

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 Central
Province dated 17.12.2009

SC Appeal 76/2010
SC HCCA LA No.26/2010
CP/HCCA/562/2004
D.C. Kandy Case No.19692/L

IN THE DISTRICT COURT OF KANDY

Rev. Galboda Sumangala Thero of
Asgiri Viharaya, Kandy. (Temporary
trustee of Niththawela Rajamaha
Viharaya, Kandy)

Plaintiff

Vs.

Rev. Welihelathenne Somaloka Thero of
Asgiri Viharaya, Kandy. (Temporary
trustee of Niththawela Rajamaha
Viharaya, (Kandy)

Substituted Plaintiff

Vs.

1. Chandasekera Wasala Mudiyansele
George Chandrasekera of 8/4
Mawilmada, Kandy.
2. Chandasekera Wasala Mudiyansele
Anuradha Chandrasekera, alias, Arty
Chandrasekera of No.82, 1st Lane,
Mawilmada, Kandy.

3. Rev. Arambegama Saranankara
Thero of Keda Pansala ,Asgiri
Viharaya,Kandy.

Defendants.

AND BETWEEN IN THE HIGH COURT OF Central
PROVINCE

1. ChandasekeraWasala Mudiyansele
George Chandrasekera of 8/4
Mawilmada, Kandy.
2. ChandasekeraWasala
Mudiyansele
Anuradha Chandrasekera, alias, Arty
Chandrasekera of No.82, 1st Lane,
Mawilmada, Kandy.
3. Rev. Arambegama Saranankara
Thero of Keda Pansala ,Asgiri
Viharaya,Kandy.

Defendants-Appellants

Vs.

Rev. Welihelathenne Somaloka Thero of
Asgiri Viharaya, Kandy. (Temporary
trustee of Nithhawela Rajamaha
Viharaya, (Kandy)

Substituted Plaintiff-Respondent

AND NOW BETWEEN, IN THE SUPREME
COURT IN AN APPEAL

(DECEASED)

- 1.ChandasekeraWasala Mudiyansele
George Chandrasekera of 8/4
Mawilmada, Kandy.

- 1A Herath Mudiyansele
Walgampaha Gedera Podi Menike
of No.8/4, Aluthgantota Road,
Mawilmada, Kandy. (*IA
substituted Defendant Appellant
Petitioner*)
2. Chandasekera Wasala Mudiyansele
Anuradha Chandrasekera, alias, Arty
Chandrasekera of No.82, 1st Lane,
Mawilmada, Kandy.
3. Rev. Arambegama Saranankara
Thero of Keda Pansala Asgiri
Viharaya, Kandy.

Defendant-Appellant-Petitioners

Vs.

Rev. Welihelathenne Somaloka Thero of
Asgiri Viharaya, Kandy. (Temporary
trustee of Niththawela Rajamaha
Viharaya, (Kandy)

**Substituted-Plaintiff-Respondent-
Respondent**

BEFORE

BUWANeka ALUWIHARE, PC, J,
PRIYANTHA JAYAWARDENA, PC, J &
PRASANNA S. JAYAWARDENA, PC, J.

COUNSEL:

Ms. Sudarshani Cooray for the Defendant-
Appellant-Appellants.
Harsha Soza, PC with Ranil Prematilake for the
Substituted Plaintiff-Respondent-Respondent.

ARGUED ON: 13.01.2017

DECIDED ON: 05.09.2018

ALUWIHARE, PC, J:

Ven. Galboda Sumangala Thero, the original Plaintiff filed an action in the District Court of Kandy against 2nd and 3rd Defendant-Appellants and another Defendant seeking among other reliefs to have the land referred to in the schedule to the plaint declared a property belonging to “Nittawela” Raja Maha Viharaya and to have the 1st and 2nd Defendants evicted from the said land. The action referred to was filed on the basis that Plaintiff was the temporary trustee of the temple concerned.

In response to the plaint filed by the Ven. Sumangala Thero, the Defendants-Appellants filed a joint answer followed by the replication of the Plaintiff priest; consequently, the trial was fixed by the learned District Judge for the 30th March, 2001. On the said date of trial Ven. Sumangala Thero was not present in court and due to this reason, the learned District Judge dismissed the action filed by the Plaintiff. On 4th July, 2001, by way of a Petition and affidavit, invoking Section 87 (3) of the Civil Procedure Code, the Plaintiff moved to have the order of dismissal vacated, and to have the action restored.

The Defendant-Appellants resisted the said application and filed objections. Consequently, the learned District Judge inquired into the matter where the parties were afforded an opportunity to place oral evidence, and by order dated 15th September, 2004 the learned District

Judge vacated the order of dismissal of the Plaintiff's action and the case was re-fixed for trial.

The Defendant-appellants aggrieved by the order of the learned District Judge invoked the appellate jurisdiction of the Court of Appeal and with the establishment of the High Court of Civil Appeals, the matter was referred to the High Court of Civil Appeals, Central Province.

The High Court of Civil Appeals having heard the parties, by its judgment dated 17th December, 2009 dismissed the appeal of the Defendants-Appellants holding that this was not a fit matter to be interfered with.

The Defendant-Appellants aggrieved by the said judgment of the High Court of Civil Appeals moved this court by way of leave to appeal and leave was granted on the question set out in sub-paragraph (vii) of paragraph 13 of the Petition of the Petitioner which is as follows:

“Did the learned Provincial High Court judges misdirect themselves in deciding that the Plaintiff had acted within the framework of Section 87 (3) of the Civil Procedure Code and that it is sufficient for a purge default application”.

The relevant facts can briefly be stated as follows:

The original Plaintiff, Somaloka Thero, filed an action in the District Court against the Defendants seeking certain reliefs pertaining to some land. After the completion of the filing of pleadings, the matter was fixed for trial on 30th March, 2001. On that day the Plaintiff had been absent, but represented by his Attorney-at-Law, who informed the court that he had no instructions with regard to the matter. Acting in terms of Section 87

of the Civil Procedure Code the learned District Judge dismissed the action of the Plaintiff due to his non-appearance.

About three months after the dismissal of the Plaintiff's action, the Plaintiff by way of Petition and affidavit moved court to have the order of dismissal vacated and to have the matter restored back. To this application, the Defendants objected and accordingly their written objections were also filed.

The Plaintiff in seeking to have the order of dismissal vacated, took up the position that his failure to attend court on the date the matter was fixed for trial was due to serious health conditions he was suffering at the relevant time, namely Tuberculosis, which was supported by a medical report from the doctor who treated the Plaintiff.

The Plaintiff said in his evidence that he was hospitalized during the relevant time. Even on the day he gave evidence he was not certain as to the date on which he defaulted appearance. Even the year he was not certain of. Under cross examination the Priest had said he was suffering from Tuberculosis and had been advised not to go out, due to the contagious nature of the illness. Further, under cross examination, in answer to a leading question put to him, the Plaintiff had said that it is possible that he mixed up the dates (of the trial).

According to Dr. Korosgolla who testified at the inquiry, the Plaintiff was suffering from Tuberculosis and he recommended bed rest for a period of three months from 28th March, 2001. He had added that the priest was physically weak and due to the possibility of the patient transmitting the disease to others he recommended three months rest.

Upon consideration of the material placed before the learned District Judge by his order dated 15th September, 2004, vacated the order of dismissal of plaint and re-fixed the matter for trial.

The learned District Judge had held that the Plaintiff Priest had established through evidence the reason for his non-appearance on the date the matter was fixed for trial, and there is no reason to reject the evidence so placed by the Plaintiff. The learned District Judge had further observed the fact that the Plaintiff Priest passing away 27 days after he testified in court is confirmation of the fact that he was ill.

It was the contention of the learned counsel for the Defendant-Appellant that both the learned District Judge as well as the learned Judges of the High Court of Civil Appeals, fell into error by arriving at the finding that the Plaintiff (Respondent) had proved by evidence that he had reasonable grounds or reasonable cause for the default.

It was also contended on behalf of the Appellant that both courts fell further into error by their failure to consider that the Plaintiff (Respondent) was suffering from a common disease, namely tuberculosis and it was further argued that the Plaintiff-Respondent's evidence at the inquiry to purge the default was that he had forgotten the date, and it cannot be considered as a ground, in favour of purging default.

I am of the view that, this factor, i.e. Forgetting the date the matter was fixed for trial, if taken in isolation is certainly not a ground to purge the default. The judges, however are expected to give due regard to the totality of evidence placed before the court and to arrive at a decision

upon evaluation of such evidence. In the instant case, the finding of the learned District Judge as to whether the grounds urged by the Plaintiff-Respondent for his default were reasonable to purge default is purely a question of fact, and as such not to be lightly disturbed unless we are convinced by the plainest considerations it would be justified in doing so.

The fact that the Plaintiff-Respondent was suffering from tuberculosis is not disputed nor the fact that he passed away a few weeks after he gave evidence at the purge default inquiry. The doctor who had issued the medical certificate to the Plaintiff-Respondent had stated that he was physically weak and as such he recommended three months rest. Under these conditions, a person forgetting a date, in my view is quite natural and thus excusable.

The learned District Judge in his order dated 15th September, 2004 relied on the observations he had made with regard to the manner in which the Plaintiff-Respondent testified.

The learned District Judge had held that the fact that the plaintiff-Respondent's state of ill health was apparent from the observation, he had made of the Plaintiff-Respondent; the manner in which he testified at the inquiry. Further the learned District Judge had held that he has no reason to reject the medical evidence either.

The issue is whether this court can interfere with the above findings of fact on the part of the learned District Judge who would have been in a better position in deciding the questions of fact than this court or for that matter the High Court of Civil Appeals.

As Chief Justice G.P.S.de Silva observed in the case of Alwis Vs. Piyasena Fernando 1993 1 SLR 112 “it is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal”

I also wish to cite with approval the decision in the case of *De Silva and others v. Seneviratne and another* – 1981 2 SLR page 7, where in Justice Ranasinghe observed: (at page 17)

“..it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so: that, where the findings of fact are based upon the trial judge's evaluation of facts, the appellate Court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task"

In the case before us the learned District Judge appears to have made use of the advantage he had in considering the demeanour of the witnesses which the learned District Judge was fully entitled to do so.

Considering the above, I am of the view that it cannot be said that the learned District Judge could be said to have erred in setting aside the order of the dismissal of the plaintiff's case, nor could it be said that the learned judges of the High Court of Civil Appeals erred in affirming the order of the learned District Judges.

As such I answer the question of law on which leave was granted in the negative and accordingly this appeal is dismissed.

In the circumstances of the case I make no order as to costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA, PC.

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA, PC.

I agree.

JUDGE OF THE SUPREME COURT

