

CHANDRAWATHIE
v.
DHARMARATNE AND ANOTHER

SUPREME COURT
S. N. SILVA, C.J.
BANDARANAYAKE, J. AND
YAPA, J.
SC (APPEAL) NO. 10/2001
CA (APPEAL) NO. 312/91(F)
DC (COLOMBO) NO. 5161 (ZL)
MARCH 26 AND SEPTEMBER 7, 2001

Civil Procedure Code – Dismissal of action for plaintiff's default – Application for setting aside the order of dismissal – Section 87 (3) of the Code – Requirement that the petition be supported by affidavit – Sections 168, 181 and 438 of the Code – Whether a defect in plaintiff's own affidavit would per se disqualify relief.

The plaintiff instituted action in the District Court against the 1st and 2nd defendants for declaration of title and ejectment from the land in suit. On 03. 10. 1988 the case was fixed for trial on 01. 03. 1989. The plaintiff was not present. His registered attorney who was present took down the date as 03. 03. 1989 and informed the plaintiff accordingly. On 03. 03. 1989 the plaintiff came to know that the case had been fixed for trial on 01. 03. 1989. Consequently, the plaintiff was absent and unrepresented on 01. 03. 1989; whereupon the District Judge dismissed the action. Thereafter, the plaintiff applied to the District Judge to have the order of dismissal vacated in terms of section 87 (3) of the Civil Procedure Code. He also tendered to Court an affidavit from his registered attorney. The 2nd defendant objected to the application on the ground that the plaintiff's affidavit was not confined to statements of such facts as the plaintiff was able of his own knowledge and observations to testify to and; (b) the plaintiff in making his affirmation failed to profess that he was a non-Christian. Section 168 of the Code also refers to this requirement for a non-Christian.

Held:

Even though the failure of the plaintiff to specify in his affidavit that he was a non-Christian denudes the document of the essential characteristics of an affidavit yet, the affidavit of the registered attorney should have been considered sufficient to explain the facts relevant to the default as the wrong date was taken down by the registered attorney on 03. 10. 1988.

The plaintiff was not in Court on that day. He could not therefore, testify to the relevant matters of his knowledge and observations as required by section 181 of the Code.

Cases referred to:

1. *Simeon Fernando v. Goonesekera* – (1946) 47 NLR 512.
2. *Samarakoon v. Ponniah* – (1931) 32 NLR 257.
3. *Kanagasabai v. Kirupamoorthy* – (1959) 62 NLR 54.
4. *Damayanthi Abeywardene and Another v. Hemalatha Abeywardena and Others* – (1993) 1 Sri LR 272.

APPEAL from the judgment of the Court of Appeal.

A. K. Premadasa, PC with C. E. de Silva for appellant.

S. Gunasekera for respondent.

Cur. adv. vult.

November 1, 2001

SHIRANI A. BANDARANAYAKE, J.

The plaintiff-petitioner-appellant-respondent-respondent (hereinafter referred to as the 1st respondent) instituted action in the District Court of Colombo against the 1st defendant-respondent-respondent-respondent-respondent (hereinafter referred to as the 2nd respondent) and the 2nd defendant-respondent-respondent-petitioner-appellant (hereinafter referred to as the appellant) for a declaration of title and ejection of appellant and 2nd respondent from the allotment of land known as Kahatagahawatta (marked Lot A3 in Plan No. 5193 made by M. B. de Silva, Licensed Surveyor). On 03. 10. 1988 the case was fixed for trial on 01. 03 1989 (X3 and X3b). When the case was taken up for trial on 01. 03. 1989, the 1st respondent was absent and unrepresented and the Additional District Judge, dismissed the action (X4). Thereafter, the 1st respondent made an application to the District Court, Colombo, to have the order of dismissal vacated

(X5 and X6). The 1st respondent had also tendered to Court an affidavit of the registered attorney for the 1st respondent (X7). The appellant filed her statement of objection to this application (X8 and X9). The application made to vacate the order of dismissal was taken up for inquiry on 21. 03. 1991 and the counsel for appellant raised a preliminary objection. He submitted that as the affidavit of the 1st respondent (X6) did not conform to the provisions of sections 181 and 438 of the Civil Procedure Code, the 1st respondent cannot maintain the said application (X10). The learned Additional District Judge of Colombo on 07. 05. 1991 rejected the application filed by the 1st respondent to vacate the order of dismissal (X11). The 1st respondent appealed to the Court of Appeal against this order (X12). On 30. 11. 2000, the Court of Appeal allowed the said appeal on the basis that the learned Additional District Judge should have considered the affidavit of the 1st respondent's registered attorney. The appellant sought for special leave to appeal from this Court against the said order.

This Court granted leave to appeal on the following question :

"whether the application to set aside the order of dismissal has been in compliance with the provisions of section 87 (3) of the Civil Procedure Code."

Chapter XII of the Civil Procedure Code deals with the consequences and cure (when permissible) of default in pleading and appearing in Court. Section 87 which falls under that chapter is with regard to the non-appearance of plaintiff. Section 87 (3) of the Code reads as follows:

"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."

The requirements of section 87 (3) of the Civil Procedure Code 50 as to an application to cure a default are two-fold: Firstly, the plaintiff must make his application within a reasonable time from the date of dismissal of his action. Secondly, the plaintiff must make such application by way of petition supported by affidavit. The affidavit of the 1st respondent, which was in Sinhala, commenced with the following words:

"කළුතර බොම්බුවල කන්ද මාවතේ පදිංචි ගණයේ දෙක පාලිත විකුම්භිර ධර්මරත්න වන මා ගම්භිරතා පුරවකව ද, අවංකව ද, සත්‍ය ලෙස ද, මෙය ප්‍රකාශ කරමි."

The jurat of the affidavit was worded as follows:

"1989 ක වූ මාරතු මස 30 වන දින කියවා මගේ අත්සන කොළඹ දී තබන බවයි." 60

It is, therefore, apparent that the affidavit of the 1st respondent does not comply with the requirements of section 168 of the Civil Procedure Code which states that,

". . . witnesses not professing to be Christians or Jews shall be examined on affirmation. The same rule shall apply to affidavits . . ."

The failure to specify, when the deponent was a non-christian, that he was affirming to the matters therein denudes the document of the essential characteristics of an affidavit in terms of sections 168 and 438 of the Civil Procedure Code and Form 75 of the 1st schedule 70 to the Civil Procedure Code.

The next matter to be considered is whether the affidavit of the registered attorney that was filed with the petition, satisfies the requirements of section 87 (3). Learned President's Counsel for the appellant contended that a valid affidavit of the plaintiff in support of the averments of the petition is an essential component of an application under section 87 (3) and that the affidavit of the registered attorney does not satisfy this requirement.

I am in agreement with the learned President's Counsel for the appellant that the affidavit filed by the 1st respondent is not in ⁸⁰ compliance with sections 168 and 438 of the Civil Procedure Code. However, I am unable to agree with the learned President's Counsel that the affidavit filed by the registered attorney of the 1st respondent cannot be considered in terms of section 87 (3) of the Civil Procedure Code.

Section 87 (3) provides for the Court to consider setting aside a dismissal due to the non-appearance of the plaintiff. For this purpose, the plaintiff would have to satisfy the Court that there were reasonable grounds for his non-appearance in Court. The process for invoking the jurisdiction of this Court in this regard is by way of petition ⁹⁰ supported with affidavit. Although it is mandatory that the plaintiff must make his application by way of petition supported by affidavit, section 87 (3) does not specify that the affidavit must be that of the plaintiff. The only requirement according to section 87 (3) is that there should be an affidavit which supports the petition of the plaintiff, in order to set aside the dismissal.

Section 181 of the Civil Procedure Code, refers to the kind of statements that an affidavit can contain, which is in the following terms:

"Affidavits shall be confined to the statements of such facts as the declarant is able of his knowledge and observation to testify ¹⁰⁰ to, except on interlocutory applications in which statements of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit."

Section 181 is specific that the affidavit must contain statements of such facts which the declarant is able to testify of his own knowledge and observations. In *Simeon Fernando v. Goonesekera*⁽¹⁾ it was held that,

"... an affidavit must be confined to a statement of such facts as the declarant is able of his own knowledge and observations to testify to."

110

A similar view has been taken in *Samarakoon v. Ponniah*⁽²⁾ and *Kanagasabai v. Kirupamoorthy*⁽³⁾.

The only exception to this provision is with regard to interlocutory applications in which section 181 provides that statements of the declarant's belief must be set forth in the affidavit. This position was confirmed in *Damayanthi Abeywardene and another v. Hemalatha Abeywardene and others*⁽⁴⁾ where it was held by S. N. Silva J., (as he then was) in the following terms (at page 278):

"The rule in section 181 which confines an affidavit to 'a statement of such facts as the declarant is able of his own knowledge and observation to testify to' is intended to restrict the contents of affidavits to direct evidence as prescribed in section 60 of the Evidence Ordinance. By necessary implication it excludes hearsay from such affidavits. The only exception is that in interlocutory applications a statement of what is believed, as to the relevant facts, may be included. This exception is subject to a proviso that reasonable grounds for such belief should also be set forth in the affidavit".

120

The rule in section 181 of the Civil Procedure Code, therefore, is that the affidavit should contain only direct evidence. Referring to the kind of direct evidence that is expected in an affidavit under section 181 of the Civil Procedure Code, S. N. Silva J., (as he then was) said in *Damayanthi Abeywardene and another v. Hemalatha Abeywardene and others* (supra, at page 279):

130

"That is, a statement of such facts as the declarant is able of his own knowledge and observations to testify to, in relation to the matters set out or alleged in the petition."

The 1st respondent's action was dismissed on 01. 03. 1989, and on 03. 03. 1989, the 1st respondent filed a petition informing the Court of the circumstances relevant to the default. He stated that when the case came up for trial previously on 03. 10. 1988, he had not attended Court as he was indisposed. His registered attorney, who was present in Court on that day, had taken down the next date as 03. 03. 1989 and informed the 1st respondent accordingly. On 03. 03. 1989, the 1st respondent came to know that his case was fixed for trial not on 03. 03. 1989, but on 01. 03. 1989. 140

In these circumstances, it is clear that the facts relevant to the default were within the knowledge of the registered attorney and not of the 1st respondent. The wrong date was taken by the registered attorney on 03. 10. 1988 and it is not disputed that the 1st respondent was not in Court on that day. In such a situation, the 1st respondent cannot testify to these matters of his own knowledge and observation as required by section 181. The affidavit of the registered attorney should therefore be considered sufficient to explain the facts relevant to the default. 150

For the aforementioned reasons, I dismiss the appeal and affirm the judgment of the Court of Appeal.

There will be no costs.

S. N. SILVA, CJ. – I agree.

YAPA, J. – I agree.

Appeal dismissed.