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

SC. Appeal No. 46/05
S.C. Spl. L.A. No. 53/2005
C.A. Appeal No. 46/95(F)
D.C. Negombo Case No. 7683/M

In the matter of an application for Special Leave to Appeal against judgment delivered on 14/02/2005 by the Court of Appeal in C.A. Appeal No. 46/95 (F)
D.C. Negombo Case No.7683/M.

Rohan Ajith Jude Silva, of Walauwwa, Kochchikade.
SUBSTITUTED DEFENDANT-PETITIONER-APPELLANT-APPELLANT

Vs.

Y.B. Aleckman, of Alight Motor Works, Kochchikade.
PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

Before : Tilakawardane, J.
Dep, PC J. &
Wanasundera, PC J.

Counsel : Saumya Amerasekara with Dhammika Walagedara for the Substituted-Defendant-Petitioner-Appellant-Appellant.
Kuvera de Soyza,PC with Amrith Rajapakshe for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 05/07/2013.

Decided on : 18/11/2013.

SHIRANEE TILAKAWARDANE, J.

Special Leave was granted by this Court in order to enable an Appeal against the Judgment delivered by the Court of Appeal on 14.02.2005.
Leave was granted on the following questions of law:

1. Whether the Court of Appeal erred by holding that there had been no reasonable grounds for the default of appearance on 05.02.1993 and in deciding that the case of **Kathiresu v Sinniah** (*71 NLR 450)* was inapplicable in this case;
2. Whether the Court of Appeal had erred in holding that, legally admissible evidence had been led at the *ex-parte* trial and further, by refusing to act in revision.

The facts relating to this appeal are as follows. Prior to the institution of this action the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) was ejected from the premises located at No.11, Negombo Road, Kochikade, by the mother of the Substituted-Defendant-Petitioner-Appellant-Appellant (hereinafter referred to as the Petitioner). The said action was instituted in the District Court by the Petitioner's mother who was the original Defendant in this case. In this regard and judgment was entered in favour of the mother of the Petitioner (the original Defendant in this case) at the District Court which was later upheld by the Court of Appeal. Subsequently, the present action was instituted by the Respondent against the mother of the Petitioner (the original Defendant) on the grounds that the writ of the District Court in Negombo in the said case was wrongfully issued and that the loss and damage caused to the machinery and business of the Respondent by the Fiscal Officer was not compensated for by the Petitioner.

The context is created by the fact that the mother of the Petitioner, the original Defendant in this case on 28.10.1992 received summons from the Court with a plaint that claimed Rs. 1,825,000.00 in damages. Upon receipt of this summons the original Defendant the mother of the Petitioner along with her son, met with Mr. Panditharatne who accepted payment for the filing of the answer in accordance with the summons. He had then, mistakenly recorded the summons returnable date for filing Answers as 05.03.1993, as opposed to the actual date of 05.02.1993. Evidence to affirm this fact has been tendered by the Petitioner and marked as වි1 and වි6 (අ). This error was discovered subsequent to the scheduling of the *ex-parte* trial by the District Court to be held on 27.04.1993 and Mr. Panditharatne contacted Mr. E. B. K. De Zoysa, the Attorney retained by the Respondents, in order to ascertain whether the consent of the Respondents could be obtained to vacate the order fixing the case for *ex-parte* trial. However, Mr. De Zoysa failed to procure his clients' consent to do so. Therefore, Mr. Panditharatne also filed a motion in Court to provide the Court with the notice of his failure to appear on the said date.

On 27.04.1993 the case was taken up for an *ex-parte* trial and Mr. Panditharatne offered to pay the cost of the Respondent and moved to allow his client to file her answer. However, this offer too was rejected by the Respondent. Therefore , the case was heard by the District Court *ex-parte,* where the Respondent alleged that the abovementioned writ was issued wrongfully and the District Court entered judgment in favour of the Respondent as the evidence of the Respondent remained undisputed and un-contradicted.

In the District Court, the Petitioner's mother refused to vacate the *ex-parte* action as the Court was of the opinion that the failure of the Petitioner's mother to appear before the Court was due to her negligence and not a mistake. Furthermore, the Petitioner's appeal to the Court of Appeal to set aside the order of the District Court which refused to vacate the ex-parte decree was dismissed on the basis that the

Attorney-at-Law had not filed a proxy to appear while the Court further refused the plea to revise the ex-parte decree on the basis that though no documentary evidence was lead during the case, the Respondent had 'personal knowledge' of the case, which negated the need for such documentary evidence.

This issue madates the discussion of the present law pertaining to the failure of an Attorney to appear before Court on a given date with particular consideration as to whether a lawyer can appear on behalf of a client without a proxy or a defective proxy. In this regard, the Petitioners relied on the case of **Kathiresu v Sinniah** (*71 NLR 450)* where the Court vacated an *ex-parte* decree entered against the Defendant due to the fact that his lawyer had taken down the incorrect trial date erroneously. It was the opinion of the Court of Appeal in the present case that **Kathiresu v Sinniah** (71 NLR 450) was irrelevant as the proxy was filed at the time of the default of the Attorney, which the Court of Appeal believed were not the circumstances in the present case.

This Court notes that on 05.01.1993 the Petitioner (the original Defendant) has in fact signed the proxy as per Vide evidence at page 66 and 75 and the proxy was tendered to Court on 05.03.1993 and is marked "වී4" in evidence. The question then arises as to whether the act of signing the proxy qualifies as sufficient in Sri Lankan Courts to enable the Attorney – at – Law to appear on behalf of the client.

In this regard, the Court notes the case of **L.J.Peiris and Co. Limited v L.C.H. Peiris** (74 NLR 261) where **Thamodaram J** stated that:

"The relationship of a Proctor and client may well be a contract of agency but there is no law requiring that the contract should be in writing. A proxy is a writing given by a suitor to court authorizing the Proctor to act on his behalf".

Further, there is precedent to indicate that the Courts will look at the intention of

the parties as opposed to the actual documentation available at the relevant time.

In the case of **Paul Coir (Pvt) Ltd v Waas** (2002) (1 SLR 13) **Wigneswaran J** held:

"*Whether there was an agency visible between the lawyer and the client on the basis of the documents filed was not what the Courts look for. It was the real intention of the parties at the relevant time which the Court examined".*

As such an intention is tangibly apparent to the Court, this Court also takes into account the case of **Udeshi v Mather (1988)** (*1 SLR 12)* where **Athukorala J** held that an irregularity in the appointment of a proxy is curable so far as there is no legal bar, or impediment, that prevents the acts that have already been done from being ratified. This case is also authority for the rule found in Section 27(1) of the Civil Procedure Code which states that:
"The appointment of a registered attorney to make any appearance or application, or do any acts as aforesaid, shall be in writing signed by the client and shall be filed in Court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.", being a directory provision and not a mandatory rule.

Accordingly, the failure of Mr. Panditharatne to file the proxy prior to the date of summons should not, in law be considered fatal to his client's action, in the light that there is no legal impediment to it being so ratified. This view was also upheld by **Hutchinson J** in the case of **Tillekeratne v Wijesinghe** (*11 NLR 270).*

In this context, this Court feels that the proxy was created, as was intended by the parties, at the moment in time when the Petitioner paid Mr. Panditharatne the sum of Rs.1000 and placed her signature on the proxy document, which was on 05.01.1993, one month ahead of the date on which the Answer of the Petitioner was

due to be filed in Court. Therefore, it is the opinion of this Court that a valid proxy does exist and did exist at the moment in which the Answer of the Petitioner was due.

The issue of whether the error made by Mr. Panditharatne was due to negligence or a mistake is also relevant to this case. Extensive case law suggests that Courts are inclined to consider the error of a lawyer, whilst noting dates that are relevant to his case, as mistakes and not acts of negligence. This Court quotes the case of **Kathiresu v Sinniah** (71 NLR 450) where **H.N.G.Fernando J** held that the absence of both the Proctor and the Petitioner on the given date, arising out of confusion of dates, was a mistake and not due to the negligence of the parties. Accordingly, Court set aside the *ex-parte* decree. The Learned Judge arrived at this decision by taking into consideration the precedent set out in the case of **Punchihamy v Rambukpotha** (16 Times of Ceylon Law Reports) where **De Krester J** held:

"*The whole case indicates very gross carelessness on the part of the Defendant and it is most unfortunate that there should be now, in addition, a mistake on the part of the proctor. The mistake however is there and must be given effect to."*

This Court feels that the abovementioned situation must be distinguished from that which is found in the case of **Packiyanathan v Singarajah** (1991) (*2 SLR 205)* and the case of **Schareguivel v Orr** (11NLR 302). In the said case of **Schareguivel v Orr** (11NLR 302) the Court held that:

" To my mind facts indicates that there was negligence on the part of the proctor and not personal negligence on the part of the proctor and not personal negligence in 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 considering whether a mistake amounts to negligence as well as the distinction between these two elements, the Court finds the decision in **Packiyanathan v Singarajah** (2003)(2 SLR 205) relevant. Here, **Kulatunga J** noted that the distinguishing of a mistake from negligence '*will depend upon the facts and circumstances of each case'* and held that *' A mere mistake can generally be excused; but not negligence, especially continuing negligence.'* [(This sentiment is similarly echoed in **Wimalasiri and another v Premasiri** (2003 SLR 330)]. Accordingly, the Supreme Court refused to grant relief on basis that their conduct was negligent stemming from the fact that measures had not been taking by neither the Attorney-at-Law nor the Appellant until the lapse of 9 months subsequent to the ejectment.

The said cases are distinguished from the matter before this Court on the basis that Mr. Panditharatne and the Petitioner took all feasible measures to remedy the delay upon discovery of it. This effort made by them in rectifying the error qualifies it as one arising out of mistake as opposed to negligence.

The next issue which begs the consideration of this Court is the validity of the *ex-parte* judgment and the issues pertaining to the execution of the writ. The Respondent provided the Court with oral evidence of the damages caused but failed to adduce the decision of the Negombo District Court as evidence. This failure to adduce the decision of the Court is in contravention of Section 91 of the Evidence Ordinance which states that:

"when the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained ."

Accordingly, the Respondent's oral evidence of the decision of the Negombo District Court, or lack thereof, is inadmissible due to the fact that the original primary evidence was in existence and not submitted to Court. Therefore, the District Court was not provided with all the relevant and material facts prior to arriving at its decision. The inadmissibility of oral evidence in the event of the existence of primary evidence was affirmed by **Basnayake CJ** in the case of **Queen v Murugan Ramasamy** (*64 NLR 433)* while this sentiment is further echoed in Section 59 of the Evidence Ordinance which states that: " *All facts, except the contents of documents, maybe proved by oral evidence",* and supported by E.S.S.R.Coomaraswamy in 'A Textbook of the Law of Evidence.' In this light, the existence of 'personal knowledge' , as held by the Court of Appeal is insufficient grounds upon which oral evidence, when primary documentary evidence exists, can be affirmed as sufficient and satisfactory.

The issue of imposing liability for damages on the Petitioner for the harm caused to the Respondent's machinery by the Fiscal Officer at the time of the ejectment was also raised in this Court. Precedent in this regard was established in the case of **Ranesinghe v Henry** (*1 NLR 303*)where Bonser CJ held that the cost of damages that are incurred in the process of executing a writ falls on the creditor, in this context on the Petitioner. It is noteworthy that at the time of the ejectment writ being executed by the Fiscal Officer, the Petitioner was not present at the scene hence making it impossible to hold her liable for the damages caused to the property of the Respondent. Furthermore, Section 85(1) of the Civil Procedure Code states that:

"The plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court, if satisfied that the plaintiff is entitled to the relief claimed by him, either in its entirety or subject to modification, may enter such judgment in favour of the plaintiff as to it shall seem proper, and enter

decree accordingly."

It is the opinion of this Court that the *ex-parte* hearing could not have resulted in favour of either party without the Court having access to the evidence of the trial in the District Court. The incomplete information provided to the Court bars it from arriving at a legally accurate decision. Hence, this Court does not see how the burden of 'satisfaction' of the Court was adequately executed in the absence of crucial evidence in the form of the decision of the District Court.

On the reasons set out above this court holds in favour of the Petitioners on the questions of law. Accordingly, this Appeal is allowed. No costs.

JUDGE OF THE SUPREME COURT

P.DEP, PC J.

I agree

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC J.

I agree

JUDGE OF THE SUPREME COURT