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

C.A. Case No.750/1997 (F)

D.C. Badulla Case No. 2039/1995/M

1. **Wijekoon Mudiyanselage Heenmenike**
2. **W.M. Nishantha Kumara** (Minor)
3. **W.M. Saminda Kumara** (Minor)
4. **W.M. Ranjith Bandara**
5. **W.M. Thushara Sampath** (Minor)
6. **W.M. Arosh Malkanthi** (Minor)
7. **Wijekoon Mudiyanselage Peter**

Appearing as the next friend of the 2nd, 3rd, 4th, 5th and 6th Plaintiffs above named who are minors.

8. **W.M. Sunil Kumara**

All of No.58, Giragolla,
Girandurukotte,
Mahiyanaganaya.

PLAINTIFFS

-Vs-

1. **The Attorney General**

Attorney General's Department
Colombo 12.

2. **Nimal Wijenanda**

of Girandurukotte.

DEFENDANTS

AND

The Attorney General

Attorney General's Department

Colombo 12.

1st DEFENDANT-APPELLANT

-Vs-

1. Wijekoon Mudiyanselage Heenmenike
2. W.M. Nishantha Kumara (Minor)
3. W.M. Saminda Kumara (Minor)
4. W.M. Ranjith Bandara
5. W.M. Thushara Sampath (Minor)
6. W.M. Arosh Malkanthi (Minor)
7. Wijekoon Mudiyanselage Peter

Appearing as the next friend of the 2nd, 3rd, 4th, 5th and 6th Plaintiffs above named who are minors.

8. W.M. Sunil Kumara

All of No.58, Giragolla,

Girandurukotte,

Mahiyanaganaya.

PLAINTIFF-RESPONDENTS

9. Nimal Wijenanda

of Girandurukotte.

2nd DEFENDANT-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Vikum de Abrew, DSG with Chaya Sri Nammuni, SC for the 1st Defendant-Appellant Priyantha Abeyrathne for the Plaintiff-Respondent
Decided on	:	19.07.2018

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

The Plaintiff-Respondents (hereinafter sometimes referred to as "the Respondents") filed an action in the District Court of *Badulla* claiming, *inter alia* damages in a sum of Rs.500,000/- jointly or severally from the 1st Defendant-Appellant (hereinafter sometimes referred to as "the Appellant"), the Hon. Attorney General and the 2nd Defendant-Respondent, Nimal Wijenanda, a driver of the *Girandurukotte* Police Station, for the death of the husband and father of the Plaintiff-Respondents, allegedly caused by the negligent driving of the 2nd Defendant-Respondent.

The Hon. Attorney General was made a party on the basis of the alleged vicarious liability attached to the State since the vehicle driven by the 2nd Defendant-Respondent belonged to the *Girandurukotte* Police Station.

Having filed the plaint, summons was served on the Appellant on 07.07.1995 and upon a perusal of the summons it was returnable on 15.09.1995, which also was designated to be a date for Answer.

It has been the inveterate of the Attorney General's Department from time immemorial that an Attorney-at-Law of good repute form the private bar is chosen to function as the Registered Attorney on behalf of the Attorney General in designated courts. Section 27 of the Civil Procedure Code recognizes this practice.

At this stage I would delve into the chronology of events as quite compendiously briefed to this Court by learned Deputy Solicitor General. It is also manifest from the record.

Chronology of events

The Proxy along with a covering letter (marked **P1** and **P1(a)** respectively), had been dispatched to the Registered Attorney to reach him on 12.09.1995 requesting him to obtain a long date to file Answer.

One observes that the State Attorney had thereafter sent a letter to the State Attorney inquiring as to the state of the case as there had not been any response. This letter marked **P2** inquired whether a proxy was filed and a date obtained to file answer.

One finds Mr. Perera replying to **P2** on 09.10.1995 stating that he had not been in *Badulla* during the week of the 15th of September and that this had been notified in writing to the District Judge of *Badulla*. By this response **P3**, Mr. Perera further informed the State Attorney that he had not received the proxy and covering letter (**P1** and **P1(a)**) and since he had not filed the proxy nor had he been present in court, the matter had been fixed for *ex parte* trial against the Hon. Attorney General. He went on to state in **P3** that he had already obtained the consent of the Plaintiff-Respondents' counsel to have the *ex parte* order set aside and he would file the necessary papers if a fresh proxy was sent since the former had been misplaced by him-*vide* page 86 of the Appeal Brief.

As requested, the relevant Assistant State Attorney had duly sent another coving letter along with a fresh proxy on 19.10.1995 requesting the Registered Attorney to obtain a long date for answer-*see* **P4** page 88 of the Appeal Brief.

By a letter dated **P5** Mr. Perera informed the Assistant State Attorney that the order for the *ex parte* trial had been vacated and the case would sent be called on 03.11.1995. Thereafter another letter had been stating that Answer was due on 19.01.1996-*see* **P6.**

Thus this machinery tried and tested for years on end has been in existence in order to ensure the appearance and defence of the Hon Attorney General in civil litigation and this contractual relationship with the State attorney designated in the circuit imposes on him the duty to appear on behalf of the Hon. Attorney General and keep him posted of the progress of the case every step of the way.

In this instance one next observes a letter sent by Mr. Perera **(P7)** dated 25.03.1996 wherein he states that he had sent the Attorney-General's Department several letters dated 11.11.1995; 04.12.1995 **(P6)** and 18.01.1996 out of which the State Attorney in the Department had only received the letter dated 04.12.2005 marked **P6**. Mr. Perera states in the letter dated 25.03.1996 that although by the aforementioned letters he had informed the department that the next date for answer was 22.03.1996 and that he had not received the answer and that he could not have filed answer himself since he did not have even a copy of the plaint with him and that although he had tried to move for time to file answer on behalf of the 2nd Defendant the matter was fixed *ex parte* against the 2nd Defendant on 17.03.1996. Thereafter, Mr. Perera had sent two consecutive letters dated 08.04.1996 and 22.04.1996 requesting for the answer to be sent.

It is apparent upon a perusal of the record that the Attorney General was not informed of the next date for answer, namely the 22nd March 1996 and that he was the 1st Defendant and not the 2nd Defendant as mentioned in the letter marked **P7**. The relevant State Attorney in the Attorney-General's Department had sent three copies of the answer of the 1st Respondent to Mr. Perera by letter dated 30.04.1996 and had, by letter dated 09.05.1996 inquired as to the correct position, whether the trial had been fixed *ex parte* against the 2nd Defendant or the 1st Defendant who was the Hon. Attorney General. Thereafter it would appear that the position that the matter was fixed *ex parte* against the Hon. Attorney General had been confirmed and it transpired that the Plaintiffs had refused to consent to allow an the answer to be filed on behalf of the Hon. Attorney General.

The case was taken up for trial on 08.07.1996 where the Counsel for the Plaintiffs had made the application to conduct the *ex parte* trial against the 1st Defendant, the Hon. Attorney General and that he would conduct the case against the 2nd Defendant the driver if necessary. With the adduction of evidence of two witnesses, the case for the Plaintiff had been concluded.

On the very same date the learned district Judge made order that the accident had occurred due to the negligent driving of the 2nd Defendant and an *ex parte* judgment was entered against the 1stDefendant-*vide* page 37 of the Appeal Brief.

Afterwards, once the *ex parte* decree was served on the 1st Defendant, the Hon. Attorney General made an application to vacate the *ex parte* judgment and at the purge-default inquiry, the evidence of the Senior State Attorney regarding the correspondence between the State and Mr. Perera had been led before the District Court. One also finds written submissions filed on behalf of the Attorney-General-*vide* page 61 of the Appeal Brief. The principal grounds for the vacation of the *ex parte* decree that had been urged before the District Court are *inter alia* the following:-

i. the Hon. Attorney General had not been informed that the matter had been fixed for answer on 22.03.1996 and therefore there was no opportunity to prepare answer and transmit it to Mr. Perera so that it could have been filed on that day;

ii. that, within the structural framework of the Attorney General's Department, all measures were taken to attend to this case diligently;

iii. that the Hon. Attorney General, should not be made to suffer for the mistakes/inadvertence of his Registered Attorney (Mr. Perera).

The learned District Court Judge refused to vacate the *ex parte* judgment and adumbrated the following at page 50 of the appeal brief:-

i. Mr. Perera had been negligent from the very commencement of the case as evident from the correspondence marked by the 1st Defendant;

ii. that a mistake could have been excused but negligence cannot, and that as there is negligence by the client as well, the Indian case cited would not apply;

iii. that the Hon. Attorney General has numerous officers working for him so that any one of them could have been utilized to file answer;

iv. that the Attorney General's Department should be more proactive and eager in a case than any other Department.

Being aggrieved and dissatisfied with the above order, the Hon. Attorney General has preferred this appeal.

After preliminary written submissions, oral submissions were made and written submissions have since been filed by the parties setting out the cracks of the oral submissions.

Section 86(2) of the Civil Procedure Code is quite clear that if reasonable grounds are shown for the default, the Court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the state of his default upon such terms as to cost or otherwise as to the Court shall appear proper.

The question before the learned District Judge at the purge-default inquiry was whether the Attorney General had satisfied Court that there were reasonable grounds for the default that had occurred in this case.

Moreover an inquiry into an application to set aside an *ex parte* decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness. Section 839 of the Civil Procedure Code recognizes the inherent power of the court to make an order as may be necessary for the ends of justice. ***De Fonseka v. Dharmawardene*** (1994) 3 Sri L.R 49. Fairness and Reasonableness dictate the overarching ambit of a purge-default inquiry and one has to bear in mind the useful guidelines given in the case of ***Rev Sumanatissa v. Harry*** 2009 (1) Sri L.R 31 wherein this Court held that what is to be decided is whether the default in question was willful or not. It was further held in this case that: *"Negligence may in certain circumstances constitute reasonable grounds within the meaning of Section 87(2) of the Code".*

Thus this Court in CA 1104/00 (F) (decided on 17.03.2017) explored the reasonableness of an order to dismiss the plaint in an action where the registered Attorney-at-Law and Counsel were both present in Court but the Plaintiff was absent from Court because he

was away in the United States having met with an accident. This Plaintiff had been present in Court on previous occasions. This Court emphasized to look upon previous conduct of a party in attending Courts before proceeding to treat absence on a particular day as willful default.

Willful default has to be decided taking into consideration the past conduct of the parties and the circumstances which gave rise to the default and whether the Plaintiff has concocted fraudulent reasons to explain his absence-*see* similar strands of thought in the case of ***Althaf v. Perera*** CA No.1587/2008 dated 12.07.2007 which has been cited by the learned Counsel from the State.

There was abundant evidence before the learned District Judge to conclude that there was no willful default on the part of the Attorney General in proceeding to undertake a defence in this case as the relevant State Attorney has diligently acted in communicating with the recognized agent in this case. Merely because a Registered Attorney-at-Law of the Attorney-General has misplaced his communications from the Attorney-General the Attorney-General cannot be visited with the sanction of nonparticipation in the trial by virtue of an *ex parte* trial being fixed against him when the course of correspondence between the State Attorney in the office of the Attorney-General and its Registered Attorney in the outstation courts quite clearly manifests due diligence on the part of the State Attorney. The learned District Judge has evidently held that the Registered Attorney had been negligent and in my view that would constitute a reasonable ground for the default on the part of the 1st Defendant-Appellant in not filing answer on the due date and in the circumstances the learned District Judge ought to have vacated the decree that had been entered after trial *ex parte.*

I see a palpable error of law on the part of the learned District Judge to have refused to set aside the judgment entered upon default and accordingly I set aside the judgment dated refusing to vacate the *ex parte* judgment dated 23.09.1997 and in the process the *ex parte* judgment dated 08.07. 1996 is also set aside.

I allow the appeal and remit this case to the District Court of *Badulla* with a direction to the learned District Judge to permit the Attorney-General to file answer and thereafter to hear and conclude the trial.

JUDGE OF THE COURT OF APPEAL