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

SC/CHC/Appeal/08/2007

HC (Civil) No. 294/2002(1)

Merchant Bank of Sri Lanka Ltd.,
No. 28, St. Michael's Road,
Colombo 3.
(formerly at No. 189, Galle Road, Colombo 3)

PLAINTIFF

Vs.

1. Deguruge Nihal Perera
Caring on business under the name, style
and firm of "Desan Enterprises"
At No. 19/21, Eksath Mawatha,
Mahara, Kadawatha.

2. D.C.A. Ramani Mallika
No. 14, Eksath Mawatha,
Mahara, Kadawatha.

DEFENDANTS

AND

1. Deguruge Nihal Perera
Caring on business under the name, style
and firm of "Desan Enterprises"
At No. 19/21, Eksath Mawatha,
Mahara, Kadawatha.

2. D.C.A. Ramani Mallika
No. 14, Eksath Mawatha,
Mahara, Kadawatha.

DEFENDANTS-PETITIONERS

Vs.

Merchant Bank of Sri Lanka Ltd.,
No. 28, St. Michael's Road,
Colombo 3.
(formerly at No. 189, Galle Road, Colombo 3)

PLAINTIFF-RESPONDENT-RESPONDENT

AND BETWEEN

1. Deguruge Nihal Perera
Caring on business under the name, style
and firm of "Desan Enterprises"
At No. 19/21, Eksath Mawatha,
Mahara, Kadawatha.

2. D.C.A. Ramani Mallika
No. 14, Eksath Mawatha,
Mahara, Kadawatha.

DEFENDANTS-PETITIONERS-APPELLANTS

Vs.

Merchant Bank of Sri Lanka Ltd.,
No. 28, St. Michael's Road,
Colombo 3.
(formerly at No. 189, Galle Road, Colombo 3)

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: B.P. Aluwihare P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Pubudu Alwis with Premachandra Epa for the Defendant-Petitioner-Appellants

Prasanna Jayawardena P.C. for the Plaintiff-Respondent-Respondent

ARGUED ON: 14.08.2015

DECIDED ON: 03.11.2015

GOONERATNE J.

This appeal refers to an order refusing to purge default, in an application made to the High Court of Western Province (exercising Civil Jurisdiction) to purge the default of appearance of the Defendant-Petitioner-Appellants. On the day fixed for trial in the High Court on 22.03.2004, Defendant-Petitioner-Appellants were absent and unrepresented and the matter was fixed for ex-parte trial against both Defendants on 28.05.2004, and Plaintiff Respondent-Respondent (Merchant Bank of Sri Lanka) having placed evidence

before the High Court at the ex-parte trial obtained an ex-parte judgment against the said Defendants-Petitioner-Appellants by the judgment of the learned High Court Judge dated 10.06.2004. On a perusal of the learned High Court Judge's order dated 11.01.2007, I find that the following two important matters were considered and accordingly the High Court refused to purge default. The said two matters are:

(a) Admissibility of Petitioners-Defendants-Appellants counter affidavit. Affidavits were rejected by the learned High Court Judge as being devoid of any validity in law.

(b) Absence of proof of reasonable grounds for default or the reasons for default being not acceptable.

The grounds of appeal to the Apex Court are contained in para 18 of the petition dated 07.03.2007.

In brief the facts pertaining to the case of the Plaintiff as presented by the plaint are as follows. Plaintiff Bank filed action against the Defendants seeking a judgment against the Defendants jointly and severally in a sum of Rs. 3,827,668/89 being the amounts due from the Defendants for facilities extended by the Plaintiff Bank to the 1st Defendant. The 2nd Defendant had guaranteed the repayment of the said facilities on guarantee and indemnity bonds. The learned

High Court Judge has carefully referred to the series of steps taken in the High Court starting from the point of service of summons on the both Defendants-Petitioner-Appellant up to the date of default of appearances. As such it would be unnecessary to repeat in this judgment the procedural steps that had taken place in the High court, as the record bears all such procedural steps.

It is settled law that an ex-parte judgment cannot be entered without a hearing and adjudication. Trial Judges need to be satisfied that the Plaintiff is entitled to the relief claimed. It is also necessary for the trial Judge at an ex-parte trial to reach findings on relevant points after a process of hearing an adjudication. It is preferable to lead oral testimony at the ex-parte trial but law does not prohibit evidence being placed before court in support of the claim by way of an affidavit. (Section 85(1) of the Code). I have examined the judgment entered by the learned High Court Judge. Plaintiff at the trial had placed evidence by way of an affidavit affirmed to, by one Mrs. Liyanage Renuka Amarasinghe who was an Assistant Director of the Finance Unit of the Plaintiff Bank. Documents P1 to P8 had been produced along with the affidavit, which documents are relevant and important to establish Plaintiff's case. In brief the trial Judge very correctly gives his mind to the facts pleaded in the affidavit, more particularly the request of the 1st Defendant for certain discounting facilities for which the Bank

responded by letter of 04.10.1983. 1st Defendant by letter P2 accepted Plaintiff's offer. By document P3 Bill of Exchange, entered on 22.08.1995 for a sum of Rs. 1,500,000/- Defendant having agreed to repay the amount due on P3 had subsequently defaulted. But the 1st Defendant-Appellant had subsequently agreed to settle and admitted the transaction . Thereafter a letter of demand was sent and as there was no response to the Letter of Demand plaint was filed.

The learned High Court Judge has considered all necessary points and evidence and entered judgment, accordingly. I also examined the order of the learned High Court Judge dated 11.01.2007 whereby he refused to vacate the ex-parte judgment, entered in default. The two points referred to above, (a) & (b) have been considered inter alia by the trial Judge and had been dealt adequately with cogent reasons.

However prior to examining, the position dealt by the learned High Court Judge in (a) above, I will proceed to consider the position in (b) above (absence of reasonable grounds).

It seems to be the position of the Defendant-Petitioner-Appellants that they were present in court on all dates when the case had been called/mentioned. On the trial date according to the case presented by the Appellants, they arrived in court on 24.03.2004 and having looked at the notice

board, they found that it was not put down for trial on 24.03.2004 but having inquired they came to know that the trial had been held on 22.03.2004 in their absence. In the written submissions the Appellants have stated that they had taken all necessary steps and acted with due diligence but what is stressed is that the wrong date had been taken down by their Attorneys and as a result court had proceeded with the ex-parte trial and entered judgment.

At the inquiry to vacate the ex-parte judgment (purge default inquiry) the appellant's position in brief was that on 16.03.2005 the 1st Defendant-Petitioner-Appellant gave evidence at the inquiry and at the conclusion of his evidence in examination-in-chief, the counsel for the Respondent had moved for a date to cross-examine the witness. Court allowed this application and re-fixed the inquiry on 18.06.2005. On the said date cross-examination and re-examination of the witness was concluded. At that stage an application was made for a postponement by the Appellant's party to enable them to lead the evidence of both the senior and junior counsel of the Appellant who were not present on the trial date which resulted in default of appearance. To this application the Plaintiff-Respondent-Respondent's counsel had vehemently objected. The learned High Court Judge having heard counsel on either side made order refusing to grant a postponement of the inquiry.

It is the position of the Appellant that it was in the best interest of justice, and it was essential to lead the evidence of both the senior and junior counsel. Appellants further submit that refusal to grant a date by the trial Judge has resulted in a miscarriage of justice and the learned trial Judge had erred in refusing to grant a postponement which is a breach of the rules of natural justice according to the Appellants. The order of the learned High Court Judge regarding the objection to grant a date are contained in the proceedings of 18.05.2006.

It is necessary to ascertain the grounds on which the learned trial Judge made order refusing to grant a postponement to the Appellants. In the said order the learned High Court Judge takes the view that further inquiry was fixed on 25.11.2005 for 18.05.2006 which is almost a period of six months to the date of further inquiry date (18.05.2006) Journal Entry (22) of 25.11.2005 and Journal Entry (23) of 18.05.2006 establish this fact. Learned High Court Judge further observes that during the period of six months referred to above no attempt or steps had been taken by the Appellant's party to ensure the presence of the witnesses whom the Appellants relies, to prove their case. Nor have the Appellants moved for summons officially. It is the view of the High Court Judge that the Appellant's party had not acted with due diligence and failed to exercise necessary care to take the required steps.

I wish to observe that the learned High Court Judge was not in error when he pronounced the order dated 18.05.2006 refusing to grant a postponement for the reasons stated in the said order. Any Judge sitting in a court of law need to control court proceedings and manage the cases before the court with proper case management. Justice need to move forward at a reasonable pace. It cannot be delayed nor can it be hurried. Both those factors tend to result in injustice. A counsel appearing for a client must be methodical and organize his work and cases of his client to the best of his/her ability and serve his client in the best possible way which need to be of prime importance. I endorse the views expressed by the leaned High Court Judge, in the said order.

In the order of the learned High Court Judge dated 11.07.2007 (refusal to purge default) at folio 190 of the brief, he has focused on two other important points. It supports the trial Judge's earlier order of 18.05.2006. It is stated that two Attorneys-at-Law named therein, one who gave the 1st Defendant-Petitioner-Appellant the date of trial as 24.03.2004 and the other Attorney who is said to have checked the date with the said Appellant (as 24.03.2004) were not called to give evidence. The learned trial Judge observes that the attitude of the Petitioners towards the preparation of the inquiry, suggests total inactiveness and sluggishness on their part. Both the orders are of

some significance to the case before this court. It suggests and emphasizes the need to prepare for the cases and further demonstrates the indifferent attitude of the Attorneys who handled the case of the Appellants. Counsel need to anticipate, leading the evidence of a witness, in court. This cannot be achieved by moving for postponements as a habit. Having failed to summon the required witness, on time and date cannot be made use of to blame the trial court, subsequently, in an appeal, before the Supreme Court.

The learned High Court Judge in his very comprehensive order of 11.01.2007 (final paragraph) refer to another indifferent attitude of the concerned Attorneys. The wrong date was detected on 24th March and a late application to court under Section 86(2A) of the Code was made on 06.04.2004. The order further highlight the failure of the Appellant to have brought to the notice of court that they were present in court on the 24th March and the trial Judge had observed that a motion should have been filed on that date itself to keep the court informed. It is the view of the trial Judge that such a delay renders the version highly improbable. I see no basis to take a different view of that from the learned High Court Judge.

In A.G. vs. Herath and another 2002 (2) SLR 162 Udalagama J. in a somewhat similar case held “another normal practice of diligent counsel would be to obtain, before the due date a copy of the previous day’s proceedings. If that was done in the instant action the next date would invariably appear at the end of the previous day’s proceedings. Obviously this had not been done. Such failure could not amount to a mistake”.

In this regard I also wish to observe that registered Attorneys-at-law usually employ Clerks to attend the registry of the District Court and other original courts for the purpose of obtaining proceedings, checking the next date etc. In the yester years these Clerks were called ‘Proctors Clerk’. This practice continues even today. If the party concerned was vigilant enough very many problems arising in court as taking down the wrong date, etc. could have been avoided if the record was checked at an earlier stage.

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. David Appuhamy Vs. Yassassi Thero 1987 (1) SLR 253.

In this case another important matter had been urged as in (a) above. However I have already dealt with (b) above before considering the validity of the affidavit presented to the High Court. Defendant-Petitioner-Appellants have not

been able to satisfy the learned High Court Judge of the required reasonable ground to cure their defect as regards default of appearance. On that ground alone this appeal has to be rejected. It may be of some academic interest to consider (a) above. Learned President's Counsel for the Plaintiff-Respondent-Respondent in his submissions has invited this court to consider several case laws, in this regard.

The evidence transpired in the High Court, establish that services of Mr. Chinthaka Ratnayake Attorney-at-law was engaged as junior counsel for the Appellants. Affidavit filed along with the petition was affirmed before the said Attorney-at-Law. Courts in Sri Lanka and U.K do not condone this practice. An affidavit sworn before deponents own lawyer is not acceptable and strict compliance with Section 86(3) of the Civil Procedure Code is essential to enable a party to proceed to the very end of his case. Pakeer Mohideen Vs. Cassim 4 NLR 299; Jayathilake and Another Vs. kaleel and Others 1994(1) SLR 319; Inaya Vs. Orix Leasing Co. 1993(3) SLR 197. As regards a valid affidavit to be filed under Section 86(3) of the Code was also dealt in Coomaraswamy Vs. Mariamma 2001 (3) SLR 312. The legal position as stated in the above case laws remains intact up to date. Further arguments on this aspect maybe developed as time goes by, but, whatever it may be the law seems to be settled on this aspect.

In view of the above facts and circumstances and material placed in the context of this case, we are not inclined to grant any relief to the Defendant-Petitioner-Appellants. Therefore we proceed to dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT