IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

V.A.K.Cisilin Nona alias
Pesonahamy
Moratota
Pelmadulla
Plaintiff-Respondent-Appellant

S.C.Appeal No.190/2012
S.C.(SPL) LA No.44/2012
Court of Appeal Case No.249/99[F]
D.C.Ratnapura Case No.11254/D Vs.

Gunasena Jayawardana
Moratota
Pelmadulla
Defendant-Appellant-Respondent

BEFORE : PRIYASATH DEP, PC, J.
PRIYANTHA JAYAWARDENA, PC, J.
K.T.CHITRASIRI,J.

COUNSEL : Chathura Galhena with Ms.Manoja Gunawardana
for the Plaintiff-Respondent-Appellant
S.N.Vijithsingh
for the Defendant-Appellant-Respondent

ARGUED ON : 02.02.2016

WRITTEN : 16.11.2012 by the Defendant-Appellant-Respondent
SUBMISSIONS ON : 21.07.2015 by the Plaintiff-Respondent-Appellant

DECIDED ON : 05.05.2016

CHITRASIRI, J.

Plaintiff-Respondent-Appellant (hereinafter referred to as the Appellant) instituted this action in the District Court of Ratnapura claiming *inter alia* 1/10th share of the land described in the schedule to the plaint and to have the defendant-appellant respondent (hereinafter referred to as the respondent) evicted therefrom. Respondent filed his answer praying for dismissal of the action. The case was then taken up for trial on 10.07.1995. On that date, the appellant was not ready for the trial. On her application the trial was fixed for 12.12.1995. On that date too, the trial was once again re-fixed anticipating a settlement. The case was again re-fixed on the third date of trial, stating that there was no settlement and it was re-fixed for 22.10.1996. On that date also, the case was again postponed since the learned trial judge was on a transfer order to another station. Then the case was taken up for trial on 27.05.1997.

On this particular day, learned Counsel for the respondent informed Court that he had not received instructions from the respondent to appear for her. Immediately thereafter, learned trial judge took the matter up for hearing in the absence of the respondent considering it as an *ex parte* trial. It is evident by the journal entry made on 27.05.1997. Accordingly, the judgment was delivered on that date itself. The journal entry made on the aforesaid date reads thus:

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[At page 12 in the appeal brief]

Accordingly, *ex parte* decree was entered and it had been served on the respondent. Thereafter, respondent made an application under Section 86(2) of the Civil Procedure Code to have the *ex parte* decree set aside. Learned District Judge refused the said application. As a result, the *ex-parte* judgment remained valid. Being aggrieved by that order, appellant filed an appeal to the Court of Appeal. Court of Appeal made order setting aside the order of the learned District Judge and directed the original court to have a *trial de novo*. The matter before this Court now, is to determine the correctness of the judgment of the Court of Appeal. The issue that was argued in the Court of Appeal was whether the trial held in the District Court should have been a trial *ex parte* or was it a trial *inter partes*. In other words, had the trial judge followed the proper procedure when he decided to take up the matter *ex parte*

consequent to the submissions made by the counsel for the respondent as to his appearance?

The order made by the learned District Judge on 27.05.1997 shows that he has taken up the matter, considering it as an *ex parte* trial. The judgment and the decree entered in that case also was on that basis. Thereafter, learned trial judge made order to serve a copy of the decree as required by Section 85(4) of the Civil Procedure Code. Consequently, an application also had been made under Section 86(2) of the Civil Procedure Code by the respondent upon receiving the decree to have the decree vacated. Accordingly, it is clear that the appeal made to the Court of Appeal was to set aside the order made in the application filed under Section 86(2) of the Civil Procedure Code.

As referred to earlier, the Court of Appeal was basically on the question that the trial in the original court was an *ex parte* or it was a trial *inter-partes*. Having considered the authorities, Court of appeal held that it should have been a trial *inter-partes*. Hence, I will now look at the issue to determine whether the Court of Appeal was misdirected when coming to such a decision.

In Andappa Chettiar vs. Sanmugam Chettiar, [33 NLR at 217] it was held that;

> *" When a case is called when the proctor on the record is present in Court constitutes an appearance for the party from whom the proctor holds proxy, unless the proctor expressly informs the Court that he does not,*

on that occasion appear, for the party. Accordingly, it was held that the matter cannot be re-opened due to the absence of the party when the proctor has marked his appearance before the judge".

In that case **Macdonell, C.J.**held thus:

"The Commissioner quite rightly refused to do so, since the proceedings whereon that judgment was pronounced were inter partes". (at page 221)

Lyall Grant J, in that case held as follows:

"For the reasons given in answering the first terms of reference, I think that there was an appearance by the defendant and that the judgment therefore was not ex parte.

It purported to be inter partes but was not properly entered, inasmuch as the plaintiff was not called upon to give evidence in support of a claim to which a specific defence had been entered".[at page 226].

Identical issue was dealt with by Jayasinghe J. in **Isek Fernando Vs. Rita Fernando and others. [1999(3) SLR 29]** In that decision it was held thus:

"Appearance may be by the party in person or by his counsel or his registered Attorney, and where the defendant is absent but is represented by counsel or by Attorney-at-Law and the Court is satisfied on the evidence adduced by the plaintiff, Court must enter a final judgment and not an Order Nisi. Judgment must be considered as being pronounced inter-partes and not ex parte."

Having referred to the law applicable in this connection, I will now advert to the facts of this case in order to determine whether the trial in the original court was *inter-partes* or was it a trial *ex-parte*. Both in the journal entry and in the proceedings recorded on 27.05.1997 show that Mr.Junaideen Attorney-at-law, on that date, he being the proxy holder had marked his appearance on behalf of the respondent. Even the answer of the respondent had been filed under his name. Having marked his appearance for the respondent, he has merely submitted that the respondent had not given him instructions to appear on that particular date.

Authorities referred to above show that the trial judge, under those circumstances should have taken up the matter considering it as an *inter-parte*s trial and allowed the counsel to cross examine the witness. Accordingly, it is clear that the Court of Appeal has correctly decided the issue in this case having adopted the law relevant thereto. In the circumstances, I am not inclined to interfere with the decision of the Court of Appeal.

At this stage, it is also necessary to refer to the contents that are required to be mentioned in a judgment irrespective of the fact that it was a judgment delivered upon holding an *ex-parte* trial or trial *inter-partes*. Those matters that should contain in a judgment are mentioned in Section 187 of the Civil Procedure Code and it reads thus:

187. *The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.*

In this instance, the impugned judgment contains only one line and it reads as follows:

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I will now refer to the authorities relevant to this particular issue. In the case of **Sirimavo Bandaranaike Vs. Times of Ceylon, [1995 (1) SLR 22]** it was held thus:

"Even in an ex parte trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An ex parte judgment cannot be entered without a hearing and adjudication."

Clearly, the impugned judgment does not contain the matters referred to in Section 187 of the Civil Procedure Code. The authorities referred to hereinbefore show the importance of having those matters in a judgment of a court. In view of the above, it is clear that the *ex parte* judgment delivered in this case is contrary to law particularly because no proper evaluation of evidence had been made by the learned District Judge in this instance. Therefore, such a judgment cannot be allowed to stand before the eyes of the law.

Learned Counsel for the appellant also submitted that the Court of Appeal should not have considered the question as to the manner in which the case was taken up for trial in the District Court since no such a matter had been mentioned in the petition of appeal. However, merely because an issue of that nature had not been referred to in the petition of appeal, the Court of appeal is not prevented from looking at such a question since it amounts to a question of law.

Section 758 (2) of the Civil Procedure Code stipulates that the court deciding any appeal shall not be confined to the grounds set forth by the appellant. The said Section 758(2) stipulates thus:

> 758(2) *The Court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground.*

In view of the above provision in law, I am not inclined to agree with the contention of the learned Counsel for the appellant. Accordingly, I am of the opinion that the appellate courts are empowered to consider an issue concerning a question of law despite the fact that such a question is not being mentioned or agitated in the petition of appeal.

For the aforesaid reasons, I affirm the judgment dated 27.01.2012 of the Court of Appeal. Accordingly, the decisions of the Court of Appeal are to remain intact. Registrar is directed to take steps accordingly,

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PC, J.

I agree

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.

I agree

JUDGE OF THE SUPREME COURT