

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

In the matter of an application for
Revision and/or Restitutio oi integrum
under Article 138 (1) of the constitution.

C.A Revision application No: CA/RI/O9/18
D.C case No: 00115/09 DLM

Safar Shiraz Jeevunjee
No.5/1, Gower Street,
Colombo 05.

Plaintiff

V

1. Anthiya Neeladevi
No.46/7 A
Puwakwatta Road,
Nayakkanda,
Hendala,
Wattala.
2. Jude Tyrone Philip
No.30/19,
Circular Road,
Kandana

Defendants

AND NOW BETWEEN

Anthiya Neeladevi
No.46/7 A
Puwakwatta Road,
Nayakkanda,
Hendala,
Wattala.

1st Defendant- Petitioner

V

Safar Shiraz jeevunjee
No.5/1, Gower Street,
Colombo 05

Plaintiff- Respondent

Jude Tyrone Philip
No.30/19,
Circular Road,
Kandana

2nd Defendant- Respondent

Before : Justice D.N. Samarakoon
Justice C.P. Kirtisinghe

Counsel: Asthika Devendra with Wasantha Sandaruwan for 1st defendant- Petitioner. Geethaka Gunawardana, PC with Kushlan Seneviratne and Chanaka Weerasuriya instructed by D.M. Swaminathan Associates for Plaintiff Respondent.

Agued on : 26.01.2021
Decided on : 25.02.2021

Justice D. N. Samarakoon

When the District Court action came up for trial on 30.06.2017 the attorney at Law of the 1st defendant was not present. When she asked for a further date, the District Court indicated that she will be given a date if cost is paid to the other parties. The plaintiff asked for Rs. 25,000 /-prepayment of costs, which the court granted. The 2nd defendant although sailing with the 1st defendant also moved for Rs. 31,500/- as costs. The order said,

“ The cost of prepayments is **ordered** according to the application of the counsel for the Plaintiff and the Counsel for the 2nd Defendant to be paid cost by the 1st Defendant on or before 9. a.m on the next date. In the event of failure to make the cost the, 2nd Defendant is entitle go get a writ to collect the money from the 1st Defendant and the Plaintiff is entitle to have the reliefs against the 1st defendant as prayed for in the Plaintiff.”

The position of the 1st defendant petitioner before this court is that she being a Tamil national she cannot understand Sinhala Language and there was no Tamil translator at the time the Learned District Judge dictated the above order to the English stenographer. Although she has signed the Journal Entry that was in Sinhala she says she did not understand the contents. Hence she says she inquired from the Court staff about the order and she was

told that she has to pay Rs. 31,500 to 2nd defendant before the next date, which she has paid on 25.10.2017.

The contention of the 1st defendant is that it is reasonable to presume a reasonable person would not intentionally pay only the Pre-payment Cost for the 2nd defendant whom she was sailing with without paying the cost for the Plaintiff unless there was miscommunication.

The 1st defendant says that when the action was taken up for trial on the next date, that is on 27.10.2017 the attorneys at Law appearing for the 1st defendant and the 2nd defendant revoked their proxies and refrained from appearing on behalf of them and the Court called a Tamil translator called Ms. Pawithra and questioned as to why she had not paid the due prepayment cost of Rs.25,000/-. The 1st defendant then said that she did not know about that . The 1st defendant says that then her son Ramesh who was also present in Court had informed the translator that he has Rs.10,000/- with him and if he is permitted he can obtain money from the bank and pay to the plaintiff. The 1st defendant says that the translator disregarding the request informed the Court that the 1st defendant does not have money to pay to the plaintiff. The Learned District Judge thereafter in compliance with the earlier order ordered that a decree be entered in plaintiff's favour

1st defendant petitioner basically relies on two judgements reported in 1994(3) SLR 305 and 1986 (1) SLR 47. It was said in **CALISTUS PERERA Vs. NAWANGE (1994) 3 SLR 305 (SC)** it was held inter alia that;

“ Where a party applies for a postponement, it is open to the judge to inquire whether the other party consents to it being granted; if

the latter says he would agree to a postponement only on the condition that the action shall be decided in a particular way if the costs are not paid, and the former agree to this, the order as to the decision of the case becomes a consent order and will therefore bind the former; but if the party seeking a postponement does not consent to that condition, it is open to the court to refuse the postponement and to proceed with the trial. Section 91A cannot be approached on the assumption that the legislative intent was to confer on the court the power to give judgement without adjudication even where there was no consent to the order of prepayment. The trial judge had no jurisdiction to give judgment for the plaintiff merely because the defendant had failed to pre-pay the costs ordered without the defendant's consent"

It was said in **PIYASEELI v. PREMATILLEKE (1986)1 SLR 47 (SC)** that an order that the action would be dismissed if the plaintiff failed to pay nominated costs before a fixed date and time if made without consent of the parties does not entitle the Court to dismiss the action where such costs are not paid as stipulated.

Because the position of the 1st defendant is that the order made on 30.06.2017 is not a consent order the 1st defendant relies on paragraph 13 of the written submissions of the plaintiff dated 12.12.2019 at page 5 paragraph 13 which says

“ 13. However. this order of 30.06.2017 cannot be considered as A CONSENT JUDGEMENT”

Hence the position of the 1st defendant is that even the plaintiff admits that the said order is not a consent judgement.

The learned President's Counsel for the plaintiff said that the consent should be by the registered attorney at Law. However he further said

that the aforesaid order is not a mere order. The plaintiff's said written submissions states after paragraph 13

“ 14. If it is a consent judgement, then, this issue has to be answered against the plaintiff- respondent.

15. It is **of consent**, a term agreed upon only in order to obtain a postponement is the trial, and was granted to the 1st defendant at her request.

16. It was an **indulgence bestowed** upon the 1st defendant by court.

17. Thus, it was not only an agreement reached between the parties but also with court to obtain a postponement.

He said that the Learned Judge took great pains to explain the outcome of the order. He drew the attention of the court to P.6 which is the proceedings of 30.06.2017 which says

“Court:

The 1st defendant is present. There is no appearance for her.

At this stage, the 1st defendant appears in person and states that she has informed the Lawyer over the telephone and he didn't come. According to the instructions obtained from the 2nd defendant, counsel for the 2nd defendant informs court that the 2nd defendant has requested several times the 1st defendant to go and meet the counsel and give instructions which she fails to do that.

Considering all these matters court inquires from the 1st defendant about her application on this matter and informs her that if she is moving for a date she will be subjected to a cost of

prepayment **as requested** by the counsel for the plaintiff as well as the counsel for the 2nd defendant.

The 1st defendant is agreeable to the prepayment and moved for a postponement of this trial.

Counsel for the plaintiff states **thus**;

I state that I am ready for the trial today. However, since the application has been made by the 1st defendant in person for postponement of trial, the plaintiff would not object to such application provided prepayment of cost of the plaintiff is paid on or before 9.00 a.m. of the next date which this trial refixed, I move that your honor's court be pleased to make order against the defendant as prayed for in the plaint. Although the incurred cost is much more will restrict my prepayment of cost at **Rs.25,000/-**

The learned president counsel for the 1st defendant emphasized the words "as requested" saying that the 1st defendant also requested and that the words "thus" appearing before the figure "Rs.25,000/-" signifies that the date was given as per the condition to pay Rs.25,000/-.

However the phrase appearing there is "she will be subjected to a cost of prepayment **as requested** by the counsel for the plaintiff.." Hence it refers not to a request made by the 01st defendant but to a request to be made by the counsel for the plaintiff. The term "thus" refers to what the counsel of the plaintiff next requested.

Hence it is not possible to say that the 01st defendant requested to pay costs. Her request was only for a further date and thereafter the counsel for the plaintiff requested for costs.

The passage, ““ The cost of prepayments is **ordered** according to the application of the counsel for the Plaintiff and the Counsel for the 2nd Defendant to be paid cost by the 1st Defendant on or before 9. a.m on the next date. In the event of failure to make the cost the, 2nd Defendant is entitled go get a writ to collect the money from the 1st Defendant and the Plaintiff is entitled to have the reliefs against the 1st defendant as prayed for in the Plaint,” refers to the order then made by the court.

The 01st defendant in her written submissions citing the cases **Kandiah vs. Vairamuttu 60 NLR 01, Manamperi Somawathie vs. Buwaneswari 1990 01 SLR 223, Seelawathie and another vs. Jayasinghe 1985 02 SLR 266** and **Hameed vs Deen and others** contends that only her Attorney at Law could have consented. But her Attorney at Law was not present and in the absence of the Attorney at Law she requested for a postponement of the trial. If she could not have performed any act without through the Attorney at Law then she could not have asked for a date too. But in the absence of the Attorney at Law there was no barrier as to why she could not have asked for a date and if she gave her consent to the conditions imposed by the court then it is valid. But the problem is that aforesaid passage which was recorded by court does not indicate that she so gave her consent either to pay the costs or to abide by the condition that if that is not paid a decree will be entered in favour of the plaintiff. This supports her position that since there was no Tamil

Translator she could not understand the character of the order made by the court. Hence it is apparent that there was no consent by her. Hence the position that it is not a “consent order” is correct. The position of the plaintiff however is that it is not only an agreement reached between parties but also with court to obtain a postponement. [See paragraph 17 of the written submissions of the plaintiff] Such an “agreement” presupposes “consent” and as aforesaid the position of the 01st defendant is that there was no “consent” by her. This position is substantiated by the passage recorded by court as proceedings which was relied upon by the plaintiff.

In addition a strong point in favour of the 01st defendant is that she paid costs of Rs. 31,500/- to the 02nd defendant. This substantiates her position that she asked from someone about the order made by the court and she was told only that portion because otherwise she had no reason to pay costs to the 02nd defendant who sailed with her but not to the plaintiff.

Plaintiff respondent states that the words “as requested by the plaintiff’s counsel” is very important and material. But the position of the 01st defendant that there was no Tamil translator on that day is not contradicted. Hence the position that the 01st defendant could not understand the character of the order made is substantiated.

Another point on which the plaintiff relies upon is that paragraph 07 of the counter affidavit of the 01st defendant. Among other things she states there “I further state that on 27.10.2017 the Attorney at Law retained by me tendered proxy revocation papers to the court without proper notice to me”. The position of the plaintiff is that at page 730 the revocation papers has been

signed one day before and hence she has lied in paragraph 07 and if she can lie on one day she can lie on the other day. The answer of the learned counsel for the 01st defendant was that the revocation papers was in Sinhalese language. It could well be that the 01st defendant even one day previously signed the revocation papers without knowing its exact character. It is not uncommon that when her Attorney at Law gave her a paper for her to sign she would place her signature on the trust she has in the Attorney at law.

Hence the position of the 01st defendant that she was not aware of the character of the order made by court on 30.06.2017 is substantiated. As per the authorities the court could not have imposed a condition that a decree will be entered in favour of the plaintiff in the event of not paying the prepayment of costs without the consent of the 01st defendant.

Hence exercising the powers of revision and restitutio in integrum this court sets aside that condition and the decree entered against her for default and restores the case of the 01st defendant to the roll. The learned district judge will hear the case from the position that the proceedings were interrupted. There is no order on costs.

Judge of the court of Appeal

C.P. Kirtisinghe – J

I agree

Judge of the court of Appeal