

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

In the matter of an Application for Leave to Appeal against Judgment of the Provincial High Court of North Central Province dated 24/02/2011 in Case No. NCP/HCCA/ANU 688/2009 D.C. Anuradhapura Case No.10596/L.

**SC APPEAL NO.39/2013**  
SC/HCCA/LA No.105/2011

NCP/HCCA/ANU 688/2009.  
D.C. Anuradhapura case No.10596/L

W. Justin Fernando. **(Deceased)**

Thambarawila, Waikkala.

**(Plaintiff)**

K. Mary Margaret Fernando.

Thambarawila,

Waikkawala.

**Substituted Plaintiff**

**Vs.**

W.M. Seneviratne,

No. 402, Eliya Diwulwewa,

Eppawala.

**Defendant**

**And then,**

W.M. Seneviratne,

No. 402, Eliya Diwulwewa,

Eppawala.

**Defendant-Appellant.**

**Vs.**

K. Mary Margaret Fernando.

Thambarawila,

Waikkawala.

**Substituted Plaintiff-Respondent.**

**AND NOW BETWEEN,**

K. Mary Margaret Fernando.

Thambarawila,

Waikkawala.

**Substituted Plaintiff-Respondent-  
Petitioner**

**Vs.**

W.M. Seneviratne,

No. 402, Eliya Diwulwewa,

Eppawala.

**Defendant-Appellant-Respondent**

**BEFORE** : **BUWANEKA ALUWIHARE, PC, J.**

**L.T.B. DEHIDENIYA, J.**

**S. THURAIRAJA, PC, J.**

**COUNSEL** : Sudarshani Cooray Attorney-at-Law for the Substituted Plaintiff-  
Respondent- Petitioner.

Defendant- Appellant- Respondent is absent and unrepresented.

**ARGUED ON** : 01<sup>st</sup> February 2019.

**WRITTEN SUBMISSIONS** : Substituted Plaintiff- Respondent-Appellant filed on 12<sup>th</sup> February 2019.

**DECIDED ON** : 5<sup>th</sup> April 2019.

**S. THURAIRAJA, PC, J.**

Justin Fernando had instituted an action in 1982, against Wijekoon Mudiyansele Seneviratne (the Defendant-Appellant-Respondent) for declaration of title to the land described in the schedule to the plaint (as amended) dated 29<sup>th</sup> October 1993 and to eject the Defendant-Appellant- Respondent and Rs.1000/- per month as damages from October 1980 on the basis that, the Plaintiff-Respondent-Appellant is the owner of the said land on deeds and possession. The Defendant-Appellant-Respondent resisted the action and took the defence of prescription. During the case was pending Justin Fernando passed away and he was substituted by his wife K. Mary Margret Fernando (Substituted Plaintiff-Respondent-Appellant). The case was fixed for trial on 17<sup>th</sup> June 2005, the Defendant-Appellant-Respondent was absent and the Court fixed this case for trial for the 13<sup>th</sup> time (as per the journal entry) on 26<sup>th</sup> August 2005 and marked it as final date.

On the said date, the Defendant-Appellant-Respondent was absent and his regular Counsel informed Court that, he has no proper instructions from his client. It is also observed, even though it was the final date for trial; the Defendant-Appellant-Respondent had not filed the list of witnesses and documents. The Learned District Judge considering all factors, decided to take up this case ex-parte. All procedures were followed and the trial was taken up on the same day and order was delivered on 14<sup>th</sup> November 2005 (page 137 of the Appeal Brief). The order was delivered in favour of the Substituted Plaintiff- Respondent- Appellant and served the said order to the Defendant-Appellant-Respondent.

According to the available documents, the Defendant-Appellant- Respondent had filed papers to purge his default (page 113 of the Appeal Brief). Substituted Plaintiff- Respondent-Appellant objected to the said application of purge in default of the Defendant- Appellant- Respondent and to set aside the said ex-parte judgement (at page 11 of the Appeal Brief) dated 21<sup>st</sup> July 2006. When we go through the journal entries of the proceedings in the District Court, it is evident that, the Defendant-Appellant- Respondent had not been present before the District Court on several dates and the Counsel appeared for the Defendant-Appellant- Respondent had moved for dates.

Defendant-Appellant-Respondent's position is that, he was seriously ill and that, he had to go to the clinic on 26<sup>th</sup> August 2005 and as such, he could not come to Court (vide page 03 of the proceedings dated 23<sup>rd</sup> January 2007) and in the cross-examination it was revealed that, though he went to the Clinic as scheduled by his Doctor on the previous date of the Clinic, on 26<sup>th</sup> August 2005, he was not admitted to the Hospital on that day.

After a proper inquiry, Learned District Judge dismissed the application and refused to vacate his original judgment.

Being aggrieved with the said order, the Defendant-Appellant-Respondent appealed to the Provincial High Court (Holden in Anuradhapura) and the Learned Judges of the said Provincial High Court had decided that, under Section 86(2) of the Civil Procedure Code, that the Defendant-Appellant-Respondent had purged his default. Hence, he had directed the Learned District Judge to re-hear the case.

Being aggrieved with the said order of the Provincial High Court, the Substituted Plaintiff-Respondent- Appellant had preferred this appeal to the Supreme Court. The Counsel alleges that, the Learned Judge of the Provincial High Court had misdirected

himself with the medical certificates. Hence the order is perverse. Further, it was submitted that, the evidence at the inquiry does not revealed "a reasonable ground" to set aside the Order dated 26<sup>th</sup> August 2005. Leave was granted on the question of law raised in paragraphs 9 (b) and (c) of the Petition dated 1<sup>st</sup> of April 2011 which reads as follows.

- I. (b) Did the Learned High Court Judges gravely err in holding that the Learned District Court Judge did not consider the seriousness of the illness of the Defendant-Appellant whereas the vital question that has to be considered in a purging default application is that whether the Defendant was so sick that he could not attend Court or give instruction to his lawyers to appear on the 26.08.2005?
  
- II. (c) Did the Learned High Court Judges gravely err in holding that the Defendant was an inpatient at the Hospital on 26/08/2005, when actually he was not an inpatient and had only attended the Clinic on 26/08/2005?

The Defendant-Appellant-Respondent was absent and unrepresented from the inception of the case before this Court. This Court has taken all necessary steps including publishing notices in National Newspapers, but, the Defendant-Appellant-Respondent was both absent and unrepresented.

Considering the available materials before this Court we find that, the Defendant-Appellant- Respondent was present at the District Court of Anuradhapura for a considerable period of time. When the matter was fixed for trial finally, the Defendant-Appellant-Respondent was absent and unrepresented.

It is noted on the relevant date namely 26<sup>th</sup> August 2005; his Attorney-at-Law was present and informed Court that, he had no instructions from his client. Since, the

matter was fixed for trial and that was the 13<sup>th</sup> date of trial. Further, parties were informed, that was the final date. Perusing the trial proceedings, it is observed that the Defendant-Appellant-Respondent had not taken meaningful steps including filing of list of witnesses and documents to proceed with the trial. The Learned District Court Judge had taken necessary precautions and reasonable steps to conduct an ex-parte trial and proceeded with the trial. Subsequently, judgment was delivered on 14<sup>th</sup> November 2005.

Thereafter, the Defendant-Appellant-Respondent filed petition and affidavit dated 26<sup>th</sup> February 2006 to purge the default and moved to have the ex parte judgment set aside. The Defendant-Appellant-Respondent made an application under Section 86(2) of the Civil Procedure Code to the Judge of the District Court, to purge his default. He mainly relied on a medical certificate issued by an Ayurvedic Doctor. Where it says, he had attended a clinic on the 26<sup>th</sup> of August 2005. Further he had submitted medical records (exercise book) to Courts. It appears that he was attending clinic regularly for some time. He was attending the General Hospital for illness regarding kidney and taking medicine at Ayurvedic Hospital for swelling of his legs (page 152 of the Appeal Brief).

The Learned District Judge had comprehensively analysed the evidence before him and concluded that the reasons are insufficient/inadequate to purge his default.

Being aggrieved with the said order Defendant-Appellant- Respondent made an appeal to the High Court (Civil Appeal). There, the same materials were analysed and the Learned Judges of the High Court (Civil Appeal) had concluded that, the Defendant-Appellant-Respondent had substantially purged his default and the Judgment was delivered on 23<sup>rd</sup> February 2011 (marked as 'P4').

It appears that the High Court of Civil Appeal had come to the conclusion that, the finding of the District Judge is wrong because, medical certificates submitted by the Defendant-Appellant-Respondent were not properly considered. The High Court of Civil Appeal had concluded that, the Defendant-Appellant- Respondent had purged his default.

Purge in Default is discussed in Section 86(2) of the Civil Procedure Code and it reads as follows:

*"Where, within fourteen days of the service of the decree entered against' him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."*

Considering the submissions made by the Counsel for the Plaintiff-Respondent-Petitioner, we find that the materials submitted before the District Court and the High Court of Civil Appeal were differently considered. Hence, we perused the relevant medical certificates which are submitted as sole evidence. According to the medical certificate submitted by the Defendant-Appellant-Respondent, it was obtained from the Ayurvedic doctor of Anuradhapura. The medical records revealed that, he had taken treatment for illness in kidney at the General Hospital of Anuradhapura. It is evidenced before the Court that on the said date ie. 26/08/2005 the Defendant-Appellant-Respondent had attended Ayurvedic Clinic at the Anuradhapura Hospital and he was never hospitalised on the said date. Hence, the finding of the District Judge is correct.

In **David Appuhamy Vs. Yasassi Thero (1987 SLR 253)** it was held that,

*"an ex- parte order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default.."*

Considering all, we find that the Learned District Judge had carefully considered the evidence and all the materials before him and concluded that, the Defendant-Appellant-Respondent has not adequately purged his default. Further we find that, the Learned Judge of the High Court of Civil Appeal has misconceived the facts, especially the medical certificates and hospitalization. As such I answer the questions of law on which leave to appeal was granted in the affirmative. Accordingly, I allow the appeal and vacate the order made by the High Court of Civil Appeal; Anuradhapura dated 23<sup>rd</sup> February 2011 and affirm the order of the Learned District Judge dated 14<sup>th</sup> November 2005.

***Appeal allowed.***

**JUDGE OF THE SUPREME COURT**

**B.P. ALUWIHARE, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**L.T.B. DEHIDENIYA, J.**

I agree.

**JUDGE OF THE SUPREME COURT**