

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

D. R. M. R.T. Ranjith Eheliyagoda
No. 21, Kotuwegedera,
Matale.

PLAINTIFF-APPELLANT

C,A 130/1997(F)
D.C. Avissawella 794/L

Vs.

K. A. Dhanapala
No. 68, 69, Thalaghamula,
Eheliyagoda.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Thishya Weeragoda for the Defendant-Appellant

Harsha Soza P.C with S. Samaranayake
for the Plaintiff-Respondent

ARGUED ON: 22.03.2011

DECIDED ON: 06.05.2011

GOONERATNE J.

This appeal arises from the order dated 29.11.1996 of the learned District Judge, Avissawella setting aside the Judgment entered upon default. On or about 14.9.1994 Plaintiff's action was dismissed, since Plaintiff was absent and unrepresented. The journal entry No. 17 of 14.9.1994 indicates that both Plaintiff and Defendant were absent on the said date. It is also recorded in the above journal entry No.17 that on the previous trial dates also both Plaintiff and Defendant were absent. Further that there was no appearance for Plaintiff and no application made on his behalf, and case dismissed without cost.

The learned counsel for the Defendant-Appellant drew the attention of this court to journal entry Nos. 15, 16, 17 & 18 of the original court record to demonstrate the appearance and non appearance of Plaintiff, and his registered Attorney especially on 14.9.1994 (J.E 17). It was his position that even the proctor on record was not present in court and it was the duty of the registered Attorney to have appeared on the said date, on behalf of his client, (Plaintiff) although Plaintiff was absent. Learned counsel for Defendant-Appellant emphasised the point that in paragraph 3 of the petition dated 14.9.1994 it is averred that the Plaintiff arrived in the court

by about 10.00 a.m and by that time his case had been dismissed. At the inquiry to vacate the order made in default it was the position of the Plaintiff-Respondent in his evidence that he got delayed to arrive in court by about 1 ½ to 2 hours and the time was about 10.30/11.00 a.m. Further that the delay was due to delayed bus service. The Defendant-Appellant's Counsel argue that version in court and the averments in petition differ which give rise to question of credibility of witness. Learned counsel inter alia submitted that learned District Judge was in error as he failed to realize that the Plaintiff-Respondent was negligent.

The learned President's Counsel for Plaintiff-Respondent support the order of the learned District Judge dated 29.11.1996. President's Counsel stress the following in his submissions to this court

- (a) Promptness of his client to file petition and affidavit on the very same date of default.
- (b) Client has always acted diligently to prosecute his case. E.g. list of witnesses and document filed. Refer to evidence at Pg 36 of brief.
- (c) Delay due to an unavoidable delay caused by public transport
- (d) Cause for delay explained in evidence - Pg 39/40 of brief.
- (e) Trial Judge's reasoning cannot be disputed as he had the opportunity to hear evidence and test demeanour of witness. Trial Judge expressed views on factual matters and Court of Appeal should not interfere.

The relevant provisions with regard to non-appearance of Plaintiff is contained in Section 87 of the Civil Procedure Code. I would refer to entirety of Section 87 though in this problem attention need to be focused only to Section 87(3) of the code.

Section 87 reads thus:

- (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.
- (2) Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.
- (3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.

The requirement as in Section 87(3) of the Code is to apply to court within a reasonable time and satisfy court that there were reasonable grounds for non-appearance. The standard of proof as in Section 87(3) is only reasonable grounds unlike 'sufficient cause' or 'good cause'. The Indian Civil Procedure contemplates of showing sufficient cause for non-

appearance as the case may be. (Code of Civil Procedure 3rd Ed. Woodroffe & Ameer Ali's Pg. 1701)

Further I would prefer to interpret and understand 'reasonable cause' by comparing the terms 'good cause' and 'sufficient cause'. In the above text at Pg. 1709 'good cause' and 'sufficient cause' had been explained as follows:

There is no material difference between the facts to the established for satisfying the two tests of 'good cause' and 'sufficient cause'. If, on the other hand, there is any difference between the two it can only be that the requirement of a 'good cause' is complied with on a lesser degree of proof than that of 'sufficient cause'.

Our statute seems to be more reasonable and liberal in the above context and the required proof of 'reasonable cause' is on a lesser degree of proof than good cause and sufficient cause.

I must also refer to the old Civil Procedure Code of ours. Chapter XII of the old Code and Section 84 of that Code include provisions for non-appearance of Plaintiff. That section requires to show good cause for non-appearance of Plaintiff. (Vide 31 NLR 344). Difference in the Old Code and the present Civil Procedure Code is that good cause had been replaced by reasonable cause. In my view more liberal approach is found in the present Code to excuse a default of Plaintiff's non-appearance.

However reasonable cause would not mean that lashes or delay and indifference would be entertained or tolerated by court. In the case in hand one of the main points that favour the Plaintiff-Respondent is that his promptness to excuse his absence by filing necessary pleadings on the very same day of default. I would proceed to examine the evidence at the inquiry and the order of the learned District Judge.

The Plaintiff-Appellant in his evidence state that he came from Matale and left home by about 3.45 or 4.00 a.m. Usually he could arrive in court by 8.30 a.m. He also state that from Matale he has to take 3 buses and on that day there was a delay in the bus he traveled and emphasis that bus delay as result of a break down resulted him arriving late in court. He also state that it took some time to locate his Attorney-at-law and that he was very existed. Evidence of Plaintiff suggest that he had been very keen about his case. His answer to a question is as follows “ මම හරිම උනන්දුවෙන් නඩුවට කටයුතු කලා”. In cross-examination Plaintiff was able to maintain his position of delay except as regards arrival time in court to be 10.30 a.m. or 11.00 a.m which is a slight difference to paragraph of his petition which time as pleaded in the petition was 10.00 a.m.

The learned District Judge by his order has set aside the order of dismissal and awarded costs to the Defendant in a sum of Rs. 3000/=. The trial Court Judge's order refer to the above evidence of Plaintiff and state that no material changes were shown in his cross-examination. I would incorporate the following excerpts from the Judgment of the learned District Judge which suggest that the District Judge has correctly analysed the evidence, and considered all primary facts.

මෙහිදී පමණිලිකරු හඬ දින අධිකරණයට පැමිණ ඇති බව ඔහු ඵදිනම අධිකරණය වෙත දිවුරුම් පෙත්සමක් හා පෙත්සමක් ඉදිරිපත් කරීමෙන් සනාථ වේ. එසේ නම් සිදුව ඇත්තේ හඬ දින ඔහු පැමිණීම ප්‍රමාද වීම පමණි.

පැමිණිලිකරුගේ පුර්ව ක්‍රියාකලාපය සැලකිල්ලට ගත්විට ඔහු මෙම හඬව සඳහා සාක්ෂි ලේඛණයක් ද ඉදිරිපත් කර හඬවට සුදානම් වී ඇත. හඬවෙහි පලමු වහාග දින පැමිණිලිකරුගේ පැමිණීම වාර්තාගත වී නැති අතර විත්තිකරු නොපැමිණි නිසා විත්තිය දින පතා ඇත. 2 වන වහාග දින පැමිණිලිකරු ද විත්තිකරු ද පැමිණ නැත. මෙම හඬව නිෂ්ප්‍රභ කල දිනද පැමිණිලිකරු ද විත්තිකරු ද පැමිණ නැත. එහෙයින් වහාග දිනයන්හි හඬවට නොපැමිණීම පිලිබඳව සලකා බැලීමේදී විත්තිකරු කිසිදු හඬ දිනයක පැමිණ නැත. පැමිණිලිකරු මෙම හඬව නිෂ්ප්‍රභ කල 1994.09.14 වන දින අධිකරණයට පැමිණ ඇති බව සනාථ වන අතර ඔහු එසේ පැමිණ හඬව නිෂ්ප්‍රභ කරීමෙන් පසුවය.

පැමිණිලිකරු ඉතා දුර බැහැර ප්‍රදේශයක සිට නඩුවට පමණෙන බව ඔහුගේ සාක්ෂියෙන් අනාවරණය වී ඇත. ඔහු පැමිණිල්ල ඉදිරිපත් කිරීමේදී දී ඇති ලිපිණය මාතලේ ලිපිනයයි. එලෙස ඇත ප්‍රදේශයක සිට පැමිණීමේදී ඇති වූ ප්‍රමාදය පිලිබඳව ඔහු දී ඇති සාක්ෂියේදී කරන ලද පැහැදිලි කිරීම පිලිගත හැකි පැහැදිලි කිරීමකි. දුර බැහැර ප්‍රදේශයක සිට අධිකරණයට පැමිණෙන අයෙකුට බස් රථයක් කැඩීම නිසා ප්‍රමාදයක් සිදුවීමට හැකියාවක් ඇතැයි යන්න පිලිගත හැකි කරුණකි. පැමිණිලිකරු නඩු දින අධිකරණයට නොපැමිණීමෙන් මෙහි දී සිදුව ඇති අතර සිදුව අත්තේ ප්‍රමාද වී පැමිණීමක් පමණකි.

එම ප්‍රමාදයට හේතුව ඔහුගේ සාක්ෂියේදී පිලිගත හැකි ලෙස පැහැදිලිකර ඇත.

There does not seem to be a material defect or error in the order of the learned District Judge. The Trial Court Judge's finding on very many primary facts need not be altered by this court. Generally an Appellate Court would not interfere with primary facts unless such findings are highly unacceptable or without proper reasons (vide 1993(1) SLR 119 & 20 NLR 337). In all the above circumstances I affirm the Judgment of the learned District Judge dated 29.11.1996.

Appeal dismissed without costs. I direct the Registrar of this court to forward this judgment to the Registrar of the relevant District Court

— JUDGE OF THE COURT OF APPEAL