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

In the matter of an application for Leave to Appeal in terms of Article 128 of the Constitution read with Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC. Appeal No. 48/2011

SC. HC. CA. LA. No. 122/09

HC (Civil) WP/HCCA/COL -140/2007 (F)

D.C. Colombo 42217/MR

National Housing Development Authority
P.O. Box 1826,
5th Floor,
Chittampalam A. Gardiner Mawatha,
Colombo 02.
Defendant-Appellant-Petitioner

Vs.

D. S. Paranayapa
No. 263A (1),
Devala Road,
Koswatte,
Battaramulla.
Plaintiff-Respondent-Respondent

BEFORE : Sisira J. de Abrew, Acting CJ.

Murdu N. B. Fernando, PC, J.

E. A. G. R. Amarasekara, J.

COUNSEL : Sanjay Rajaratnam, PC, ASG, with Ravindra Pathiranage, DSG, for the Defendant-Appellant-Appellant.

M. U. M. Ali Sabry, PC, with Shamith Fernando and Nalin Alwis for the Plaintiff-Respondent-Respondent.

ARGUED & DECIDED ON : 22.01.2019

Sisira J. de Abrew, Acting CJ.

Heard both Counsel in support of their respective cases.

This is an appeal filed against the Judgment of the learned Judges of the Civil Appellate High Court Judge dated 14.05.2009 wherein they affirmed the order of the learned District Judge dated 27.03.2007.

Learned District Judge in this case by the said order refused the application to purge the default by the Defendant. This Court by its order dated 31.03.2011 granted leave to appeal on questions of law set out in paragraph 13 of the petition of appeal dated 16.06.2010 which are stated below:-

(i) Did the learned Judges of the Provincial Civil Appellate High Court err on law when it came to the finding that there was

no due diligence displayed on the part of the Attorney-at-Law on behalf of the Petitioner who was assigned to appear in the District Court of Colombo on the said date?

(ii) Did the learned Judges of the Provincial Civil Appellate High Court err on law when it came to the finding that filing of a proxy on behalf of a relevant party amounts to a legal representation in Court?

(iii) Did the learned Judges of the Provincial Civil Appellant High Court err in law when it did not take cognizance of the motion dated 03.12.2004, which encompassed the proxy of the Petitioner?

(iv) Did the learned Judges of the Provincial Civil Appellate High Court misdirect themselves in rejecting the bona fide conduct of the Attorney-at-Law for the Petitioner who had filed a motion dated 03.12.2004 along with the proxy (P2)?

(v). Did the learned Judges of the Provincial Civil Appellate High Court misdirect themselves that filing of the motion (P2) was a clear indication that the Petitioner never intended the trial to proceed by default?

Learned District Judge on 07.12.2004 noted that summons had been served on the Defendant and the Defendant was

absent and unrepresented. He therefore made an order to the following effect. "The case is fixed for ex-parte trial against the Defendant. In order to fix the case for ex-parte trial, call the case in Court No. 06 on 25.01.2005."

According to the journal entry No. 03, the Attorney-at-Law for the Defendant has filed a motion with a proxy. The date, according to the said journal entry is 07.12.2004/03.12.2004. The District Judge has noted that the Attorney-at-Law had failed to fix relevant stamps to the proxy. However, according to journal entry No. 04, dated 07.01.2005, the Attorney-at-Law for the Defendant has, by way of a motion, filed a proxy with correct stamps. The learned District Judge on the said motion has made an order to call the case on 27.01.2005 for the answer as prayed for by the said motion. This order has been made on 07.01.2005. According to the said order in journal entry No. 04 dated 07.01.2005, the case has to be called on 27.01.2005. However, the learned District Judge has called the case on 25.01.2005. According to journal entry No. 05 dated 25.01.2005, the case was being called in order to fix the matter for ex-parte. The learned District Judge has, on 25.01.2005, noted that the Defendant has filed proxy and moved for time to file the answer.

When considering all the above matters, the most important question that must be decided by this Court is whether the learned District Judge fixed the case for ex-parte trial on 07.12.2004 or 25.01.2005. I now advert to the said question. According to journal entry No. 04 dated 07.01.2005, the Attorney-at-Law for the Defendant has moved permission of Court to file the answer and the Judge has granted a date to file the answer. The said date was 27.01.2005.

According to journal entry No. 05 dated 25.01.2005, the case was being called in order to fix for ex-parte trial. Even according to journal entry No. 02 dated 07.12.2004, there is an order to the effect that the case will be called in Court No. 06 on 25.01.2005 in order to fix the matter for ex-parte trial.

When we consider all the above matters, we hold the view that the learned District Judge has decided to fix the case for ex-parte trial on 25.01.2005 and not on 07.12.2004. If the learned District Judge took a decision on 25/01/2005 to fix the case for ex-parte trial, how did he ignore his own order made on 07.01.2005 giving a date to the Defendant to file the answer on 27.01.2005? Therefore, fixing the case for ex-parte trial even on 25/01/2005 is wrong.

When we consider the above matters, we hold the view that the order made by the learned District Judge on 25.01.2005 fixing the matter for ex-parte is wrong and cannot be accepted. Learned District Judge however, by order dated 27.03.2007 has rejected the application of the Defendant to purge the default. He has made the said order on the basis that he fixed the matter for ex-parte trial on 07.12.2004. This is an error on the part of the learned District Judge.

Learned Judges of the Civil Appellate High Court unfortunately too have fallen into the same error. We have earlier held that the learned District Judge has fixed the case for ex-parte trial on 25.01.2005 and not on 07.12.2004.

For the aforementioned reasons, we hold that both the learned District Judge and the Judges of the Civil Appellate High Court were wrong when they rejected the application of the Defendant to purge the default. For the purpose of clarity, we hold that the learned District Judge has made the order fixing the matter for ex-parte only on 25.01.2005. Therefore, the learned District Judge could not have ignored his own order dated 07.01.2005 giving a date for the Defendant to file answer on 27.01.2005. We have earlier pointed out that fixing the case for ex-parte trial even on 25/01/2005 is wrong.

For the reasons, we answer questions of law Nos. 3 and 5 in the affirmative. The question of law Nos. 1, 2 and 4 do not arise for consideration.

For the aforementioned reasons, we set aside the ex-pate order of the learned District Judge dated 27.03.2007 and the judgment of the Civil Appellate High Court Judge dated 14.05.2009.

Learned District Judge by ex-parte judgment dated 13.09.2005 has held the case in favour of the Plaintiff.

For the reason stated above, we are unable to permit the said judgment dated 13.09.2005 to stand. We set aside the said judgment dated 13.09.2005 as well.

We direct the learned District Judge to grant an opportunity to the Defendant to file answer and expeditiously conclude this case.

ACTING CHIEF JUSTICE

Murdu N. B. Fernando, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara, J.

I agree.

JUDGE OF THE SUPREME COURT

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