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

In the matter of an appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal No / 117/2013

SC/ HCCA/LA/ No 134/2013

WP/HCCA/MT No 48/08/F

DC (Mt. Lavinia) No 4695/04/D

Hilary Howard Dunstan De Silva,
No 18/1, Dakshinarama Road,
Mount Lavinia.

Plaintiff

Vs.

Rani Lokugalappaththi,
C/O Shakila Achini De Silva,
No. 26, Fathima Mawatha,
Welikadamulla Road,
Mabola, Wattala.

Defendant

AND

Rani Lokugalappaththi,
C/O Shakila Achini De Silva,

No. 26, Fathima Mawatha,
Welikadamulla Road,
Mabola, Wattala.

Defendant Petitioner

Vs.

Hilary Howard Dunstan De Silva,
No 18/1, Dakshinarama Road,
Mount Lavinia.

Plaintiff Respondent

AND NOW BETWEEN

Rani Lokugalappaththi,
C/O Shakila Achini De Silva,
No. 26, Fathima Mawatha,
Welikadamulla Road,
Mabola, Wattala.

Defendant Petitioner Appellant

Vs.

Hilary Howard Dunstan De Silva,
No 18/1, Dakshinarama Road,
Mount Lavinia.

Plaintiff Respondent- Respondent

BEFORE	:	B. P. ALUVIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Kamaran Aziz with Ershan Ariyaratnam for the Defendant- Petitioner- Appellant V. K. Choksy with D. Timirige for the Plaintiff -Respondent- Respondent
ARGUED ON	:	15.06.2015
WRITTEN SUBMISSION ON:		13.11.2013 (Appellant) 30.10.2013 (Respondent)
DECIDED ON	:	02.10.2015

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Western Province holden in Mount Lavinia dated 06.03.2013. By the said judgment the learned High Court Judges of the High Court of Civil Appeal, Mount Lavinia have dismissed the appeal of the Defendant Petitioner Appellant (hereinafter referred to as the Appellant). The Appellant sought leave to appeal from the said judgment and this Court granted leave on the following questions of

law set out in paragraph 18 (d), (g), (j) and (n) of the petition of the Appellant dated 04.04.2013, namely;

(d) Has the High Court of Civil Appeal misdirected itself by failing to appreciate that the Petitioner had lawful and/or genuine and/or reasonable grounds for her default in appearing before the District Court of Mount Lavinia on 4th July 2006, having particular regard to the fact that the petitioner was in extremely poor health at the material time as established in Petitioner's evidence and/or by the evidence of the Doctor of indigenous medicine summoned to give evidence and/or by the medical certificates duly submitted to Court on behalf of the Petitioner?

(g) Has the High Court of Civil Appeal misdirected itself in fact and/or law by affirming the determinations contained in the order of the learned District Judge when such impugned order clearly failed to take in to account the totality of the evidence led at the inquiry?

(j) Has the High Court of Civil Appeal erred in law by determining that the medical certificate issued by the Ayurvedic Physician marked as P2 cannot be accepted as genuine and/or relevant evidence?

(n) Has the High Court of Civil Appeal misdirected itself in law by failing to take adequate cognizance of the fact that Ayurvedic Physician who gave evidence at the inquiry had prescribed leave for the Petitioner due to her medical condition and this fact should necessarily have convinced the District Court that

the Petitioner had established on a balance of probability that the Petitioner was unable to attend Court and/or appoint an Attorney-at-law prior to 4th July 2006 upon reasonable and genuine grounds?

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) in this case instituted the said action against the Appellant seeking for divorce *a vinculo matrimonii* on the ground of constructive malicious desertion. They had got married on 4th of July 1992, but they had no children by the said marriage. It was an admitted fact that both the Appellant and the Respondent had children by their previous marriages. The Appellant filed an answer denying the averments contained in the plaint and praying for divorce *a vinculo matrimonii* on the ground of constructive malicious desertion by the Respondent. After the replication was filed by the Respondent the case was fixed for trial. As reflected in Journal Entry (J.E.) No 15 dated 29.03.2006 when the case was taken up for trial on the said date the Appellant tendered papers in order to revoke the proxy given to her Attorney At Law and thereafter the case had been re-fixed for trial on 04.07.2006 to enable the Appellant to obtain legal assistance. When the case was taken up for trial on 04.07.2006, the Appellant was absent and unrepresented. Then the learned District Judge had dismissed the Appellant's claim in reconvention and had taken up the main case for an ex-parte trial and entered a decree nisi in favour of the Respondent as prayed for in the plaint.

Upon the receipt of the said ex-parte decree the Appellant had made an application under Section 86(2) of the Civil Procedure Code seeking to set aside the said ex-parte judgment and the decree and to permit the Appellant to proceed with her defence as from the stage of default. At the inquiry into the said application to vacate the ex-parte decree, the Appellant had closed her case leading

her evidence and the evidence of an Ayurvedic Doctor, H.T.P.P. Thilakarathna. Also a medical certificate issued by the said Ayurvedic Doctor had been produced marked Pe.2. The Respondent had not led any evidence. After the said inquiry the learned District Judge had refused the said application of the Appellant without cost. Being aggrieved by the said order dated 30.06.2008 the Appellant had appealed to the High Court of Civil Appeal of the Western Province, Mount Lavinia. After the hearing of the said appeal the learned High Court Judges of the High Court of Civil Appeal, Mount Lavinia have dismissed the appeal of Appellant by the abovementioned judgment dated 06.03.2013.

It has transpired from the evidence led at the said inquiry under Section 86(2) that on the date of trial relevant to this application, i.e. 04.07.2006, the Appellant was absent from court on the advice of said Ayurvedic Doctor as she was under medical treatment for dislocation of her knee joint due to a fall. In proof of that she has produced the said medical certificate issued by the said Ayurvedic Doctor marked Pe. 2. The said Ayurvedic Doctor in his evidence had testified that he treated the Appellant for dislocation of her knee joint and also issued the said medical certificate Pe. 2 dated 28.06.2006 recommending leave for a period of 14 days commencing from 28.06.2006 to 11.07.2006. No doubt that 04.07.2006 which was the date of trial had fallen within the said period of 14 days of medical leave. Said evidence had not been contradicted at the cross examination. Also there had been no any other evidence led by the Respondent in order to counter the said position of the Appellant.

Apart from that it is important to note that at the said inquiry before the learned District Judge, the Appellant was given a chair at her request as she was not fit enough to give evidence whilst standing. Said position of the Appellant indicates that she was suffering with an ailment in her legs.

In the said context when I examine the impugned judgment of the Civil Appellate High Court of Mount Lavinia dated 06.03.2013 and also the order of the learned District Judge dated 30.06.2008 it is clear to me that both courts have failed to appreciate the said evidence led on behalf of the Appellant and the obvious physical condition of the Appellant. The learned High Court Judges, in the said judgment, have not expressed a word in considering the said evidence of the Appellant and the Ayurvedic Doctor together with the medical certificate marked Pe.1. At page 04 of the impugned judgment the learned High Court Judges have merely stated in a few lines that "Ayurvedic Physician has only recommended leave but had not examined nor prescribed any medicine for her ailment. A doctor who had not treated a patient cannot issue a medical certificate of that nature. Further such certificate cannot be accepted in a court of law and should stand rejected". Apart from the said few lines of the impugned judgment the High Court has not considered at all the totality of the evidence led by the Appellant.

It is important to note that in an inquiry under Section 86(2) of the Civil Procedure Code a Court of Law should come to a just and fair conclusion having regard to the totality of the facts and circumstances revealed at the inquiry before the court. But in the present case before me, both the High Court and the District Court in contrary to the said requirement of Section 86(2), has made an attempt to place a heavy burden of proof on the Appellant paying their attention to trivial contradictions and infirmities of the medical certificate and have reached a conclusion which cannot be justified on the evidence led before the District Court.

It must be noted that the burden of proof cast upon an Applicant who makes an application under Section 86(2) of the Civil Procedure Code is not similar to a proof of balance of probability. It is much less than that. What is required under Section 86(2) is that to adduce 'reasonable grounds for default' to

the satisfaction of Court. Section 86(2) stipulates that "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."

In the said order dated 30.06.2008, the learned District Judge having referred to the Appellant's petition dated 28.11.2006, has come to a conclusion that the Appellant was suffering from arthritis but in her evidence she has stated that she could not come to court on 04.07.2006 due to dislocation of her knee joint due to a fall and thereby she had contradicted her own evidence with the averments contained in her petition and affidavit dated 28.11.2006. It must be noted that at the inquiry before the District Court, during the cross examination of the Appellant, the Respondent has neither touched the facts and circumstances elaborated in the said petition and affidavit nor has challenged the evidence of the Appellant on the said basis in order to contradict the averments contained in the said petition and affidavit. When the facts and circumstances contained in the petition and affidavit are not disputed at the inquiry by the parties it is not opened for the learned District Judge to mark contradictions in the evidence of the Appellant upon facts which were not so challenge.

On the aforesaid premise when I consider the facts and circumstances of the case revealed at the inquiry I have no option but to reach the conclusion that the said questions of law raised by the Appellant before this court should be answered in the affirmative as the Appellant has adduced reasonable grounds for her default to the satisfaction of court. Hence I set aside the said judgment of the

High Court of Civil Appeal of the Western Province holden in Mount Lavinia dated 06.03.2013 and the order of the learned District Judge dated 30.06.2008 and permit the Appellant to proceed with her defence as from the stage of default. Appeal of the Appellant is allowed with cost in all courts.

Appeal allowed.

Judge of the Supreme Court

B. P. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court