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

C.A. Case No. 641/1999 (F)

D.C. Matale Case No. 4074/L

1. Elle Gedara Pinchi Amma
2. Bulugahamulle Gedara Jayawardena

Both of Rattota, Kuruwawe.

PLAINTIFFS

-Vs-

1. Bulugahamulle Gedara Seelawathie (deceased)

1A. Mallawa Mudiyansela Gedara Mudiyanse

2. Mallawa Mudiyansela Gedara Mudiyanse
3. Ganetenne Gedara Ranmenika
4. Ganetenne Gedara Ranhami

All of Kaikawala, Madurawela, Ganetenne.

5. Mallawa Mudiyanselage Ratnayake

DEFENDANTS

AND

1. Elle Gedara Pinchi Amma

1st PLAINTIFF-APPELLANT

-Vs-

1. Bulugahamulle Gedara Seelawathie (deceased)

1A. Mallawa Mudiyansela Gedara Mudiyanse (deceased)

1AA. Mallawa Mudiyanselage Ratnayake,

No. 140/2, Ganetenna Road, Rattota.

2. Mallawa Mudiyansela Gedara Mudiyanse (deceased)

2A. Mallawa Mudiyanselage Ratnayake,

No. 140/2, Ganetenna Road, Rattota.

3. Ganetenne Gedara Ranmenika

4. Ganetenne Gedara Ranhami

Both of Kaikawala, Madurawela, Ganetenne.

5. Mallawa Mudiyanselage Ratnayake

DEFENDANT - RESPONDENTS

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

COUNSEL : Rohan Sahabandu, PC with Diloka Perera for the Plaintiff-Appellant

Oliver Jayasuriya for the 1AA, 2A and 5th Defendant-Respondents

Decided on : 24.05.2017

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

This is an appeal against the order of the learned District Judge of *Matale* dated 26.03.1999 which refused to set aside the judgement entered upon default of appearance of the 1st Plaintiff in the case on 11.12.1997. The factual background to the case becomes apposite. The 1st Plaintiff along with her son-the 2nd Plaintiff (the Plaintiff-Appellants before this Court) instituted this action against the Defendant-Respondents and their 2nd amended plaint dated 27.08.1993 averred *inter alia* that:

(a) The Defendants, without any rights whatsoever, had forcibly entered the property as depicted in the second schedule to the amended plaint dated 27.08.1993 and cut and destroyed some of the trees on the plaintiff's property, thereby causing severe damage and loss to the Plaintiffs.

(b) The Plaintiffs, their predecessors in title and all those holding under them had been in possession of the property depicted in schedules 1 and 2 for over 10 years and as a result they had obtained prescriptive possession of the property.

(c) The Defendants had forcibly entered the property and paddy field depicted in schedule 2 of the amended plaint and consequently the Plaintiffs continued to suffer loss amounting to a sum of Rs 500 per month:

Thus the Plaintiffs sought a declaratory relief praying for the eviction of the Defendants from the lands described in schedules 1 and 2 to the plaint.

The original 1st and 2nd Defendants filed their answer on 28.01.1994 traversing *inter alia* that:-

(a) they disputed the claim of ownership by the Plaintiffs;

(b) they had been in uninterrupted possession of the land since 1938 and in 1988 the Plaintiffs who had no title or ownership and/or never possessed the said land sought to cause problems to the Defendants on or about 17.05.1988.

In other words the 1st and 2nd Defendants claimed the property on a different pedigree and sought a dismissal of the action.

Disputing the title of the Plaintiffs *inter alia*, the 3rd and 4th Defendants also prayed for a dismissal of the plaint in their amended answer dated 11.03.1994.

On 31.07.1997, the trial was fixed for 11.12.1997-the fateful day that has given rise to this appeal on the part of the Plaintiffs.

Absence of the Plaintiffs on 11.12.1997

Admittedly this was the first date of trial but as neither the Plaintiffs nor were their representatives were present in Court, on an application made by counsel for the Defendants, the action was dismissed with costs-*vide* Journal Entry No.42 at page 42 of the appeal brief.

Application to Purge Default

By a petition dated 29.12.1997, only the 1st Plaintiff moved the District Court to have the order of dismissal for default of appearance set aside. At the conclusion of the purge-default inquiry, the learned District Judge of *Matale* refused the application to have the order of dismissal set aside.

The main reason that underpins the judgment of the learned District Judge of *Matale* is that a witness who testified on behalf of the 1st Plaintiff-an Ayurvedic doctor cannot be believed.

The testimony on behalf of the 1st Plaintiff came from two professionals namely Dr. Fahim from the Raththotta Hospital and one Ayurvedic physician called Gunapala Welgama. In fact they gave evidence first before the 1st Plaintiff testified.

Dr. Hameed Mohamed Fahim giving evidence testified that the 1st Plaintiff was admitted to the hospital with a complaint of stomach ache and vomiting on the 12th and she was discharged on the 15th. It is worth noting that the trial date was the 11th but the date of admission was the 12th. But the fact remains that there was this government doctor who asserted that the 1st Plaintiff had been hospitalized at the Raththota hospital a day after the date of trial and it resonates with the rest of the evidence that she had been sick on the 11th. Dr. Fahim's evidence and his testimonial trustworthiness were not challenged seriously. In a nutshell Dr. Fahim testified to the effect that the 1st Plaintiff Pinchi Amma was hospitalized from 12.12.1997 till 15.12.1997. The witness further stated that the patient was examined by the former D.M.O. and the Diagnosis Sheet showed that she was suffering from stomach pains and was vomiting and Dr.

Fahim went on to state that he too treated the patient. He also testified that as the patient was getting better and recovering she was released on the 15th. The record maintained at the hospital and the bed head ticket indicated that she had gastritis.

The next witness was one Welgama the Ayurvedic Physician. He produced the medical certificate that he had issued to the Plaintiff on 12.02.1997. According to him, the symptoms manifested by the patient connoted that she was weak and dizzy and he also stated that he had treated her from 05.12.1997 onwards albeit intermittently and the treatment was repetitive from this date. The medical certificate **P1** shows that she was recommended leave from 05.12.1997 to 12.121997.

The tenor of the argument advanced before this Court was that there was no documentary evidence in support of the position that the Plaintiff had been treated form 05.12.1997 till 12.12.1997. But this witness quite categorically stated that the Plaintiff had asked for a medical certificate on the 11th but he gave the certificate on the 12th and from the categorical evidence given by Welgama it is not inconceivable that she was not in a position to move about. With the evidence of both the 1st Plaintiff and Welgama-the Ayurvedic Physician taken in their correct perspective, it is apparent that she had been obtaining treatment regularly from the 5th December to 11th December.

Cumulatively the following points of salience emerge from the testimony of the two witnesses-the Plaintiff had been certainly sick. She had been hospitalized from 12th December to 15th December and the Ayurvedic Doctor had treated her from the 5th onwards and a medical certificate was given to her only on the 12th, though requested on the 11th. This clearly shows that the illness was not a figment concocted by the 1st Plaintiff.

The Counsel for the 1st Plaintiff-Appellant posed the question-If two professionals qualified in medicine state that the Plaintiff had been sick and was not recommended to travel why could not this evidence be accepted? Both men were not intimately known to the Plaintiff. No suggestion was ever made to them to this effect. They came off as independent witnesses. Having gone through the evidence of these two witnesses I find

that the witnesses were giving direct evidence of what they saw, heard and perceived. It does not appear to this Court that the medical certificates of these two doctors were given to suit the story of the 1st Plaintiff.

Pinchi Amma-the 1st Plaintiff testified that as she had been ill on the 11th December 1997 she had to visit an Ayurvedic Doctor to be treated with medicines on the 11th. At page 85 of the brief she describes as to how herillness had progressed rather than regressed. She first fell ill on the 5th and she was too weak to get up or walk. So she first got treatment from an Ayurvedic Doctor called Welgama and as she did not get better, she went to a Government hospital. She was warded therein for 4 days. It goes without saying that if the Plaintiff had not been so sick as she described, she would not have been kept as a patient for 4 days.

Her testimony reveals the fact that she had asked for a medical certificate on the 11th but it was given only on the 12th and collected by her son. There is corroboration of this testimony to a great degree by the two medical men. But there is a misappreciation of evidence as the learned District Judge wonders as to how the Plaintiff could get a medical certificate from the Ayurvedic doctor if she had been in the hospital on the 12th. The observation of the learned District Judge on this score is thus erroneous having regard to the fact that the medical certificate was collected by her son.

What strikes this Court as a factor to be taken cognizance of is the evidence of two doctors who had treated the 1st Plaintiff successively and no suggestion was ever made that they were lying on oath. In this context the perennial observation of H.N.G. Fernando, J. in the case of ***Edrick de Silva v. Chandradasa de Silva*** 70 N.L.R. 165 at 179 becomes applicable.

> *"If the petitioner leads evidence and the respondent does not contradict it, this is an additional "matter before the Court," which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account".*

The Defendant remained silent by not posing any questions on the testimonial trustworthiness of these two witnesses and it is additional proof of the fact in issue and therefore the witnesses have to be believed.

Apart from the evidence that transpired at the purge-default inquiry, Journal Entry No.42 of 11.12.1997 indicates that it was the 1st date of trial. On this date the Plaintiff and their Attorney-at-Law had been absent and the Court dismissed the plaint.

Journal Entry No.51 indicates that on 06.01.1998 the Plaintiff filed papers with notice to the contesting parties seeking to get the matter relisted. The application to purge default was dismissed on 26.03.1999.

In my view the learned District Judge of *Matale* failed to appreciate the probabilities that arose on evidence and they indicate that the Plaintiff fell ill on the 11th December 1997. This was a land action for which the Plaintiffs sought vindication and in my view the Plaintiff made out a case that her illness on the 11th prevented her from attending Court on the day in question. The learned District Judge should have been guided by the testimony of the two men who spoke to a continuous stroke of ill health on the part of the 1st Plaintiff and both the doctors corroborated her.

In the circumstances I decide to allow the appealand set aside the order of dismissal made on 26.03.1999 in regard to the application to purge default. The order dated 11.12.1997 dismissing the plaint of the Plaintiff is also set aside.

I direct the learned District Judge of *Matale* to proceed with the trial according to law and on the pleadings that have already been filed.

JUDGE OF THE COURT OF APPEAL