KAROLIS
v
WICKREMARATNE

COURT OF APPEAL
RANJITH SILVA, J.
SALAM, J.
CA (REV.) 1689/2005
DC MT. LAVINIA 870/96/M
AUGUST 1, 2007
MAY 21, 2008
JUNE 17, 2008
JULY 4, 2008

Civil Procedure Code – Section 24, Section 87, – Section 145 – Trial – Plaintiff present – Attorney-at-Law absent – Dismissed – Inter parte or ex parte? Revision – Alternate remedy.

The plaintiff-petitioner instituted action seeking to recover a certain sum as damages from the defendant-respondent. On a date fixed for trial, the plaintiff was present but his Attorney-at-Law was absent, the application for a date by the petitioner was refused and the Court dismissed the action.

The plaintiff without taking steps to follow the statutory remedy of appealing - moved in revision stating that (i) the judgment is contrary to law (ii) that Court has erred in law by not granting the application for a date by the petitioner who was present in Court (iii) the Court instead of directing/requesting or providing an opportunity to the plaintiff to proceed with the case opted to dismiss same.

It was contended by the plaintiff that, the learned District Judge failed to act under Section 145 of the Code, as he had no power to dismiss the case, as it was his duty to proceed to hear and decide the case.

Held:

(1) Although the plaintiff-petitioner made an appearance in Court he could not have made any application or taken any steps in the absence of his Attorney-at-Law.

The refusal to grant a postponement and the dismissal of the case has to be treated as an order made in default of appearance and this should be treated as an *ex parte order.*

On the other hand if the lawyer was present and moved for a date but was refused it could be treated as an *inter parte* judgment.

(2) The learned District Judge could not have directed the plaintiff to conduct the trial and proceed with the case in person as there was an attorney-at-law – Section 145 is not applicable.

Per Ranjith Silva, J.

"Where an attorney-at-law fails to appear in Court not due to his negligence but because he was indisposed, in such a situation will the plaintiff be prevented from relying on Section 87(3) as it is not the plaintiff who really defaulted? But justice and fair play demand that in such a situation too the plaintiff should be allowed to proceed with Section 87 (3), to purge the default of the attorney-at law, *if* the attorney-at-law did not appear due to his negligence, then the application to purge default shall fail and the attorney-at-law will have to take the responsibility for this default."

(3) In the instant case the petitioner should have made an application to purge default under Section 87 (3), there is no valid reason let alone exceptional circumstances to interfere with the impugned judgment by way of revision.

APPLICATION in revision from an order of the District Judge of Mt. Lavinia.

Cases referred to:

1. *Podimenika* v *Dingiri Mahatthaya and others* CA (Rev) 1491/2002 CAM 14.5.2007.
2. *Soysa* v *Silva and others* 2002 2 Sri LR 235.
3. *Mariam Bee Bee* v *Seyad Mohamed* (1965) 68 NLR 36 at 38.
4. *Jinadasa* v *Sam Silva* 1994 1 Sri LR 222
5. *Hameed* v *Deen and others* 1988 2 Sri LR 266.
6. *Seelawathie* v *Jayasinghe* 1985 2 Sri LR at 266.
7. *Carolis Appuhamy* v *Peter Singho* 26 NLR 376.
8. *Andradie* v *Jayasekera* 1985 2 JUCR 204.
9. *Gamini Abeysundara* v *Malalage Gunapala* CA 676/2000 (App.) DC Colombo 18322/L.
10. *Isek Fernando* v *Rita Fernando and others* 1999 3 Sri LR 29.

Mahinda Nanayakkara for plaintiff-petitioner.
Mauyra Gunawansa for defendant-respondent.

July 04, 2008
RANJITH SILVA, J.

The Plaintiff-Petitioner (hereinafter referred to as the Petitioner) instituted action bearing No. 870/96/M in the District Court of Mt. Lavinia against the defendant-respondent (hereinafter referred to as the Respondent) claiming *inter alia* a sum of Rs. 500,000/- from the respondent as damages caused to the petitioner.

The case took a long time during the preliminary stages as the parties and the Counsel defaulted in taking steps on numerous occasions and once, as far back as 24.09.96 the case was fixed for *ex-parte* trial. Later the *ex-parte* judgment was vacated and the respondent was allowed to file his answer and to proceed with the case. Thereafter once again the parties defaulted at various stages of the case and finally the case was re-fixed for trial for 24.02.2003. On 24.02.2003 both parties raised issues and thereafter the case was re-fixed for further trial for 03.06.2003. On 03.06.2003 the trial commenced and the petitioner in the course of his evidence marked and produced P1 to P11 but did not conclude his evidence. Thereafter the trial was fixed for 01.09.2003 and on the said date the trial was postponed due to an application for a date by Counsel for the respondent on personal grounds. The matter was fixed to be resumed on 13.11.2003. On 13.11.2003 the petitioner was cross-examined by Counsel for the respondent and the Court re-fixed the case for further trial for 01.04.2004. On 01.04.2004 the case was not called as the Court officers were not available as they had gone for election duty and the matter was re-fixed for 16.08.2004. On 16.08.2004, the Attorney-at-Law who appeared for the plaintiff-petitioner revoked the proxy and tendered a fresh proxy and moved for a date on the personal grounds of the Counsel. Thereafter the Court re-fixed the matter to be resumed on 02.12.2004 and ordered that it shall be the final date. On 02.12.2004 the learned Additional District Judge was on leave and trial was re-fixed for 18.04.2005. When the matter came up for trial on 18.04.2005 the petitioner was present in Court but his registered Attorney-at-Law and the senior Counsel was not present in Court. The petitioner under the circumstances moved for a date but the Court refused to grant a date as there were no acceptable reasons, adduced to Court, by the petitioner, to grant a date. By that order dated 18.04.2005 the

learned trial Judge dismissed the said case. Aggrieved by the said decision of the learned District Judge, the petitioner filed notice of appeal but failed to file the petition of appeal and thus failed to follow up the appeal. The petitioner has alleged in his petition that he could not file the petition of appeal and proceed with the appeal because of his poor health and old age.

It was argued on behalf of the petitioner that the judgment of the learned Additional District Judge of Mt. Lavinia in dismissing the action was *per se* erroneous in law. It was submitted on behalf of the petitioner that there were exceptional circumstances that warranted the exercise of the revisionary jurisdiction of this Court despite the fact that the petitioner failed to exercise his right of appeal. The Counsel for the petitioner urged *inter alia* the following grounds as constituting exceptional circumstances.

a) That the said judgment is contrary to law and against the basic legal principles.

b) That the learned trial Judge had erred in law by not granting the application for a date by the petitioner who was present in Court.

c) That the learned District Judge, instead of directing/ requesting or providing an opportunity to the petitioner to proceed with the case opted to dismiss the same, etc.

The petitioner cited several cases namely, *Podimenike* v *Dingiri Mahaththaya and others*[1], *Soysa* v *Silva and other*[2], *Mariam Bee Bee* v *Seyed Mohamed*[3] at 38, in support of their argument that there were exceptional circumstances to warrant the invocation of the Revisionary jurisdiction of this Court although the petitioner failed to exercise the right of appeal.

If one were to assume that the judgment of the learned District Judge dated 18.04.2005, dismissing the action was an *inter-partes* judgment, the question arises whether the petitioner can maintain this revision application against the said judgment when he had an alternative and effective remedy, namely an appeal to the Court of Appeal from the said judgment.

Therefore this Court has to examine carefully the impugned judgment delivered on 18.04.2005.

Counsel for the petitioner contended that the learned District Judge should have acted under section 145 of the Civil Procedure Code, when the petitioner moved for a date on the ground that his Counsel was absent. Section 145 of the Civil Procedure Code reads as follows:

"If any party to an action, to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed the Court may, notwithstanding such default, proceed to decide the action forthwith."

Counsel for the petitioner contended that according to section 145 of the Civil Procedure Code the learned trial Judge had no power to dismiss the case as it was his duty to proceed to hear and decide the case when he refused to grant a postponement .

In other words the argument of the Counsel was that when the application for a postponement or adjournment made by the petitioner who was present in Court was not allowed, the learned District Judge should have directed the petitioner to proceed with the action and should have proceeded to hear and decide the case, instead of dismissing the action.

According to section 24 of the Civil Procedure Code an appearance of a party may be by an Attorney-at-Law. Once an Attorney-at-Law is duly appointed by the party concerned he forfeits his rights to tender and sign notices or to take any steps in the case as long as the Attorney-at-Law is alive able and competent and his proxy remains valid.

In *Jinadasa* v *Sam Silva*(4) it was held that if there is a oral hearing, then a party is entitled to be legally represented unless the legislature expressly provided otherwise. Therefore unless the legislature provides otherwise, a party can decide whether he will himself go into Court or be legally represented in the exercise of his right.

Once he so elects to have himself represented, he must take all the steps in the action through that Attorney-at-Law. (Vide: *Hameed* v *Deen and others*(5)).

In *Seelawathie* v *Jayasinghe*[6] at 266 it was held that when a party to a case has an Attorney-at-Law on record, such a party must take all steps in the case through such Attorney-at-Law.

In the instant case although the plaintiff-petitioner made an appearance in Court he could not have made any application or taken any steps in the absence of his Attorney-at-Law. He could not have proceeded with the trial, given evidence or called witnesses without the assistance of his lawyer. He could not have in the first place moved even for a date personally, perhaps, other than an application for a date on behalf of his lawyer who was absent. Refusal to grant a postponement and the dismissal of the case has to be treated as an order made in default of appearance and thus should be treated as an *ex-parte* order. On the other hand if the lawyer was present and moved for a date but was refused by the trial judge resulting in a dismissal of the case that could be treated as an *interpartes* judgment. Nevertheless in such a situation the trial Judge must give an opportunity to the Attorney-at-Law to proceed with the case if a request is made in that behalf by the Attorney-at-Law.

The petitioner argued that when the petitioner moved for a date on the ground that his Counsel was not present in Court to go on with the trial, the learned District Judge should have directed the petitioner to proceed with the trial and then make a decision forthwith.

In support of this argument Counsel cited *Carolis Appuhamy* v *Peter Singho*[7], wherein it was held "where a party to an action has been granted time to proceed certain evidence at the hearing, the Court has no power to dismiss the action and it must be proceeded to hear as may be tendered on behalf of the party in default and decided the action forthwith".

In *Carolis Appuhamy* v *Peter Singho (supra)* the facts and circumstances are different. In that case the learned Judge insisted that the plaintiff should lead the evidence of an expert witness in addition to the evidence already led by the plaintiff. The evidence the plaintiff intended to lead, as the Judge was of the view that it would be futile to record any further evidence in the absence of expert evidence. For that reason, when an application was made for a further date to lead expert evidence the learned District Judge refused the application and dismissed the case. With respect I must state that the approach of the learned District Judge in that case was obnoxious

and repugnant to the provisions of section 145 of the Civil Procedure Code. In that case, the learned District Judge should have either allowed the application for a date to summon the expert to give evidence or at least directed the plaintiff to present whatever the evidence the plaintiff intended to lead, even though it was the view of the learned District Judge that the plaintiff would not succeed without leading expert evidence. In the instant case obviously the learned District Judge did not act under section 145 of the CPC. In the instant case the petitioner had not obtained a date, to produce any evidence or to cause the attendance of his witnesses. It was merely fixed for further hearing. In the instant case the petitioner moved for a date not because he wanted a date to lead his own evidence or to summon witnesses to give evidence but because his Counsel did not make an appearance in Court to conduct the case and because he could not have conducted the trial personally, as there was a registered Attorney on record. Therefore when the petitioner moved for a date it was open to the District Judge, to either in his discretion, to allow a date subject to terms or refuse to grant a date and dismiss the case, but the learned District Judge could not have directed the plaintiff to conduct the trial and proceed with the case in person as there was an Attorney-at-Law on record. Hence the judgment of the learned District Judge in dismissing the action cannot be branded as erroneous or illegal. (Vide ss. 82 & 87(1) of the Ci.P.C.)

It is apparent from the tenor of the language of the petition of appeal and the written submissions of the Counsel for the petitioner that the petitioner, made this application for revision on the premise that the impugned judgment or order dated 18.04.2005 was an *inter-partes* judgment. If it were to be considered as an *inter-parte* judgment then the petitioner should fail in this application for revision because the petitioner failed to disclose exceptional circumstances in order to invoke the revisionary jurisdiction of this court when there was an alternative remedy by way of an appeal available to him.

If the judgment were to be considered as *inter-partes*, perhaps one could argue that the judgment is unreasonable or unfair, which is purely a matter of discretion. In which event the petitioner should have appealed against the said judgment. The petitioner could move in revision only if the exercise of discretion was perverse or manifestly illegal.

Let us assume a situation where the Attorney-at-Law fails to appear in Court not due to his negligence but because he was indisposed. In such a situation will the plaintiff be prevented from relying on section 87(3) of the Civil Procedure Code, as it is not the plaintiff who really defaulted? But justice and fair play demand that in such a situation too the plaintiff should be allowed to proceed under section 87(3) to purge the default of his Attorney-at-Law. If it is found that the Attorney-at-Law did not appear due to his negligence, then the application to purge default shall fail and the Attorney-at-Law will have to take the responsibility for his default.

The petitioner moved for a date on 16.08.2004 and the matter was finally fixed for 02.12.2004. As the petitioner moved for a date on that date too, the learned District Judge even though he had the discretion to adjourn the hearing for good reasons, refused to grant further time and dismissed the case. In the instant case the petitioner should have made an application to purge default under section 87(3) of the Civil Procedure Code. Instead the petitioner opted to file this application for revision. Therefore we cannot see any valid reason, let alone exceptional circumstances to interfere with the impugned judgment by way of revision as the petitioner should have made an application to the same Court under section 87(3) to have the said judgment entered upon default set aside.

It was held in *Andradie* v *Jayasekera Perera*[8] that the practice has grown and hardened into a rule that where a decree or judgment has been entered *exparte* or on default of appearance and is sought to be set aside, on any ground, application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application is not consistent with reason or the proper exercise of the judge's discretion or where he has misdirected himself on the facts or law that the Court of Appeal will grant the extraordinary relief by way of Revision or *Restitutio Intergrum.*

A distinction can be drawn between the various reasons for which a plaintiff may default. It may be the failure on the plaintiff to appear in Court or the failure on the part of his Attorney-at-Law to appear in Court or the failure on the part of both the plaintiff and the Attorney-at-Law to appear in Court on the day fixed for the trial.

In the instant case the petitioner was present in Court but was not represented by his Attorney-at-Law. Therefore there was no proper

appearance on behalf of the petitioner. The presence of the petitioner in Court cannot be considered as an appearance as the petitioner couldn't have taken any action or steps on his behalf without his lawyer. For all purposes the so-called appearance has to be treated as mere presence and not as an appearance. The converse is rather different. If the petitioner was absent and the Registered Attorney-at-Law had moved for a date on the ground that he was not well without explaining the absence of his client and the learned District Judge had dismissed the case refusing to grant a postponement then the judgment would be an *inter partes* judgment. In *Don Gamini Abeysundara* v *Malalage Gunapala*(9). The Attorney-at-Law moved for a date on the ground that he was not well and not because the plaintiff was absent. The learned District Judge dismissed the case as the plaintiff was absent. It was held that it was not an order made on default.

Per Gamini Amaratunge, J. "When an action is dismissed in the presence of a party's lawyer after refusing an application for a postponement it is not an order made for default. The order dismissing the action had been made *inter partes*. Such an order cannot be set aside under Section 87(3). The remedy for the plaintiff is a final appeal. Therefore the purported application made by the plaintiff was misconceived in law and the learned District Judge was correct in refusing the application of the plaintiff."

If the Attorney-at-Law had stated that he had no instructions and that, he did not appear, it would have been a different kettle of fish. (Vide. *Isek Fernando* v *Rita Fernando and others*(10)).

For the reasons adumbrated by me, whatever the stand point from which one looks at the issue as to the maintainability of this application for revision namely whether the impugned Judgment amounts to a dismissal of the action for non appearance of the plaintiff or a dismissal *inter partes* (default Judgment or an *inter partes* judgment) I hold that the petitioner in any event cannot maintain this application for revision.

I dismiss this application for revision with costs fixed at Rs. 7500.00.

A.W.A. SALAM, J. – I agree.

Application dismissed.