

ABDEEN
v.
MANEL DAHANAYAKE

COURT OF APPEAL.
DR. RANARAJA, J.
C.A. NO. 1031/91(F).
D.C. KANDY NO. 15490/L.
MAY 26, 1997.

Civil Procedure Code sections 87(1), 88(1) – Trial date – Plaintiff and her registered Attorney-at-Law absent – An Attorney-at-Law appeared for the limited purpose of tendering a Medical Certificate. – Action dismissed – Was the Order of dismissal made inter partes? If not does an appeal lie.

Held:

Section 87(1) provides that where the plaintiff makes default in appearing on the day fixed for trial, the Court shall dismiss the action

Section 88(1) provides that no appeal shall lie against any judgment entered upon default.

(1) The Attorney-at-Law who tendered the Medical Certificate appeared for the limited purpose of tendering the certificate, not being the registered Attorney she could not have had any instructions from the plaintiff to proceed with the case.

The trial judge has understood her *limited role*, he has not asked her whether she was prepared to lead any evidence on behalf of the plaintiff, but treated the plaintiff's absence as a "default" and dismissed her action.

There were no proceedings *inter partes*. The Order of dismissal have therefore been made *ex parte* for default in appearing.

(2) No appeal lies from an order of dismissal.

AN APPEAL from the judgment of the District Court of Kandy.

Cases referred to:

1. *Andiappa Chettiar v. Shanmugam Chettiar* – 33 NLR 217.
2. *Scharenguivel v. Orr* – 28 NLR 302.
3. *Dick v. Piller* – 1943 AER 627.

Faiz Musthapha, P.C. with *S. Jayawardena* for appellants.
Respondent absent and unrepresented.

May 26, 1997.

DR. RANARAJA, J.

On the 5th Trial date, 2.4.91 the plaintiff and her registered Attorney were absent. One Mrs. Garihagama appeared for the limited purpose of tendering a medical certificate issued to the plaintiff. The learned District Judge dismissed the plaintiff's action on the ground that the plaintiff had not been ready on any of the trial dates according to the journal entries. This appeal is from that order.

Section 87(1) of the Civil Procedure Code provides that where the plaintiff makes default in appearing on the day fixed for the trial, the Court shall dismiss the plaintiff's action.

Section 88(1) of the Code provides that no appeal shall lie against any judgment entered upon default.

Two questions arise in this appeal. Namely, (1) Was the order of dismissal made *inter-partes*? (2) If not does an appeal lie from that order?

Learned Counsel submitted that the order dated 2.4.91 was made *inter-partes* and not in default of appearance. He cited the decision in *Andiappa Chettiar v. Shanmugam Chettiar*⁽¹⁾ in support. At the outset, it is to be noted that in the instant case, neither the plaintiff nor her registered Attorney was present in Court. The facts in *Andiappa* can therefore be distinguished.

However Macdonell, C.J. observed "consequently it seems but reasonable that the proctor should have the right to inform the Court that, though he is physically present, he does not on this occasion appear for the (plaintiff) defendant whose case has been just called. But it seems to me that it is his duty to make it clear that he does not on this occasion appear for his client, and that if he does not so make it clear, his presence in Court will *ipso facto* be an appearance for that client. A few words only will be necessary provided that they make it clear that he does not appear for his client ... The substance of what he says will of course be entered forthwith in the journal of the case.

As seen Mrs. Giriagama who was not the registered Attorney on record, clearly stated that she was appearing for the limited purpose of tendering the medical certificate. Not being the registered Attorney she could not have had any instructions from the plaintiff to proceed with the case. The Trial Judge has understood her limited role. He has not asked her whether she was prepared to lead any evidence on behalf of the plaintiff, but treated the plaintiff's absence as a "default" and dismissed her action. Thus clearly there were no proceedings *inter-partes*.

The principle laid down in *Scharenguivel v. Orr*⁽²⁾ that "It has never been held that a proctor for a plaintiff who has received a proxy and instructions for the preparation of a plaint is entitled to avoid a final judgment against his client merely by stating on the date fixed for trial that he has received no instruction" has no application to the facts of the instant case.

What took place on the date of trial was, the plaintiff purportedly for reasons of ill-health was not present in Court. The registered Attorney too was absent. An Attorney with limited instructions to tender to Court a medical certificate issued to the plaintiff has done so. The plaintiff nor her registered Attorney being present in Court there could logically have been no *inter-partes* proceedings. The order of dismissal has therefore been made *ex parte* for "default in appearing". The facts in *Dick v. Piller*⁽³⁾ are entirely different from those relevant to the present case, where the trial had not even commenced due to the plaintiff seeking adjournments on no less than on seven trial dates.

No appeal lies from the order of dismissal. The plaintiff's remedy lay in section 87(3) of the Code.

Appeal dismissed.