REV. SUMANATISSA
vs
HARRY

COURT OF APPEAL
ROHINI MARASINGHE. J.
SARATH DE ABREW. J.
CA 959/95 (F).
DC EMBILIPITIYA 2930.
FEBRUARY 27, 2009.
MARCH 30, 2009.

Civil Procedure Code Section 87 (1) (2) (3) - Plaintiff absent - Trial date - Application to purge default - Reasonable time - reasonable grounds for non appearance - liberal approach? - Subjective approach? - Record the presence of parties - vital?

The plaintiff-appellant instituted action seeking inter alia for a judgment to eject the defendant - respondent. As he was absent on the trial date, the action was dismissed. The plaintiff's application to purge the default was also refused.

Held:

(1) On an analysis of section 87 (3) of the Code the limiting factors would be that the application to restore should be made within a reasonable time and the plaintiff should satisfy Court that there were reasonable grounds for non appearance.

In the instant case the application to purge the default was made within a reasonable time of 19 days.

(2) The legislature in its wisdom had not set a rigid deadline as to what period of time should construe within a reasonable time. This is a clear indication that in interpreting Section 87 (3) Court must use the yardstick of a subjective test rather than a less flexible objective test in determining what is reasonable.

Per Sarath de Abrew. J:

"Applying this liberal approach in determining whether the plaintiff has satisfied Court in adducing reasonable grounds for non appearance,

in my view, where necessary, Court is not precluded from having recourse to other salient feature in the case in hand to determine whether the plaintiff exhibited blatant and willful default, which features would perhaps tilt the balance in favour of the plaintiff. Special attention may be given to the past history of the case with the past conduct of the defaulter and his opponent being subject to scrutiny...."

(3) In applying the subjective test as to whether the plaintiff afforded reasonable grounds for his non-appearance, in the absence of any evidence to establish willful default and taking into consideration the past history as to the conduct of parties the unchallenged averments in the affidavit of the plaintiff-the evidence on oath of the plaintiff - the old age, infirmity and the status of the plaintiff and the unlikelihood of the plaintiff inventing the story as to the trip to Colombo, any doubt arising out of the above should have been redressed in favour of the plaintiff.

Held further:

(4) Where the trial Judge proceeds to dismiss the action of the plaintiff due to his non-appearance there is an implied duty cast on him to record in the journal as to the presence or absence of the defendant. The trial Judge has failed to give due consideration to this important aspect which would have had a vital bearing on the outcome of the inquiry under Section 87 (3).

(5) It may well be that the plaintiff may have been negligent in not ensuring that his lawyer appeared in Court, and informed Court of his illness. Negligence may in certain circumstances constitute reasonable grounds within the meaning of Section 87 (3).

APPEAL from a judgment of the District Court of Embilipitiya.

Cases referred to:-

(1) *Chandrawathie vs. Dharmaratne* 2002 1 Sri LR

(2) *CALA 154/91 DC Colombo* CAM 3.10.1991

P. L. Gunawardene with K. W. E. Karaliyadda for substituted plaintiff - appellant.

P. Peramunagama for defendant - respondent.

Cur.adv.vult.

July 7, 2009

SARATH DE ABREW, J.

The plaintiff-appellant (now deceased) had instituted action in the District Court of Embilipitiya seeking, inter alia, for a judgment to eject the defendant-respondent from the premises in suit which is morefully described in the schedule to the plaint. The defendant-respondent (hereinafter sometimes referred to as the Respondent) filed answer and the trial commenced on 28.10.93 and the parties raised issues. Subsequently the trial was refixed for 07.07.94. On this date as the plaintiff defaulted from appearing in court the learned trial Judge dismissed the action. On 26.07.94 the plaintiff filed petition and affidavit in order to restore the case and the application was fixed for hearing where the plaintiff gave evidence and marked two documents P1 and P2 in order to purge the default. On 28.09.95 the learned trial Judge made order refusing to set aside the order of dismissal made on 07.07.94. Being aggrieved by the said order the plaintiff-appellant has submitted this appeal to this Court in order to have the order of 28.09.95 set aside. After the demise of the plaintiff subsequently, the present Chief Incumbent of the temple concerned had been substituted as the Substituted Plaintiff-Appellant (hereinafter sometimes referred to as the Appellant).

At the hearing of the Appeal both parties filed written submissions and agreed to abide by the order made thereon. I have perused the entirety of the written submissions thus filed, the journal entries, proceedings and other documents in the trial case at D. C. Embilipitiya.

The facts briefly are as follows: According to the evidence of the plaintiff, on the day in question, namely 07.07.94, the plaintiff priest suffering from a diabetic condition, had felt faintish the previous day and had decided to travel to Colombo from Embilipitiya in a vehicle to seek specialist treatment from one Dr. Wijesuriya. He had left around

5 a.m. and returned to Embilipitiya the same day afternoon after obtaining medicine from Dr. M. A. Wijesuriya, consultant physician, to which effect he had produced the medical prescription marked P1. Prior to leaving Embilipitiya the plaintiff priest had made arrangements to despatch another priest from the temple to meet the lawyer of the plaintiff to inform of the illness of the plaintiff and obtain a date. Apparently this had not been conveyed to Court as the journal entry of 07.07.94 reads "පැමිනිලිකරු පැමිණ නැත. පැමිනිල්ල විභාගයට සූදානම් නැත. පැමිනිල්ල නිශ්ප්‍රභා කරමි." This journal entry is silent as to the presence of the defendant or his counsel.

Having obtained a medical certificate (marked P2) on 12.07.94 from the consultant physician, the plaintiff had filed petition and affidavit on 26.07.94 to purge the default and restore the case. After due inquiry, at which the plaintiff priest had given evidence and was duly cross-examined, and documents P1, and P2 were marked subject to proof, the learned trial Judge had delivered order on 28.09.95 refusing to set aside the order of dismissal. The impugned order has been made under section 87 (3) of the Civil Procedure Code.

Section 87 of the Code reads as follows:

"87 (1) Where the plaintiff or where the plaintiff and the defendant make default in appearing on the day fixed for trial, the Court shall dismiss the plaintiff's action.

(2) Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.

(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice the Court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the Court shall make order

setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made."

On an analysis of section 87(3) of the Code, the limiting factors would be that the application to restore should be made within a reasonable time and that the plaintiff should satisfy Court that there were reasonable grounds for non-appearance. In the instant case the application to purge the default has been made within a reasonable time of 19 days. The legislature in its wisdom had not set a rigid deadline as to what period of time should construe within a reasonable time. This is a clear indication that in interpreting section 87(3) of the Code, court must use the yardstick of a subjective test rather than a less flexible objective test in determining what is reasonable. A broad and flexible interpretation should therefore be given to the word reasonable. Employing this liberal approach in determining whether the plaintiff has satisfied Court in adducing reasonable grounds for non-appearance, in my view, where necessary, Court is not precluded from having recourse to other salient features in the case in hand to determine whether the plaintiff exhibited blatant and willful default, which features would perhaps tilt the balance in favour of the plaintiff. Special attention may therefore be given to the past history of the case with the past conduct of the defaulter and his opponent being subject to scrutiny, and whether the defaulter derived any undue advantage as a result of the default, and last but not the least, the effect of such default on the daily functioning of the Court concerned on that particular day.

In this respect, in *Chandrawathie vs Dharmaratne*[1] it has been held that our Courts have extended a liberal attitude in analyzing the evidence and pleadings in cases of default of the plaintiff under section 87(3) of the Code. This is all the more significant as the provisions contained in section

87(2) and 88(1) of the Code debar a fresh action and subsequent appeal respectively where judgments are entered upon default which would deny the defaulting litigant any further opportunity to vindicate his rights under our civil law unless and until he succeeds in purging his default. This is all the more reason why our Courts should be more circumspect in refusing relief to defaulting litigants unless the very circumstances relating to the default demand otherwise.

With the above guidelines in mind I now approach the problem. For the following reasons enumerated below I am inclined to take the view that the learned trial Judge has erred in law in refusing to set aside the dismissal on default.

The evidence discloses that the plaintiff was an elderly priest around 80 years of age with a severe diabetic condition. According to his uncontroverted evidence, on 06.07.94 he had felt faintish and decided to rush to Colombo to seek specialist treatment from his regular consultant physician. He had taken steps to send another priest to inform his lawyer to obtain a date. This apparently had not been conveyed to Court due to some undisclosed reason. The ailing plaintiff priest was well within his rights to decide on the best course of action with regard to his ailment. This was the first time he had defaulted on the grounds of ill health. The learned trial Judge need not have embarked on a voyage of discovery to determine whether the plaintiff was justified in going to Colombo to seek treatment. The issue in contention should have been whether the plaintiff was medically unfit to appear before Court, irrespective of whether he was justified in seeking specialist treatment in Colombo or not. Even though marked subject to proof, the medical prescription P1 and the medical certificate P2, the unchallenged averments in the plaintiff's affidavit dated 26.07.94 and the evidence on oath of the plaintiff, in my view, applying a subjective test, and in view of the lack of any evidence to establish willful default, would have constituted reasonable grounds for the non appearance of the plaintiff. Taking into

consideration the old age, infirmity and the stature of the plaintiff as a Chief Incumbent of a temple, the unlikelihood of the plaintiff inventing the story as to the trip to Colombo, any doubt arising out of the above should have been resolved in favour of the plaintiff.

Further, paragraph 06 of the petition and affidavit of the plaintiff dated 26.07.94 allege that the defendant too was absent and moved for a date. This has not been challenged by the defendant when the plaintiff was cross-examined. The journal entry of 07.07.94 is silent as to the presence or absence of the defendant. Section 87(1) of the Code provides for a situation where the plaintiff or where both the plaintiff and the defendant make default in appearing. Under the circumstances, where the trial Judge proceeds to dismiss the action of the plaintiff due to his non appearance, there is a implied duty cast on him to record in the journal entry or the proceedings as to the presence or absence of the defendant. In the impugned order of 28.09.95 the learned trial Judge has failed to give due consideration to this important aspect, which would have had a vital bearing on the outcome of the inquiry under section 87(3) of the Code.

An illuminating insight as to the past conduct of the parties is afforded on perusal of the journal entries where the following matters are also disclosed:

(a) The defendant had moved for postponement on four occasions for various reasons and was granted dates - namely 15.11.90, 30.05.91, 10.10.91 and 06.05.92.

(b) The only two occasions the plaintiff defaulted, the case had been dismissed on both occasions - namely 22.07.92 but restored on 07.07.93 and finally on 07.07.94.

The circumstances enumerated above tilt the decision in favour of the plaintiff.

Therefore in applying the subjective test as to whether the plaintiff afforded reasonable grounds for his non-

appearance, in the absence of any evidence to establish willful default, and taking into consideration the past history as to the conduct of the parties concerned I hold that the learned trial Judge had failed to exercise a reasonable judicial evaluation of the material at his disposal in refusing to restore the case. It may well be that the plaintiff may have been negligent in not ensuring that his lawyer appeared in Court and informed Court of his illness. Negligence may in certain circumstances constitute reasonable grounds within the meaning of section 87(2) of the Code.

The learned counsel for the Respondent contended that no proper notice had been given of the application of the plaintiff to restore the case. However the journal entry of 14.10.94 discloses that notice had been given before the inquiry which commenced on 19.10.94. No prejudice has been caused to the Defendant-Respondent who had been represented by counsel at the inquiry and the plaintiff himself had been subject to lengthy cross-examination.

In view of the foregoing reasons, I set aside the impugned order of the learned District Judge of Embilipitiya dated 28.09.95 and further make order that this case be sent back to the District Court of Embilipitiya to recommence trial from the stage it had been dismissed. The Registrar is directed to send a copy of this order along with the original record forthwith to the District Court of Embilipitiya. In all the circumstances of this case I make no order as to costs.

Appeal is therefore allowed.

MARASINGHE, J. - I agree.

Appeal allowed

Case sent back to recommence trial.