with Chapter XII of the Code which deals with defaults in appearance or non-appearance of respective parties, whether it be the Plaintiff or Defendant in a case. I hold this opinion because Section 144 of the Code which bestows a wide discretion in District Judges unerringly makes reference to Chapter XII. Whenever a default appears on an adjourned date, a District Judge must have regard to Section 144 of the Civil Procedure Code. What strikes me as significant about Section 144 is that the provision gets engaged on an adjourned date and the said provision reads as follows:

Section 144

> *If on any day to which the hearing of the action is* ***adjourned, the parties or any of them fail to appear****, the court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII, or make such other order as it thinks fit.*

A District Court has to apply the discretionary power in Section 144 when parties or any of them fail to appear on an adjourned date.

Section 144 of the Code is identical to Order XVII, Rule 2 of the Code of Civil Procedure, 1908 of India, which substantially mirrors the language of its Sri Lankan counterpart-

> *Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX , or make such other order as it thinks fit.*

There are differences *though* between the two provisions. The first difference between the two sections is only cosmetic and constitutes no difference at all. The words *If* and *action* in Section 144 have been substituted by the words *where* and *suit* in the Indian Code

with a reference to Order IX, which is the corresponding chapter for defaults in appearance in India. Needless to say, these words make no difference without a distinction and there is a plethora of cases that have interpreted Order XVII, Rule 2 in India.

There is an explanation appended to the Indian provision which stares the following:

> *Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.*

Chitaley and Rao in their Commentaries on the Code of Civil Procedure (7th Edition) draw attention to a concatenation of cases but in view of my final finding in this case that there was no default on the part of the Plaintiff, all that I would henceforth say on Section 144 would likely run the risk of being called *obiter* but I would emphasize that if indeed there is a default on the part of either the Plaintiff or Defendant on an adjourned date, a District Judge has to bear in mind the provisions of Section 144.

Section 144 will come into play only when the hearing of the suit has commenced and the trial is adjourned as a part heard suit to a future date. When the partly heard case comes up on an adjourned date and a default in appearance occurs, it is Section 144 of the Civil Procedure Code that governs the situation. The provision gives the District Judge a discretion and gives him two options, either of which the learned District Judge is empowered to adopt subject to rules pertaining to the exercise of discretionary powers. Either the District Judge resorts to Chapter XII (Chapter on default in appearances) or he must *make such other order as it thinks fit*. This discretion to adopt either of the two options must be exercised fairly and reasonably. Neither option is automatic. The order to adopt either of the two options must be enriched with reasons which this Court could assess for its reasonableness having regard to the material on record.

Section 144 came up for interpretation in ***Johanis Appuhamy v. Carlincho*** (1963) 67 N.L.R. 144. After the Plaintiff had closed his case and the Defendant called a witness, the

case was put off for further hearing. On that adjourned date, the Defendant and his proctor were absent. The District Judge pronounced judgment for the Plaintiff on the basis that the Defendant did not intend to lead any further evidence.

The question that arose in appeal was whether in these circumstances the District Judge enjoyed the power to pronounce judgment on merits as if the case had been heard *inter partes* or whether he should have entered only a decree nisi in the plaintiff's favour.

Sansoni J. (with whom H.N.G. Fernando J. concurred) held that in the circumstances, the only course which a Court could have adopted was to enter a decree nisi in favour of the Plaintiff in terms of Section 85 of the Civil Procedure Code. In the circumstances of the case, the Court could not have given judgment for the Plaintiff on the ground that the Defendant did not intend to lead any further evidence.

Sansoni J. posed the pertinent question, "Does the judgment given by the District Judge come under the words *'make such other order as it thinks fit?'*" The learned Judge opined that "I do not think so, because those words seem to contemplate some other order such as giving notice to the absent party, or putting the case by, short of an order disposing of the action".

In other words Sansoni J. took the view that the learned District Judge of *Galle* in ***Johanis Appuhamy*** (supra) must have resorted to chapter XII and pronounced an *ex parte* judgment, instead of an *inter partes* judgment as he did. There was certainly warrant for this view because neither the defendant nor his proctor was present in Court on the adjourned date and thus there was no appearance for the defendant. There was clearly a default in appearance on the part of the Defendant. In the circumstances the learned District Judge of *Galle* must have proceeded to an *ex parte* decree or a decree *nisi* as was the wont in days gone by. Instead he gave judgment as if the case had been heard *inter partes.* So the Supreme Court (Sansoni, J with H.N.G.Fernando, J concurring) proceeded to strike down the order of the District Court to enter a judgment on the merit and directed him to enter a decree *nisi.* In a terse and laconic judgment Sansoni, J held that

the facts and circumstances of the case would not permit the judge to write an *inter parte* judgment even under the second limb of Section 144- "*make such other order as it thinks fit*".

The phrase "*make such other order as it thinks fit*" does not include within it the disposal of the case on the merits. In other words what the learned District Judge of *Galle* did in ***Johanis Appuhamy*** -i.e proceeding to write a judgment on the merits cannot be justified under the phrase "*make such other order as it thinks fit*". It was an erroneous exercise of discretion. The proper course must have been for the learned District Judge to have entered a decree *nisi* under Section 85 of the Old Civil Procedure Code. That would also give the absent Defendant an opportunity to purge his default.

In the process Sansoni, J stated that the words "*make such other order as it thinks fit*" contemplate **some order such as giving notice to the absent party, or putting the case by, short of an order disposing of the action**.

According to the Supreme Court, the grant of a date was indeed an option on an adjourned when a party has defaulted but on the facts of ***Johanis Appuhamy*** (supra), the Supreme Court was not inclined to set aside the *inter partes* decree and grant him a date to lead evidence. Instead the Supreme Court felt that the District Court should proceed under Section 85(1) and enter an *ex parte* decree, because both the Defendant and his proctor were absent on the adjourned date.

The case of ***Johanis Appuhamy v Calincho*** (supra) acknowledges the fact that a discretion resides in the District Court by virtue of Section 144 to grant a date under the phrase "*make such other order as it thinks fit*" having regard to the facts and circumstances of a particular case. In other words recourse to Chapter 12 is not automatic.

As I said before, ***Johanis Appuhamy*** (supra) has no application at all in this case. The case of ***Johanis Appuhamy*** (*supra*) will not apply here because in that case both the Defendant and his proctor were absent on the adjourned date and so there was indeed a default on the part of the Defendant. The Supreme Court felt that the then learned District Judge of *Galle* in ***Johanis Appuhamy*** (*supra*) must have proceeded to ***an ex***

parte decree. In the case before me which has also come up on appeal incidentally from the Additional District Court of *Galle*, though the Plaintiff was absent, his proxy given to his registered Attorney remained valid and effectual and his Counsel only notified Court that he had no instructions.

The Counsel did not say that he was withdrawing his appearance for the Plaintiff and therefore the appearance of Mr Sarath Bandara constitutes an appearance on that day for the Plaintiff. A Plaintiff may appear in person or through his registered Attorney or his Counsel. Section 24 of the Code makes this position crystal clear.

> *Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to an action or appeal in such Court, except only such appearances, applications, or acts as by any law for the time being in force only attorneys-at-law are authorized to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognized agent, or by a registered attorney duly appointed by the party or such agent to act on behalf of such party;*
>
> *Provided that any such appearance shall be made by the party in person, if the Court so directs. An Attorney-at-law instructed by a registered attorney for this purpose, represents the registered attorney in Court.*

The pith and substance of this provision is that a party is allowed to appear by his registered Attorney-at-law and Section 24 goes on to say that "*An Attorney-at-law instructed by a registered attorney for this purpose, represents the registered attorney in Court*". Since there is a contractual nexus between a party and his registered Attorney-at-law, the registered Attorney-at-law would represent the party in Court by virtue of his appointment. Where his appointment authorizes him to retain another Attorney-at-law (counsel), as it does in this case, that Attorney-at-law would represent the registered Attorney. That means that his appearance is the appearance of the registered Attorney. The Counsel's appearance is indeed the appearance of the registered Attorney and that again is the appearance of the party.

So when Mr Sarath Bandara appeared in Court on 15.07.1996 and stated that he had no instructions, that amounted to Plaintiff's appearance and there was no default on the part of the Plaintiff. This is the view that prevails now but there was quite an uncertainty about it at one time. Whether the proceedings should be *inter partes* or *ex parte* in the context of a defendant when his Attorney stated to Court "he had no instructions" came up before Middleton J in ***Senanayake v Cooray*** 15 N.L.R 36 and he took the view that in such circumstances the proceedings would be *ex parte*.

On the day fixed for the trial, the defendant in the case was absent and his proctor on record, who was present in court, stated he had no instructions. It was held that the physical presence of the proctor in the Court, coupled with what he said on the trial day, did not constitute an appearance for the defendant, which would give the proceedings the character of an *inter partes* trial enabling the judge to enter a final decree.

But a four bench division of the Supreme Court in ***Andiappa Chettiar v Sanmugam Chettiar*** 33 N.L.R 217 reached judicial consensus that when an Attorney-at-law intimated to Court that he had no instructions, that would be tantamount to appearance of the party and therefore there cannot be recourse to Chapter 12 of the Code.

In ***Andiappa Chettiar vs. Sanmugam Chettiar*** (supra) Macdonell C.J heading a bench of four judges of the Supreme Court (with Garvin S.P.J., Lyall Grant J., and Maartensz A.J) held that the presence in Court, when a case is called, of the Proctor on the record constitutes an appearance for the party from whom the proctor holds the proxy, unless the proctor expressly informs the Court that he does not, on that occasion, appear for the party.

Macdonell. C.J was quite emphatic

> *The proctor of record is there when the case is called; then, if he wishes his presence in Court not to be reckoned an appearance for the defendant, he should make that clear to the Court forthwith. This is necessary in the interest of the Court itself, to inform it if, notwithstanding the*

presence of the proctor in Court, the occasion is not to be treated as an appearance; the Court needs this information that it may know how to proceed. This is necessary also in the interest of the proctor himself, that there may be some entry in the journal of the case to show what he did for his client on the case being called.

So if the proctor wishes not to appear for the client, he must bring it home to the notice of Court.

Garvin S.P.J too at p 222 of the judgment emphasizes this requirement of informing court that a lawyer does not wish to appear for a party.

If the proctor, though present, does not wish his presence to be construed as an appearance on behalf of his client, he must immediately inform the Court that he does not desire to and is not entering or making an appearance in the case. This must be done clearly and unambiguously. ***It is not sufficient, as in the case under consideration, to say that he has no instructions.***

So mere *ipsissima verba* of an Attorney-at-law that he has no instructions does not constitute non-appearance of his client unless it is clearly brought home to Court that the Attorney-at-law was ceasing to make an appearance for the party.

Maartensz A.J too echoed the same principle.

I agree with my Lord the Chief Justice that a definite rule should be laid down for the guidance of proctors and the Courts of original jurisdiction; and that the rule should be that a proctor present in Court when his case is called, if he does not desire to enter an appearance for an absent party whose proxy he has filed should definitely state to the Court that he is not entering an appearance, and that otherwise his presence in Court should be deemed an appearance for that party.

The instructive judgment of ***Andiappa Chettiar v Sanmugam Chettiar*** (supra) where all four judges of the Supreme Court wrote separate judgments was followed by the Court of Appeal in ***Alima Umma vs. Siyaneris*** (2006) 1 Sri.LR 22 where on the trial date

the plaintiff was absent and her registered attorney and counsel were present and were ready to start the plaintiff's case. The objection taken by the defendant that since the plaintiff has failed to appear, the action had to be dismissed under section 87(1) was upheld. The plaintiff moved in revision. Gamini Ameratunga J held

> *"In terms of section 24 of the Code, the registered attorney or any 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 that is an appearance for the party even if the party is not physically present in Court, the Court cannot dismiss the action for the absence of the party.*

On the same lines as in ***Andiappa Chettiar v Sanmugam Chettiar*** (supra), the Court of Appeal held as follows in ***Ishek Fernando v Rita Fernando and Others*** (1999) 3 Sri.LR 29:

> *"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."*

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 case of ***Andiappa Chettiar v Sanmugam Chettiar*** (supra) was followed by Chitrasiri, J in ***Cisilin Nona alias Personahamy v Gunasena Jayawardana*** **(2016) Athula Bandara Herath's Supreme Court Law Report 247.** Chitrasiri, J affirmed the judgment of Anil Gooneratne J in the Court of Appeal which is reported in 2012 (B.L.R) 361 *sub nom*, ***Jayawardena v Cicilin Nona*** . What Chitrasiri, J stated in the Supreme Court is pertinent to quote:

".....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. Accordingly, it is clear that the Court of Appeal has correctly decided the issue in this case having adopted the law relevant thereto...."

In fact in ***De Mel et al vs. Gunasekera et al*** 41 N.L.R 33, on the day fixed for trial, an Advocate entered an appearance for the defendants and applied for a postponement, which was refused. The Advocate thereupon withdrew from the case, intimating that he had been instructed only to apply for the postponement. It was held that the proceedings were *inter partes.*

In the above case it was conceded that if a defendant applied for a postponement and then withdrew, the trial would proceed *inter partes*. It was also conceded that if a Proctor acted similarly, the proceeding would be *inter partes*, but it was contended that if an Advocate appeared for a limited purpose of applying for a date and withdrew upon refusal of the application, his appearance was only for that purpose and no other. De Kretser J., expressed the view that. "This seems a startling proposition, and its only foundation is that a Proctor holds a proxy from his client and therefore represents him, but a Counsel does not represent him; yet it is conceded that if he did appear for a part of the trial and then withdrew, the trial would be considered one *inter partes*... The Advocate's appearance for a limited purpose was the Proctor's appearance for a limited purpose, and that again was the appearance of the party for a limited purpose". De Kretser J went on to hold that even if the Advocate withdrew from the case, intimating

that he had been instructed only to apply for a postponement, the proceedings were *inter partes*.

So it is clear that when an Attorney-at-law, be it the registered Attorney or Counsel intimates to Court that he has no instructions in the case, there cannot be an *ex parte* trial nor could there be a dismissal of the plaint. The trial judge may proceed with the *inter partes* trial. The trial judge may even proceed to notice the Plaintiff or Defendant because it may well be that the Plaintiff may have encountered a difficulty that prevented him from instructing his registered Attorney or Counsel.

Section 91 A (3) of the Code states that the Court may, for sufficient cause, either on the application of the parties or *of its own motion*, advance, postpone or adjourn the trial to any other date upon such terms as to costs or otherwise as to it shall seem meet. It was for this reason that it was held in ***Rev.Sumanatissa v Harry Dias*** (2009) (1) Sri.LR 31 that the Court has to have regard to the past history of the case. Sufficient cause may lie in the fact that the case record displays, as in this case, constant presence of the Plaintiff in Court, whereas absence from Court is just an isolated instance on the adjourned day.

As I said before, the facts in the case before me are quite different from the facts of ***Johanis Appuhamy*** (supra). In that case both the defendant and his proctor were absent. But in this case both the Plaintiff and his registered attorney were absent but his counsel Mr Sarath Bandara was present in Court. The counsel did not say that he was withdrawing from making an appearance for the Plaintiff. He merely intimated to Court that he had no instructions from the registered Attorney-at-law. The learned Counsel was present in Court because of the legal nexus between him and the registered Attorney. Thus the appearance of counsel in court constituted an appearance on behalf of the Plaintiff and it cannot be said that the Plaintiff defaulted in appearance in Court.

So the learned District Judge could not have resorted to Chapter XII and dismissed the action of the Plaintiff under Section 87 (1) of the Civil Procedure Code. The proper order would have been to grant a date and notice the Plaintiff and therefore the order of

dismissal made in this case was indeed a nullity. Nothing could have flowed from this nullity. In fact Lord Denning in the Privy Council in ***McFoy v United Africa Company*** **(1961) 3 AER 1169** stated at p 1172

> *If an act in law is void, then it is in law a nullity.....There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

There was no warrant for the learned Additional District Judge to have dismissed this matter on the basis that there was a default on 15.07.1996. He proceeded to dismiss the plaint subject to cost immediately upon an application made by the Counsel for the Defendant. The learned Additional District Judge was oblivious to section 24 and a slew of cases that have interpreted the provision. So this decision of the learned Additional District Judge was *per incuriam*.

> *"There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind; first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which the Attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority....The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked."* Louis Philippe Pigeon, *Drafting and Interpreting Legislation* 60 (1988).

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or in forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, *Precedent in English Law*, 149 (4th Ed. 1991).

In Halsbury, Laws of England 4th Edition, Volume 26 para 578 it was stated that:

"A decision will be regarded as given per incuriam if it was given in ignorance of some inconsistent statute or binding decision: but not simply because the Court had not the benefit of the best argument."

In the case of ***Morelle Ltd v Wakeling*** (1955) 1 All ER 708 at page 718 Sir Raymond Evershed MR stated that

As a general rule the only cases in which decisions should be held to have been given per ***incuriam*** *are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not exhaustive, but cases are not strictly within it which can properly be held to have been decided per incuriam must, in our judgement, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, MR, of the rarest occurrence. In the present case, it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case.*

Having regard to the indicia given above, the learned Additional District Judge was in ignorance or forgetfulness of Section 24 of the Code and the precedents such as ***Andiappa Chettiar*** (supra) and ***De Mel*** (supra) and as Lord Green M.R said in *Craig v. Kanseen* (1943) 1 A. E. R. 108 at p 113 "these cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside ".

The Plaintiff did not default in appearance but because of the erroneous order of dismissal, it would appear that he moved the District Court for a purge default inquiry which was decided against him by an order dated 31.01.1997. As I said before, this inquiry was a nullity because it flowed from a nullity. It was needlessly conducted when the Plaintiff had no default to purge. If there was no default to purge, there could not be a purge-default inquiry.

It is an established rule that no party should suffer due to an act of Court. It is set out in the case of ***Rodger v Comptoir D'Escompte de Paris*** (1871) LR 3/1 4C 405 that

> *"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors.*

The bottom-line of all this boils down to this nitty-gritty. The case is still in existence on the roll or the cause list of the District Court of *Galle* and should be expeditiously recommenced and concluded. So I proceed to set aside the order of dismissal dated 15.07.1996 and the subsequent order dated 31.01. 1997 and declare them nullities. Accordingly I allow the appeal of the Plaintiff-Appellant and direct the learned District Judge of *Galle* to recommence this trial *inter partes* from where it stopped and conclude the trial as expeditiously as expeditious could be.

JUDGE OF THE COURT OF APPEAL