

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

Anthony Surendra,

No. 251/42B,

Kirula Road,

Colombo 05.

SC CHC/APPEAL 68/2014

Commercial HC- No.29/2008/IP

PLAINTIFF

vs.

1. Sri Lankan Airlines,

No.22, East Tower,

World Trade Center,

Echelon Square,

Colombo 01.

2. Sri Lanka Rupavahini Corporation,

P.O. Box 2204,

Independence Square,

Colombo 07.

DEFENDANTS

AND

***In an application under Section 87(3)
of the Civil Procedure Code.***

Anthony Surendra,

No. 251/42B,

Kirula Road,

Colombo 05.

PLAINTIFF-PETITIONER

vs.

1. Sri Lankan Airlines,

No.22, East Tower,

World Trade Center,

Echelon Square,

Colombo 01.

2. Sri Lanka Rupavahini Corporation,

P.O. Box 2204,

Independence Square,

Colombo 07.

DEFENDANT-RESPONDENTS

AND NOW

***In the matter of an application under
Section 5(1) of the High Court of the
Provinces (Special Provisions) Act***

***No.10 of 1996 read together with
Section 6 thereof and Section 88(2)
read together with Section 754(1)
read together with Section 755(3)
and 758 of the Civil Procedure Code.***

Sri Lanka Rupavahini Corporation,

P.O. Box 2204,

Independence Square,

Colombo 07.

2ND DEFENDANT-RESPONDENT-APPELLANT

vs.

1. Anthony Surendra,

No. 251/42B,

Kirula Road,

Colombo 05.

PLAINTIFF-PETITIONER-RESPONDENT

2. Sri Lankan Airlines,

No.22, East Tower,

World Trade Center,

Echelon Square,

Colombo 01.

DEFENDANT-RESPONDENTS

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ**
S. THURAIRAJ, PC, J
MAHINDA SAMAYAWARDHENA, J

COUNSEL : Palitha Kumarasinghe, PC with Viraj Bandaranayake instructed by Mrs. N. Wijekoon for the 2nd- Defendant- Respondent- Appellant. Chandaka Jayasundere, PC with Rehan Almeida instructed by Gayan Salwathura for the Plaintiff-Petitioner-Respondent. Minoli Jinadasa instructed by M/S Pieris and Pieris for the 1st Defendant-Respondent- Respondent.

WRITTEN SUBMISSIONS: 2nd Defendant-Respondent-Appellant on 6th January 2021.
Plaintiff- Petitioner-Respondent on 6th February 2023.

ARGUED ON : 30th January 2023

DECIDED ON : 1st December 2023

S. THURAIRAJA, PC, J.

The Plaintiff-Respondent-Respondent, namely Anthony Surendra (hereinafter sometimes referred to as the "Plaintiff") instituted this action at the Commercial High Court against the 1st Defendant-Respondent-Respondent (hereinafter sometimes referred to as the "1st Defendant") and the 2nd Defendant-Respondent-Appellant (hereinafter sometimes referred to as "2nd Defendant") claiming compensation for the alleged infringement of the Copyrights of the Plaintiff in and over the songs "Nana nanane" and "Rajakale Hittapu" which were being exploited without his authorization in contravention of the Plaintiff's economic rights and moral rights in and over the

music and the lyrics over the aforementioned songs. Thereby, Plaintiff sought relief in the form of *inter alia* an order for a sum of Rs. 10 million on account of loss suffered by the Plaintiff for several acts of infringement by the Defendants, and, an order to deliver to the Plaintiff all material that infringes the said rights that is in possession of the Defendant. The matter was set for trial, and upon settling the issues, the Plaintiff sought permission to file evidence by way of an Affidavit. The 2nd Defendant states that upon the Plaintiff filing his evidence by way of Affidavit, the matter was fixed for further hearing, and after two days of hearing which concluded on 18th October 2011, the matter was re-fixed for 16th January 2012, on which date the Plaintiff was to be cross-examined. However, on 16th January 2012, the Plaintiff failed to appear before the court at 9.30 A.M., at which time the proceedings had commenced. The Court waited for a period of time at the request of the Attorneys-at-Law, and the case was taken up again at 10:15 A.M., at which time the Plaintiff was still absent. The Court thereafter proceeded to dismiss the Action by reason of the Plaintiff not being present at the trial.

Despite this, Plaintiff, who arrived at 10:45 A.M. of the same day as the aforementioned proceedings, states that the delay was caused not as a result of his default but due to an unusual traffic congestion in the area surrounding the Plaintiff's residence caused as a result of the ceremonial opening of the Narahenpita Police Station on the same day. Thereafter, the Plaintiff proceeded to tender the petition and affidavit seeking the permission of the Commercial High Court to set aside the order dismissing the action of the Plaintiff in accordance with section 87(3) of the Civil Procedure Code.

The Learned Commercial High Court Judge delivered his Order permitting the Application of the Plaintiff and held *inter alia* that; (a) the Plaintiff was interested in the case as he filed papers to set aside the dismissal order on the same day, (b) the Plaintiff had not admitted that he was negligent, (c) the Plaintiff informed the Attorney-at-Law of his delay in attending the Court at around 10.15-10.30 A.M., (d) the delay of the Plaintiff in attending the Court was beyond his control, (e) no objections were raised by the 2nd Defendant under section 145 of the Civil Procedure Code, and (f) time was

given to the Defendant on 18th October 2011 till 16th January 2012 and as such section 145 of the Civil Procedure Code does not apply in the instant case.

Being aggrieved by this order, the 2nd Defendant has now made an appeal to this Court on the grounds that the Learned High Court Judge had no power to set aside the order dismissing the action of the Plaintiff as the instant was a default within the ambit of section 145 of the Civil Procedure Code, and even if it was within the ambit of section 87(3) of the Civil Procedure Code, the Plaintiff had failed to establish reasonable grounds for his non-appearance, thereby the application of the Plaintiff should not be permitted.

In light of the facts and circumstances of the instant case, the evidence on behalf of the Plaintiff was led through three witnesses; namely the Plaintiff, one Karagapalliya Guruge Dayananda and one Kaluthara Patabendige Patrick. Firstly, the evidence of the Plaintiff was led wherein the Plaintiff affirmed the matters as follows.

On the date fixed for trial, the Plaintiff was delayed in being present in Court at the time at which the matter was called. Nonetheless, the Plaintiff arrived in Court at 10.45 A.M. despite having attempted to arrive by 9.00 A.M. due to the fact that a halt in traffic flow down the lane in which the Plaintiff lived had occurred due to the new Narahenpita Police Station being ceremoniously opened on that specific date.

Furthermore, the vehicles of the Department of Labour were parked down the Plaintiff's Lane and in addition, two banks were also situated on the said lane. From time to time, the main road was closed due to the opening of the new building of the Narahenpita Police Station, and there was a continuous inflow of vehicles into the Plaintiff's Lane. As a result, the Plaintiff stated that although he was able to leave his house in his vehicle, the vehicle was later jammed by the traffic congestion that had occurred in the lane. Therefore, the Plaintiff stated that he was unable to attend Court at the specified time due to no fault of his own. Furthermore, on this day, due to the traffic congestion, the Plaintiff had failed to hear his mobile phone and therefore missed the calls from his instructing Attorney. The Plaintiff was unable to leave his vehicle in the middle of

the road and journey on foot and/or resort to alternate means of transportation. Furthermore, the vehicle could not be parked on either side of the road due to the fact that several vehicles had already been parked therein. The Plaintiff stated to Court that, on previous occasions, his appearances at Court were punctual, having left his residence at the same time as he did on 16th January 2012. His contention was that the delay was not his fault and instead beyond his control.

The evidence of one Karagapalliya Guruge Udayananda (a three-wheeler driver who operates from a three-wheeler stand opposite the Narahenpita Police Station) and one Kalutara Patabandige Patrick Anesley Peiris (a resident of a road which leads to Kirula Road) was led thereafter. These witnesses corroborated the evidence of the Plaintiff, and in particular, stated that on 16th January 2012, the new building housing the Narahenpita Police Station was being ceremoniously opened, and a major congestion of traffic occurred between 8.00 A.M. and 10.30 A.M. While the Narahenpita police station has two gates, on that specific date, it was only the gate alongside Kirula Road that was in use. The said Kirula Road is an ordinary by-road where, in the event two vehicles are parked, it would be difficult to manoeuvre another. On the said date, senior police officials and VIPs had parked their vehicles on Kirula Road, which made it impossible for the residents and users, including the said Udayananda, to move their vehicles. A photo showing the road was marked 2D3 (at page 368 of the appeal brief). All witnesses claim that on the said date, the police did not allow the residents to move their vehicles out or in that morning.

The 2nd Defendant led evidence of Police Inspector Weerasinghelage Wasantha Jayaratne. The witness confirmed the fact that the ceremonial opening of the Narahenpita Police Station took place on 16th January 2012 and that a number of distinguished invitees were present, including Mr. Dinesh Gunawardene, Mr. Geethanjan Gunawardene, Mr. Gotabaya Rajapakse and the Inspector General of Police. There was no road closure during the time at which VIPs were travelling towards the ceremony, but, from time to time, roads were indeed closed, coinciding with the arrival

of VIPs. Further, he stated that the vehicles of the VIPs were parked in the car park of the police station while the other vehicles of Police dignitaries were parked alongside the wall of the Department of Labour situated on Kirula Road. During the time at which the ceremony took place, the police took steps to ensure that the vehicles of the individuals participating in the ceremony were given parking in and around the area and that the vehicles that were usually parked in those areas were not allowed to park there during such time. The traffic flow on Kirula Road was stopped by the police from time to time, although he stated that he was not personally aware of the state of traffic between 8.30 A.M. and 9.00 A.M. on the top of the road on which the Plaintiff resides (Vide- at page 416 of appeal brief). Furthermore, the witness stated that it is only when there is a special traffic plan in operation that the police take steps to notify the public of the same and on this occasion, there was no such traffic plan in place. Therefore, no such information was conveyed to the public. In this regard, the movement of VIPs and road closures, as stated by the witness, took place during normal traffic conditions, which are admittedly already heavily congested at that specific time of day (Vide- at page 417 of appeal brief). The witness also admitted that in the event that a vehicle is within the lane on which the Plaintiff resides, there was no alternative way to exit the road other than the singular access towards Kirula Road.

Sections 87 and 145 of Civil Procedure Code

In this case, the Plaintiff, relying on section 87(3) of the Civil Procedure Code, submitted that the order of dismissal can be set aside. But the 2nd Defendant submitted to Court in his written submissions to consider his application under Section 145 of the Civil Procedure Code.

The learned High Court Judge explained this situation at pages 10 and 11 of his judgement which reads as follows.

"සිවිල් නඩු විධාන සංග්‍රහයේ 87 වගන්තියට අනුකූලව අයදුම්පත ඉදිරිපත් කර නැති බවට විරෝධතාවක්ද 2 වන විත්තිකාර වගඋත්තරකරු විරෝධතා පෙන්සමේදී ගෙන ඇතත්, ප්‍රමාණවත් ලෙස පෙන්සම්, දිවුරුම් පෙන්සම් මගින් අදාළ ඉල්ලීම කර ඇත. ඒ අනුව එකී විරෝධය හුදු තාක්ෂණික විරෝධයක් පමණි.

ලිඛිත දේශන වලදී 2 විත්තිකාර වගඋත්තරකරු වෙනුවෙන් සිවිල් නඩු විධාන සංග්‍රහයේ 87 වගන්තිය යටතේ ඉල්ලීමක් කළ නොහැකි බවත් අදාළ වන්නේ සිවිල් නඩු විධාන සංග්‍රහයේ 145 වගන්තිය බවත් ඒ අනුව වලංගු ඉල්ලීමක් නැති බවටත්, කළ යුතුව තිබුණේ සෘජු ඇපැලක් ඉදිරිපත් කිරීම බවත් තර්ක කර ඇත. මෙය නම විරෝධතාවයන් දී නොනැගූ ලිඛිත දේශණයේ දී පමණක් අනෙක් පාර්ශවයට පිළිතුරු දීමට හැකියාවක් නොමැති වන ලෙස ගොඩ නගන තර්කයකි. විරෝධතාවයේදී 2 වන විත්තිකරු වෙනුවෙන් ගෙන ඇති ඉල්ලීම 87 වගන්තියට අනුකූලව ඉදිරිපත් කර නැති බවකි."

An approximate translation of the above paragraph is produced below:

"Although the 2nd defendant-respondent has also raised an objection that the application has not been submitted in accordance with Section 87 of the Code of Civil Procedure, the relevant request has been made through petitions and affidavits. Accordingly, that objection is only a technical objection.

In the written submissions, it has been argued that no request can be made under Section 87 of the Civil Procedure Code and Section 145 of the Civil Procedure Code is applicable therefore, there is no valid request, and a direct appeal should have been made. This is an argument that is built only in the written submissions so that the other party is not able to answer without raising their objections. The plea taken on behalf of the 2nd Defendant in the objection is that

the application of the Plaintiff has not been submitted in accordance with Section 87.”

Chapter XII of the Civil Procedure Code deals with matters relating to consequences and cures of default of appearance and pleadings of the parties to actions. While section 84 deals with default of appearance of the defendant, section 87 deals with non-appearance of the plaintiff. Both above-mentioned sections deal with appearance and non-appearance of the parties. Default of appearance of the defendant may occur on the summons returnable day and the answer due date. Default of appearance of the plaintiff may occur on the replication due date. Further, either party can be in default, in instances where a date was granted for a step but failed to take such step, where there is failure to file list of witnesses and documents and where either party is not ready with evidence at the trial stage and at the partly heard trial stage. The provisions of the Civil Procedure Code, relating to the consequences of default of appearance, does not contemplate orders made thereunder to be final and conclusive in the first instance itself. In every instance, an opportunity is afforded to a party in default to cure his default. It is only upon failure to cure such default; an order is made absolute and final.

Non-appearance of the plaintiff and reinstatement of the case is set out in section 87 of the Code. Section 87(3) of the Code enables a Court, upon application by a plaintiff within a reasonable time from the date of dismissal, to set aside its order of dismissal for want of appearance of a plaintiff, where it is *satisfied* that there were reasonable grounds for the non-appearance of the plaintiff. The burden of alleging and proving the existence of facts, on the basis of which a court may decide that there is good cause for absence, rests on the absent party who seeks reinstatement of the case. Section 87(3) of the Civil Procedure Code provides as follows:

*“The plaintiff may apply within a **reasonable time** from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the*

*defendant shall be given notice, the court is **satisfied** that there were **reasonable grounds** for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.”*

(Emphasis added)

Chapter XVIII of the Civil Procedure Code dealt with the adjournments, which contained sections 143-145, which reads as follows.

143. (1) The court may, if sufficient cause be shown at any stage of the action, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the action:

Provided however, that no adjournment in excess of Six weeks may be granted except in exceptional circumstances, and for reasons to be recorded.

(2) In all such cases the court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the action shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing to be necessary for reasons to be recorded and signed by the Judge.

144. If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the court may proceed to dispose

of the action in one of the modes directed in that behalf by Chapter XII, or make such other order as it thinks fit.

145. 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."

The word 'adjournment' generally means the appointment of another day for the continuation of that which has already commenced in contradistinction to postponement, which means the putting off of that which was appointed to be done on a specified day for a later day. As per section 143, when the hearing of evidence has begun, the hearing must be continued from day to day, until all the witnesses in attendance have been examined, unless the Court finds any adjournment necessary for reasons to be recorded and signed by the Judge. Under section 143 of the Code, adjournment is entirely discretionary, and under section 145 of the Code, if a party to whom time has been granted fails to produce his evidence or to bring his witnesses or to do any other act necessary for the further progress of the case, for which time has been allowed, the Court has power notwithstanding such default, to decide the action forthwith. Section 144 of the Civil Procedure Code provides for instances of non-appearance of a party on the adjourned day.

It appears as per section 145 that when a court grants time to a party to the case to produce certain evidence at the hearing, and the said party has failed to do so, the court must proceed to hear the other evidence as may be tendered on behalf of the party in default and decide the action forthwith.

However, on the day in question, namely 16th January 2012, this case was listed for cross-examination of the Plaintiff, and the date was granted based on the request made by the Defendants. The Court granted time for the Defendants on 18th October 2011 for the cross-examination upon the request made by the Defendants. Section

145 deals with the failure of such parties to whom such time has been granted and empowers the judge to exercise his discretion as to whether or not the case should proceed and be decided notwithstanding such failure. In the instant case the learned High Court judge has duly applied his mind and exercised his discretion and deemed it appropriate to afford an opportunity for the Plaintiff to cure his default. In my view the Defendants have not given sufficient reasons as to why this Court should interfere with the findings of the learned High Court Judge. Therefore, I am inclined to agree with the view taken by the learned High Court Judge to consider this matter under section 87 of the Civil Procedure Code and in giving an order in terms of section 87(3) of the Civil Procedure Code.

In order to succeed in the application in question, the Plaintiff had to prove that there were reasonable grounds for the non-appearance on the part of the plaintiff.

In **Rev. Sumanatissa vs Harry [2009 (1) SLR 31]** it was held that,

*“On an analysis of section 87 (3) of the Code the limiting factors would be that the application to restore should be made within a reasonable time and the plaintiff should satisfy Court that there were **reasonable grounds** for non-appearance. The legislature in its wisdom had not set a rigid deadline as to what period of time should construe **within a reasonable time**. This is a clear indication that in interpreting Section 87 (3) Court must use the yardstick of a **subjective test** rather than a less flexible objective test in determining what is reasonable.”*

(Emphasis added)

Section 87(3) states that the application should be made within a reasonable time and on reasonable grounds, and this section enables a Court to decide the application based on a subjective test. The burden of proving the existence of facts, on the basis of which a court may decide that there is a good cause for absence, rests on the absent party who seeks reinstatement of the case. Considering the evidence led before the

High Court, it was undisputed that on the date in question, the opening ceremony of the Narahenpita Police Station took place. From the strength of the evidence of the Plaintiff, it is proven that on the date in question, a considerable amount of traffic congestion was present in the Plaintiff's Lane, and the reason for such congestion was the fact that an unforeseen number of vehicles had been directed into the Plaintiff's lane. The position of the Plaintiff was corroborated, by other independent evidence produced before the Court.

As it was revealed, during the opening ceremony of the police station, no traffic plan was in place. However, evidence was given by Police Inspector Weerasinghelage Wasantha Jayaratne to the effect that he did not personally know the situation in the Plaintiff's Lane as this officer was not on duty at that point. Although certain dignitaries' vehicles were parked within the premises of the police station, certain other dignitaries' vehicles (particularly the high-ranking police official's vehicles) had to be parked outside of the police station. As a result, the vehicles that were normally parked at this location had to find alternative areas to park. The witness was unable to account for where these vehicles had found parking. Therefore, it can be considered that vehicles that normally park in other areas surrounding the Plaintiff's Road, had parked down the road instead, leading to a heightened congestion of vehicles. As such, the Plaintiff's reasons for being unable to be present before Court at the designated time could be accepted on a balance of probabilities.

Decision

For the aforementioned reasons, considering all facts and circumstances of this instant case, I hold that the Plaintiff does in fact have reasonable grounds for his non-appearance at the Commercial High Court on 16th January 2012. Having perused the aforementioned evidence, it can be understood that there was, in fact, an unusual level of traffic congestion, which resulted in the Plaintiff arriving at the Commercial High Court on 16th January 2012 well after the time of trial. Yet, the most compelling point

on behalf of the Plaintiff in my view is that an application was filed on the same day for an appeal to set aside the order dismissing his application, which indicates that it was due to a misfortune beyond his control that he was not able to arrive on time and that he did yet maintain an interest in this action. Therefore, the view taken by the learned High Court Judge to consider this matter under section 87 of the Civil Procedure Code and in giving an order in terms of section 87(3) of the Civil Procedure Code setting aside the dismissal of the action of the Plaintiff is acceptable. The Appeal of the 2nd Defendant is hereby dismissed with taxed Costs.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ

I agree.

CHIEF JUSTICE

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT