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

SC APPEAL NO. 191/2017
SC No. SC HC CA LA. 152/2016
HCCA No. UVA / HCCA/ BDL / 01/13/F
DC Badulla Case No. M 6896/2010

In the matter of an Application for Leave to Appeal under and in terms of the Provisions of Section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended, read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka

The People's Bank,
No. 75,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Plaintiff

Vs.

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya
3. Chamila Dilanthi Wijesekera
   All at
   No. 66 and 68.
   Bazaar Street,
   Badulla.

Defendants

AND BETWEEN

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya
3. Chamila Dilanthi Wijesekera

All at
No. 66 and 68.
Bazaar Street,
Badulla.

Defendants- Appellants

Vs.

The People's Bank
No. 75,
Sir Chittampalam A. Gardier Mawatha,
Colombo 02.

Plaintiff-Respondent

AND BETWEEN

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya

All at
No. 190/3,
Peter De Perera Mawatha,
Dutugamunu Street,
Kohuwala.

1st and 2nd Defendants-Appellants-Petitioners

Vs.

The People's Bank
No. 75,
Sir Chittampalam A. Gardier
Mawatha,
Colombo 02.

Plaintiff-
Respondent-Respondent

AND NOW BETWEEN

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya

All at
No. 190/3,
Peter De Perera Mawatha,
Dutugamunu Street,
Kohuwala.

1st and 2nd
Defendants-Appellants-
Petitioners-Appellants

Vs.

The People's Bank
No. 75,
Sir Chittampalam A. Gardier
Mawatha,
Colombo 02.

Plaintiff-
Respondent-Respondent-
Respondent

And

3. Chamila Dilanthi Wijesekera
No. 29,
Jambugasmulla Mawatha,

Nugegoda.
3rd Defendant-Appellant-Respondent-Respondent

BEFORE: **B.P ALUWIHARE, PC, J.**
K.KUMUDINI WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL: Faisza Musthapha Markar with Zainab Markar with Dilini Gamage instructed by Sanjeewa Kaluarachchi for the Defendants-Appellant-Petitioners-Appellants.

Kaushalya Nawaratne with Aravinda Rajapaksa and Eshan Sandungahawatta for the Plaintiff- Respondent- Respondent Respondent.

WRITTEN SUBMISSIONS: By 1st and 2nd Defendants-Appellants-Petitioners- Appellants on 14.11.2017.

By the Plaintiff- Respondent-Respondent Respondent on 27.05.2020.

ARGUED ON: 30.09.2022

DECIDED ON: 30.10.2023

K.KUMUDINI WICKREMASINGHE, J.

This is an appeal from an order of the Provincial High Court of Civil Appeal of the Uva Province holden in Badulla dated 24.02.2016 which dismissed the application made by the Appellants to re-list the Appeal bearing No. UVA/HCCA/BDL/ 01/13/F, after the said appeal was dismissed by the same court on 09.10.2013 for want of appearance of the Appellant, or their Attorney-at-Law.

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the "Respondent") instituted the initial action in the District Court of Badulla against the 1st and 2nd Defendants-Appellants-Petitioners-Appellants (hereinafter referred to as the "Appellants") and the 3rd Defendant-Appellant-Respondent-Respondent seeking to recover a sum of Rs. 7,126,338.17 and interest thereon. The Respondent stated that the said sum was owed by way of temporary overdrafts granted to one M.H.B Company of which Appellants were partners. The Appellant together with the 3rd Defendant-Appellant-Respondent-Respondent sought the dismissal of the Respondent's action and contended that there was a case filed earlier by them before Commercial High Court bearing No. L/C/Civil/268/09/MR seeking to recover damages against the Respondent.

When the case was taken up for trial in the District Court, the Appellant raised a preliminary objection that the District Court of Badulla has no jurisdiction to hear the case, and the case should be transferred to the Commercial High Court of Colombo having regard to the value of the claim. The said preliminary objection was overruled by the District Court by an order dated 31.05.2012 stating that the Appellant has accepted the jurisdiction of the District Court in their answer and any objection on such should have been raised at that stage. The Learned District Court Judge also refused two more applications made by the Appellants to postpone the trial pending a Leave to Appeal application

bearing No.UVA/ HCCA/ BDL/LA/13/2012 and a Revision Application bearing No. HC/RA/14/12 being made by the Appellants against the said District Court order and for postponements to cross-examine a witness.

The District Court delivered the judgment dated 28.09.2012 in favour of the Respondent. In the judgment, the Learned District Court stated that in the absence of a stay order, there was no legal obligation to await the outcome of the Revision and Leave to appeal applications and although the witnesses were not cross-examined, the Appellant's counsel was present in court on all trial dates. Thereafter, the High Court delivered the order dated 18.10.2012 dismissing the said Leave to Appeal and Revision applications.

Aggrieved by the judgment of the Learned District Court Judge of Badulla, the Appellants appealed to the High Court of Civil Appeal of the Uva Province, Badulla. The Appellant were served with notice to be present before the High Court on 09.10.2013 and on the said date neither the Appellants nor their attorney-at-law were present. The Provincial High Court of Civil Appeal dismissed the appeal of the Appellants stating that "it appears that the Appellants are not proceeding with the appeal with due diligence". (page 488 of the brief) Thereafter, the Appellants filed an application to re-list the said appeal and the Provincial High Court of Civil Appeal refused the application for re-listing by the order dated 24.02.2016.

The Appellant is before this court challenging the said order. This court by order dated 03.10.2017 granted Leave to Appeal on the questions of law stated in paragraph 19 (a) to (e) of the Petition dated 04.04.2016, as set out below.

1. Did the Civil Appellate High Court err by the omission to take cognizance of the fact that its order dated 09.10.2013 dismissing the appeal for want of appearance contains no consideration whatsoever of the merits of the

said appeal and as such has been made in breach of Section 769 (2) of the Civil Procedure Code?

2. Did the Civil Appellate High Court misdirect itself in law by the failure to consider that it was not competent for the said court to have made an order of dismissal inasmuch as the said appeal did not come up for "hearing" as contemplated by Section 769 (1) of the Civil Procedure Code?

3. Did the High Court of Civil Appeal misdirect itself by its failure to take cognizance of the fact that the Petitioners had paid the brief-fees and instructed their Attorney-at-Law to appear on their behalf before the said court, and thereby, err in holding that the petitioners had not prosecuted the civil appeal with due diligence?

4. Did the Civil Appellate High Court fail to take into consideration the attendant circumstances in making the said order of dismissal?

5. In making the said orders, did the Civil Appellate High Court fail to take into account the relevant circumstances and as such err in not exercising the discretion vested in court judicially?

In addition, the Learned Counsel for the Respondent has raised the following issues.

a) Whether the order of the Lordships of the High Court appeal dated 24.02.2016 is in compliance with the provisions of Section 769 of the Civil Procedure Code in view of the non-appearance of the Petitioners before court?

b) In such an event, are the petitioners bound and obliged to comply with proviso of Section 769 of the Civil Procedure Code to produce sufficient cause in making an application for re-listing?

The first matter for consideration by this court is whether the High Court erred in law by the failure to take cognizance of the fact that its order dated 09.10.2013 dismissing the appeal for want of appearance contains no consideration of the merits of the appeal and as such has been made in breach of Section 769 (2) of the Civil Procedure Code.

In order to ascertain the above question of law, it is pivotal to analyze Section 769 (2) of the Civil Procedure Code which states as follows,

"(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.

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 position of the Appellant is that the court has a duty under the aforementioned section to consider the appeal before making any order thereon, in instances where the Appellant does not appear and the Learned High Court Judge has failed in his duty. In support of this position, the counsel for the Appellant has relied on the decision in the case of **M. H. M. Suweyal Vs. Pandigamage Podinona, [S.C. Appeal No. 92A/2008]** decided on 05.07.2017. In this judgment, Hon. Justice Aluwihare set aside the order of the High Court dismissing the Appeal and emphasized on the duty of the court to consider the merits of the appeal before making an order for dismissal.

The aforesaid judgment has no application here as the facts and the circumstances in the above case differ from that of the case at hand. In the above cited case, there was a delay in receiving notice to appear in the court as the Defendant had shifted from his original address and at the time he was informed, the appeal had already been dismissed. Nevertheless, the Appellants in the present case were served with notice to be present before the Provincial High Court of Civil Appeal of Uva Province on 09.10.2013. The Appellant has submitted to this court that they notified their attorney-at-law of the date and they were unable to be present on the said date as they reside in Colombo. The said Attorney-at-Law in his affidavit has failed to disclose any reasonable cause for his absence but rather has stated that, 'as this was the very first date **it was taken for granted** that it was only to be mentioned for the purpose of granting the next step namely a date for the written submissions of the Defendant-Appellants'. (page number 517 of the brief)

The above reason given by the said Attorney-at-Law in his affidavit itself clearly establishes that he has failed to carry out his bounden duty as the legal representative of the Appellants.

In **Packiyanathan Vs. Singarajah [1991] 2 Sri L.R 205,** Kulatunga, J. held that in page number 209 that,

"Relief will not be granted for default in prosecuting an appeal where —
(a) the default has resulted from the negligence of the client or both the client and his attorney-at-law,
(b) the default has resulted from the negligence of the attorney-at-law in which event the principle is that the negligence of the attorney-at-law is the negligence of the client and the client must suffer for it."

It was further emphasized in this case at page 205 that,

"A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. ***The Court will in granting relief ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law****."* [emphasis added]

Similarly, in **Pakir Mohideen Vs. Mohamadu Casim [1900] 04 N.L.R 299,** Bonser, C.J. held that,
"If the Proctor did not do his duty, he is to blame for the absence of the defendant and the defendant must suffer for the fault of his position."

This sentiment is similarly echoed in **Schareguivel v Orr [1926] 11 N.L.R 302,** where Lyall Grant J. held that,

"To my mind facts indicate that there was negligence on the part of the proctor and not personal negligence on the part of the Plaintiff. That however is immaterial. The plaintiff must suffer for his proctor's negligence. This is clearly laid down by Bonser CJ in Pakir Mohideen v Mohamadu Cassim (4 NLR 299)."

In the present case, both the Appellant and their Attorney-at-Law were informed of the date to appear in advance. However, neither of them appeared in court on the due date. It must be noted that they were not prevented from attending by an unavoidable cause. The reason given by the Appellant is that they reside in Colombo and could not come to Badulla on the date the appeal was taken. They further state that they informed their attorney and the attorney states he took the date as 'granted'. Both the Appellants and their attorney have 'assumed that their presence was not necessary as this was only a calling date'. (page 517 and 518 of the brief) In my view, these reasons given by the Appellants are absurd and the negligence on their side is unjustifiable.

With regard to the first question of law, I direct my focus to the case of **Appuhamy Vs. Appuhamy [1911] 14 N.L.R. 233,** where Wood Renton, J. held at page 236 that,

"The Court has undoubtedly a discretion as to whether or not an appeal shall be dismissed, when it is first called for hearing, on the ground of non-appearance, and we exercise that discretion every day".

I am of the opinion that the learned High Court judge in the present case has wielded the said discretion in the interest of justice. Therefore, I answer the first question of law in negative on the ground that the duty to consider the appeal before dismissal on default of appearance of the Appellant does not become a mandatory duty in situations where there is negligence on the part of the Appellants.

The second matter for consideration by this court is whether the High Court erred in law by dismissing the appeal as the said appeal did not come up for "hearing" as contemplated by Section 769 (1) of the Civil Procedure Code.

The position of the Appellant on this regard is that the said appeal was not taken up for 'hearing' under Section 769 (1) of the Civil Procedure Code on 09.10.2013 but was merely a calling date. Therefore, the appeal is not liable to be dismissed.

Nonetheless, in **The General Insurance Company Ltd Vs. T.A.Don Abraham [1957] 59 N.L.R 282,** Basnayake, C.J, in page 284 stated that,

"For the purpose of section 769 an appeal " comes on for hearing " each time it is on the daily list. If the appellant or his counsel is not present when the appeal is called in Court whether for the purpose of hearing the submissions of counsel or ***for. any other purpose, it is liable to be dismissed****". [emphasis added]*

In **Jinadasa and another Vs. Sam Silva and Others [1994] 1 Sri L.R. 232**, Amerasinghe J, stated at page 248 that,

"A judge must ensure a prompt disposition of cases, emphasising that dates given by the court, including ***dates set out in "lists" published by a court's registry, for hearing or other purposes, must be regarded by the parties and their counsel as definite court appointments****. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for." [emphasis added]*

In the same judgment, Amerasinghe, J. has cited the **Abdul Aziz v. Punjab National Bank [AIR 1929 Lahore 96, 99, 100]**., where Jai Lai, J. has stated that,

*"In this connection due regard must be had to the nature of duties of counsel towards his other clients and the other courts. At the same time the court cannot be expected to give unlimited or unreasonable latitude to counsel in this respect. Counsel is ordinarily expected to be ready in court when the case is called and i****t is no good excuse to say he was busy elsewhere****." [emphasis added]*

As previously mentioned, the Appellants as well as their attorney assumed that their presence was not necessary as this was only a 'calling date'. (page 517 and 518 of the brief) Thus, the attorney has stated that he went out of Badulla on the date the case was taken into consideration. (page 517 of the brief) I must emphasize that every attorney has a duty towards his client as well as to the court and attorneys must assist the Judges in prompt disposition of cases. As stated in the case of **Jinadasa and another Vs. Sam Silva and Others** (above cited) every date where the case comes for hearing or for any other purpose, including, 'calling dates' must be regarded by the parties and their

attorneys as definite court appointments which the absence will not be excused without a justifiable cause.

In the present case, the reason that the attorney was out of Badulla on the day that the case was taken cannot under any circumstance be excused. Therefore, I am of the opinion that every 'calling date' of a case must be considered as a date for 'hearing' under Section 769 (1) of the Civil Procedure Code and the second question of law must also be answered in negative.

The third question for consideration is whether the High Court erred in holding that the petitioners had not prosecuted the civil appeal with due diligence when the Appellant had paid the brief-fees and instructed their Attorney-at-Law to appear on their behalf.

In order to examine the legal issue raised above, it is important to first define 'due diligence' expected from an Appellant in an appeal. The phrase 'due diligence' has been defined in the **Black's Law Dictionary, 2nd Ed**. as,

"Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

The Appellant has paid brief fees and has received notices to appear before the court on 09.10.2013. However, the Appellant or their attorney did not appear on the said date as they 'thought it was not necessary' since it was only a calling date. The standard of due diligence expected from an Appellant does not stop once he has paid the brief fees and retained an attorney. It is the assiduity expected from a person whose rights have been violated and such assiduity must continue until he or she receives justice.

In **Kanagasabai Vs. Kirupamoorthy [1959] 62 N.L.R. 45,** while stating that if parties are required by law or by court to be present, then they must be present Bansanayake CJ held at page 58 that,
"Where, as in this case, the party is required to appear in person and he does not do so then he must suffer the consequences of his non-appearance. ***It is not sufficient to say that he gave a proxy to a Proctor and that the Proctor failed to appear by an " oversight"****. [emphasis added]*

In the present case, the Appellant's cannot avert their duty to proceed with due diligence merely by stating that they paid the brief fees and retained an attorney. The Appellants are required to appear in the court on the given date either in person or through their attorney. If neither of them appear, there is no way for the court to determine whether there is a case to proceed or not. In the case at hand, the Appellant's attorney has stated that they thought their presence was not necessary. (page 518 of the brief) The Appellants have stated that they were unable to present on the said date on the sole reason of them being residents of Colombo. (the petition of the Appellants to this court)

Thus,as I have already discussed, the reason given by the Appellant's attorney for his absence is absurd and intolarable. Hence, even if it was the absence of due diligence of the Appellant's attorney which alone resulted in the challenged decision of the High Court, such is indefensible according to "the negligence of the proctor is in law the negligence of the client" and "the client must suffer for his proctor's negligence" principles as it was discussed in the case of **Packiyanathan Vs. Singarajah** (cited above). As this court has already established in **Pakir Mohideen Vs. Mohamadu Casim** and **Schareguivel v Orr** (cited above) it is the party who suffers when the attorney who was under a duty to have appeared for him fails to appear without sufficient case, yet, that is not a factor to be considered in deciding whether a matter should be considered

Therefore, in relation to the third question of law, I conclude that the learned High Court judge has not erred in law as the Appellants lacked the standard of due diligence expected from them.

The fourth and fifth questions of law which the leave was granted by this court can be considered together. Both these questions consider whether the High Court failed to take into account the relevant and/or attendant circumstances and as such err in not exercising the discretion vested in court judicially.

In this regard, it was held in **D.S Ranaweera Vs. W.W.P Jinadasa and another [1992] BAL Vol.IV, Part II** at page 20 that,

"Dealing instead, in the matter before it, with a mere invocation for the assistance of the Court of Appeal in the exercise of its discretion, the court had an uncontrolled power of disposal, so long as that power was not exercised in transgression of the law and legal principles, and so long as it was not actuated by whim or caprice, and exercised in good faith."

In the same case, Amerasinghe J cited the Indian case of **Shamdasani and others Vs. Central Bank of India, [1938 Bombay 199]**. where Chief Justice Beaumont at page 202 stated that,

"It is, after all, a very serious matter to dismiss a man's suit or summons, or whatever if may be, without hearing it, and that course ought not be adopted unless the court is really satisfied that justice so requires."

If the court is to wield its discretion to dismiss a case without hearing, such must be done to meet the ends of justice. In the above cited **D.S Ranaweera Vs. W.W.P Jinadasa and another** Amerasinghe J. stated that 'the needs of justice' go beyond the narrow interest of justice one or all of litigants in a matter and further held at page 21 that,

"The needs and expectations of the community as a whole in the due administration of justice must be considered. Interest rei publicae ut sit finis litum."

In the same case, it was held at page 23 that the court would order reinstatement in an application dismissed for want of appearance only if the defaulting party furnished the court with a '*comprehensive and satisfactory disclosure of all attendant circumstances'*.

In the present case, the attendant circumstances are not satisfactory as such do not elucidate any reasonable or sensible explanation that justify the absence of the Appellant's attorney at the High Court on the said date. If this court is to allow this sort of irresponsible behavior of an attorney, it will lead to the erosion of professionalism in this noble profession. Even though it is very unfortunate in the present case that the Appellant has to suffer for the fault of their attorney, this one party's grievances must be overridden by the necessity to protect the interests of justice. Therefore, I am of the opinion that the learned High Court judge has correctly exercised his discretion in dismissing the application by the Appellants for re-listing to preserve the interests of justice.

In addition to the above questions of law, the Learned Counsel for the Respondent has two more questions. The first question is whether the order of the High Court appeal is in compliance with the provisions of Section 769 of the Civil Procedure Code in view of the non-appearance of the Petitioners before court. As I have already discussed, the court has wide discretion in relation to the dismissal of cases. However, if the court is to dismiss a case without giving a hearing, such has to be done only when the justice so requires and justice so requires in the present case.

The second question raised by the learned Respondent's counsel is whether the Appellants are bound and obliged to comply with proviso of Section 769 of the Civil Procedure Code to produce sufficient cause in making an application for re-listing.

In the **Jinadasa and another Vs. Sam Silva and Others** (cited above), the court by referring to the provision of Section 769 (2) of the Civil Procedure code held at page 250 that,

"The court may have reinstated the matter upon such terms as to costs or otherwise as it thought fit, yet it could only do so if sufficient cause for reinstatement had been established."

In the same case at page 233 states that,

"A court will hold that there was sufficient cause if the facts and circumstances established as ***forming the grounds for absence are not absurd, ridiculous, trifling or irrational but sensible, sane, and without expecting too much, aggreable to reason.****" [emphasis added]*

The facts and circumstances established in the present case as forming grounds for absence are absurd and irrational. In the absence of sufficient cause, there was no obligation on the High Court to order a reinstatement.

In these circumstances and for the foregoing reasons, the appeal is hereby dismissed.

JUDGE OF THE SUPREME COURT

B.P ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT