GNANAWATHIE AND OTHERS
v
WIJESINGHE

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA , J.
C.A. 166/96
D.C. COLOMBO 15304/L
AUGUST 26, 2002 AND
JANUARY 23, 2003

Civil Procedure Code, sections 27(1)(2) 87(1)(3) 168, and 181 – Plaintiff absent – No instructions – Should he be noticed ? – Action dismissed – Legality of the order – Purging of default – Procedure – Laches – Affidavit of a non-Christian.

Held:

(i) When the trial was refixed an attorney-at-law had appeared instructed by the registered attorney and had informed court that he had no instructions from the plaintiff.

(ii) There was no legal requirement that notice be issued on the plaintiff-appellants when the trial was refixed, as the appellant's registered attorney was present in court.

(iii) When court acts under section 87(1), the plaintiff-appellants could apply to court under section 87(3). The application must be (i) within a reasonable time and (ii) supported by an affidavit.

(iv) There is laches on the part of the plaintiff-appellants. The plaintiffs have slept over the application for over 7 months.

(v) Once the registered attorney appoints a counsel, the counsel assumes full control of the case.

(vi) The affidavit does not comply with the requirements of section 168, which states that, "witness not professing to be Christian or .. shall be examined on affirmation". In the instant case, it was sworn to.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Jinadasa* v *Sam Silva* – (1994) 1 SRI LR 232.

2. *Chandrawathie* v *Damayanthie Abeywardena & others* (2002) 1 SRI LR 43 (SC).
3. *Damayanthie Abeywardena and Another* v *Hemawathie Abeywardena* – (1993) 1 SRI LR Page 272 (CA)
4. *Clifford Ratwatte* v *Thilanga Sumathipala and others* (2001) 2 SRI LR 55.

Surath Piyasena for plaintiff-appellant.

M.U.M. Ali Sabry for defendant-respondent.

Cur.adv.vult.

May 23, 2003

SOMAWANSA, J.

This is an appeal arising from the order of the learned Additional District Judge of Colombo dated 24.04.1996 dismissing an application made by the plaintiff-petitioners-appellants hereinafter referred to as the appellants to have the instant action restored to the trial roll which was dismissed on being informed by the registered attorney-at-law for the appellants that he has no instructions from the appellants. Proceedings reveal that the appellants were not present in Court on the day the action was dismissed.

Briefly the relevant facts are when the case was taken up for trial on 14th July, 1994 the attorney-at-law for the defendant-respondent-respondent, hereinafter referred to as the respondent moved for a postponement and the trial was re-fixed for the 10th of October 1994. On 15.07.94 as per journal entry 16, the attorney-at-law for the respondent had filed a motion moving that the case be called on 25.07.1994 in Court No. 06 to have the trial re-fixed for another day as the counsel for the respondent was indisposed on 10.10.1994. On 25.07.1994 the case was called and trial was re-fixed for the 20th October 1994. When the trial was taken up on 20.10.1994 the appellants were absent and their attorney-at-law had intimated to court that as the attorney-at-law for the defendant had got the trial date altered before the Additional District Judge the appellants could not have been aware that the trial has been re-fixed for 20.10.1994. In the circumstances, the Court made order that respondent was not entitled to costs for the day and re-fixed the trial for 13th February, 1995.

On 13.02.1995 the appellants were not present in Court. However Mr.Jayawardena, attorney-at-law purporting to appear on behalf of the appellants informed Court that he had no instructions from the appellants. Thereupon the Court dismissed the action with costs. On 04.10.1995 as per journal entry 20 the appellants filed a fresh proxy along with a petition and affidavit seeking to have the said order of dismissal of the action vacated and have the case restored to the trial roll. This application as stated above was dismissed by the learned Additional District Judge on the basis that the application is made after 8 months from the date of dismissal of the action and that there is no provision in the Civil Procedure Code for the appellants to make an application of this nature as the action has been dismissed on an application of the attorney-at-law for the appellants.

At the hearing of this appeal it was contended by the counsel for the appellants that inasmuch as Mr. Jayawardena, attorney-at-law had no *locus standi* to make any statement on behalf of the appellants and that in any event the record does not bear that the said Mr. Jayawardena attorney-at-law appeared on the instructions of the registered attorney-at-law for the appellants, Court could not have dismissed the action on the basis that there was no instruction from the appellants.

While conceding that the record does not bear that the said Mr.Jayawardena, attorney-at-law appeared on the instructions of the registered attorney-at-law for the appellants, in paragraph 09 of the petition and paragraph 10 of the affidavit filed by the appellants they themselves have admitted that on 13.02.1995 the said Mr. Jayawardena appeared on the instructions of the appellant's registered attorney-at-law Mr.S.A. Hemapala and informed Court that he has no instructions from the appellants to proceed with the trial. In the circumstances, the argument that Mr. Jayawardena had no instructions from the registered attorney-at-law of the appellants or that he had no locus standi to make any statement on behalf of the appellants cannot succeed.

In *Jinadasa* v *Sam Silva* (1) it was observed that -

> "Once the registered attorney has done his duty of appointing counsel i.e.retaining and instructing him, counsel assumes full control of the case, and becomes the conductor and regulator of the whole thing".

It is submitted by the counsel for the appellants that inasmuch as the plaintiffs (appellants) were not present in court on 13th February, 1995 they were not in a position to testify as averred in the affidavit filed of record that Mr. Jayawardena, attorney-at-law had appeared on the instructions of the registered attorney-at-law for the plaintiffs (appellants). In support of this contention he cited the judgment in *Chandrawathie* v *Damayanthie Abeywardena and another*(2) where the Supreme Court held approving the judgment of S.N.Silva, J. as he then was in *Damayanthie Abeywardena and Another* v *Hemalatha Abeywardena and others.*(3)

> "The rule in section 181 which confines an affidavit to 'a statement of 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".

Applying this principle to the affidavit tendered by the appellants in the instant case though the appellants were not present in Court they have set forth reasonable grounds for their belief as to what transpired on 13.02.1995. For the appellants themselves in paragraph 09 of their affidavit state that this information was given to them by their registered attorney-at-law Mr.S.A. Hemapala when they met him in the first week of March 1995. I would say this is reasonable grounds for their belief as to what transpired in Court on 13.02.1995.

It is also contended by the counsel for the appellants that the Court had erred by not issuing notice on the appellants informing of the trial date on 13.02.1995. In this regard I would say section 27(1) and (2) of the Civil Procedure Code would supply the answer. The relevant provisions of the said section is as follows:

> "The appointment of a registered attorney to make any appearance or application, or do any act as foresaid, shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any

process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made".

(2) "When so filed, it shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court, or until the attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client".

Applying the provisions contained in the said section to the instant case it becomes manifest that there was no legal requirement that notice be issued on the appellants for on 20.10.1994 when the trial was re-fixed for the 13th of February, 1995 appellants' registered attorney-at-law was present in court and this is borne out by the proceedings of that day. In the circumstances, on 13.02.1995 when the trial was taken up and if as stated in the affidavit the letters sent to the appellants by the registered attorney informing the change of trial date were returned, the registered attorney-at-law was duty bound to inform Court his inability to communicate with the appellants. However the attorney-at-law who appeared in Court on 13.02.1995 on the instruction of the registered attorney-at-law merely informed that he had no instructions from the appellants. Accordingly, I would say that the learned Additional District Judge was correct in the circumstances to have dismissed the action in view of the provisions contained in section 87(1) of the Civil Procedure Code which reads as follows:

"Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action".

Where the Court proceed to act under section 87(1) of the Civil Procedure Code and dismiss the plaintiffs'-(appellants') action the plaintiffs (appellants) could apply to Court under section 87(3) to have the dismissal set aside. The relevant section reads thus:

"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 requirement of section 87 (3) of the Civil Procedure Code as to an application to cure a default are two fold:

1) the plaintiff must make such application within a reasonable time from the date of dismissal of his action.

2) the plaintiff must make such application by way of petition supported by affidavit.

It was contended by the counsel for the respondent that the appellants have failed to comply with either of the requirements, in that the application to purge the default had been made more than 8 months after the date of the dismissal of the case and that the affidavit of the appellants does not comply with the requirements of section 168 of the Civil Procedure Code. I think there is force in this argument.

On an examination of the record, it appears the date of dismissal of the action is 13.02.1994. The application to purge the default though the petition is dated 25.09.1995 has been filed on 04.10.1995. According to paragraph 09 of the petition the appellants have come to know of the dismissal of the case in the first week of March 1995. Even from March 1995 the appellants have slept over the application for over 7 months. In any event no reasonable cause shown for such delay.

As for the affidavit of the appellants, which was in Sinhalese commenced with the following words:

කැළණිය, වෙදමුල්ල, වරාගොඩ පාරේ, අංක, 485 දරණ ස්ථානයේ පදිංචි, (1) කලූ ආරච්චිගේ වයලට් ඥාණවති, කලූ ආරච්චිගේ කළ්‍යාණවති, (3) කලූ ආරච්චිගේ කමලාවති වන අපි බෞද්ධාගම්කාරයන් වශයෙන් පහත සඳහන් කරුණු දිවුරා ප්‍රකාශ කර සිටිමු.

The jurat of the affidavit was worded as follows:

ඉහත සඳහන් දිවුරුම් ප්‍රකාශ මා විසින් දිවුරුම්
ප්‍රකාශිකාවන්ට කියවා තේරුම් කර දුන් පසු ඔවුන්
විසින් තේරුම් ගෙන පත්‍ය බවට පිළිගෙන වර්ෂ

1995 ක්‌වූ ..... සැප්තැම්බර් මස 25)
වන දින කොළඹ දී දිවුරා අත්සන් තබන ලදී)

It is therefore apparent that the affidavit of the appellants do 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 the affidavit. In *Clifford Ratwatte* v *Thilange Sumathipala & others*(4) it was held:

> "The defendant states that he is a Christian and make oath. The jurat clause at the end of the affidavit states that the deponent has affirmed. The affidavit is defective". 180

I think the same principle in reverse would apply to the affidavit of the appellants in the instant case.

For the aforementioned reasons, I do not propose to interfere with the order of the learned Additional District Judge of Colombo dated 24.04.1996. The appeal will stand dismissed with costs fixed at Rs. 5000/-.

DISSANAYAKE, J. - I agree.

Appeal dismissed.