

THE ATTORNEY-GENERAL
v
HERATH AND ANOTHER

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
C.A. NO. 252/99 (F)
D.C. COLOMBO NO. 6842/M
JUNE 4, 2003

Civil Procedure Code, sections 85(4), 86(2), 88(2) and 755(3) – Evidence led – Defendant and counsel absent – Judgment pronounced – Reasonable grounds not shown for the absence of counsel – Mistake – Negligence.

Judgment was entered upon default. Steps were then taken to purge default. The trial court refused the application to set aside the judgment.

On appeal –

Held:

- (i) A mistake could be excused – Negligence of counsel is not a reasonable ground to set aside proceedings.

Per Udalagama, J.

“Another normal practice of diligent counsel would be to obtain before the due date a copy of the previous day’s proceedings. If that was done the next date would invariably appear at the end of the previous day’s proceedings. This has not been done. Such failure could not amount to a mistake.”

Per Udalagama, J.

“On a consideration of the normal practice in courts of law counsel as well as the instructing attorneys note down all dates the case is fixed for. Counsel who knew that the case was specially fixed for 3 dates on 29.3.96 ought to have taken down the dates in his diary; it was incumbent on such counsel to have left 3 dates free to be present at the resumed trial....”

APPEAL from the order of the District Court of Colombo.

Case referred to:

1. *Jinadasa and another v Sam Silva and others* – (1994) 1 Sri LR 232.
L.M.K. Arulanandan, Deputy Solicitor-General for defendant-petitioner-appellant.
Ananda Kasturiaratchchi with Udeshika Abeysirwardena for plaintiffs-respondents-respondents.

Cur.adv.vult.

July 15, 2003

UDALAGAMA, J.

This is an appeal instituted under the provisions of section 755(3) of the Civil Procedure Code against the order of the learned Additional District Judge in D.C. Colombo case No. 6842/M dated 22.04.99 refusing to set aside the judgment entered upon default after the recording of evidence on 12.07.96 relevant to the provisions of section 88(2) of the Civil Procedure Code. 01

The facts briefly appear to be as follows:

The respondents instituted the above action claiming damages for breach of a contract admittedly entered on 02.07.87 against the defendant on 25.05.89, approximately 14 years ago. 10

The 1st plaintiff entered into the aforesaid contract with the Director-General of Health Services *inter alia* to construct an addition and improvements to the Judicial Medical Officer's office (Stage II)

The 2nd plaintiff who was the wife of the 1st plaintiff withdrew from the case consequent to a separation. The trial being delayed for various reasons had come up for hearing *de novo* and issues settled by order dated 24.09.94. Subsequently to the evidence of the plaintiff the learned District Judge hearing the case had been transferred out and when the action came before the succeeding Judge the latter had requested the Judicial Service Commission and in fact succeeded in having satisfied the Judicial Service Commission to have the previous trial judge appointed to hear and conclude the said case and accordingly the case had been called 20

to fix the case for further trial and the further hearing had been fixed for 29.03.96, on which date further evidence of the plaintiff had been recorded. Subsequently further hearing was postponed for 3 separate dates namely 28.06.99, 12.07.99. It must be noted here that the trial judge had been specially appointed to conclude the trial and the latter of whom was travelling from another station for that purpose alone. 30

It is undisputed that the learned Counsel for the defendant-appellant on 28.06.99 did present himself for the resumed hearing and in fact moved for a postponement on personal grounds which application went unchallenged and the trial judge appears to have obliged the learned Counsel for the appellant and granted a postponement. The next date having been already announced and fixed, the trial judge as stated above on the next date fixed being 12.07.99 arrived in Colombo to take up the matter for further trial, but found the Counsel for the appellant nor the instructing attorney 40 nor even a representative of the Director-General of Health Services present in court. The trial judge had subsequent to giving time for the appellant to make their appearance, on that date at 11.30 a:m. finding the defendant-appellant absent and unrepresented proceeded to record further evidence of the plaintiff who had arrived in court in time and the trial judge concluded the recording of evidence of the plaintiff on the said date namely 12.07.99 (J.E. 49).

Consequent to the consideration of the evidence so led and also the documents marked P1 the learned District Judge entered 50 judgment for the plaintiff as prayed for:

Aggrieved, the defendant-appellant appealed therefrom on the basis of a *inter parte* judgment and the appeal itself was numbered C.A. 899/96(F). The Court of Appeal in the aforesaid action although a final appeal, by its order dated 18.12.97 directed the District Judge of Colombo to comply with the provisions of section 85(4) of the Civil Procedure Code. Subsequently, on the service of the decree the Counsel for the defendant-appellant in terms of the provisions of section 86(2) of the Civil Procedure Code moved to satisfy the trial court that the latter had reasonable grounds for default. 60

The learned Additional District Judge who inquired into the application under the aforesaid provisions of section 86(2) of the Civil Procedure Code by his impugned order dated 22.04.99 refused to vacate the judgment entered on 12.07.96.

Aggrieved, the defendant-appellant appeals therefrom.

I am inclined to the view on a consideration of the normal practice in courts of law counsel as well as instructing attorneys note down all dates the case is fixed for. I am also of the view that counsel who knew that the case was specially fixed for 3 dates on 29.03.96 and who ought to have taken down the dates in his diary it was incumbent on such counsel to have left all 3 dates free to be present at the resumed trial. Counsel would not have agreed to the dates if he was not free on the said dates. By implication the counsel for the appellant would have done that as on the 1st of the 3 dates so fixed the counsel for the respondent-appellant had arrived and in person moved for a date on personal grounds. This court cannot comprehend how the learned counsel could not have noted down the next date which had already been fixed. In any event the trial court could not be expected to accept the fact that the counsel for the appellant had not taken down the next date when a postponement had been granted on his very application. I am also inclined to the view that if counsel failed to do so it could not be a mere mistake but negligence. Whilst a mistake could be excused the negligence of counsel is not a reasonable ground to set aside proceedings. As also clearly observed by the learned Additional District Judge even a representative of the Health Department had not been present, leave alone counsel and the instructing attorney.

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Another normal practice of diligent counsel would be to obtain, before the due date a copy of the previous day's proceedings. If that was done in the instant action the next date would invariably appear at the end of the previous day's proceedings. Obviously this had not been done. Such failure could not amount to a mistake.

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In all the circumstances considering the overall facts of the case, I am inclined to the view that no reasonable cause had been shown for the absence of counsel who was under a duty to appear on all 3 dates fixed on 29.03.96 no doubt so obtained as convenient dates for counsel.

In a judgment bearing relevance to the instant case, Justice Amerasinghe in *Jinadasa & another v Sam Silva & others* citing no less than 153 authorities had observed in the course of his judgment that “the exercise of discretion by a lower court should not be interfered with unless the decision was capricious or made in disregard of legal principles.” It is my belief that the learned Additional District Judge had rejected the application of the counsel for the appellant on the consideration of the facts as presented before him and I would not classify the impugned order to be capricious or one disregarding legal principles. 100

For the above reasons I see no reason to disturb the finding of the learned Additional District Judge dated 22.04.99 refusing to vacate the judgment entered on 07.12.96. 110

This appeal is dismissed, but court makes no order for costs.

NANAYAKKARA, J. - I agree

Appeal dismissed.