

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

**SC.Appeal No. SC/CHC/19/2011**

**HC. Civil No. 278/2007/MR**

In the matter of an Appeal in terms  
of Sections 5(1) & 6 of the High  
Court of the Provinces (Special  
Provisions) Act No. 10 of 1996 read  
with Chapter LVIII of the Civil  
Procedure Code and Articles 127 &  
128 (4) of the Constitution.

MOD TEC LANKA (PVT) LTD,  
No.7, Rajagiriya Udyanaya, Rajagiriya.

Defendant-Appellant

-Vs-

FOREST GLEN HOTEL & SPA(PVT) LTD  
No.7, Wilson Street, Colombo-12.

Plaintiff-Respondent

**BEFORE** : **TILAKAWARDANE. J**  
**HETTIGE. P.C. J &**  
**MARASINGHE. J**

**COUNSEL** : Appellant is absent and unrepresented  
Dr. Wickrama Weerasooriya with B.U Jayaweera for  
the Respondent

**ARGUED ON** : 13.01.2014

**DECIDED ON** : 17.03.2014

**TILAKAWARDANE. J**

The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted action against the Defendant-Appellant (hereinafter referred to as the 'Appellant') in the High Court of the Western Province holden in Colombo exercising civil jurisdiction, seeking inter-alia, the sum of Rs. 28,704,466/= together with legal interest, and in an alternative cause of action, the payment of the sum of Rs. 24,954,466/= with a decreed sum of legal interest. The aforementioned claims were consequent to a terminated contract between the Respondant and the Appellant, for the structural and civil construction of a

hotel in Elk Plain, Nuwara Eliya. The Respondant had advanced the Appellant a sum of Rs. 28,246,400/=however at the time of the termination of the contract, the Defendant had only used a sum of Rs. 3,291,934/=, entitling the Respondent to recover the remaining sum of Rs. 24, 954,466/=.

As per a Motion filed on the 02.09.2009, the Respondents informed the High Court that they will not be calling any other witnesses. When the case was commenced on the 16.12.2009, the Appellant was not ready to proceed with their case and so the trial was fixed for the 04.12.2009. On this given date, neither the Appellant nor their Counsel was present in the High Court, resulting in the Respondent seeking an Ex-parte order, and the matter was fixed for the 15.12.2009. On that date, the Appellant did not call any evidence, and simply relied on the cross-examination of the Respondent's main witness. The Learned Judge of the High Court (Civil) of Colombo thereafter decided in favour of the Respondent, on the 03.11.2010.

The Appellant tendered a Petition of Appeal to the Supreme Court of Sri Lanka, bearing Appeal number 19/2011, dated 31.12.2010 and notices were issued to both the Respondant and the Appellant. However the Notice sent to the Appellant was returned undelivered with the endorsement that they had "Left the place". Consequently, Notice was served to the Appellant by means of Registered Post. The case was called on the 15.02.2013 to fix a date for hearing and Notices were served to this effect, however here too, the Notice sent to the

Appellant was returned undelivered. A subsequent Notice was sent by means of Registered Post.

When the case was heard on the 15.02.2013 the Court was informed that the Instructing Attorney for the Appellant, Mr. Almeida, had passed away and a fresh proxy would be filed. Conversely on the 19.03.2013, the Junior Counsel for the Appellant informed the Court that he was unable to file a fresh Proxy and moved that the matter be re-fixed for hearing, in which time the Junior Counsel would file a new Proxy. The matter was re-fixed, however on this date the Appellant was absent and unrepresented. The Court directed a Notice be sent again to the Appellant, to appear personally.

On this day, the Respondent also informed the Court that the Appellant had changed the name of the Company. He subsequently filed a Motion, informing the Registrar of the new address of the Company on the 17.10.2013 and a Notice was sent to the new address. When the case was heard on the 31.10.2013, the Appellant was absent and unrepresented. An additional Notice was served on the Appellant however neither the Appellant nor their Counsel was present when the case was called on the 13.01.2014.

It is apparent that in both the High Court, and the Supreme Court, the Appellant has employed a variety of tactics to prolong the duration of both proceedings, to the detriment of the Respondant and the respective Courts. What is unfathomable is that in this particular case, it is the Appellant who has failed to act with due diligence in pursuing their claims, after the institution of proceedings. If the Appellant felt the need not to pursue this matter, he should have withdrawn his Appeal, rather than allow it to come before this Court in such an improvident manner. This Court does not take lightly the apparent misuse of the procedures of Court, whether it be calculated or negligent.

As stated **Rule 34** of the **Supreme Court Rules 1990**, where a party has failed to show “due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application”, the Court is entitled to dismiss the Appeal or Application for non-prosecution. For the purposes of this provision, due diligence is defined in Black’s Law Dictionary 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”.

In the case before this Court, the Appellant has not acted in a manner which the Court sees fit to satisfy the burden upon him and it is undeniable in that there has been such a failure to show due diligence. No reasonable or prudent

person will instigate such an action in this Court and allow the matter to be neglected to this extent. Such an attitude may be regarded as being disrespectful not only to this Court, but also to the administration of justice and as a result, undermines the judicial process, as was held in **Daniel v. Chandradeva** (1994) 2 SLR 1

With reference to the change of address of the Appellant, the onus to notify Court that a change has been made to a party's address falls on the party who has made the change, if not, the situation will create an undue detriment to the opposing party and will serve as a misuse of the valuable time of the Court. Not only will it cause a loss in time and resources to the opposing party, but it serves as an unnecessary delay in the deliverance of justice. Furthermore, the Court notes that it was the Respondent who informed the Court of the change in address of the Appellant and as expressed by Justice Wijetunga in **Priyani E. Soysa v. Rienzie Arsecularatne** :

*``It is inconceivable that a party has to speculate on what the present address of an adverse party is or that he has to 'go on a voyage of discovery' to ascertain such present address. ``*

With regards to the reasons stated above, this case is dismissed. No costs.

Sgd.

**JUDGE OF THE SUPREME COURT**

**HETTIGE. P.C. J**

I agree.

Sgd.

**JUDGE OF THE SUPREME COURT**

**MARASINGHE. J**

I agree.

Sgd.

**JUDGE OF THE SUPREME COURT**