

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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with the provisions prescribed in terms of chapter LVIII of the Civil Procedure Code.

SC CHC Appeal 06/13

HC (CIVIL)224/06/01

Farzana Clearing Agencies (Private) Ltd.
No. F75, People's Park Complex
Gas Works Street
Colombo 11.

Defendant-Respondent-Appellant

Vs.

Kala Traders (Private) Ltd.
No. 151, Dam Street
Colombo 12.

Plaintiff-Petitioner-Respondent

Before : Jayantha Jayasuriya, PC, CJ
Murdu N.B. Fernando, PC, J.
Arjuna Obeyesekere, J.

Counsel : Kamran Aziz with Ms, Farma Latheef instructed by Ershan Ariaratnam for the Defendant-Respondent-Appellant.

Written submissions : Defendant-Respondent-Appellant on 31.05.2018
filed

Argued on : 20.07.2023

Decided on : 16.01.2024

Jayantha Jayasuriya, PC, CJ

The plaintiff-petitioner-respondent (hereinafter referred to as the “respondent”) instituted action in the Commercial High Court against the defendant-respondent-appellant (hereinafter referred to as the “appellant”). Both the appellant and the respondent are limited liability companies. The respondent who was an importer of food items had appointed the appellant as his clearing agent. The appellant had agreed to perform all necessary duties subject to payment of his fees. The respondent by the plaint dated 03rd October 2006 instituted action in the Commercial High Court seeking judgment against the appellant in a sum of Rupees 1,588,300,390/- on the basis that the appellant failed to discharge his duties with due care, due diligence and efficiently. The respondent claimed that the abovementioned conduct of the appellant resulted in a customs inquiry against the respondent over a consignment of sugar imported by him. The appellant by his amended answer dated 27th June 2007 claimed, that he always acted on instructions of the respondent and therefore prayed for the dismissal of action.

This action had been initially listed to be called to schedule for trial and thereafter had been called in court on several occasions. However, action had been dismissed on the day it was listed for trial as the respondent was absent and unrepresented. Several months thereafter the respondent, having sought permission of court to revoke the proxy and appoint a new attorney, filed papers to purge its default. The appellant objected to the said application. The court after inquiry made an order setting aside its initial order of dismissal and restored the case. The appellant, impugns the, last mentioned order of the Commercial High Court, by this appeal and moves that the said order be set aside.

When this matter was mentioned in this Court on 20th September 2017 both parties were represented by counsel and of consent, hearing had been scheduled for the 22nd March 2018. On 22nd March 2018, the learned counsel who marked appearance for the respondent on the previous day informed the Court that he has no instructions from the respondent. When this matter came up for argument on 03rd October 2018, the same counsel moved Court to release him from these proceedings and the Court having granted the application directed the petitioner to re- issue notices on the respondent. However, these notices issued on the respondent were returned with the endorsement “closed”. Thereafter at several occasions notices were re-issued on the

respondent and the registered attorney. A representative of the company, the secretary of the respondent who appeared before this Court, on notice, informed that they had not had any communication with the respondent since 2015. Under these circumstances this Court decided to take this matter up for argument in the absence of the unrepresented respondent.

The learned counsel for the appellant impugned the Order of the Commercial High Court dated 23rd February 2012. This Order sets aside its initial order of dismissal and allowed the application of the respondent made under section 87(3) of the Civil Procedure Code to restore the case. This decision is now impugned on the basis that the Commercial High Court erred in granting relief to the respondent when the respondent failed to make the aforesaid application within a reasonable time and to disclose reasonable grounds for the default.

The learned trial judge in the impugned Order had set out the sequence of events that ultimately led to the initial order of dismissal made on 10th June 2008. The trial had been initially scheduled for 31st March 2008 after all pleadings were complete. However due to an inadvertence, the case had been called in open court on 03rd March 2008 for trial and neither party had been present. The journal entry of 03rd March 2008 reads “Parties are absent. No order”. Thereafter, the case had been called on 31st March 2008 but both parties had been absent. Again, this matter had been called in open court on 14th May 2008 and had scheduled for trial on 10th June 2008, in the absence of both parties. Finally, on 10th June 2008, the court had ordered that “Plaintiff absent. No appearance. plaint is dismissed without costs”. It is twenty months, thereafter, on 11th February 2010 the respondent made an application under Section 87(3) of the Civil Procedure Code and moved court to set aside the aforesaid order of dismissal. This application was made by way of a petition and an affidavit. The affidavit was sworn by a director of the respondent company. This application was resisted by the appellant company. The Managing Director of the appellant had sworn an affidavit along with the petition resisting the respondent’s application. / An inquiry had been held by the trial court where the marketing manager and the director whose affidavit was filed had testified on behalf of the respondent whilst no evidence had been presented on behalf of the appellant.

Evidence of the Director who testified at the inquiry reveals that the initial owner of the respondent company was one Nadarajah Sri Skandarajah. According to the evidence, this witness said Sri Skandarajah had owned three other business establishments. In August 2006, said Sri Skandarajah had disappeared. After an investigation by the Criminal Investigations Department two accused had been indicted for the abduction and murder of him. According to this witness after the said Sri Skandarajah disappeared, his wife left Sri Lanka to join with their daughter who was studying in Australia, at that time. Therefore, there had been no one to look after the affairs of the respondent company. However, after this witness became a director on 15th January 2009, he had initially taken necessary steps to obtain a death certificate of the deceased Sri Skandarajah, who died intestate, from the District Court and thereafter had to attend to the affairs of the deceased person's estate including the affairs of the companies. According to this witness he had encountered many difficulties to locate the attorney-at-law who was retained to appear in the Commercial High Court when the proceedings were instituted in 2006 and with great difficulty had managed to obtain papers to revoke his proxy and obtain assistance of a legal firm to restore the case, that had been dismissed in 2008. This witness had admitted that no steps to restore the case had been taken between 2008 and 2009. He had reasoned out this lapse on the basis that no director was present in Sri Lanka who had the capacity to take any meaningful action, as the sole director had proceeded to Australia after her husband was abducted in August 2006.

The learned trial judge had given his mind to the evidence of the above witness in determining whether the court should allow the application of the respondent dated 11th February 2010, to vacate the order of dismissal and restore the case.

Section 87(3) of the Civil Procedure Code reads:

“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”

The learned trial judge had followed the dicta in **Rev.Sumanatissa v Harry** [2009] 1 SLR 31 which followed **Chandrawathie v Dharmaratne** [2002] 1 SLR 43 in deciding whether to allow the respondent's application to restore proceedings or not. The learned trial judge had observed that " 'reasonable time' and 'reasonable grounds' cannot be decided on rigid standards with mathematical precision, but have to be decided upon the given facts and circumstances of each individual case. The test is subjective as opposed to objective. It is purely a question of fact and not law".

In my view, the learned trial judge had neither misdirected nor erred in law when he decided to adopt the aforementioned criteria in determining the issue. Furthermore, the evidence as revealed by the witness as described hereinbefore reflects that the learned trial judge did not err or misdirect himself in facts too. I am of the view that there is no merit in this appeal. Hence the appeal of the appellant is dismissed and the order of the learned trial judge dated 23rd February 2012 is affirmed.

The Commercial High Court is directed to give priority to the proceedings in HC (Civil) 224/2006/(1) and conclude proceedings expeditiously.

Chief Justice

Murdu N.B. Fernando, PC, J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court