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

In the matter of an application for leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 5C of the High Court of the Provinces (Special provisions) Act No. 54 of 2006, against the Judgment of the Provincial High Court of Western Province dated 07.07.2021 in Case No. WP/HCCA/NEG/01/2019 (F); D.C. Negombo Case No. 7505/L.

SC APPEAL No. 54/2022
SC HCCA/LA/257/2021
WP/HCCA/NEG /01/19 (F)
D.C. NEG. Case No. 7505/L

Malcom Susantha Fernando Anandapulle of
No. 19, Fathima Road, Welihena,
Kochchikade.

PLAINTIFF

v.

Ignatius Brito Kaithan Pulle
No.140/B/1, Bambukuliya,
Kochchikade.

DEFENDANT

AND BETWEEN

Ignatius Brito Kaithan Pulle
No.140/B/1, Bambukuliya,
Kochchikade.

DEFENDANT – APPELLANT

v.

Malcom Susantha Fernando Anandapulle of
No. 19, Fathima Road, Welihena,
Kochchikade.

PLAINTIFF - RESPONDENT

AND NOW BETWEEN

Ignatius Brito Kaithan Pulle
No.140/B/1, Bambukuliya,
Kochchikade.

DEFENDANT – APPELLANT – APPELLANT

v.

Malcom Susantha Fernando Anandapulle of

No. 19, Fathima Road, Welihena,
Kochchikade.

PLAINTIFF – RESPONDENT - RESPONDENT

BEFORE : P. Padman Surasena, C.J.
Mahinda Samayawardhena J. &
M. Sampath K. B. Wijeratne J.

COUNSEL : Ms. Sudarshani Coorey instructed by Ms. Diana Stephanie Rodrigo for the Defendant - Appellant - Appellant.

Dushantha Epitawala instructed by Mr. Chinthaka for the Plaintiff – Respondent – Respondent.

ARGUED ON : 26.05.2025

DECIDED ON : 04.09.2025

M. Sampath K. B. Wijeratne J.

This appeal stems from the judgment of the Provincial High Court of Civil Appeal, Negombo, dated July 7, 2021, wherein the learned Judges of the High Court upheld the decision of the learned District Judge of Negombo delivered on January 1, 2019.

Following the filing of an application seeking leave to appeal before this Court, and after considering the submissions made by the learned Counsel for the Defendant–Appellant–Appellant (hereinafter referred to as the 'Defendant') and the learned Counsel for the Plaintiff–Respondent–Respondent (hereinafter referred to as the 'Plaintiff'), this Court granted leave to appeal on the questions of law set out in paragraphs 13(a) and 13(e) of the Petition dated August 04, 2021, which reads as follows:

(a) Did the learned High Court Judges gravely err in holding that, falling from a Jak tree and injury on the spine is not a reasonable ground to purge default under section 86 (2) of Civil Procedure Code;

(e) Did the learned High Court Judges gravely err in holding that, all oral evidence is insufficient to prove purge default of the Defendant Petitioner in the absence of evidence of the Ayurvedic Doctor;

Accordingly, this Court fixed the matter for argument, at which stage the learned Counsel for the Defendant and the learned Counsel for the Plaintiff made comprehensive submissions.

The Plaintiff instituted the instant action in the District Court of Negombo, *inter alia*, seeking, a decree for the cancellation of Deed No. 27246 dated October 02, 2010, attested by Deshabandu Wickremasingha, Notary Public; the ejectment of the Defendant

and all others claiming under him from the land described in the schedule to the Plaint; and damages as prayed for in the Plaint.

Upon accepting the Plaint, the District Court issued summons to the Defendant, and the Fiscal reported that summons had been duly served on the Defendant. However, on January 02, 2012, the returnable date, the Defendant failed to appear, and accordingly, the case was fixed for *ex-parte* trial in terms of Section 85 of the Civil Procedure Code.

Subsequently, the case was taken up for *ex-parte* trial on March 15, 2012, and the Plaintiff gave evidence in support of his case. The matter was then fixed for judgment, and on August 21, 2012, the learned District Judge delivered the judgment granting the reliefs (අ) and (ඉ) prayed for in the plaint, including ejectment of the Defendant and costs.

Consequently, the learned District Judge directed that the *ex-parte* decree be served on the Defendant, and the Fiscal reported that it had been served on the Defendant on November 08, 2012. Thereafter, on November 21, 2012, the Defendant filed a proxy together with a Petition supported by an Affidavit, seeking to purge his default[1].

Thereafter, the Plaintiff moved to file objections to the application and the objections were accordingly filed[2].

Thereafter, the learned District Judge fixed the matter for Inquiry. It is important to note that '[*a*]*n inquiry on an application to set aside an exparte decree is not regulated by any specific provision in the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and requirements of fairness. Section 839 of the Civil Procedure Code recognizes the inherent power of the court to make an order as may be necessary to meet the ends of justice*.' [3]

1 *Vide* J.E.No. 9 dated November 22, 2012.
2 *Vide* J.E. No.11 dated January 28, 2013.
3 *De Fonseka vs Dharmawardene* [1994] 3 Sri LR 49.

At the inquiry, the Defendant testified that he fell from a tree in October 2011. However, he immediately changed the date to December 23, 2011. During cross-examination, the Defendant further altered the date to December 29, 2011, also stating that it could have been either the 28th or 29th, showing uncertainty.

According to the Defendant, the injury sustained from falling from the tree was to his spine, causing him to be confined to bed for fifteen days and unable to engage in his usual activities for several months.

In these circumstances, I am of the view that it is highly improbable that the Defendant does not remember the exact date of such a significant and unfortunate incident.

The Defendant's own daughter testified that the incident occurred on December 29, 2011. However, another witness, Michel Fernando, who accompanied the Defendant to the Ayurvedic physician, was unable to state the exact date but estimated it could have been either the 27th, 28th, or 29th of December, somewhere between Christmas and the New Year[4].

It is important to observe that even the Ayurvedic medical certificate ('P1') does not specify the date of the fall from the tree either. Furthermore, although the Defendant and the witnesses stated that the Defendant was unable to engage in his daily activities for several months, the Ayurvedic Physician recommended leave for only five days. This discrepancy raises serious doubts as to the credibility of the witnesses concerning the injury allegedly sustained by the Defendant.

According to the Defendant, the Ayurvedic Physician who treated him was from Ja-Ela. However, the Ayurvedic medical certificate ('P1') produced to the court was issued by an Ayurvedic Physician from Imbulgoda. The Defendant's daughter also testified that her father was treated by an Ayurvedic Physician from the Ja-Ela area. In contrast, the witness Michel Fernando stated that the Defendant was taken to an Ayurvedic Physician

4 At pp. 225 and 226 of the Appeal brief.

at Imbulgoda, noting that they traveled to Imbulgoda, located between Colombo and Gampaha, passing through Ja-Ela.

According to the Defendant, on that unfortunate day, he was taken to the Ayurvedic Physician by a person named 'Christy'. However, according to the witness, Michel Fernando, who testified on behalf of the Defendant, it was he who had taken the Defendant to the Ayurvedic Physician.

According to the Ayurvedic medical certificate ('P1'), the diagnosis given by the Ayurvedic Physician is 'කයිශූල'. However, the Ayurvedic Physician was not called to give evidence regarding this diagnosis. Consequently, the District Judge was unable to assess the seriousness of the injury or the qualifications of the Ayurvedic Physician to make such a diagnosis. The medical certificate ('P1') was marked subject to proof.[5] However, at the closure of the Defendant's case, no objection was raised by the Plaintiff. As held by Samarakoon C.J. in ***Sri Lanka Ports Authority v. Jugolinija-Boal East***[6] and followed in many subsequent judicial decisions,[7] if no objection is taken at the closure of a case, documents read in evidence become evidence for all purposes of the law.[8] The fact that the medical certificate was marked subject to proof but not objected to at the closure of the Defendant's case should not, by itself, prevent the Court from considering its contents. The evidential value of the document is ultimately a matter for the Court to determine.

In ***Sirinivasam Prasanth & another v. Nadarajah Deverajan***[9] this court rightly held that, mere fact that a document was objected to at its production does not compel court to mechanically reject the same. Justice Mahinda Samayawardena has observed,

5 *Vide* proceedings dated March 25, 2015.
6 [1981]1 Sri. L.R. 18.
7 See *Balapitiya Gunananda Thero v. Talalle Meththananda Thero* (1997) 2 Sri L.R 101 and *Dadallage Anil Shantha Samarasinghe v. Dadallage Mervin Silva* SC Appeal 45/2010 S/C Minute dated 11.6.2019.
8 See also *Cinemas Limited V Sounderarajan* (1998) 2 Sri L.R. 16, *Adaicappa Chetty v. Thos.Cook and Son* 31 N L R 385, Silva v. Kindersley 18 N L R 85.
9 S.C. Appeal No. 163/2019, S.C. Minutes dated 22.03.2021 at pp 14 and 15.

"What I have stated above shall not be taken to mean that all documents the opposing party purportedly requires to be marked subject to proof must necessarily be proved by calling witnesses. There is a practice among some lawyers to get up and say 'subject to proof' whenever a document is marked in evidence by the other party. This they do as a matter of course or as a matter of routine and not with any particular objective in mind, except perhaps to prolong the trial. It is regrettable that most of the time the party who produces the document obliges to this without a murmur. If we are serious about laws delays, we must put an end to this bad practice. When a counsel routinely says 'subject to proof', the Judge must ask what he wants the other party to prove in the document. If this simple question is asked, I am certain the objection would be withdrawn or at least the issue to be addressed would be narrowed down. On the other hand, if the document is, take for instance, a Deed pleaded in the plaint but no issue has been raised disputing the Deed, the Defendant cannot make a routine application to mark it subject to proof when it is marked in evidence. Against this backdrop ***, I must emphasize that the Judge shall not mechanically refuse documents marked subject to proof but not technically proved by calling witnesses. The Judge shall decide the question of proof at the end of the trial on the facts and circumstances of each individual case****."* [emphasis added]

This rule is applicable vice versa. Even a document is marked without objection, the duty of court remains to examine its probative value and if it cannot be relied upon court should refuse to rely on it.

Therefore, Justice Aluwihare in the case of ***Koswatte Gamage Jayanatha vs Jayasinghe Arachchige Ranjanie Jayasinghe and others***[10] states,

"If the statement is relevant and admissible, then the court has no discretion, but to admit it. The court, however, is at liberty to consider the probative value of the contents upon evaluation and decide either to act on them or to reject it."

10 SC/Appeal/146/12, SC Minutes of 17-02-2016

Justice Janak de Silva in ***Multiform Chemicals Limited vs Adrian Machado***[11] distinguishes admissibility of evidence from the evidential value given to a piece of evidence as follows;

"Probative value of evidence means the weight to be attached to the evidence tendered and is different from admissibility of evidence. It is a question of fact that cannot be regulated by a set of precise rules."

The first application to vacate the *ex-parte* decree was made only on November 22, 2012. No application was made to Court to set aside the *ex-parte* decree until it was served on the Defendant. This Court is mindful that, even if such an application had been made prior to the service of the *ex-parte* decree on the Defendant, the decree could have been vacated only with the consent of the Plaintiff[12].

The Defendant's evidence was that he received summons in advance requiring him to appear in Court on January 2, 2012. However, due to the unfortunate incident that occurred, he was unable to be present in Court. In the circumstances, this Court is of the view that if this situation had been brought to its notice before the *ex-parte* decree was served, although such an application could not have been considered at that stage, it would nevertheless have supported the *bona fides* of the Defendant.

Samayawardhena, J. in the case of ***Nirmala Anura Fernando vs Sri Lanka Savings Bank Limited and Others***[13] citing the dicta of Justice Weerasuriya in ***Coomaraswamy v. Mariamma***[14] observed that "*the requirement for the party to make an application within 14 days of the service of the decree does not preclude the defendant to make an application before service of the decree and for the Court to inquire into such application after decree was served*."

11 *Multiform Chemicals Limited vs Adrian Machado* (S.C. Appeal No. 183/2011, SC Minutes of 18.07.2024).

12 Section 86 (2A) of the Civil Procedure Code.

13 SC/CHC/APPEAL/81/2014, SC Minutes of 28.02.2024.

14 [2001] 3 Sri LR 312 at 315.

In light of the above analysis, I am of the view that the learned High Court Judges rightly affirmed the decision of the learned District Judge refusing to set aside the *ex-parte* decree entered against the Defendant.

Consequently, I answer both questions of law in the negative.

The Plaintiff is entitled to the costs of this Court as well as those of both lower courts.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, C.J.
I Agree.

CHIEF JUSTICE

Mahinda Samayawardhena, J.
I Agree.

JUDGE OF THE SUPREME COURT