ISEK FERNANDO
v.
RITA FERNANDO AND OTHERS

COURT OF APPEAL.
WEERASEKERA, J., (P/CA)
JAYASINGHE, J.
C.A. NO. 288/92 (F).
D.C. MT. LAVINIA NO. 1185/L.
JANUARY 29, 1998.
FEBRUARY 27, 1998.

Civil Procedure Code ss. 28, 29, 84 – Defendant absent – Represented by an Attorney-at-law – Is the inquiry an ex parte inquiry? – What is an appearance?

Plaintiff-respondent instituted action for ejectment of the defendant-appellant from the land in question. The defendant-appellant filed answer denying the averments in the plaint and prayed for a dismissal of the action. The case was taken up for trial on 9.11.1989, adjourned for 24.5.1990, defendant-appellant was absent on 24.5.1990. However, she had sent a letter to the counsel and the registered Attorney requesting them to seek a postponement on the ground of ill health. The counsel produced the letter and stated that a medical certificate would be produced before the next date of trial. The counsel for the plaintiff-respondent had objected; thereafter the Court refused the application and fixed the case for *ex parte* trial. On 24.2.1992 the defendant's application for vacation of the *ex parte* decree was refused. It was contended that, the District Court erred in deciding to hold an *ex parte* inquiry when she was represented by her Attorney-at-law.

Held:

1. Perusal of s. 24 CPC demonstrates the fact that an appearance of a party may be by an Attorney-at-law. When a client requests an Attorney-at-law to make an application it is an application the Attorney-at-law makes on behalf of the party he represents for the due administration of justice.

2. When Court decides to refuse an application made by counsel for the adjournment of proceedings the Court has only one option – inform the counsel that he should proceed with the trial *inter-partes*.

3. Appearance may be by the party in person or by his counsel or his registered Attorney, and where the defendant is absent but is represented by counsel or by Attorney-at-law and the Court is satisfied on the evidence adduced by the plaintiff, Court must enter a final judgment and not an order *Nisi*. Judgment must be considered as being pronounced *inter-partes* and not *ex parte*.

"Registered Attorney present in Court when he is called to do so if he does not desire to enter an appearance for an absent party whose proxy he has filed shall definitely state to Court that he is not entering an appearance and that otherwise his appearance in Court must be deemed an appearance for the party."

4. The trial Judge erred in law by deciding to hold an *ex parte* trial offending s. 84 read with s. 24 CPC.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Fernando v. Fernando* – SC No. 2/97 – SCM 4. 6. 1997.
2. *De Silva v. Gunasekera* – 41 NLR 33.
3. *Perumal Chetti v. Gunatilaka* – 4 Balasingham reports 2.
4. *Pieris v. Fernando* – (1892) 1 SCR 67.
5. *Garsial et al v. Somasunderam Chetti* – 9 NLR 26.
6. *Cannon v. Thelising* – 30 NLR 372.
7. *Andi Appa Chettiar v. Sanmugam* – 33 NLR 217.
8. *Scharenguivel v. Orr* – 28 NLR 302.

Rohan Sahabandu for defendant-appellant.

Geoffrey Alagaratnam with *Ms Dilanthi Herath* and *Ms Thushari Dharmakeerthi* for plaintiff-respondent.

Cur. adv. vult.

June 30, 1998.

JAYASINGHE, J.

Plaintiff filed action in the District Court of Mt. Lavinia praying for ejectment of the defendant from the land and premises and for costs. The defendant filed answer denying the averments in the plaint and

prayed for the dismissal of the action and for costs. The case against the defendant was taken up for trial on 09.11.89 and adjourned for 24.05.90 for want of time. The defendant claimed that she suddenly fell ill a few days before the date of trial and had to be treated by a physician and consequently could not appear on 24.05.90. She says, however, that she sent a letter to her counsel and the registered Attorney requesting them to seek a postponement on the grounds of ill health. She submits that when the case was taken up for trial on 24.05.90 her counsel produced the aforesaid letter and sought a postponement. The counsel also informed Court that a medical certificate would be produced before the next date of trial. The counsel for the plaintiff objected. The learned District Judge refusing the application stated that there was no medical certificate before Court and that the explanation of the appellant did not appear to be acceptable and made order refusing the application and fixed the case for *ex parte* trial against the defendant and the 2nd and 3rd defendants who were also not present in Court on summons. Consequently, *ex parte* trial against the defendant was held and judgment entered. *Ex parte* decree was served on the defendant on 07.12.90. The defendant thereafter filed petition and affidavit praying for vacation of the *ex parte* decree. The inquiry was held on 19.01.1992. At the said inquiry the defendant gave evidence and produced a medical certificate. The learned District Judge by order delivered on 24.02.1992 refused the defendant's application for the vacation of *ex parte* decree. The trial Judge observed that "there is no indication in the record that the Attorney who appeared on behalf of the 1st defendant did not participate at the trial and has also failed to raise issues *or* cross-examine the witnesses or participate in the proceedings in any other manner and the necessary conclusion that one could draw is that there was no appearance on behalf of the 1st defendant and it is an order made after an *ex parte* inquiry and the 1st defendant had not shown reasonable grounds for her default". This appeal is from the said order of the learned District Judge.

The counsel agreed that this matter may be disposed of by way of written submissions and accordingly written submissions were tendered.

The counsel for the appellant raised a question of law in the written submissions as to whether the learned District Judge erred in deciding to hold an *ex parte* inquiry against the 1st defendant when she was represented by her duly appointed Attorney-at-law although she failed to appear in Court in person on the day of the trial on the grounds of ill health.

It is, therefore, necessary to examine the relevant provisions in the Civil Procedure Code that governs appearance of parties by an Attorney-at-law and also the provisions relating to *ex parte* trial. Section 24 reads as follows:

Any appearance, application, or act in or to any Court, required or authorised by law to be made or done by a party to an action or appeal in such Court, except only such appearance, applications, or acts as by any law for the time being in force only Attorneys-at-law are authorised to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognized agent, or by an Attorney-at-law duly appointed by the party or such agent to act on behalf of such party;

Provided, that, any such appearance shall be made by the party in person, if the Court so directs. An Attorney-at-law instructed by a registered Attorney for this purpose, represents the registered Attorney in Court.

It has been held in the case of *Fernando v. Fernando*[1] that when an appointment of a Proctor is filed it remains in force until revoked with the leave of Court or until the client dies or until the Proctor dies or is removed or suspended or otherwise becomes incapable of acting until all proceedings in the action are ended and the judgment satisfied so far as regards the client. Section 28 provides that if a registered Attorney shall die or be removed or suspended or otherwise become incapable to act as aforesaid at any time before judgment no further proceedings shall be taken in the action against the party for whom he appeared until 30 days after notice to appoint another registered Attorney has been given to that party either personally or in such other manner as the Court directs and section 29 states

that any process served on the registered Attorney of any party or left at the office or ordinary residence of such registered Attorney relative to an action or appeal except where the same is for the personal appearance of the party, shall be presumed to be duly communicated and made known to the party whom the registered Attorney represents; and unless the Court otherwise directs, shall be as effectual for the purposes in relation to the action or appeal as if the same had been given to or served on the party in person.

Perusal of section 24 no doubt demonstrates the fact that an appearance of a party may be by an Attorney-at-law. Section 28 stipulates that in the event of the incapacity of the Attorney for any reason the proceedings are held in abeyance. Section 27 of the Civil Procedure Code stipulates that the appointment of a registered Attorney to make any appearance or any application shall be in writing by the client and shall be filed in Court. . . and, when so filed it shall be in force until revoked. All these sections demonstrate that the registered Attorney is an integral element in any proceedings and cannot be ignored by a Court unless there are compelling reasons for not doing so. When a client requests an Attorney-at-law to make an application it is an application the Attorney-at-law makes on behalf of the party he represents for the due administration of justice. Court will disallow an application only upon being satisfied that the application is not tenable in the circumstances. This is discretionary and must be founded on sound reasoning. When Court decides to refuse an application made by counsel for the adjournment of proceedings the Court has only one option. Inform the counsel that he should proceed with the trial. If he decides to allow the application he can make good the inconvenience caused to the other party by the payment of appropriate costs. If the Judge decides to refuse the application then he is left with no option but to proceed with the trial as *inter-partes*. In *De Silva v. Gunasekera et al*[2] it was held that the proceedings are *inter-partes* if on the day fixed for trial an advocate entered an appearance for the defendants and applied for a postponement which was refused, and if the advocate thereupon withdrew from the case intimating that he has been instructed only to apply for a postponement. In the present instance, the trial Judge was clearly wrong when he proceeded to hold an *ex parte* inquiry when the

counsel was present in Court. It is always possible for a client to leave the case in the hands of the Attorney and not participate at the trial. It is possible that the Attorney-at-law might even advise the client that the matter is being taken care of by the Attorney and that participation at the trial by the client is unnecessary. We often see this happen. As stated in *Perumal Chetti v. Gunathilaka*[3] there is no requirement for the defendant to appear personally as it is sufficient if he is represented by his Proctor.

Section 84 of the Civil Procedure Code provides for a situation where there is a default.

It provides that if the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the Court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the Court shall proceed to hear the case *ex parte* forthwith, or on such other day as the Court may fix. Section 84 read with section 24 defines what constitutes appearance. What it says by "appearance" is that an appearance may be by the party in person or by his counsel or his Attorney and therefore where the defendant is absent but is represented by counsel or by Attorney-at-law and the Court is satisfied on the evidence adduced by the plaintiff, Court must enter a final judgment and not an order *nisi* as in the earlier instant. Judgment must be considered as being pronounced *inter-partes* and not *ex parte*. *Peiris v. Fernando*[4] and *Gargial et al v. Somasundaram Chettti*[5]. In *Cannon v. Thelising*[6] Akbar, J. held that where the defendant was absent but his Proctor was present the Court of Requests was wrong in entering judgment by default. In *Andi Appa Chettiar v. Sanmugam*[7] it was held that the presence in Court when a case is called of the Proctor on record constitutes an appearance for the party from whom the Proctor holds the proxy unless the Proctor expressly informs Court that he does not on that occasion appear for the party. Where in

an action the claim of the plaintiff is traversed in the answer and there is an appearance for the defendant the evidence should be taken up in support of the plaintiff's case. It is significant that in the case of *Andi Appa Chettiar v. Sanmugam Chettiar* (*supra*) that the Court laid down the definite rule to the effect that the Proctor present in Court when he is called to do so if he does not desire to enter an appearance for an absent party whose proxy he has filed should definitely state to Court that he is not entering an appearance and that otherwise his appearance in Court must be deemed an appearance for the party. In *Andi Appa Chettiar* case (*supra*) the facts are as follows: In a Court of Requests a plaint was filed and thereafter the defendant filed answer. On the day of the trial the Proctors on record for both the plaintiff and the defendant appeared but the defendant was absent without excuse. The defendant's Proctor stated to Court that he had no instructions and no material on which to proceed with the case. Thereupon, the learned Commissioner journalized as follows: "it is useless to frame issues and I enter judgment for the plaintiff as prayed for with costs and issued decree. Thereafter, the Proctor for defendant filed affidavit from the defendant and moved for the reasons therein that the Court be pleased to set aside the judgment against the defendant and permit him to proceed with the case. The Court refused the application. The Judge observed that the said judgment was entered not *ex parte* because the defendant was present through his Proctor, but *inter-partes* and that the Court had no power to set aside the order. The defendant thereupon appealed from the said order. At the hearing before the Supreme Court two matters came up for consideration. Firstly, was there an appearance for the defendant in this case and secondly, was a judgment *inter-partes* or judgment by default *ex parte*. Here the parties are different and need not be considered. Macdonell, CJ. stated that Court was clearly of the opinion that as regards the first proposition above there was an appearance for the defendant in this case. He had given a proxy to a Proctor who had filed the same, so that there was an appearance in Court authorised by law to be made in an action which could be made by a Proctor duly appointed. The Proctor on record was present in Court and stated certain matters in connection with the case on behalf of his client, viz that he had no instructions. This was clearly an appearance for the client. Lyall Grant, J. in *Scharenguivel v. Orr*[8]

stated that it has never been held that a Proctor for the plaintiff who has received a proxy and instructions for the preparation of a plaint is entitled to avoid final judgment. . . stating that he had received no instructions. I think the dictum holds good equally where, as in the present case, the client is the defendant in the action. When the Proctor on record is in Court. . . when the case is called. Then either the client is also personally present or he is not. If he is personally present then beyond question he has appeared. If he is absent the presence of his Proctor of record is *prima facie* an appearance for him in the absence of anything that appears to the contrary.

Garvin, SPJ. in his separate judgment observed: "but a party may make an appearance by a Proctor duly appointed by him. . . Court must know and have some means of ascertaining whether a party appears and the ordinary test of such appearance must be the presence of the party or his Proctor. If the Proctor though present does not wish his presence to be construed as an appearance on behalf of his client, he must immediately inform Court that he does not desire to and is not entering or making an appearance in the case. This must be done clearly and unambiguously. It is not sufficient as in the case under consideration to say that he has no instructions. A Proctor who has no instructions may nevertheless do much for his client and in his interests. The Court is entitled to know at the outset whether the Proctor is making an appearance for his client or not and unless he states that he is not making such an appearance it is entitled to treat his presence as an appearance and to proceed as if the party had appeared. . ." Lyall Grant, J. in his judgment stated: "CPC makes it clear; A party appears in Court when he is there present in person to conduct his case, or is represented there by a Proctor or other duly authorised person". . . we have not in Ceylon the qualifications imposed in the Indian Code Order V, rule 1, there the Proctor must be duly instructed and able to answer all material questions relating to his client. . . As I understand the reason for allowing a decree *nisi* in cases of default is because there may be an excellent reason for non-appearance, eg. no notice of the date may have been served or there may be some other convincing reason for the person's non-appearance. . . I find it difficult to see why the statement that the Proctor has no instructions, no reason being given

should place the litigant in a better position than that in which he is placed by an application being made on his behalf for a postponement on the ground that for stated reasons his Proctor has no instructions.

According to the proceedings of 24.5.90 the 1st defendant was represented by his duly appointed Attorney. An application was made for a postponement upon instructions the Attorney received from the defendant. Mr. Sahabandu submitted that the trial Judge erred in law by deciding to hold an *ex parte* trial against the 1st defendant and therefore offended section 84 read with section 24 of the Civil Procedure Code. He further stated that the proper procedure would have been for the trial Judge to state that it is an inquiry *inter-partes* and instructed the Attorney representing the 1st defendant to proceed with the trial. The application by the 1st defendant for the vacation of the order of 24.5.90 was refused by the trial Judge on the basis that the defendant did not participate in the proceedings and that he had not raised issues or cross-examined the witnesses or participated in the proceedings in any other manner and that the only and the necessary conclusion is that the defendant failed to appear and that the duly appointed Attorney was also in default. Mr. Sahabandu submits that this conclusion is erroneous. I am inclined to agree with these submissions. Accordingly, I set aside the Order of the learned District Judge dated 24.02.1992 and direct the Registrar to send the case back to the District Court of Mt. Lavinia for a trial *de novo*. I make no order for costs.

WEERASEKERA, J. (P/CA) – I agree.

Appeal allowed.