

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

*In the matter of an Application for
Appeal in terms of Section 754(1) of
the Civil Procedure Code and read
with the Provisions of the High
Court of the Provinces (Special
Provisions) Act No.10 of 1996*

SC (CHC) No. 05/2010

HC (Civil) 237/2003

The Sampath Bank Limited
No.110, Sir James Peiris Mawatha,
Colombo 02.

PLAINTIFF

Vs

The Pay Phone Company (Pvt) Ltd.
No.367, R.A De Mel Mawatha, and
now at No.18, 5th Lane, Ratmalana.

DEFENDANT

AND NOW

The Pay Phone Company (Pvt) Ltd.
No.367, R.A De Mel Mawatha, and
now at No.18, 5th Lane, Ratmalana.

DEFENDANT-APPELLANT

Vs

The Sampath Bank Limited
No.110, Sir James Peiris Mawatha,
Colombo 02.

PLAINTIFF- RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J.**
A.H.M.D. NAWAZ, J. AND
ACHALA WENGAPPULI, J.

COUNSEL : The Defendant-Appellant is absent and unrepresented
Chandaka Jayasundera, PC with Ms. Vishmi Fernando instructed
by Senaka Hewawitharana for the Plaintiff-Respondent.

WRITTEN SUBMISSIONS : Defendant-Appellant on 24th November 2014

Plaintiff-Respondent on 22nd April 2015

ARGUED ON : 1st November 2021

DECIDED ON : 9th June 2022

S. THURAIRAJA, PC, J.

The Sampath Bank Limited (Plaintiff-Respondent to this action) instituted the present action against The Pay Phone Company (Pvt) Ltd. (Defendant-Appellant to this action) in the High Court of Colombo (Civil) by way of Plaint dated 17th October 2003.

The Plaintiff-Respondent sought a judgement and decree against the Defendant-Appellant to pay the Plaintiff-Respondent a sum of Rs. 3,554,729/08 and a further sum of Rs. 2,802,778/08 from 28th May 2003 up to date of judgement and pay

interest at the rate of 17% on the aforesaid amount. Secondly, they sought a judgement and decree against the Defendant-Appellant to pay the Plaintiff-Respondent a sum of Rs. 690,371/02 and a further sum of Rs.646,250/62 from 28th May 2003 up to date of judgement and to pay interest at the rate of 28% on the aforementioned aggregated amount.

Following the proceedings of the High Court, the Defendant-Appellant instituted action before this Court by Petition dated 7th September 2007 appealing against the Orders granted by the Learned High Court Judge on the 7th March 2007 which decided to proceed with the case as per Section 145 of the Civil Procedure Code, and the decision dated 24th July 2007 which entered judgement in favour of the Plaintiff-Respondent. The Defendant-Appellant further prays this Court to order trial de novo from the inception and allow Defendant-Appellant to raise defences, grant cost and other suitable remedies.

Facts

Upon the Plaintiff-Respondent filing Plaintiff with the reliefs prayed for as above to recover certain monies lent to the Defendant-Appellant, the Defendant-Appellant denied the claim and sought for a dismissal of the Plaintiff by the Plaintiff-Respondent. The parties agreed on 3 admissions and 45 issues out of which 19 issues were raised by the Plaintiff-Respondent and 26 by the Defendant-Appellant. Upon perusing the record, I find certain events regarding the parties before the Commercial High Court worth noting.

On 2nd May 2005 the Plaintiff-Respondent was not ready for the hearing as they were unable to obtain the required documents as it was a Bank Holiday. On 24th February 2006, a date was moved for further trial as the Plaintiff-Respondent's lawyer was not in the country on that day, On 26th August 2006 Plaintiff-Respondent moved for a date on a personal difficulty of the counsel. Court re-fixed matter for trial on 7th December and granted permission to the Plaintiff-Respondent to tender examination on chief by affidavit on 7th November.

On 7th November 2006 the Plaintiff-Respondent's first witness submitted an affidavit as Evidence in chief. When the matter was called for cross examination the counsel for the Defendant-Appellant was not prepared for the same stating the reason that it was a calling date and not a trial date. On 7th December 2006 when the Defendant-Appellant was asked to cross-examine the witness, Counsel for the Defendant-Appellant stated that he was unaware that the matter was called for trial hence is unprepared and moved for a further date. There were no representatives from the Defendant-Appellant present. The Directors of Defendant-Appellant whose signatures were in the affidavit were asked to come to court since the names were not clearly mentioned and the Attorney at Law of the Defendant-Appellant was to be present in court the next day due to a discrepancy of the address provided in her proxy. The affidavit of the first witness of the Plaintiff-Respondent was given to the Counsel of the Defendant-Appellant.

On 7th March 2007 all persons who were sent notice by court to be present were absent. The Counsel that appeared for the Defendant-Appellant, Mr. Anusha Wickramasinghe, stated his inability to act on behalf of the Defendant-Appellant as he had not received any instructions from the Defendant-Appellant and could not communicate with them. It was further submitted that he had informed Defendant-Appellant company by letter requesting them to be present in court on March 7th. The names of the Defendant-Appellant and counsel Seneviratne's names were called in court but they were absent despite having sent a letter to the address mentioned in the proxy. The witness of the Plaintiff-Respondent was present for further evidence and the Counsel for the Plaintiff-Respondent requested the court to decide as per 145 of the Civil Procedure Code, which was granted on the same date.

On 24th April 2007, Defendant-Appellant made an application to revoke the proxy, accept new proxy, set aside Order on 7th March and for permission to take up defences against Petition and Affidavit. On 26th April 2007 the Defendant-Appellant requested court not to deliver judgment until the Defendant-Appellant was permitted

to present evidence with the reasoning that he couldn't obtain services of an Attorney at Law after the Attorney at Law who appeared previously withdrew. Court rejected the application by Defendant-Appellant noting that previous Attorney at Law withdrew since he was not properly instructed, and the Director of Defendant-Appellant and Attorney at Law were not present even after being notified. The High Court Judge specially noted that the Defendant-Appellant had sufficient time and more to obtain services of an Attorney at Law. The learned Judge further noted that the Director of Defendant-Appellant had signed Proxy to be revoked, two Affidavits compared to the Petition as if signed by two different people when it was the same person, which was admitted by Director of Defendant-Appellant. The Learned Judge noted that the Defendant-Appellant was avoiding court proceedings and attempting to mislead court. In terms of the proxies the High Court judge noted the discrepancies in the revocation papers filed to revoke proxy of the Defendant-Appellant's instructing Attorney and decided not to consider such application.

On this date the learned High Court Judge mentioned that as per the affidavit, the Plaintiff-Respondent had sought permission to provide for further evidence due to certain information not having been produced and the Counsel for the Plaintiff-Respondent requested for further date to provide evidence. A reference has been made in the Journal Entries that the Plaintiff-Respondent tendered further affidavit and Court fixed matter for judgement on 7th July 2007. The Defendant-Appellant claims that these documents were not served on the Defendant-Appellant and that the Defendant-Appellant was not given an opportunity to cross-examine the Plaintiff-Respondent's Witness on the purported further affidavit.

The case was fixed for judgement on 24th July on which date the Judgement was delivered in favour of Plaintiff-Respondent.

On 18th July 2007, the Defendant-Appellant filed revocation of previous proxy with written consent of the previous Attorney at Law and the Defendant-Appellant, and filed new proxy of Mr. Ruwan Rodrigo, Attorney at Law and they moved to accept the

same. On 24th July, on the date judgement was pronounced, the Plaintiff-Respondent was directed to file Objections against application by Defendant-Appellant for revocation of proxy and appointment of new Attorney at Law on 3rd September 2007. Subsequently no order was made regarding the revocation of proxy.

At this juncture it is important to note that the Defendant-Appellant has followed a similar pattern in proceedings of this Court.

In terms of conduct pertaining to Attorneys at law, it is apparent by the above facts that Counsel had withdrawn due to the failure of the client to instruct them sufficiently. Further, the Defendant-Appellant had failed to procure services of an Attorney at law when the Proxy of the previous Attorney at Law was revoked, albeit having had sufficient time to do so. In the present Court, the Defendant-Appellant revoked appointment of Mr. Ruwan Rodrigo, Attorney at Law in 2012. The proxy for appointment of Attorneys of Paul Ratnayake Associates was filed in February 2013 and revoked in September 2015. Thereafter, Mrs. R.A Lanka R. Dharmasiri, Attorney at Law was appointed by proxy on 8th October 2015 and revocation of proxy was received by this Court on 2nd August 2018. There have not been any proxies filed subsequently and the Defendant-Appellant has since been absent and unrepresented.

Notices sent on numerous occasions have returned undelivered stating reasons as that no such company exists at that address, and that the Defendant-Appellant has left the place. This Court has noted on the 13th October 2020 that the Defendant-Appellant is not diligently prosecuting the case and fixed this matter for argument even in the absence of the Defendant-Appellant. On the date of argument, the Defendant-Appellant was absent and unrepresented despite the attempts of this Court to serve notice, all of which have returned undelivered. I have perused the record and observe that the behaviour of the Defendant-Appellant does not appear to be isolated incidents but rather a pattern of behaviour.

As the events before both the High Court and the present Court have been established, I find it pertinent to address the grounds of appeal and prayer for appeal as pleaded before this Court by the Defendant-Appellant

Relief Prayed for by the Defendant-Appellant

The Defendant-Appellant in the Petition has urged the grounds of appeal as:

- a) The said judgment is contrary to law and evidence transpired in the said matter
- b) The said judgment is contrary to the principles of natural justice wherein the Appellant had not been afforded an opportunity to purge default
- c) The said judgment is totally inconsistent with the applicable legal principles and procedures specially the provisions of the Civil Procedure Code
- d) The said Judgment is contrary to legal precedents created by our Superior Court in similar circumstances and,
- e) The said judgment had been entered contrary to the evidence transpired in the Case and without affording the Appellant an opportunity to defend itself in a meaningful manner.

However, I find that the above grounds lack specificity and have been left purposefully vague. Despite allegations that the judgment is contrary to principles of Natural Justice, there has been no elaboration as to the manner in which such a violation has occurred. Despite urging this Court that the judgment is inconsistent with relevant legal principles, the Civil Procedure Code, legal precedents, the grounds nor the Petition in itself specifies which principles, which provisions of the Civil Procedure Code or which cases establishing precedent the Defendant-Appellant refers to.

The Defendant-Appellant prays:

- a) To set aside and/or vacate and/or vary the judgment dated 24 July 2007 in the Commercial High Court Case No: 273/2003 (i)
- b) To set aside the Order of Learned High Court Judge dated 7th March 2007 by fixing the matter for judgment in terms of section 145 of the Civil Procedure

Code and permit the Appellant to defend the case by cross-examination notice and leading evidence of the defence.

- c) In the alternative direct the Learned High Court Judge to conduct an inquiry into Appellant's application to purge default in terms of Section 839 of the Civil Procedure Code or
- d) In the alternative direct the Learned High Court Judge to commence and conduct a trial de novo

And to grant cost and such other further reliefs as to the Court shall meet.

As such any specificity can only be found in the prayer for relief as to which provisions of the Civil Procedure Code the Defendant-Appellant relies on.

Section 145 of the Civil procedure Code states as follows:

"If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith."

As clearly enumerated above, the Defendant-Appellant had been granted sufficient opportunity which they have failed to utilize, resulting in a justified exercise of this provision by the High Court Judge. As such, there are no circumstances leading to the granting of any specific relief as prayed for by the Defendant-Appellant.

The Defendant-Appellant prays for the High Court Judge to be directed to exercise the powers under Section 839 of the Civil Procedure Code which states:

*"Nothing in this Ordinance shall be inherent deemed to limit or otherwise affect the powers of court save inherent power of the court to make such orders as may be necessary for the ends of justice or to **prevent abuse of the process of the court.**"*

(Emphasis Added)

This Court recognizes that it is indeed possible to exercise powers under this provision for the High Court to allow Defendant-Appellant to purge default. However, it must be necessary for the ends of justice or to prevent abuse of the process of the court. Indeed, in the present instance, allowing for this application would have been for the High Court Judge to do the contrary in facilitating the abuse of process of the court by the Defendant-Appellant in light of their conduct before both the High Court in itself, as well as in the Supreme Court.

Despite praying for an opportunity to purge default, The Defendant-Appellant has not mentioned the relevant provisions of the Civil Procedure Code for the same nor discussed them at any point in the Petition or Written Submissions before this Court. As such, I believe that since this application urges such an opportunity to purge default, it is pertinent to emphasise Section 86(2) which states:

"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."

As per the above, it was incumbent upon the Defendant-Appellant to satisfy the court that they had reasonable grounds for such default. Despite the Application having been made for the same, the Defendant-Appellant had no such reasonable grounds that would result in the court setting aside the decision to proceed as per Section 145 of the Civil Procedure Code. I believe that given the circumstances of failure to appear before the said court, it is reasonable for the court not to allow purging of default, which would only have led to further delay in proceedings.

Additionally, despite the Defendant-Appellant attempting to vaguely invoke the powers of the court under Section 839 as above, I must emphasize that such exercise of powers is discretionary. A Court has to be cautious in exercising such powers and must only do so in circumstances that warrant the same. Contrary to the request of the Defendant-Appellant, I find that refusal to exercise inherent powers in a manner prayed for by the Defendant-Appellant is indeed in the interest of preventing abuse of process of court.

In terms of existing precedent in similar circumstances which the Defendant-Appellant avers to almost in the passing, I find that existing precedent does not do any favours to the Defendant-Appellant.

In the case of **David Appuhamy V. Yassassi Thero (1987) 1 SLR 253**, it was stated that:

"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."

In further interpreting the above provisions, the case of **Sanicoch Group of Companies v. Kala Traders (Pvt) Ltd (2016) BLR 44** considered the standard set by the above as follows:

"The above section requires the Defendant to satisfy court that the Defendant had reasonable grounds for such default. To state very briefly is that, the Defendant party need to satisfy court which would mean, to meet the expectations or desires, to be accepted by as adequate in the circumstances. What should or would be adequate needs to be only reasonable grounds. It is well known according to case law that inquiries on application to set aside an ex-parte decree is not regulated by any specific provision of the Civil Procedure Code but such inquiries must be conducted consistent with rules of Natural Justice and the requirement of fairness"

As such, the burden was upon the Defendant-Appellant to prove circumstances justifying the Court exercising the above provisions, especially that of Section 839. The case of **Sanicoch Group of Companies v. Kala Traders (Pvt) Ltd** refers to **De Fonseka Vs. Dharmawardena (1994) 3 SLR 49** in the Court of Appeal where it was considered

"Section 839 of the Civil Procedure Code recognises the inherent power of the Court to make an order as may be necessary for the ends of justice. There is no error or illegality that has caused any prejudice to the substantive rights of the parties."

In light of the same, based on the circumstances outlined above, with special attention to the conduct of the Defendant-Appellant themselves, I do not find that the refusal to exercise the inherent powers of the court under the abovementioned sections amounts to any miscarriage of justice.

It appears that the decision by the High Court Judge on the 7th March 2007 was necessary in order to avoid any further delay and the appeal to the same does not have any merit. In any case, the Petition has only been filed on the 20th of September 2007. This application is time barred as a period of over six months, a duration much later than the appealable period, has elapsed since this Order by the learned High Court Judge. As such this ground of appeal fails on its own merits

Pertaining to the appeal against the final order on 24th July 2007, for the purpose of completeness, I perused the facts of this case and the final order, and I do not find any illegality or irregularity in following the procedure. Under the circumstances I find the Order of the Trial Judge is not void due to any unjudicial conduct as alleged by the Defendant-Appellant.

As such the Defendant-Appellant has not succeeded in adducing sufficient valid reasoning before either court to warrant vacating the decree by the previous court. As the Defendant-Appellant has not prayed for any further specific relief, In the interest

of discouraging abuse of Judicial process by parties, I find that the decisions of the High Court are justified in these circumstances.

Based on the above facts and circumstances and considering all matters outlined in the Petition and Written Submissions by the parties, I dismiss this application with cost. In addition to the above cost, I order Sum of Rupees Five Hundred Thousand to be paid by the Defendant-Appellant as punitive cost, the money to be deposited at the Commercial High Court of Colombo.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.

I agree.

JUDGE OF THE SUPREME COURT