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

S.C. Appeal No. 61/2012

SC (HC) CALA 324/2011
HCCA/Rev/29/2009
D.C. Kandy Case No. 19989/MR

In the matter of an Application for Leave to Appeal against the Judgment dated 06.07.2011 pronounced by Civil Appellate High Court of the Central Province in Kandy in Application No. HC (Appeal) No. 29/2009 (Rev)

G. M. M. Majeed
No. 94/1, School Lane,
Galhinna.

1ST DEFENDANT-PETITIONER

Vs.
G.R.W.M. Weerakoone
No. 09, Colombo Street,
Kandy.

PLAINTIFF-RESPONDENT

Jayantha Fernando
29/9. Sri Pushpananda Mawatha,
Kandy.

2ND DEFENDANT-RESPONDENT

AND BETWEEN

G. M. M. Majeed
No. 94/1, School Lane,
Galhinna.

1ST DEFENDANT-PETITIONER-PETITIONER

Vs.

G.R.W.M. Weerakoone
No. 09, Colombo Street,
Kandy.

PLAINTIFF-RESPONDENT-RESPONDENT

Jayantha Fernando
29/9. Sri Pushpananda Mawatha,
Kandy.

2ND DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.

Anil Gooneratne J. &

Vijith K. Malalgoda P.C., J.

COUNSEL: Chula Bandara with Ms. Gayathri Kodagoda for the 1st Defendant-Petitioner-Appellant

Ranjan Suwandaratne P.C. with Yuwin Matugama
For the Plaintiff-Respondent-Respondent

ARGUED ON: 03.07.2017

WRITTEN SUBMISSIONS ON BEHALF OF THE 1ST DEFENDANT-PETITIONER-APPELLANT FILED ON:
25.04.2012

WRITTEN SUBMISSIONS ON BEHALF OF THE PLAINTIFF-RESPONDENT-RESPONDENT FILED ON:
01.06.2012

DECIDED ON: 14.09.2017

ANIL GOONERATNE J.

Plaintiff-Respondent instituted a money recovery action bearing No. 19989 in the District Court of Kandy against the 1st Defendant-Petitioner and the 2nd Defendant-Respondent praying for a Judgment, to recover a sum of Rs. 470,570/- from the 1st Defendant-Petitioner and the 2nd Defendant-Respondent and interest at 15% on the above sum and also for legal interest from the date of Judgment until settlement in full. On the trial date Defendants were absent an unrepresented. As such ex-parte evidence was led and judgment entered. An application to purge default under Section 86(2) of the Civil Procedure Code to the District Court, Kandy was made and refused after inquiry by the learned District Judge on 29.03.2006. The 1st Defendant-Petitioner as pleaded in the petition filed before this court, states the Revision Application filed in the Civil Appellate High Court, Kandy to set aside the ex-parte Judgment of 23.04.2009 was also refused by the Civil Appellate High Court, Kandy.

Supreme Court on or about 09.03.2012 granted leave to proceed on the following questions of law.

(1) Did the Honourable High Court Judges of the Civil Appellate High Court of Kandy err in law by confirming the ex-parte Judgment dated 23.04.2004 which was not supported by legal evidence?

(2) When the ex-parte Judgment lacks proper analysis of the evidence whether the court was justified in refusing the Revision Application to

canvass that Judgment on its merits, on the basis that there was delay on the part of the Petitioner?

(3) In view of the nature of the Judgment given by the District Court at the ex-parte trial is the Petitioner entitled to invoke the revisionary jurisdiction of the Civil Appellate High Court to canvass the correctness of the Judgment on its merits?

It is necessary to ascertain the facts of this case prior to examining the legal position. As stated above Plaintiff-Respondent instituted action on or about 21.09.1988 to recover a sum of Rs.470,570/-. The 1st Defendant-Petitioner and the 2nd Defendant-Respondent-Respondent filed a joint answer denying the averments in the plaint, and by way of a counter claim whilst praying for a dismissal of the Plaintiff's action included a claim of Rs. 550,000/- against the Plaintiff. On 29.01.1996 the case was fixed ex-parte, as the 1st Defendant-Petitioner-Petitioner and the 2nd Respondent-Respondent were absent and unrepresented. Thereafter an application was made to purge default, but was refused by the learned District Judge.

I also note the evidence led at the ex-parte trial. Plaintiff-Respondent-Respondent in his evidence state that he was a tenant of premises No 9, Colombo Street, Kandy since July 1980. Plaintiff produced P1 to prove that fact and P2 and P3 to show that his office was at that place. He also testified that on 11.07.1987 he observed that the roof of his office was removed and

Petitioner and the 2nd Defendant-Respondent-Respondent had entered the premises. To establish same produced exhibit P4 a statement to the police by 2nd Defendant-Respondent-Petitioner. Plaintiff being a surveyor and court commissioner stated that he lost his equipments, and plans and field notes. The 1st Defendant forcefully took over possession of the premises along with the 2nd Defendant-Respondent-Respondent which the Plaintiff-Respondent-Respondent occupied for a long period of time. This seems to be the evidence in brief.

The default inquiry was taken up on the first occasion, on 28.01.1997 and the learned District Judge made Order on 24.04.1997 and set aside the ex-parte Judgment. Thereafter the case was fixed for trial and had been put off on several days. On the 22nd trial date, again the 1st Defendant Petitioner and the 2nd Defendant was absent and unrepresented and for the second time case had been fixed ex-parte.

The 1st Defendant-Petitioner-Petitioner was granted Leave to Appeal on three questions of law and the relief sought from the Supreme Court is to set aside the Judgment dated 06.07.2011 of the Civil Appellate High Court of Kandy bearing No. Rev. 29/2009 and also to set aside the ex-parte Judgment dated 23.04.2004 of the District Court. Vide, sub paragraph (6) of the prayer to the petition. In the light of questions of law raised before us and the prayer to

the petition it is essential to examine the District Court Judgment of 23.04.2004 entered in favour of the Plaintiff-Respondent after an ex-parte trial.

The Judgment itself is a very brief Judgment. On perusing the relevant portion of the Judgment the trial Judge refer to documents P1 to P7 and state having produced these documents the Plaintiff closed his case. Further it is stated that on the evidence of the Plaintiff and the documents produced court is satisfied. Accordingly ex-parte judgment is entered in favour of the Plaintiff. It reads as follows:

.....පැමිණිලිකරුගේ සාක්ෂි මෙහෙයවා පැ 1 සිට පැ 7 දක්වා ලේකණ ඉදිරිපත් කරමින් නඩුව අවසන් කරන ලදි. එ අනුව පැමිණිලිකරුගේ සාක්ෂි සහ ලියවිලි මත සැහීමකට පත්වෙමි. පැමිණිල්ලේ ඉල්ලා ඇති පරිදි සහන ලබා ගැනිමටත, ඒකී ආකාරයෙන් නඩුව පැමිණිලිකරුට පාක්ෂිකව තීන්දුකරමි.

The trial Judge does not seem to have given his mind to the relief claimed and whether the Plaintiff is entitled to Judgment in fact and in law. Judge must arrive at a finding on relevant points after a process of hearing and adjudication. Trial Judge cannot apply a mechanical process and enter Judgment. Evidence led should be analysed and be satisfied that the Plaintiff is entitled for Judgment. Merely stating ‘satisfied’ with the evidence led will not amount to compliance with Sections 85(1) 84, 86 & 87 of the Civil Procedure Code.

It is necessary to consider the legality or the propriety of the ex-parte judgment. In such a brief judgment one cannot expect a proper adjudication of the dispute to have been considered. I cannot affirm or approve the ex-parte Judgment in the absence of an analysis of the evidence led at the trial. In all these circumstances the ex-parte Judgment of the District Court stands dismissed. Evidence led has not been judicially assessed and analysed.

I hold that the ex-parte Judgment is a nullity. The following decided case is on point and fortify my views.

In Mrs. *Sirimavo Bandaranaike Vs. Times of Ceylon Ltd. (1995) 1 SLR* at pgs. 36/37.

> Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. The Defendant's case is that if in fact he was not satisfied, or if on the evidence he could not reasonably have been satisfied, the error was so serious as to prejudice the substantial rights of the Defendant and to occasion a failure of justice. The question is whether entering an ex parte default judgment is a mere formality, or whether a hearing and a proper adjudication are necessary.
>
> The plain meaning of the word "satisfied" in section 85(1) is that the trial judge must reach findings on the relevant points after a process of hearing evidence and adjudication, and that he cannot give judgment for the plaintiff as a matter of course. It is unnecessary to rely on the Indian decisions cited by Mr. Seneviratne as I find that there are four other independent and compelling reasons for this interpretation: the immediate context of section 85(1), the basic principles of justice underlying the Code, the legislative history of this and similar provisions, and judicial decisions in regard to those provisions.
>
> Section 85(2) shows that a judge may award the plaintiff less than what is claimed if in his opinion the entirety of the relief cannot be granted. Obviously such

> an opinion can only be reached after hearing evidence and judicially assessing that evidence in relation to the ingredients of the Plaintiff's cause of action. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters: in every instance, such satisfaction is after adjudication upon evidence. It must be presumed that the word "satisfied" occurring in several sections in the same Chapter of the Code has the same meaning.

It is evident that the above decided case though discuss a variety of matters, emphasis the duty of court in an ex-parte trial and also jurisdiction of the Court of Appeal by way of revision to revise or vary an ex-parte trial. Both these points are equally important to the case in hand.

I would at this point of my Judgment wish to discuss the judgment of the Civil Appellate High Court, which court exercised its revisionary powers, and dismissed the Revision Application.

The revision application was filed to revise the ex-parte judgment dated 23.04.2004. Plaintiff-Respondent-Respondent was the tenant of the premises in question and the 1st Defendant-Petitioner was the owner of the premises along with some others.

The revision application was filed on or about 05.10.2009. By the revision application the ex-parte Judgment dated 23.04.2004 is challenged. The learned High Court Judge no doubt in a very comprehensive Judgment emphasis the fact that the appeal filed against the Order rejecting the application to purge default which was delivered by the High Court (prior to filing the revision

application) by Judgment dated 09.07.2009 was disclosed by the 1st Defendant-Petitioner in his petition but failed to disclose the fact whether such appeal was allowed or refused. It is the view of the learned High Court Judge, that the 1st Defendant-Petitioner ought to have disclosed that fact since revision applications are discretionary remedies. There is a lack of uberima fides by the 1st Defendant-Appellant, and cite the case of *Navarathnasingham Vs, Arumugam 1980 (2) SLR 1*. In such a situation court should be cautious and slow to permit such review. No doubt the party concerned enters into a contract with court and is bound to disclose all material facts. On that ground a revision application could have been rejected.

There is a duty cast on an Attorney-at-Law to disclose all material facts to court. This is a basic norm emanating from rules of the Supreme Court which has to be followed and respected.

The other matter considered by the High Court is the inordinate delay to file the revision application. There is a delay of 5 years and the failure to invoke the jurisdiction of the Supreme Court from Judgment of the High Court delivered on 09.07.2009. (on appeal)

Learned High Court Judge also state that exceptional circumstances cannot be found to exercise the revisionary jurisdiciton of court. There are numerous decided cases which state that exceptional circumstances need to be

established to invite the revisionary jurisdiction of court. Rustom Vs. Hapangama 1978/79 (1) SLR 352; Rasheed Alli Vs. Mohamed Alli 1981 (1) SLR 262.

The High Court Judgment based on the revision application, place more emphasis on lack of exceptional circumstances, albeit the 1st Defendant-Petitioner took up the position that the ex-parte Judgment is illegal. It is only a passing remark by the learned High Court Judge but the ex-parte Judgment has not been properly examined to decide on its propriety.

This court observes that as stated above the ex-parte Judgment is a nullity, which is earlier in time in this case and that is akin to a sound exceptional circumstances to exercise revisionary powers. The ex-parte Judgment being a nullity is a very fundamental issue. Nullity of Judgment will override and prevail over any other exceptional circumstances and as such a good ground to exercise the revisionary jurisdiction of court, notwithstanding any delay, etc.

The questions of law are answered as follows in favour of the Appellant.

(1) Yes
(2) No. The High Court was in error and it is not justified in refusing to the revisionary relief.
(3) Yes.

The case itself had been postponed by the original court on numerous occasions. The record bears that fact and it is not the function of the Apex Court to delve into that fact. All courts in the Island has to ensure due administration of Justice. Nothing flows from an illegal judgment. Mistakes do occur but illegality is paramount in the context of this case. I set aside both the ex-parte Judgment of 23.04.2004 and the High Court Judgment dated 06.07.2011, as per sub paragraph (b) of the petition and allow this appeal with costs fixed at Rs. 100,000/-

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith Malalgoda P.C., J.

I agree.

JUDGE OF THE SUPREME COURT