

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

S.C. Appeal No. 92A/2008  
S.C. (H.C) CALA 68/2008  
NCP/HCCA/ARP/43/2007F

D. C. Anuradhapura  
Case No.14383/L

In the matter of an appeal

Pandigamage Podinona  
No.44, Kandy Road,  
Medawachchiya

**Plaintiff**

-Vs-

M. H. M. Suweyal,  
No.40, New Siyana Hotel,  
Jaffna Road,  
Medawachchiya

**Defendant**

**And Between**

M. H. M. Suweyal  
No.40, New Siyana Hotel,  
Jaffna Road,  
Medawachchiya.

**Defendant/Appellant**

-Vs.

Pandigamage Podinona  
No.44, Kandy Road,  
Medawachchiya

**Plaintiff/Respondent**

**And Now Between**

M. H. M. Suweyal  
No.40, New Siyana Hotel,  
Jaffna Road,  
Medawachchiya.  
Presently at  
No.22/ 1, Bulugahatenna,  
Akurana

Defendant/Appellant/  
Appellant

-Vs-

Pandigamage Podinona (deceased)  
No.44, Kandy Road,  
Medawachchiya.

Plaintiff/Respondent/  
Respondent

- 1A. Hettiaarachchige Sriyani
- 1B. Hettiarachchiige Wasantha  
Kumara Hettiarachchi
- 1C. Hettiarachchige Chalton  
Jayaweera
- 1D. Hettiarachchige Nandaniemala

All of No.44, Kandy Road,  
Medawachchiya.

Substituted Plaintiff/  
Respondent/Respondents

**BEFORE:** B.P.ALUWIHARE, P.C, J  
UPALY ABEYRATHNE, J &  
ANIL GOONARATNE, J

**COUNSEL:** W. Dayaratne, P.C, with Ms. R. Jayawardena for the  
Defendant-Appellant-Appellant.  
Ananda Kasturiarachchi for the substituted  
Plaintiff-Respondent-Respondents.

**ARGUED ON:** 14.02.2017.

**DECIDED ON:** 05.07.2017

**ALUWIHARE, P.C., J,**

This appeal had arisen from an order of the High Court of Civil Appeals (hereinafter referred to as HCCA) of North Central Province.

Facts germane to the issue are as follows:

The Plaintiff-Respondent-Respondent (hereinafter referred to as The Plaintiff) filed a *rei-vindicatio* action in the District Court against the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant). At the conclusion of the trial the learned District Judge by his judgment dated 10<sup>th</sup> December, 2001 held with the Plaintiff.

Aggrieved by the said judgment the Defendant preferred an appeal to the HCCA. The Defendant having deposited required fees had secured a copy of the brief. Sometime thereafter, Registrar of the HCCA, North Central Province had dispatched notices to the parties informing them that the matter was due to be called on 30<sup>th</sup> April, 2008. According to the Defendant he had shifted from his original address at 40, New Siyane Hotel, Jaffna Road, Medawachchiya to an address in Akurana. The Defendant asserts that when he received the notice he got his registered Attorney to peruse the record and he was informed that the matter had come up on 30<sup>th</sup> April, 2008, and the appeal had been dismissed on that day. Subsequently the Defendant had made an application, to have the order of dismissing the appeal, set aside and to have the appeal relisted.

The HCCA had, by its order dated 10<sup>th</sup> June, 2008, dismissed the application for relisting on the ground that the Defendant had failed to exercise due diligence in prosecuting the appeal.

The Defendant is now canvassing the legality of the order of the HCCA referred to above.

Leave was granted on 11<sup>th</sup> November, 2008 on the following question of law: (Referred to in paragraph 18 (e) of the Petition of the Defendant dated 21<sup>st</sup> June, 2008)

“ Did the High Court fail to consider that no appeal can be dismissed on a calling date on the ground of default of appearance of the parties or their respective Attorney-at-Law, as the High Court has the power to dispose the appeals only on its merits”

Proceedings before the HCCA on 30<sup>th</sup> April 2008 reveal that the order of dismissal states that, ‘although the Defendant-Appellant had been noticed to attend court, the party is neither present nor represented. The appeal is dismissed for the said reason’.

Upon perusal of the order made by the HCCA, on the relisting application, it is evident that the court had gone into the reasons adduced by the Defendant for his non-appearance. The court having considered the reasons so adduced had held that the Defendant had failed to satisfy the court that there were sufficient reasons or grounds to have the order of dismissal vacated and to have the appeal relisted.

I do not wish, however, to consider the sufficiency or otherwise of the reasons adduced as the issue before us is simply whether a court can dismiss an appeal

on a date fixed for calling of the matter without considering the merits of the case.

At the hearing of the appeal the learned President's Counsel for the Defendant-Appellant relied on the decision in the case of Jinadasa Vs. Sam Silva reported in 1994 1 SLR page 231.

The learned President's Counsel for the appellant submitted that the HCCA was in error dismissing the appeal on the basis that the court could not have dismissed the application on a day the matter was only to be called and secondly falling into further error in dismissing the appeal without considering the merits.

The attention of this court was drawn to Section 769 (1) of the Civil Procedure Code which reads as follows:

769 (1) When the appeal comes on for hearing, the Appellant shall be heard in support of the Appeal. The Court shall then, if it does not at once dismiss the appeal or affirms the decree appealed from, hear the Respondent against the appeal, and in such case the Appellant shall be entitled to reply.

**(2) If the appellant does not appear either in person or by an Attorney-at-Law to support his appeal, the court shall consider the appeal and make such order thereon as it thinks fit. (emphasis added)**

Provided that, on sufficient cause shown, it shall be lawful for the court of Appeal to reinstate upon such terms as the court shall think fit any appeal that has been dismissed under this subsection.

The subsection (2) of Section 769 of the Civil Procedure Code casts a mandatory duty on the court to **consider the appeal** before making any order thereon, in instances where the Appellant does not appear.

It is clear, that in the instant case, the order of dismissal was wrong as the learned Judges had not complied with a mandatory provision of Section 769 of the Civil Procedure Code and learned judges of the HCCA had merely dismissed the appeal due to the absence of the Appellant, without considering the appeal.

It was the contention of the learned counsel for the Respondent that the powers of the Appellate Court are not fettered by any legal principle to dismiss an appeal on a date the matter is only fixed for it to be either mentioned or called. I do not see any conflict of this argument with the position taken up on behalf of the appellant. The learned counsel for the appellant did not challenge the powers of the court to dismiss an appeal, but complains of non-compliance with Section 769 (2) of the Civil Procedure Code as referred to earlier.

It was also contended on behalf of the Respondent that, the Petitioner had failed to act diligently and therefore the Appellant is not entitled to the relief sought.

In the instant case the appellant had lodged the appeal on time, and had paid fees for the preparation of the briefs and the appellant had collected the briefs. These steps taken by the appellant amply demonstrate that the appellant had been diligent in prosecuting the appeal and the only blemish had been the non-appearance on 30<sup>th</sup> April, 2008, the date for notice returnable, which the appellant had explained when the matter was supported for relisting.

I wish, however, to refer to the view formed by their Lordships in deciding the case of Jinadasa Vs. Sam Silva et el 1994 (1) SLR 232.

Their Lordships held that the court cannot prevent miscarriage of justice except within the framework of the law: it cannot order reinstatement on compassionate

grounds. Inasmuch as it is a serious thing to deny a party to his right of hearing, a court may, in evaluating the established facts, be more inclined to generosity rather than being severe, rigorous and unsparing.

The judges, as much as, are required to dispose cases, must also be alive to the fact that litigants come before them to vindicate their rights.

As such, if this court is called upon to dismiss the appeal without going into merits, such an order must be made only upon considering all facts relevant to the issue of the maintainability of the appeal. This was a supplication for relief or redress which the Petitioner had made, as a matter of right, in terms of section 754 of the Civil Procedure Code, read with Article 138 of the Constitution, seeking to have errors in fact or law corrected, which the petitioner alleges that were committed by the District Court.

As such the HCCA was obliged in terms of Section 769 (2) of the Civil Procedure Code to consider the matter before dismissing the appeal.

As referred to earlier, it was strenuously argued on behalf of the Respondent that “there is no legal principle to state that an appellate court has no power to dismiss an Appeal, on the very first day”. No doubt the court has wide powers of disposal; such powers, however, must be exercised without transgression of the law and legal principles.

Chief Justice Beaumont in the case of *Shamdasani and others v Central Bank of India AIR1938 Bombay* stated, as to the exercise of the discretion by the court:

*“ The court ought to have considered that, it is after all, a very serious matter to dismiss a man’s suit or summons, or whatever it*

*may be, without hearing it, and that course ought not to be adopted unless the court is really satisfied that justice so requires”.*

Having considered the facts and circumstances relevant to this case, I hold that the High Court of Civil Appeals was in error when it dismissed the appeal of the Defendant-Appellant without fully complying with Section 769 of the Civil Procedure Code and I answer the question of law on which leave was granted in the affirmative.

Accordingly, the order made by the High Court of Civil Appeals on the 10<sup>th</sup> June 2008, dismissing the Appeal is hereby set aside. The learned judges of the High Court of Civil Appeals are directed to relist this matter and dispose the same in compliance with Section 759 of the Civil Procedure Act.

JUDGE OF THE SUPREME COURT

Justice Upaly Abyrathne

I agree

JUDGE OF THE SUPREME COURT

Justice Anil Gooneratne

I agree

JUDGE OF THE SUPREME COURT



