PACKIYANATHAN
V.
SINGARAJAH

SUPREME COURT.
FERNANDO, J., AMERASINGHE, J. AND KULATUNGA, J.
S. C. APPEAL NO. 2/89.
C. A. NO. 151/80F.
D. C. Vavuniya 2477/RE.
September 02, 1991.

Appeal — Application for re-hearing - Civil Procedure Code, section 771 - Grounds which warrant a re-hearing - Negligence of Attorney-at-Law and client.

Relief will not be granted for default in prosecuting an appeal where —

(a) the default has resulted from the negligence of the client or both the client and his attorney-at-law,

(b) the default has resulted from the negligence of the attorney-at-law in which event the principle is that the negligence of the attorney-at-law is the negligence of the client and the client must suffer for it.

As the applicant's default appeared to be the result of his own negligence as well as the negligence of his attorney-at-law the conduct of the appellant and his attorney-at-law cannot be excused. The appellant had failed to adduce sufficient cause for a re-hearing of the appeal.

It is necessary to make a distinction between mistake or inadvertence of an attorney-at-law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. The Court will in granting relief ensure that it's order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.

Cases referred to:

1. *Kalawana Dhammadassi Thero v. Mawella Dhammavisuddhi Thero* 57 NLR 400
2. *Pakir Mohideen v. Mohamadu Casim* 04 NLR 299
3. *Carolis Appuhamy v. Singho Appu* 05 NLR 75

4. *Scharenguivel v. Orr* 28 NLR 302
5. *Kathiresu v. Sinniah* 71 NLR 450
6. *Gianchand v. Hyder* 74 NLR 300
7. *Jandi v. Pinidiya* 74 NLR 433 (D.B.)

APPEAL from order of Court of Appeal refusing to re-list appeal for hearing.

R.E. Thambiratnam with *Mr. Bazar* for Appellant.

S. Mahenthiran for Respondent.

Cur.adv.vult.

SEPTEMBER 25, 1991.

Kulatunga, J.

This is an appeal from an order of the Court of Appeal refusing an application by the appellant on 22.09.1988 in terms of s. 771 of the Civil Procedure Code to rehear the appeal in the above action which had been decided ex parte against him. Section 771 empowers the Court to rehear an appeal on grounds specified therein or for other "sufficient cause". The Court was of the opinion that there were no reasonable grounds warranting an order for rehearing the appeal.

The appellant was a sub-tenant of certain premises under the respondent who had leased it from one Govindapillai. The respondent sued the appellant to have him ejected therefrom. On 23.01.80 the District Judge dismissed the action on the ground that the notice to quit given to the appellant (defendant) is not a valid notice. The respondent appealed to the Court of Appeal. The appellant instructed Mr. Vilvarajah his Attorney-at-Law in the District Court to take necessary steps in connection with the appeal and to retain Counsel to resist the appeal. He used to periodically visit Mr. Vilvarajah to

inquire about the appeal and was told that necessary steps had been taken and that he would be informed when the appeal was taken up for hearing.

The appellant had taken the said premises on a monthly rental of Rs. 25/- and was carrying on the business of cycle repairs there. Pending the appeal the lease of the premises to the respondent appears to have expired whereupon the owner Govindapillai leased it to the appellant on 01.01.1982. The appellant states that he received no information from Mr. Vilvarajah regarding the appeal; that Mr. Vilvarajah died at the hands of an assassin in April 1988 after which he visited Mr. Vilvarajah's office and collected the appeal brief and other documents in the case; he also caused inquiries to be made about the appeal and learnt in September 1988 that the appeal had been heard ex-parte and judgment delivered on 23.10.1985 setting aside the judgment of the District Judge and entering judgment for the respondent as prayed for with costs in both Courts.

The appellant complains that the order of the Court of Appeal was not communicated to him by the District Court of Vavuniya nor were any steps taken by that Court to eject him from the premises in suit; but that prior to his becoming aware of the order in appeal, the respondent with the assistance of some unknown persons forcibly evicted him from the premises on 18.01.1988; and that an attempt by his lawyers to file a plaint in the District Court was unsuccessful for the reason that the Court had ceased to function.

The above facts show that the immediate reason for the appellant to make inquiries about the appeal was probably his ejectment from the premises in suit which occurred on 18.01.1988 whilst Mr. Vilvarajah was yet alive. However neither Mr. Vilvarajah before his death in April 1988 nor the appellant until late that year had obtained a copy of the judgment in appeal.

According to the date stamp of the Court of Appeal on P3, copy of the judgment., it had been obtained on 15.08.1988. Had the appellant taken the trouble to obtain it earlier he could have applied to the Court of Appeal for rehearing the appeal much earlier than September 1988.

In refusing his application the Court was of the view that no reasonable grounds exist to relist the matter. As reasons for its order the Court said that the appellant's Attorney-at-Law had died in April 1988 while the appeal had been decided on 23.10.1985, the 3rd occasion when it had been listed for argument. The facts set out above indicate that after the execution of a lease in his favour in 1982 the appellant probably lost interest in the appeal and left it entirely to his Attorney-at-Law, possibly for the reason that he felt secure in the possession of those premises as he was no longer a sub-tenant under the respondent. His affidavit does not indicate whether apart from obtaining the appeal brief either of them did anything else regarding the appeal. It is silent as to whether Counsel were retained to argue the appeal and whether lawyer's fees were paid. It is also silent as to whether there was any attempt to check from the Registry of the Court of Appeal regarding listing. The inference from this is that they took no steps to ascertain the progress of the appeal which was concluded in 1985 and continued to be negligent thereafter and failed to take prompt steps even after the forcible ejectment of the appellant in January 1988.

At the hearing before us Mr. Thambiratnam learned Counsel for the appellant submitted that the default of the appellant to be represented at the appeal before the Court below occurred entirely due to the negligence of his Attorney-at-Law; that the appellant had taken all the steps within his competence; and that in the circumstances of this case he should not be deprived of a hearing and as such is entitled to an order for a rehearing of the appeal.

On the facts of this case the appellant's default appears to be the result of his own negligence as well as the negligence of his Attorney-at-Law. Even if it was the negligence of his Attorney-at-Law alone the decisions of this Court which I shall presently discuss are against him, the principle being that "the negligence of the proctor is in law the negligence of the client" and "the client must suffer for his proctor's negligence". The case of *Kalawana Dhammadassi Thero v. Mawella Dhammavisuddhi Thero* (1) cited by the learned Counsel for the appellant has no application. In that case the proctor for the respondent to the appeal had falsely informed the respondent that he had retained Counsel to represent him; further during the pendancy of the appeal, the proctor had been suspended from the practice of his profession for a certain period. Gratiaen J. held that there was "sufficient cause" within the meaning of s.771 of the C.P.C. to rehear the appeal. The instant case is different.

In view of the fact that applications for rehearing are being made on an increasing scale we think it appropriate to make a brief survey of the previous decisions in the matter and to state the law in the light of those decisions. I have already referred to one such decision. Some of the other decisions which are relevant relate to applications made to the District Court for relief against ex parte orders entered by reason of default by the defendant or the plaintiff. Default in the District Court is curable by showing "reasonable grounds" therefor whilst in appeal the defaulting party must adduce "sufficient cause" for relief. The duties of legal advisers representing clients and the legal consequences of negligence on their part are the same in the original and appellate Courts.

In *Pakir Mohideen v. Mohamadu Casim* (2) the defendant had noted the trial date incorrectly when his proctor's clerk gave it to him, took no steps to get ready for trial and was absent at the trial. His proctor appeared and stated that he had no instructions and withdrew from the case. After ex parte

proceedings decree nisi was entered against him. An application to set aside the judgment on the ground that the defendant had mistaken the date of trial was refused by the District Judge. The Supreme Court refused to revise that order observing that the proctor had been forgetful or neglectful of the interests of his client in particular in failing to ask for instructions in the matter.

Bonser C.J. said -

> "If the Proctor did not do his duty, he is to blame for the absence of the defendant and the defendant must suffer for the fault of his Proctor".

In *Carolis Appuhamy v. Singho Appu* (3) the Supreme Court set aside a decree dismissing the plaintiff's action for non-appearance where the plaintiff's absence which led to the dismissal of his action was due to his continuing illness for some months. In *Scharenguivel v. Orr* (4) when the trial was fixed neither the plaintiff nor his proctor was present in Court. On the trial date proctors for both parties were present but the proctor for the plaintiff stated that he had no instructions from his client whereupon the case was dismissed.

The District Judge disallowed an application to set aside the decree on the ground that the plaintiff was not ignorant of the date of trial. In appeal Lyall Grant J. found that there was negligence on the part of the proctor and not personal negligence on the part of the plaintiff and said —

> "That, however is immaterial. The plaintiff must suffer for his proctor's negligence. This is clearly laid down by Bonser CJ in *Pakir Mohideen v. Mohamadu Casim*" (2).

Lyall Grant J. thought that the relevant circumstances of *Pakir Mohideen's* case appear indistinguishable from those in the case before him. To my mind, however, the circumstances in these cases are distinguishable to the extent that in the earlier case both the client and the proctor were negligent whereas in the later case only the proctor was negligent.

In *Kathiresu v. Sinniah* (5) the plaintiff and his proctor were both absent on the trial date because the proctor had taken down the date of trial incorrectly. Fernando CJ set aside the decree nisi entered on account of the plaintiff's non-appearance following a case reported in 16 Times of Law Reports p.119 in which the only reason for non-appearance was a mistake by the parties' proctor.

In *Gianchand v. Hyder* (6) Queen's Counsel failed to appear for the plaintiff-respondent at the hearing of the appeal because his clerk had inadvertently failed to notify the Registrar of the Court of the fact that he had been retained. The appeal was heard ex parte, the judgment was reserved on 06.06.1970 and the order was delivered on 16.07.1970 against the plaintiff-respondent. The Supreme Court accepted Queen's Counsel's explanation for his absence but refused to reopen the appeal in the absence of an explanation by the junior Counsel why he failed to appear. Alles J. also observed that had the plaintiff-respondent's legal advisers been alert they would have been aware that the appeal had been listed, heard and the judgment reserved soon after 06.06.1970.

In *Jandi v. Pinidiya (Divisional Bench)* (7) the proctor who appeared for the petitioners in a partition case desired to have his proxy revoked as he was not able to appear and told them that the statement of claim had been fixed for 07.04.1968 a date which he had obtained from the Court Mudaliyar who submitted the record to the Judge for orders with a minute specifying the date which the District Judge would have ordinarily adopted according to a practice in that Court. Later the petitioners appealed to the proctor to appear for them but on inspecting the record of the case the proctor found that the Judge had ordered 02.02.1968 for the statement of claim. No statement of claim having been filed on that date he fixed the trial for 23.03.1968 on which date interlocutory decree was entered. Fernando CJ (with Silva SPJ agreeing) observed that the proctor had neglected the interests of the client and on a

strict application of precedent the application to set aside the interlocutory decree will have to be dismissed as the client must suffer for his proctor's negligence on the ground that the fault of the agent has to be attributed to the client. He added that the justification for this principle is that under the Common Law a client has a right of action against his proctor for damages sustained as a result of the negligence of the proctor. However, the Chief Justice distinguished the case before him from others in which questions of default had been considered. He said that if for a long period officers of the District Court have customarily given information as to dates fixed for steps in an action, a proctor may perhaps have some excuse for thinking that information thus furnished is correct. He also noted that the reason why the proctor for the petitioners desired to cancel the proxy given to him by the petitioners was that another proctor was personally interested in the partition action and thought that there are circumstances in the case which might lend support to the criticism that the conduct of petitioners and Court officers has deprived the petitioners of their right to be heard in the partition action.

Upon those considerations Fernando CJ felt that the principle "justice must not only be done but must also appear to be done" should be applied and directed that subject to the deposit of Rs. 500/- payable to the respondents and the payment of costs in the District Court, the interlocutory decree will be set aside but with a warning that the Court "will not in future be inclined to grant relief when practitioners fail to carry out their responsibilities".

Weeramantry, J. (dissenting) was unable to excuse the conduct of the proctor in failing to verify the date on the record and preferred to dismiss the application applying the principle that the negligence of the proctor is in law the negligence of the client.

To sum up the position in the light ot the above decisions, it seems that relief may not be granted -

(a) where the default has resulted from the neligence of the client or both the client and his Attorney-at-Law;

(b) where the default has resulted from the negligence of the Attorney-at-Law in which event the principle is that the negligence of the Attorney-at-Law is the negligence of the client and the client must suffer for it.

However, it is necessary to make a distinction between mistake or inadvertence of an Attorney-at-Law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend upon the facts and circumstances of each case; and where the conduct of Counsel is involved the Court will, in granting relief, ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.

Applying the above principles to the facts of this case, I am of the view that the conduct of the appellant and his Attorney-at-Law cannot be excused and the appellant had failed to adduce sufficient cause for a rehearing of the appeal.

The learned Counsel for the respondent also raised a preliminary objection that the special leave to appeal was filed out of time. The application for relisting was refused on 29.09.1988, but the special leave application was lodged on 27.10.1988. This Court has granted special leave to appeal ex parte subject to any objections that the respondent would take at the hearing of the appeal. Learned Counsel for the appellant submitted that the delay in filing the application for special leave strictly within time should be excused for the reason that the order appealed from had been made in chambers and hence the appellant was not aware of it for some time.

The order appealed from has been produced marked P2. According to an entry therein it had been certified on 05.10.1988. As the date stamp of the Court of Appeal thereon indicating its issue is not decipherable I had the records of the

Court of Appeal checked and find that it has been issued after 4.20 p.m. on 05.10.1988. If so, the delay would be just one day which if not excused will bar this appeal; but as the appellant was not heard on these facts and in view of my finding above, I do not consider it necessary to decide the preliminary objection.

For the foregoing reasons, I affirm the order of the Court of Appeal and dismiss the appeal with costs.

Fernando, J. — I agree.

Amerasinghe, J. — I agree.

Appeal dismissed.