

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Abdul Majeed Mohamed Amanullah,
No. 198, Poruthota,
Kochchikade.

SC / APPEAL / 120 / 2016

PLAINTIFF

SC / HC (CA) / LA / 313 / 2013

-Vs-

WP / HCCA / GAM / 92 / 2009 (F)

DC NEGOMBO / 6357 / L

1. Martin Joseph Fernando,
No.40, Galle Face Terrace,
Colombo 03.

2. Lokukaluthotage Nandasena,
49, Hudsan Road,
Colombo 08.

DEFENDANTS

AND

Abdul Majeed Mohamed Amanullah,
No. 198, Poruthota,
Kochchikade.

PLAINTIFF – PETITIONER

-Vs-

1. Martin Joseph Fernando,
No.40, Galle Face Terrace,
Colombo 03.

2. Lokukaluthotage Nandasena,
49, Hudsan Road,
Colombo 08.

DEFENDANT – RESPONDENTS

AND THEN BETWEEN

Abdul Majeed Mohamed Amanullah,
No. 198, Poruthota,
Kochchikade.

PLAINTIFF – PETITIONER –
APPELLANT – PETITIONER

-Vs-

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Colombo 08.

DEFENDANT – RESPONDENT –
RESPONDENTS

AND NOW BETWEEN

Abdul Majeed Mohamed Amanullah,
No. 198, Poruthota,
Kochchikade.

PLAINTIFF – PETITIONER –
APPELLANT – APPELLANT

-Vs-

1. Martin Joseph Fernando,
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2. Lokukaluthotage Nandasena,
49, Hudsan Road,
Colombo 08.

DEFENDANT – RESPONDENT –
RESPONDENT – RESPONDENTS

Before: Jayantha Jayasuriya, PC, CJ.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Ikram Mohamed, PC with M.C.M. Muneer, T. Marjant and
Vinura Jayawardene for the Plaintiff – Appellant – Appellant.

Nizam Kariapper, PC with M.I.M. Iyunullah and Ahamed Ilham for
the Defendant – Respondent – Respondents.

Argued on: 21.09.2022

Written Submissions tendered on:

By the Plaintiff – Appellant on 9th September 2016.
By the 1st Defendant – Respondent – Respondent – Respondent on 28th
September 2017.

Decided on: 29.11. 2024

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

1. The oft-too-frequent question arises in this case - can the plaint be dismissed, when there is an appearance on behalf of the Plaintiff but the Plaintiff is absent on the date of the trial? The learned District Judge has answered this question in the affirmative whilst the Civil Appellate High Court affirmed the decision of the District Judge. Being aggrieved and dissatisfied with the decisions of the District Court and the Civil Appellate High Court, this Court

granted leave to the Plaintiff – Appellant – Appellant on the following questions of law:

- i. Had the learned District Judge failed to exercise his discretion in a just and equitable manner when there was a sufficient reason for postponement as there was an application by the Attorney-at-Law for the Plaintiff for such postponement on personal grounds?
- ii. Did the District Court err in law by the failure to take into consideration that any inconvenience resulting from a postponement could have been justified by granting costs to the Defendant?
- iii. Did the Civil Appellate High Court err in law by not taking into account the application made on behalf of the Attorney-at-Law of the Plaintiff for postponement of the hearing on her personal grounds which was not objected to by the Defendants?
- iv. Whether fixing of the case for *ex parte* upon non-appearance in-person by the Plaintiff, was erroneous inasmuch as there was an application for a postponement on behalf of the Attorney-at-Law for the Plaintiff?

Factual matrix

2. The Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff) instituted action against the Defendant-Respondent-Respondent (henceforth known as the Defendant) in the District Court of Negombo praying *inter alia* for the following remedies:
 - I. A declaration that the property more fully described in the schedule to the plaint was held by the 1st and/or 2nd Defendant in trust for the Plaintiff;

- II. An order directing the 1st / 2nd Defendant or the Registrar of the Court to execute a conveyance transferring the said property to the Plaintiff;
3. Upon a traversal of the averments in the plaint by way of an answer dated 26.03.2004 the 1st Defendant demurred and so did the 2nd Defendant by his answer dated 20.05.2005.
4. Delving into the core issues of the present appeal, it is worth revisiting the facts and circumstances that led to the dismissal of the plaint.
5. The case came up for trial on 04.10.2006 on which date an application was made on behalf of the Registered Attorney-at-Law of the Plaintiff for a postponement of the hearing on the ground her mother had been taken ill. In fact, it was a different Attorney-at-Law who made this application on behalf of the Registered Attorney-at-Law of the Plaintiff.
6. It was an appearance authorized by the Registered Attorney-at-Law and this application for a postponement of the trial made on behalf of the Registered Attorney-at-Law based on her personal difficulty was not objected to by the Counsel for the Defendant but he moved for a dismissal of the Plaintiff's action solely on the ground that the Plaintiff was absent without intimation of any reasonable cause.
7. Thus, though the Counsel for the Defendant raised no objection to the postponement of the trial on the ground of the personal difficulty of the Registered Attorney-at-Law of the Plaintiff, the learned District Judge proceeded to dismiss the plaint on 04.10.2006 and took up for trial on the same day the claim-in-reconvention of the 1st Defendant.
8. After having recorded the evidence of the 1st Defendant which was not challenged by the 2nd Defendant, the learned District Judge of Negombo pronounced judgement on 13.11.2006, allowing the cross-claim of the 1st

Defendant to recover possession of the subject matter of the action from the Plaintiff.

Application under Section 87(3) of the Civil Procedure Code to cure default

9. I would observe at the very outset that the order to dismiss the case of the Plaintiff, when there was no objection to a postponement made on behalf of the Registered Attorney-at-Law, appears to be insupportable having regard to the applicable provisions of the Civil Procedure Code and the associated case law to which I will advert my attention presently.
10. However, pursuant to the order made by the District Court to dismiss the case of the Plaintiff, the Plaintiff made his application to have the dismissal set aside and the succeeding District Judge conducted the purge default inquiry at which the Plaintiff proffered his grounds for his non-appearance on the relevant day fixed for trial.
11. At the inquiry into the application to purge his default in appearance, the Plaintiff testified to the following effect;
 - a) He fell ill on 01.10.2006 and received medical treatment from a physician in Colombo and he was badly affected by fever, purging and vomiting during his illness.
 - b) The failure to be present in Court on the trial date was not occasioned by negligence on the part of the Plaintiff and it was owing to his illness on the said date.
12. The Plaintiff under cross examination stated *inter alia*;
 1. Since he was advised "strict bed rest" he stayed at his daughter's house in Colombo under the medical care of the daughter.

2. The Medical Certificate issued by the Medical Officer was given on 02.10.2006 to his son, who was residing in Kochchikade, to deliver the same to his Attorney-at-Law.
 3. The Registered Attorney-at-Law of the Plaintiff was absent on the date of the trial and it was brought to his notice by his son on the following day.
13. The Medical Officer, who treated the Plaintiff during his illness and issued the Medical Certificate testified *inter alia* on the condition of the Plaintiff during his illness and in his re-examination stated that the Plaintiff was not in a position to attend Court as his condition compelled him to go to toilet on several times a day during his illness.
14. The learned District Judge by his order dated 21.08.2009 refused to vacate the order of dismissal made against the Plaintiff on 04.10.2006 and in appeal made against this order to the Civil Appellate Court in Gampaha the learned High Court Judges dismissed the appeal of the Plaintiff by their judgement dated 02.07.2013.
15. It is against the said judgement that this appeal has been preferred to this Court.

Order of dismissal of the plaintiff made on 04.10.2006

16. Having set out the narrative of facts, let me begin to look at the initial order of dismissal made by the learned Additional District Judge of Negombo on 04.10.2006. The journal entry 14 speaks for itself. It is as clear as a pikestaff that the Defense had no objection to a postponement being granted. The Registered Attorney of the Plaintiff was absent and she had instructed another Attorney-at-Law to move for a date on her behalf as her mother was stricken with illness. This quotidian occurrence in Civil Courts is not unknown and unusual.

17. The Attorney-at-Law who moved for a date had instructions to do so from the Registered Attorney-at-Law of the Plaintiff, as otherwise this application could not have been made. This appearance on the date of the trial is sanctioned by Section 24 of the Civil Procedure Code, which states as follows;

Any appearance, application, or act in or to any Court, required or authorised by law to be made or done by a party to an action or appeal in such Court, except only such appearance, applications, or acts as by any law for the time being in force only Attorneys-at-Law are authorised to make or do, and except when by any such law otherwise expressly provided, maybe made or done by the party in person, or by his recognized agent, or by an Attorney-at-Law 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.

18. In terms of Section 24 of the Civil Procedure Code it is permissible for a party to make any appearance or an application in Court by an Attorney-at-Law.

19. A party is entitled to decide whether he should be present in Court or be legally represented in Court in terms of Section 24 of the Civil Procedure Code. In terms of the aforesaid provisions of our Code, a party is allowed to appear by his Registered Attorney-at-Law, and the section goes on to say that "*an Attorney-at-Law instructed by a Registered Attorney for this purpose represents the Registered Attorney-at-Law in Court*".

20. If then a Registered Attorney-at-Law represents a party by virtue of his appointment, and specially where his appointment authorises him to instruct

another Attorney-at-Law – as it happened in this case – the Attorney-at-Law who moved for a date on 04.10.2006 represented the Registered Attorney.

21. The question is whether there has been an appearance by the Plaintiff, and I entertain no doubt that there has been. The appearance of the Attorney-at-Law for the limited purpose of moving for a postponement was the appearance of the Registered Attorney-at-Law for that limited purpose, and that again, was the appearance of the party for such a limited purpose.
22. It all boils down that there was no default of appearance on the part of the Plaintiff on the day in question and even Chapter XII which deals with default of appearance precipitates a dismissal of the plaintiff in Section 87(1) of the Civil Procedure Code only when the Plaintiff makes default in appearing on the day fixed for the trial.
23. A dismissal of the Plaintiff's action is a consequence only when there is no appearance of the Plaintiff. Even Section 84 of the Civil Procedure Code which deals with default of appearance on the part of a Defendant precipitates an *ex parte* trial only when there is no appearance on the part of the Defendant and both sections deal with appearances or non-appearances of the parties. Neither section precludes limited appearances and if the Registered Attorney-at-Law has the right to appear by another Attorney-at-Law, the latter appears on behalf of the Registered Attorney-at-Law and that appearance constitutes the appearance of the relevant party.
24. By a parity of the above reasoning, if a party appears, even to move for a postponement, he has appeared and on the day in question, the Plaintiff must be taken to have appeared and his case could not have been subjected to the sanction of a dismissal.

25.A slew of cases has illustrated the significance of Section 24 and the consequences of defaults in appearances arising under Chapter XII of the Civil Procedure Code.

26.In ***Gargial et al v. Somasundaram Chetty***,¹ the Defendant was absent at the trial stage. The proctor moved for a postponement since the Defendant was abroad. The judge refused a date. The court heard evidence of the Plaintiff and entered judgment. The question arose in appeal whether the trial was *ex parte* or *inter-partes*. The Supreme Court held that it was *inter-partes* on the basis that the proctor for the Defendant must be taken to have appeared for the Defendant at the trial. Therefore, there was no default of appearance on the part of the Defendant. The case must be reinstated.

27.The *ratio decidendi* of the above case is mirrored in ***De Mel v. Gunasekera***² where it was held that if an advocate appeared and moved for a postponement, then proceedings should be considered as *inter-partes*. In ***Perumal Chetty v. Goonetilleke***,³ the Supreme Court observed that there is no requirement for the Defendant to appear personally and it is sufficient if he is represented by Counsel.

28.In ***Isek Fernando v. Rita Fernando and Others***⁴ on an adjourned date of trial the Defendant-Appellant was absent. However, she had sent a letter to the Counsel and the Registered Attorney requesting them to seek a postponement on the ground of ill health. The counsel produced the letter and stated that the medical certificate would be produced before the next date of trial. The Counsel for the Plaintiff-Respondent had objected. Thereafter, the court refused the application and fixed the case for *ex parte* trial. On 24.02.1992

¹ 9 NLR 26.

² 41 NLR 33.

³ (1908) Bal 2.

⁴ (1999) 3 SLR.

the Defendant's application for vacation of the *ex parte* decree was refused. It was contended that the District Court erred in deciding to hold an *ex parte* inquiry despite having been represented by her Attorney-at-Law.

29. The Court of Appeal held that the appearance of the Attorney-at-Law to move for an adjournment constituted the appearance of the Defendant.

30. I would part with this long catena of cases by drawing attention to *Andiappa Chettiar v. Sanmugam Chettiar*,⁵ where the main issue was whether the presence of a proctor in court when a case is called constitutes an appearance for the party from whom the proctor holds the proxy. The Court held that the presence of the proctor does constitute an appearance for the party, unless the proctor expressly informs the court that he does not, on that occasion, appear for the party. Neither the provisions of the Civil Procedure Code nor would the judicial precedents sanction such a course of action as was adopted by the learned Additional District Judge of Negombo. I had occasion to indulge in a discussion of these cases in partition actions and I am also fortified by the reasoning adopted in the case of *Kaduwelawimal Sebastian Victor v. Warnakulasuriya Irangani Tissera and Others*.⁶

31. None of these principles were borne in mind by the learned Additional District Judge of Negombo when the erroneous order to treat the absence of the Plaintiff from Court as a default was made on 04.10.2006. There could not have been a dismissal of the plaint in these circumstances which could not have led to a purge default inquiry.

32. In any event, the attempt of the Plaintiff to purge his purported default resulted in the District Judge of Negombo affirming the order dismissing the

⁵ 33 NLR 217.

⁶ CA 374/2000 (F) decided on 12.10.2015.

Plaintiff's action and even the Civil Appellate High Court of Gampaha has proceeded to dismiss the appeal of the Plaintiff.

Purge default inquiry and the appeal thereon to the Civil Appellate Court

33. I have already itemized in a nutshell the evidence of the Plaintiff to the effect that he fell ill 01.10.2006 and the medical doctor advised him to take strict bed rest for 7 days. The trial date fell on 04.10.2006. In the course of his testimony at the inquiry the Plaintiff stated that he sent his son with the medical certificate to give it to the Registered Attorney but his son could not meet with the Registered Attorney.

34. According to Section 87(3), the plaintiff is required to demonstrate to the court that there were reasonable grounds for his default. As mentioned above, the Plaintiff attributed his absence on the trial date to his illness. Even the Medical Officer testified that the Plaintiff was under his care for fever, vomiting, diarrhoea and gastritis. The Plaintiff fell ill on 01.10.2006, and the Medical Certificate issued on the same day recommended seven days of leave starting from 01.10.2006.

35. In the teeth of the oral and documentary evidence tendered at the inquiry, the learned District Judge however observes that although the Medical Certificate confirmed that the Plaintiff had fallen ill on 01.10.2006, there was ample time for the Plaintiff to notify the Court of his illness through his lawyer. However, this was not done, and the Plaintiff's negligence in this regard could not be excused by the Court. The learned District Judge of Negombo failed to appreciate the uncontested evidence on the part of the Plaintiff that his attempt to notify his Registered Attorney-at-Law did not become a reality on account of the unavailability of the said Attorney-at-Law.

36. The District Judge, considering the circumstances, went to the extent of holding that even if the Plaintiff had been unwell as per the medical evidence, the *illness was not severe*.
37. The learned High Court Judges affirmed the view of the learned District Judge on the question of severity of the illness. The opinion held by both Courts that the illness of the Plaintiff was not so severe cannot hold water even when the expert spoke of the necessity for the Plaintiff to take "*strict bed rest for 7 days*". The opinion of an expert serves as a guide to decision making and when there is uncontested medical evidence that the Plaintiff was under a medical disability to attend Court, the opinions formed by both the District Court and the Civil Appellate Court cannot stand to reason.
38. In such a backdrop, the dispatch of the Medical Certificate by the Plaintiff through his son has to be treated as an attempt to inform his Registered Attorney-at-Law of his disability and seek a postponement.
39. I observe upon a perusal of the journal entries that the Plaintiff had been present on all the previous trial dates and it is only on this fateful day that he absented himself. This previous conduct demonstrates the consistent readiness of the Plaintiff to continue with his trial and there is sufficient material before Court that offers reasonable grounds for the non-appearance of the Plaintiff.
40. I have already observed that the Plaintiff had made his appearance through the Attorney-at-Law instructed by his Registered Attorney-at-Law. Assuming without conceding that there was a necessity to purge default, there was reasonable cause to explain the putative non-appearance assumed erroneously by both the learned District Judge of Negombo and the judges of the Civil Appellate High Court of Gampaha. The oral testimonies of the Plaintiff and the medical doctor supported by the Medical Certificate advising strict bed rest

should have left no reason to doubt that the Plaintiff was taken so ill that he was unable to attend Court.

41.What is contemplated within Section 87(3) of the Civil Procedure Code is the adduction of reasonable cause for the purported non-appearance of the Plaintiff on the trial date 04.10.2006. I hold the view that there was convincing material to inspire confidence and satisfaction that the cause proffered by the Plaintiff was reasonable.

42.I must make the observation that when the Plaintiff had appeared in Court as contemplated within the provisions of the Civil Procedure Code and case law, it is ironical that both the learned District Judge and the Civil Appellate High Court Judges had erroneously assumed that there was a default on the part of Plaintiff.

43.In parting with this judgement, I am reminded of Sir Edward Coke's passionate expression in the supreme wisdom of the common law - *Neminem Oportet Esse Sapientiorem Legibus*; no man ought to take upon him to be wiser than the laws.

44.In the circumstances, the questions of law raised before this Court on behalf of the Plaintiff are answered in the affirmative and accordingly, I proceed to set aside the following;

1. The order of the District Court dated 04.10.2006 dismissing the Plaintiff's action
2. The judgement of the District Court dated 13.11.2006 allowing the claim-in-reconvention of the 1st Defendant in the absence of the Plaintiff
3. The order of the District Court dated 28.08.2009 refusing to set aside the order of dismissal

4. The judgement of the Civil Appellate High Court dated 02.07.2013 affirming the order of the District Court dated 28.08.2009
45. The learned District Judge of Negombo is directed to commence proceedings as from the stage the dismissal for default was made and endeavour to adjudicate the Plaintiff's action and bring to a close these proceedings as expeditiously as possible.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

Mahinda Samayawardhena, J

I agree

Judge of the Supreme Court