

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

*In the matter of an Application for  
Leave to Appeal under Section 5C  
of the High Court of the Provinces  
(Special Provisions) Act No. 54 of  
2006 read with Article 128 of the  
constitution.*

**SC Appeal No. 34/2010**

SC Application No:  
SC/HCCA/LA 160/2009  
SP/HCCA/MA0069/2001(F)  
D.C. Matara Case No. L7623

Yogananda Wickramasinghe Mohotti,  
No.76/2D, Paramulla Road,  
Paramulla,  
Matara.

**PLAINTIFF**

**-VS-**

Nimal Bambarenda,  
No.20, Bandaranyake Pura,  
Medahittetiya,  
Matara.

**DEFENDANT**

**AND BETWEEN**

Nimal Bambarenda,  
No.20, Bandaranayake Pura,  
Medahittetiya,  
Matara.

**DEFENDANT-APPELLANT**

**-VS-**

Yogananda Wickramasinghe Mohotti,  
No.76/2D, Paramulla Road,  
Paramulla,  
Matara.

**PLANTIFF - RESPONDENT**

**AND NOW BETWEEN**

Nimal Bambarenda,  
No.20, Bandaranayake Pura,  
Medahittetiya,  
Matara.

**DEFENDANT-APPELLANT-**

**APPELLANT**

**-VS-**

Yogananda Wickramasinghe Mohotti,  
No.76/2D, Paramulla Road,  
Paramulla,  
Matara.

(Presently of No. 3/7, Samson Dias  
Mawatha, Polhena, Matara)

**PLAINTIFF-RESPONDENT-**

**RESPONDENT**

**BEFORE** : **SISIRA J. DE ABREW, J.**  
**S. THURAIRAJA, PC, J.**  
**E.A.G.R. AMARASEKARA, J.**

**COUNSEL** : Manohara De Silva, PC with Pubudini Wickramaratne and Imalka  
Abeysinghe for the Defendant – Appellant – Appellant.  
Nagitha Wijesekara for the Plaintiff – Respondent – Respondent.

**ARGUED ON** : 30<sup>th</sup> January 2020.

**WRITTEN SUBMISSIONS** : Plaintiff - Respondent - Respondent on the 30<sup>th</sup> of  
July 2010  
Defendant – Appellant – Appellant on the 14<sup>th</sup> of  
July 2010

**DECIDED ON** : 02<sup>nd</sup> June 2020.

**S. THURAIRAJA, PC, J.**

Yogananda Wickramasinghe Mohotti i.e. Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as Plaintiff – Respondent) instituted action bearing number L7623 in the District Court of Matara against Nimal Bambarenda i.e. Defendant – Appellant – Appellant (hereinafter sometimes referred to as Defendant – Appellant) seeking, a declaration that the Plaintiff – Respondent was the owner of the land referred to in the schedule to the plaint, to eject the Defendant – Appellant from said land and to hand over vacant possession thereof to the Plaintiff – Respondent.

In his plaint, the Plaintiff – Respondent took up the position that the aforementioned land originally belonged to the National Housing Development Authority and that Hewa Lunuwilage Dayananda became owner by conveyance bearing No. 7330 dated 04/01/1991. Dayananda transferred the land to the Plaintiff – Respondent by deed No. 30121 dated 08/03/1991 attested by Jinadasa Pathirana, Notary Public and the Plaintiff – Respondent had been in undisturbed and uninterrupted possession thereof for 10 years and also had prescriptive title. He further stated that the Defendant – Appellant was the tenant of Dayananda and when the Plaintiff – Respondent purchased the land, the Defendant – Appellant contested the Plaintiff's title and was unlawfully occupying the land and claimed title to said land.

The Defendant – Appellant filed answer maintaining, inter alia, that Hewa Lunuwilage Dayananda and the Plaintiff – Appellant had acted in collusion and had fraudulently executed the Deed No. 30121 to defraud the Defendant – Appellant since on the 6<sup>th</sup> of September 1985, Hewa Lunuwilage Dayananda had entered into an agreement to sell aforesaid land to the Defendant – Appellant for a sum of Rs.

80,000/- and the Defendant – Appellant came into possession of the land upon paying an advance of Rs. 24,000/-.

The case was fixed for Trial in the District Court on 11/06/1996. On this day the Defendant did not appear and the learned District Judge entered ex-parte judgment in favour of the Plaintiff – Respondent. Thereafter the Defendant – Appellant filed papers under Section 86 (2) of the Civil Procedure Code to purge his default. Section **86 (2)** states as follows;

*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*

The Defendant – Appellant stated in his petition that he worked as a motor mechanic undertaking work in different parts of the Island, he stated that on 02/06/1996 he had undertaken the repair of a bus belonging to one Jagath Wickramasinghe who was a resident of Dela, Maudella, Marapana in Ratnapura. Several days thereafter, there had been heavy rains in Ratnapura and the Marapana area suffered heavy flooding and transportation was completely halted. The Defendant – Appellant states that due to this heavy flooding he was unable to attend court on 11/06/1996. Thereafter the matter was fixed for inquiry and the Defendant – Appellant, Jagath Wickramasinghe and Herbert Clarence Silva who was the Grama Niladhari of Marapana, Maudella gave evidence.

By Order dated 11/12/2001 the learned District Judge after considering all evidence before him refused the Defendant's application. The Defendant appealed against the Order of the District Court to the Provincial High Court holden at Matara. The Appeal was argued on 02/04/2009 and the learned High Court delivered judgment on 15/06/2009 dismissing the Defendant – Appellant's appeal. Being

aggrieved with the Judgment of the High Court the Defendant – Appellant preferred an appeal to this Court.

Leave to appeal was granted on the questions of law set out in paragraph 14 of the Petition dated 27/07/2009.

There are several issues that need to be addressed with regard to this matter. The first being that the Defendant – Appellant had not provided sufficient evidence to prove that there were floods in Ratnapura on the day of the hearing. In his judgment the learned additional District Judge stated as follows;

අදාළ දිනයේ ගංවතුරක් තිබූ බව සනාථ කිරීමට විත්තිකරුගේ සාක්ෂිය සහ ජගත් වික්රමසිංහගේ සාක්ෂිය හැරුණු විට වෙනත් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නැත. එසේම කිසිදු ලිඛිත සාක්ෂියක්ද ඉදිරිපත් කර නොමැත.

Herbert Clarence Silva who was the Grama Niladhari of Marapana, Maudella also gave evidence and in his evidence he stated that there was no flooding;

ප්‍ර: තමන්ට පැමිණිල්ලක් කලේ නැත්නම් තමන් කුමක් පිලිබඳව සාක්ෂි දෙන්නද ආවේ අධිකරණයට.

උ: අධිකරණ නියෝගය නිසා ආවා. ජගත් වික්රමසිංහ මගේ කොට්ඨාශයේ පදිංචි කෙනෙක්. ඔහු බස් වුයිවර් කෙනෙක්. ඔහු මට මගදී හම්බ වෙනවා. ඔහු මට ගංවතුර තිබුන දවස් මතක් කරලා කිව්වා සාක්ෂියක් දෙන්න වෙව් කියලා. නමුත් මගේ කොට්ඨාශය ගංවතුරෙන් යට වුනේ නැහැ.

When this matter was appealed to the High Court, the learned High Court Judge confirmed the findings of the learned District Judge that the Defendant – Appellant had failed to adduce sufficient evidence on his behalf in regards to the floods in Ratnapura. The learned High Court Judge further observed on perusal of the brief, that it appears that after this matter was fixed for hearing in the District Court the Defendant – Appellant obtained several dates citing various reasons. On the eighth trial date, he had failed to appear in court and had failed to give

instructions to his AAL. Therefore the case was decided ex-parte in favour of the Plaintiff - Respondent. The High Court Judge gave several reasons for dismissing the Defendant – Appellant’s appeal. they are as follows;

- a) The Defendant had failed to adduce evidence to the satisfaction of the Court that he could not appear on the trial date due to the sudden flooding in the area where he was residing at the time.
- b) Upon the perusal of the case record, it appears that after the case was fixed for trial, the Defendant had obtained several dates citing various reasons and on the 8<sup>th</sup> trial date, the Defendant had failed to appear in court and failed to give instructions to his AAL. Therefore the case was decided ex-parte.
- c) At the inquiry to set aside the ex-parte order, the Defendant did not attempt to lead the evidence of the Grama Niladhari of the Division he was resident at the relevant time.
- d) In terms of the decision in *Paramalingam v Sirisena and Another* (2001) Vol. 2 SLR 239, the law assists those who are vigilant and not those asleep on their rights.

In ***Paralingam v Sirisena and Another* (2001) Vol. 2 SLR** Justice Wigneswaran held as follows;

*Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles that come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. **The second is that equity aids the vigilant and not the indolent***

(Emphasis added)

Furthermore I find that the more appropriate area of law for the Defendant – Appellant would have been Section 114 (f) of the Evidence Ordinance which states as follows;

*The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case;*

*The Court may presume-*

*(f) That evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it;*

I find that the Defendant – Appellant did not provide both the District Court and the High Court with sufficient evidence. The Newspaper articles that the Defendant – Appellant produced to this Court as evidence were not produced at the District Court. In addition to this the bus that the Defendant – Appellant repaired was parked at Jagath Wickramasinghe's brother's house which was located in Sudugedara, Marapane in Ratnapura. The Grama Sevaka who gave evidence in the District Court was the Grama Sevaka of the Marapana, Maudella division. The correct Grama Sevaka division in relation to this matter is the Sudugedara Division.

***In David Appuhamy v Yasassi Thero (1987 SLR 253)*** it was held 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."*

Moreover this incident occurred in 1996. When the Defendant – Appellant was unable to make his appearance in court, if he was vigilant (*Vigilantibus non dormientibus jura subveniunt*) he could have used a telephone to inform his lawyer. There is no explanation as to why he failed in doing so. Whether the flood prevented the Defendant – Appellant in coming to court is a matter of fact. The learned District Judge who heard and observed the witnesses disbelieved the story of the Defendant – Appellant. Consequently, we are not in a position to hold otherwise.

When taking into consideration the questions of law, I find that the Judgment of the High Court was accurate and was arrived at after taking into consideration all

available evidence. The learned High Court Judge had reached her conclusion after considering all material and submissions available to her and had taken into consideration the position of both parties. Furthermore, I find that the Defendant – Appellant had failed in providing both the District Court and the High Court with the evidence necessary to substantiate his application to purge his default. The Order of the learned District Judge had been made after all the evidence was taken into account. Moreover the Grama Sevaka who gave evidence was not from the right division and there were substantial contradictions in the evidence given by the Defendant – Appellant, Jagath Wickramasinghe and Clarence Silva. For these reasons I answer the questions of law under which leave was granted in the negative.

Taking the aforementioned into consideration I find no reason to interfere with the judgments of the District Court and High Court. The Defendant – Appellant did not provide sufficient evidence to support his application to purge his default under Section 86 (2) of the Civil Procedure Code. I dismiss the appeal with cost and I fix cost at Rs. 150,000/-

***Appeal dismissed.***

**JUDGE OF THE SUPREME COURT**

**SISIRA J, DE ABREW, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**E.A.G.R AMARASEKARA, J.**

I agree.

**JUDGE OF THE SUPREME COURT**