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

1. Rev. E.H. Palitha
   Mission House, Liyanwala, Padukka.

1A. Rev. Ranjan Karunaratne
   Maithri Christ Church,
   Preeman Mawatha, Anuradhapura.

2. Raja Uswetakeiyawa
   No.10/1, Kotugodella Street, Kandy.

3. Cyril Piyasena Wijayahewa
   No.646/1 A, Henawatte Road,
   Gonawala, Kelaniya.

4. Dharmadasa Kumarage,
   No.306/47,
   Thalawathugoda Road, Madiwela, Kotte.

5. Munisami Nesamani
   Danibar Mawatha, Hatton.

The Trustees of Christian Labour
Brotherhood of No.39, YMBA Building,
Bristol Street, Colombo 01.
Plaintiff-Respondents-Appellants

SC/APPEAL/30/2022
SC/HCCCA/LA/40/2021
WP/HCCA/MT/25/2017/F
DC MT. LAVINIA 2832/14/L

Vs.

Kurugamage Kingsley Perera,
No.10/1, Attidiya Road, Ratmalana.
Defendant-Appellant-Respondent

Before: Hon. P. Padman Surasena, J.
Hon. Kumudini Wickremasinghe, J.
Hon. Mahinda Samayawardhena, J.

Counsel: Samantha Vithana with Nishanthi Mendis and Samudika de Silva for the Plaintiff-Respondent-Appellants.
Mokshini Jayamanne for the Defendant-Appellant-Respondent.

Written Submissions:
By the Plaintiff-Respondent-Appellant on 02.08.2022
By the Defendant-Appellant-Respondent on 24.11.2023

Argued on: 28.11.2023

Decided on: 31.01.2024

Samayawardhena, J.

The plaintiffs filed this action in the District Court of Mt. Lavinia seeking a declaration of title to the land described in the 5th schedule to the plaint, ejectment of the defendant therefrom and damages. On the summons returnable date (29.05.2014), a proxy was filed on behalf of the defendant. The District Court fixed 10.07.2014 to file the answer. However, on 10.07.2014 the defendant being absent and unrepresented, the Court fixed the case for *ex parte* trial. Following the *ex parte* trial, the judgment was entered in favor of the plaintiff, and the *ex parte* decree was duly served on the defendant. The defendant filed an application in terms of section 86(2) of the Civil Procedure Code to vacate the *ex parte* decree. At the inquiry, the registered Attorney for the defendant and the defendant himself gave evidence. After the conclusion of the inquiry, the learned District Judge by order dated 26.01.2017 refused to vacate the *ex parte* judgment and dismissed the application of the defendant. On

appeal, the High Court of Civil Appeal of Mt. Lavinia set aside the said order and directed the District Court to accept the answer and continue with the case. The plaintiffs are before this Court against the judgment of the High Court of Civil Appeal. This Court granted leave to appeal against the said judgment on the question whether the judgment of the High Court is contrary to law and against the weight of the evidence led before the District Court.

This appeal revolves around a question of fact, not law. Learned counsel for both parties accept that under section 86(2) of the Civil Procedure Code the defaulting defendant needs only to satisfy Court that "he had reasonable grounds for such default" in order to get the *ex parte* judgment and decree vacated.

Section 86(2) of the Civil Procedure Code reads 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 only reason given on behalf of the defendant at the inquiry into the purging default was that the instructing Attorney for the defendant mistakenly heard the date to file the answer as 16.07.2014 instead of 10.07.2014. Both counsel agree that, if this reason is acceptable, the *ex parte* judgment shall be vacated. It is for this reason, I stated that this appeal concerns a question fact, not law.

As learned counsel for the defendant emphasises in the written submissions, the learned District Judge dismissed the defendant's application on the basis that the defendant's version cannot be believed.

It is important to note that the whole evidence at the inquiry was led before the District Judge by whom the impugned order was delivered. In the well-written order running into 14 pages, the learned District Judge has meticulously analysed the evidence and came to the conclusion that she cannot accept the evidence of the instructing Attorney on the mishearing of the date given for the answer.

Let me now consider the basis on which the High Court reversed the order of the District Judge. The High Court order virtually runs into two pages, and the relevant part reads as follows:

> *The reason adduced for the defendant under section 86(2) of the Civil Procedure Code is that the Attorney at Law of the defendant Mr. Thushara Nilantha Daskon heard the date as 16.07.2014 and so entered in his diary. He has given evidence and he has produced his diary.*
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> *But the learned district judge has not believed this and had not vacated the ex parte judgment and the decree. It appears that one of the reasons as to why the learned district judge did not believe the above evidence is that Mr. Daskon has written in his diary under 10.07.2014 as 'Kamkaru Sevana Case'. The explanation given was however that he is having a consultation about 05 or 06 days previous to the date of the action and that entry related to such a consultation.*
>
> *Another reason that the learned district judge did not believe the said evidence is that the defendant stating in evidence that the answer was prepared in the month of August. However this evidence*

does not become conclusive since the answer bears the date 26th of July 2014. Although this is also considered as an indication that false evidence is given it could be that the defendant who is not a professional mistakenly thought that the answer was prepared in the month of August and that for 16th of July the answer mistakenly was dated as 26th of July.

The provisions of section 86(2) reads as "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".

Hence it appears to this court that the defendant has by evidence adduced sufficiently established that he had a reasonable ground for the default.

The High Court only highlights two reasons for disbelieving the defendant's version by the trial Judge. I do not venture to enumerate other reasons given by the learned District Judge in her 14-page order for her inability to accept the defence version. Assuming those are the only two reasons given, can the High Court sitting in appeal reverse the said findings of fact of the District Judge in the manner it did in this appeal?

The High Court does not explain why the trial Judge was wrong in refusing to accept the explanation provided by the Attorney for writing down "Kamkaru Sevena case" on 10.07.2014 (the date the case was called for filing the answer) in his professional diary. The High Court has

not analysed the evidence at all but says "*Hence it appears to this court that the defendant has by evidence adduced sufficiently established that he had a reasonable ground for the default*". To say the least, this is very unsatisfactory.

It is trite law that, the findings of fact of the trial judge who has the priceless advantage of seeing and hearing witnesses giving evidence, thereby getting the opportunity to observe *inter alia* the demeanour and deportment of the witnesses, are regarded as sacrosanct and should not be lightly disturbed **unless there are compelling reasons**. There are no live witnesses before the appellate Court but only printed evidence. It is important to bear in mind that the trial Judge has the benefit of assessing the evidence in its overall context to reach the final decision, unlike the piecemeal approach adopted in presenting the case before the appellate Court.

One of the issues before the Court of Appeal of the United Kingdom in the recent case of *Musst Holdings Ltd v. Astra Asset Management UK Ltd* [2023] EWCA Civ 128 was whether novation could be inferred from the conduct of the parties involved in the case. Falk J. at paras 69-70 stated:

> *The question whether a novation can be inferred from the parties' conduct is a question of fact, with which this court will not lightly interfere. The judge had the benefit, which we do not, of a consideration of all the evidence. It is quite clear from his decision that he took careful account of the evidence as a whole in reaching his conclusions. This was not simply a question of looking at a few emails and invoices and determining that they amounted to an offer and acceptance. The judge explained that he was considering the documents to which he referred in their context. As Musst correctly emphasised, this was an evaluative exercise. The comment made by David Richards LJ in UK Learning Academy v. Secretary of State for*

> *Education [2020] EWCA Civ 370 at [41] bears repeating: "As has been frequently said, the trial judge is in the best position to assess the evidence not only because the judge sees and hears the witnesses but also because the judge can set the evidence on any particular issue in its overall context. This is true also of an assessment of what a particular document would convey to a reasonable reader in the position of the party who received it, having regard to all that had preceded it."*

In *Pickford (A.P) v. Imperial Chemical Industries PLC* [1998] 3 All ER 462, the House of Lords held that the Court of Appeal should not have interfered with the decision of the trial Judge that the appellants are not liable to the respondent in damages because the respondent had not discharged the onus of proving, as it was necessary to prove, that the pain she suffered due to excessively long periods of typing was organic in origin. Lord Hope of Craighead opined:

> *In the second place, the judge had the advantage of seeing and hearing all the medical evidence. The majority of the Court of Appeal said that they were well aware of the rules which define the approach which an appellate court should adopt in these circumstances. But they did not apply them as they should have done in the circumstances. As Lord Bridge of Harwich said in Wilsher v. Essex Area Health Authority [1988] AC 1074, 1091, the advantage which the trial judge enjoys is not confined to conflicts of primary fact on purely mundane matters between lay witnesses. In this case the medical experts were at odds with each other about complex issues which were particularly difficult to resolve as no pathology for the condition known as PDA4 has yet been demonstrated. They were examined and cross examined on these issues over several days. Their demeanour and the manner which*

> *they gave their evidence was before the judge, who saw and heard them while they were in the witness box. All the Court of Appeal had before them was the printed evidence.*

In *Peter Johan Devries and Another v. Australian National Railways Commission and Another* (1993) 112 ALR 641 the question before the High Court of Australia (the apex Court in Australia) was whether the Full Court of the Supreme Court of South Australia erred in setting aside a finding of a trial Judge that the plaintiff had been injured as the result of the defendants' negligence in circumstances where the trial judge had accepted the plaintiff's evidence as to how the injury occurred. The High Court answered this question in the affirmative and allowed the appeal. Brennan, Gaudron and McHugh JJ. stated at paras 10-11:

> *More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact (See Brunskill (1985) 59 ALJR 842; 62 ALR 53; Jones v. Hyde (1989) 63 ALJR 349; 85 ALR 23; Abalos v. Australian Postal Commission (1990) 171 CLR 167). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his (or her) advantage" (S.S. Hontestroom v. S.S. Sagaporack (1927) AC 37, at p 47) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" (Brunskill (1985) 59 ALJR, at p 844; 62 ALR, at p 57).*
>
> *The evidence of the plaintiff was not glaringly improbable. Nor was it inconsistent with facts incontrovertibly established by evidence.*

> *Indeed, the plaintiff's account received much support from the evidence of his wife and his fellow worker. The learned trial judge dealt in detail with the inconsistencies between the plaintiff's evidence and his out-of-court statements. No ground exists for concluding that the judge failed to use or palpably misused his advantage.*

In *Munasinghe v. Vidanage* (1966) 69 NLR 97 the Privy Council quoted with approval the following part of the speech of Viscount Simon in *Watt or Thomas v. Thomas* (1947) AC 484 at 485-486:

> *If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.*

In *Munasinghe's* case the Privy Council stated that the Supreme Court should not have reversed the findings of the trial judge who heard and saw the witnesses giving evidence because it was a case of complicated facts and there was a good deal to be said on each side and the findings

of the trial judge were not unreasonable. The Privy Council restored the judgment of the trial Court.

Fradd v. Brown & Co. Ltd (1918) 20 NLR 282 is a similar case where the Privy Council quashed the judgment of the Court of Appeal and restored the judgment of the trial Court because the whole case depended upon the veracity and trustworthiness of the witnesses who gave evidence at the trial. The Privy Council stated at 282-283:

> *Accordingly, in those circumstances, immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the Judge present, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance.*

Vide also *Dharmatilleke Thero v. Buddharakkita Thero [*1990] 1 Sri LR 211, *Alwis v. Piyasena Fernando* [1993] 1 Sri LR 119.

However, I must emphasise that this does not absolve the appellate Court from its responsibility when it is fully convinced that the trial judge has clearly erred in evaluating the evidence. Many injustices may lurk in factual mistakes, surpassing errors of law.

It is in this context Ranasinghe J. (later C.J.) in *De Silva v. Seneviratne* [1981] 2 Sri LR 7 at 17 stated:

> *On an examination of the principles laid down by the authorities referred to above, it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so: that, where the findings of fact are based upon the trial judge's evaluation of facts, the appellate Court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task".*

In *Fox v. Percy* [2003] HCA 22, Callinan J. in the High Court of Australia stated at para 142:

> *Statements made by appellate judges about findings of fact by trial judges repeatedly emphasize the advantages attaching to an opportunity to hear and see witnesses. They tend to understate or even overlook that appellate courts enjoy advantages as well: for example, the collective knowledge and experience of no fewer than three judges armed with an organized and complete record of the proceedings, and the opportunity to take an independent overview of the proceedings below, in a different atmosphere from, and a less urgent setting than the trial.*

In the instant case, the registered Attorney marked the page of his professional diary for the date 16.07.2014 as P2 to show that the case number relevant to this case is mentioned under that date among other case numbers. The witness was cross-examined on the basis that it was an interpolation and an afterthought. Thereafter, the counsel for the plaintiffs (having perused the diary) marked the page for 10.07.2014 (the correct date on which the case was to be called) as V1 where it is mentioned "Kamkaru Sevana Case" in English. The witness admits that "Kamkaru Sevana Case" refers to the present case but his explanation was that it is a reference to his discussion about the case with his senior counsel about 5-6 days before the due date, which he usually does. The counsel *inter alia* has shown to the witness the entry for 21.07.2014 wherein it is written "Galle case" without a case number, which the witness has admitted as a case to appear on that date. It indicates that describing the case without the case number does not necessarily imply anything other than Court appearance.

ප්‍ර: ඔබ සඳහන් කළා මෙම ගරු අධිකරණයට සෑම විටම නඩු අංකයකින් තමයි මෙම දිනපොතේ සඳහන් කරන්නේ කියලා මෙම නඩු තිබෙන කොට?

උ: එහෙමයි

ප්‍ර: 2014.07.21 දින ඔබ සඳහන් කරනවා Galle case කියලා?

උ: එහෙමයි

ප්‍ර: ඔබ පෙනී සිටින නඩුවල නඩු අංකය නොමැතිව අදාළ අධිකරණයේ නඩුවක් කියන එක පමණක් ඔබ සඳහන් කරනවා ඔබගේ දිනපොතේ?

උ: එහෙමයි.

ප්‍ර: ඒ ආකාරයට ඔබ මෙම අධිකරණයේ මෙම නඩුව පිළිබඳව ඔබගේ දිනපොතේ 2014.07.10 වන දින පැහැදිලිවම සඳහන් කර තිබෙනවා

උ: කම්කරු සෙවන කේස් යනුවෙන් සඳහන් කර තිබෙනවා.

ප්‍ර: ඔබගේ සාක්ෂි අනුව මූලික සාක්ෂියේදී ඔබ විසින් සඳහන් කළ කරුණු අසත්‍යක් කියා යෝජනා කරනවා?

උ: ප්‍රතික්ෂේප කරනවා.

Notwithstanding that the witness was an Attorney-at-Law, the learned District Judge by giving reasons has disbelieved the witness that he mistakenly heard the date to file the answer as 16.07.2014 instead of 10.07.2014 taking all the evidence led before her in its overall context. I cannot say that it is unreasonable or perverse. The trial Judge was entitled to come to the conclusion that she did on this issue of fact, and it was quite impossible for the High Court to substitute its own finding of fact on it unless there were cogent reasons that warrant such interference. The High Court in this case has manifestly failed to give such reasons.

In my view, on the facts and circumstances of this case, the High Court of Civil Appeal should not have cavalierly interfered with the factual findings of the trial Judge and reversed the order.

I answer the question of law upon which leave to appeal was granted in the affirmative. I set aside the judgment of the High Court of Civil Appeal dated 27.11.2020 and restore the judgment of the District Court. The plaintiffs are entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court