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

C.A 135/1997 (F)
D.C. Kandy 2247/RE

D. G. Sisiliyan Swarnalatha of
No. 143, Talawatta, Peradeniya.

PLAINTIFF

Vs.

M. I. M. Farook of
No. 401, Peradeniya Road,
Kandy.

DEFENDANT

And

D. G. Sisiliyan Swarnalatha of
No. 143, Talawatta, Peradeniya.
(Deceased)

PLAINTIFF-APPELLANT

Vs.

M. I. M. Farook of
No. 401, Peradeniya Road,
Kandy.

DEFENDANT-RESPONDENT

In the matter of an application for substitution.

H. G. Abeyratne of
No. 143, Talawatta, Peradeniya.

PETITIONER

Vs.

M. I. M. Farook of
No. 401, Peradeniya Road,
Kandy.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: C. E de Silva with Sarath Walgampaya for
Substituted Plaintiff-Appellant
H. Withanachchi for the Defendant-Respondent

ARGUED ON; 05.09.2011

DECIDED ON: 02.11.2011

GOONERATNE J.

This was a rent and ejectment suit filed in the District Court of Kandy. The appeal is from the order dated 14.8.1996 which is an order setting aside the judgment entered in default and permitting the Defendant-Respondent to proceed with his defence on prepayment of Rs. 4000/- to be deposited prior to 9.30 a.m on the next trial date. In brief as pleaded in the Petition of Appeal the main complaint of the Appellant was that the learned

District Judge having accepted the fact that the Defendant-Respondent failed to satisfy the original court of any reasonable grounds to satisfy court of his default nevertheless vacated the default judgment as aforesaid. This position was inter alia elaborated by the learned counsel for the Appellant in his oral submissions to this court, with authorities. However learned counsel for the Defendant-Respondent maintained the fact that the learned trial Judge was not in error in his order of 14.8.1996 and that what is paramount in the order is that the original court Judge considered the application made by the Defendant's Counsel for a postponement on the basis he was unwell on the date of trial and the Defendant's absence is not a factor that influenced the trial court Judge in his ultimate decision to grant

relief to the Defendant-Respondent by his order of 14.8.1996.

On a perusal of the order it is apparent that the trial Court Judge has been very critical of the Defendant's absence from court on several trial dates and fault him for the delay in the disposal of this case. No doubt conduct of a litigant of this nature is something that should not be tolerated by any court in the Island.

I would very briefly refer to the submissions of learned counsel for Plaintiff-Respondent-Appellant. He inter alia submitted the following to this court.

(a) The order fixing the case for ex-parte trial on 27.3.1995. In those proceedings reference of the learned trial Judge made to the fact that it was the 15th day of further trial, and the Defendant was not present in court. No explanation was forthcoming for his absence. Counsel Rajamani appeared for the limited purpose to inform court that learned counsel for Defendant was not well. Counsel Rajamani informed court that he has no instructions from the Defendant. Learned counsel emphasis on the material contained in pgs. 41 & 42 of the brief.

(b) Evidence of Plaintiff led at the ex-parte trial on 27.3.1998 and judgment was entered ex-parte on the said date.

(c) On an application made by the Respondent to purge the default and at that inquiry Respondent in his evidence testified that he could not be present in court because his wife was hospitalized and had to be given a blood transfusion. Learned District Judge rejects his explanation and state that no documentary evidence placed before court to prove his absence and failed to produce records from the hospital.

(d) Order (pg 81/ of 14.8.1996 learned District Judge rejects Defendant's explanation for his absence and disbelieves Defendant-Respondent's version on same. In other words Defendant-Respondent has not been able to offer a reasonable explanation for his absence. Counsel submitted that the learned District Judge cannot in law after a finding against the Defendant vacate the ex-parte judgment and permit the Defendant to proceed with his defence.

(e) emphasis on Section 145 of the Civil Procedure Code (default of party to carry out purpose of adjournment)

(f) relied on the judgments reported in

(i) 2003 (2) SLR pg. 162

(ii) 1991 (2) SLR pg. 205

(iii) D.G. Jayasooriya's case – Bar Association News Letter 1.4.1996

(iv) Defaults, lapses as indicated in order, reasons unchallenged.

The learned counsel for Defendant-Respondent inter alia submitted the following.

(a) Though the District Judge refer to the lapses of his client the learned Trial Judge in his order considers the application made on behalf of counsel for Defendant who was not well and the practice of court is to permit a postponement on personal grounds of counsel (indisposed). This is provided in terms of the rules of court.

(b) Emphasis on the penultimate paragraph of the order dated 14.8.1996.

(c) Refer to adjournments as in Section 143 (1) of the Civil Procedure Code.

It is important to examine the order permitting an ex-parte trial (dated 27.3.1995) prior to considering the order setting aside the judgment entered in default (ex-parte judgment). At folios 41 & 42 of the brief it is recorded that on 27.3.1995 the Defendant was not present in court. Proctor Rajamani had applied for a postponement on the ground that the counsel appearing for the Defendant is unwell. In these proceedings it is recorded that even on the

previous trial date an application was made for a postponement on the ground that Defendant Counsel was unwell. As such court had given a final date (27.3.1995). In the order of 27.3.1995 reasons to refuse an adjournment is very clearly and precisely stated by the trial Judge as follows: (other than counsel's inability to appear due to ill health) ....

පැමිණිල්ල නඩුව සඳහා සුදානම්ව පැමිණ ඇති නිසා නඩුවේ වැඩදුර විභාගය කරගෙන යම්. නීතිඥ රාජමුනි මහතා කියා සිටින්නේ විත්තිකරු වෙනුවෙන් පෙර කලාසිය ඉදිරිපත් කර ඇති නීතිඥ මරික්කාර් සහ මරික්කාර් මහතුන්ගේ නීතිඥ සමාගමේ කටයුතු නීතිඥ රාජමුනි මහතා කරන බවය. තවද විත්තිනරුගේ මේ නඩුව සම්බන්ධයෙන් තමාට ඉදිරිපත් වීමට කිසිම උපදේශයක්වත් ලැබී නැති බවත් කියා. එම නිසා විත්තිකරු වෙනුවෙන් නීතිඥ රාජමුනි මහතා උපදෙස් ලැබී නැති බැවින් ඔහු වෙනුවෙන් පෙනී නොසිටින බවත් කියයි.

As such the trial Judge was not made known about the reason for Defendants absence. However the same trial Judge though blame the Defendant for delay etc. (which views of the trial Judge cannot be faulted) allowed the application of the Defendant-Appellant to re-start the case after inquiry into the application to set aside the judgment (27.3.1995) entered on default. I would at this point of my judgment refer to the case of Jagath Keerthiwansa vs. Urban Council Horana. C.A No. 223/2002. D.C. Horana 6169/Spl – CA minutes 24.6.2001.

Amaratunga J, held that;

> In my opinion, the plaintiff cannot be entirely blamed for not getting ready as the 1st defendant had filed a motion to get a postponement on 19.6.2001. The fault is

the failure to give notice of that application to the Attorney-at-Law for the 2nd to 4th defendants. As Sansoni J. had stated in Daryanani Vs. Eastern Silk Emporeum (64 NLR 529) many sores of litigation can be cured by that healing medicine called costs. In the special circumstances of this case, the learned trial Judge should have exercised his discretion to grant a postponement by awarding costs to the 2nd to 4th defendants. Since further proceedings remain stayed, no party will benefit by waiting till the outcome of the appeal. It is in the interest of all parties to proceed with the trial instead of waiting for their turn for the hearing of the appeal.

Accordingly the revision application was allowed and order of dismissal set-aside, District Judge is directed to start the trial de novo. Plaintiff was ordered to withdraw appeal and to pay Rs. 1000/- to the 2nd, 3rd and 4th defendants as their costs for the day of trial.

In the order that is sought to be canvassed before this court (dated 14.8.1996) the trial Judge analysing the evidence and giving reasons for defendant's default and rejection of whatever reasons given by the Defendant for his absence from court proceed to grant relief to the Defendant by ordering prepayment of costs (as in 64 NLR 529) payable to Plaintiff by emphasizing that fact that the party Defendant should not be faulted due to the absence of counsel who was unwell. The following extract to be noted from the said order...

27.03.95 දිනදී වත්තිකරු අධිකරණයට පැමිණ නොසිටියා වුවත් ඔහුගේ නීතිඥ මහතා අසනීපව සිටින බව අධිකරණයට දන්වා ඒ මත දිනයක් ඉල්ලා ඇත. ඒ අනුව 27.03.95 දිනදී වත්තිකරු අධිකරණයට පැමිණ නොසිමේ කරුණ මත ඔහුට විරුද්ධව ඇති නඩුව ඉදිරි

කටයුතු කරගෙන යාම නිසා ඔහුට අසාධාරණයක් සිදු වී ඇති බව මගේ අදහස වේ. විත්තිකරු සාක්ෂි දී කියා සිටි පරිදි එදින සඳහා ගාස්තුව ද ඔහුගේ නිතිඥ මහතාට ගෙවන ලද්දේ නම් විත්තිකරු වෙත සම්පූර්ණ වරද තැබීමට නුපුළුවන.

I would refer to the following Court of Appeal (Appellate procedure) Rule 1990 and guide lines/JSC Circular in regard to postponement ... - Judicial Conduct Ethics and Responsibilities – Dr. A.R.B. Amarasinghe pgs. 896-898

Pg. 894....

Hon. Dr. A.R.B. Amerasinghe in his book "Judicial Conduct, Ethics and Responsibilities" dealing with the topic 'postponements and adjournments' at Page 894 observed as follows:

"Postponements and adjournments are sometimes necessary in the interests of justice. The Law recognizes this. Civil trial may be adjourned from time to time for good reasons..... Postponements and adjournments may increase the cost of litigation for an innocent party. In that connection, judges should remember that they may grant a postponement or adjournment upon terms, including the payment of costs....."

Pgs. 896-898...

When an application is made by an attorney-at-law for an adjournment or postponement on personal grounds, the specific reason shall be notified to the court; if for good cause, such reason cannot be disclosed in open court, it must be notified to the judge or bench in chambers. An application on personal grounds must be made as soon as the need for a postponement or adjournment becomes known, and may be refused if delayed unreasonably.

'Personal grounds' shall mean illness of such a nature which prevents an attorney-at-law getting ready for, or from appearing at, the hearing, illness of a close family member of such a nature, or in such circumstances, as to reasonably prevent him from appearing, travel abroad for medical, official or professional reasons; a bereavement in the family; an important family social occasion; and other like circumstances which are both personal and urgent.

The attention of the Judicial Service Commission has been drawn to the procedure followed by certain courts in regard to postponement of cases and the inconvenience thereby caused to litigants. The Commission has, therefore, directed (the Secretary of the JSC) to inform you as follows:

(i) the practice of entertaining letters from Attorneys-at-Law requesting the postponement of cases should be discouraged.

(ii) Cases should be postponed only on valid grounds to be stated on record, on application made on behalf of the Attorney-at-Law concerned.

(iii) Applications by Attorneys-at-Law for postponement on the ground that they are unable to be present due to other work or as they have to appear elsewhere should not be entertained.

(iv) No case should be postponed due to the non-appearance of an Attorney-at-Law, except on personal grounds.

(v) Applications on personal grounds should be confined to those on account of the ill-health of an Attorney-at-Law or the ill-health of the immediate family or a bereavement in the immediate family.

In the case of Ameen vs. Rasheed (38 N.L.R page 288) Abrahams; C.J.

While rejecting the contention that an order for postponement was a ministerial order and not a judicial order held that when considering an application for postponement a Judge must bring his mind to bear upon the reasons for the application and the objections made thereto, and decide judicially.

When I consider the order of the learned District Judge dated 14.8.1996, in it's entirety, the adverse comments made by the learned District Judge against the Defendant-Respondent should not be faulted as it appears to this court that the long delay in the disposal of the case in the original court was due to the conduct of the Defendant and he should be blamed to a great extent. However Counsel's inability to appear in court due to illness is excusable. Nor should the Defendant be blamed for counsel's absence genuinely due to illness. Therefore the learned District Judge's order to compensate the Plaintiff by making a prepayment order for costs is in order and correct in the circumstances of the case.

As such I dismiss this appeal. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APEPAL