

**ALIMA UMMA  
vs  
SIYANERIS**

COURT OF APPEAL,  
AMARATUNGA, J.,  
C. A. 1359/2002  
D. C. KURUNEGALA 5538/L  
NOVEMBER 12, 2005

*Civil Procedure Code, sections 27, 87(B) and 87(1)(3)-Plaintiff absent - Counsel and registered attorney present - Dismissal of action under section 87(1) - Is it lawful?*

On the trial date the plaintiff was absent and her registered attorney and counsel were present and were ready to start the plaintiff's case. The objection taken by the defendant that since the plaintiff has failed to appear, the action has to be dismissed under section 87(1) was upheld.

The plaintiff moved in revision.

**HELD :**

- (i) In terms of section 24 of the Code, the registered attorney or an attorney at law instructed by the registered attorney can represent a party to the action in court. If the registered attorney is in court and represents the party, that is an appearance for the party even if the party is not physically present in court. Court cannot dismiss the action for the absence of the party.

**APPLICATION** in revision from the order of the District Court of Kurunegala.

**Case referred to :**

1. *Anandappa Chettiar vs Sanmugam Chettiar* (DB) 33 NLR217

---

*Upali de Almeida with Anna de Almeida* for plaintiff respondent.  
*Jacob Joseph* for defendant respondent

*Cur.adv.vult*

October 15, 2004

**GAMINI AMARATUNGA, J ,**

This is an application to revise two orders made on 26.02.2001 and 22.05.2002 by the District Court of Kurunegala. The plaintiff filed action against the defendant to recover possession of the premises she had let to the defendant. The position of the defendant was that the property belonged to him by virtue of prescriptive possession. After issues were framed the trial was fixed for 26.02.2001. On that day the plaintiff did not attend but her registered attorney and counsel represented her in court. The plaintiff's witnesses too were present and the counsel for the plaintiff was ready to start the plaintiff's case. The counsel for the defendant has submitted that since the plaintiff has failed to appear, the action had to be dismissed under section 87(1) of the Civil Procedure Code. The learned counsel for the plaintiff had pointed out to Court the provisions of Section 27 of the Code, but the learned Additional District Judge had dismissed the plaintiff's action under Section 87(1) of the Code.

Thereafter, the plaintiff has tendered a notice of appeal. Having given the notice of appeal, the plaintiff has also filed an application under Section 87(B) to have the order purported to have been made under Section 87(1) set aside and also to get the order set aside on the basis that the said order had been made *per incuriam* and that under Section 839 of the Code, the Court had power to set it aside.

The learned District Judge had held an inquiry into the application. The learned District Judge in his order has stated that since the appearance of the registered attorney and the counsel was an appearance for the party, it was not open to the plaintiff to seek relief under Section 87(3) of the Code. This is a correct conclusion. However in fairness to the attorney at law who filed the application under Section 87(3) it must be stated that the application under Section 87(3) has been made in view of the learned Additional District Judge's specific reference in her order to Section 87(1). The learned District Judge has also come to the conclusion that the order of the Additional District Judge was not an order made *per incuriam*, and that he had no jurisdiction to set it aside. Accordingly, the application was

dismissed by order dated 22.05.2002. The plaintiff has filed this revision application on 02.08.2002 seeking to have orders dated 26.02.2001 and 22.05.2002 set aside.

In the written submissions filed in this Court on behalf of the defendant it is stated that since the revision application has been made more than one year after the order of 26.02.2001, the plaintiff was guilty of laches and accordingly she is not entitled to any relief by way of revision.

In terms of Section 24 of the Civil Procedure Code, the registered attorney or an attorney at law instructed by the registered attorney can represent a party to the action in Court. If the registered attorney is in Court and represents the party in Court, that is an appearance for the party even if the party is not physically present in Court. *Andiappa Chettiar vs Sanmugam Chettiar*,<sup>(1)</sup>. In such a situation a Court cannot dismiss the action for the absence of the party.

In the instant case the Court's order dismissing the action of the plaintiff under Section 87(1) was clearly wrong. In making its order the Court has turned a blind eye to Section 24 of the Code, cited by the learned counsel for the plaintiff, to show that the situation did not come within Section 87(1). By the Court's failure to consider the legal submission made by the counsel for the plaintiff and by the acceptance of the wrong legal submission made by the counsel for the defendant, the Court has brought into existence a wrong order which has caused injustice and grave prejudice to the plaintiff. This Court's revisionary powers and inherent powers are wide enough to remedy the injustice caused to the plaintiff by the wrong order made by Court.

The learned District Judge who made the order dated 22.05.2002, was rightly of opinion that in the circumstances that existed on 26.02.2001, the order dismissing the plaintiff's action under Section 87(1) was wrong. However he has declined to interfere with that order on the ground that he did not have jurisdiction to set it aside as it was not an order made *per incuriam*. However, as I have pointed out earlier the learned Additional District Judge's order dismissing the action under Section 87(1) had been made without considering a clear provision of Law, that is Section 24 of the Code. To that extent it is an order made *per incuriam*.

For the reasons set out above, I hold that the plaintiff petitioner is entitled to the relief claimed by this application. Accordingly, I allow the revision

---

application and set aside the order dated 22.05.2002 and the order of 26.02.2001 dismissing the plaintiff's action and make order restoring the plaintiff's case to the trial roll. The learned District Judge of Kurunegala is hereby directed to proceed with the action from the point it was on 26.02.2001. The defendant-respondent shall pay a sum of Rs. 10,000 to the plaintiff-petitioner as costs of this revision application and depending on the outcome of the action this cost is to be recovered or set off at the end of the action.

*Application allowed.*

---