THE

NEW LAW REPORTS OF CEYLON

VOLUME LXI

1959 *Present :* **Basnayake, C. J., and Sinnetamby, J.**

SARAVANAMUTTU, Appellant, *and* SARAVANAMUTTU, Respondent

S. C. 22—D. C. Colombo, 3,453/D

Judgment—Effect when Judge who signs and dates it has ceased to hold office—Effect of delay in writing a judgment—Civil Procedure Code, s. 185.

A judgment written by a Judge who is *functus officio* on the day on which he signs and dates it is invalid and cannot be pronounced under section 185 of the Civil Procedure Code by his successor.

In a case which turns on the impressions created by the oral evidence of witnesses it is important that the trial Judge should write his judgment without undue delay.

APPEAL from a judgment of the District Court, Colombo.

In this application by a wife for separation *a mensa et thoro*, the hearing was concluded by the District Judge of Colombo on July 27, 1956, and judgment was reserved to be delivered on a subsequent date. On August 1, 1956, however, the Judge vacated his office and was, thereafter, engaged in a busy practice as an Advocate. He was appointed on January 13, 1958, to be Additional District Judge, Colombo, to enable judgment to be delivered. His judgment, which was signed by him and dated on June 17, 1957, was pronounced in open Court on January 13, 1958, by one of the Additional District Judges.

G. E. Chitty, Q. C., with *A. S. Vanigasooriyar* and *Stanley Perera*, for Defendant-Appellant.

J. N. Fernandopulle, with *M. Shanmugalingam*, for Plaintiff-Respondent.

Cur. adv. vult.

2——J. N. B 4093-1,593 (9/59)

June 10, 1959. BASNAYAKE, C.J.—

This is an appeal by the defendant to an application for a decree for a separation *a mensa et thoro*. The defendant-appellant (hereinafter referred to as the appellant) is the husband of the plaintiff-respondent (hereinafter referred to as the respondent).

Learned counsel for the appellant has argued two preliminary questions of importance. The facts material for the decision of those two questions are as follows :— The hearing of the application was concluded on 27th July 1956. On that day judgment was reserved to be delivered on 1st August 1956. After judgment was reserved the District Judge who heard the case vacated his office. On 1st August 1956 the judgment was not delivered as it was not ready. It would appear from the minutes in the journal that it was not ready till 17th June 1957 on which day the following minute appears in the journal :— " Inform proctors that judgment will be delivered on 19.6.57 ", and notice was ordered on the respondent and her proctor. On 18th June 1957 the proctor for the appellant moved by a motion in writing that the case be fixed for further hearing and further addresses. On 26th July 1957 the matter of the motion was fixed for inquiry on 18th October 1957. On that day counsel for the respective parties were heard and on 18th December 1957 order was made refusing the appellant's application. The Judge who heard the application also made order that the judgment dated and signed on 17th June 1957 by the Judge who had ceased to hold office after 1st August 1956 will be delivered at 10.45 a.m. on 13th January 1958 and the Secretary of the Court was directed to take steps to have the Judge appointed as a District Judge on that day for the purpose of delivering the judgment. The appointment was accordingly made by the following letter of appointment :—

" Copy to : D. J., Colombo.

Ref. his lr. No.—of 18.12.57.

No. JAA/11/48.

Office of the Judicial Service Commission,
P. O. Box 573,
Colombo, 20th December, 1957.

APPOINTMENT

Sir,

The Judicial Service Commission has been pleased to appoint you to be Additional District Judge, Colombo, on 13th January, 1958, to enable judgment to be delivered in D. C. Colombo Case No. 3,453/D.

2. It is understood that you are willing to act without remuneration.

3. Your attention is specially invited to paragraphs 690-703 of the Financial Regulations, copies of which are available in all the courts.

I am, Sir,
Your obedient Servant,
Sgd. D. E. WIJEYEWARDENE,
Secretary, Judicial Service Commission.

P. A. W. Kingsley Herat Esq..
Advocate,
" Shiranthi ",
209, Quarry Road,
Dehiwala. "

On 13th January 1958 the judgment written on 17th June 1957 and signed and dated on that day by Mr. Herat was pronounced in open court by one of the additional District Judges.

The first point taken by learned counsel is that the Judge who heard the case was *functus officio* on the date on which he wrote the judgment and that although it was pronounced by a Judge of the court it has no validity as it was written by a person who had ceased to be a Judge and was no longer qualified to give a judicial decision.

The second point is that as nearly a year had elapsed between the conclusion of the hearing and the date on which the judgment was written, the Judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard, and that his recollection of the fine points in the case would have faded from his memory by the time he came to write the judgment, especially as he had by that time been nearly a year at the Bar and was engaged in a busy practice.

Learned counsel for the appellant drew our attention to some features of the judgment which he submitted indicate that the Judge's recollection of the niceties of the evidence had faded. In the course of his judgment the learned Judge himself says that " the evidence in the case became so evenly balanced that I am not ashamed to confess that the decision of this case has given me considerable anxiety and difficulty. "

Learned counsel for the appellant emphasised the point that the learned Judge had described the evidence of two witnesses who gave important evidence for the appellant as colourless, a description which he submitted their evidence did not merit. He further submitted that the way in which the learned Judge had dealt with their evidence supports his contention that the evidence was not vivid in the Judge's mind at the time he wrote the judgment. As a further indication of the fact that the Judge's recollection of the evidence was faint learned counsel drew our attention to his observations about the attitude of the defendant towards the female servants, which he submitted were unsupported by the evidence.

In regard to the first point I am of opinion that the judgment is not in law a judgment of the court as at the time he recorded his judicial decisions the Judge did not hold judicial office and was not qualified to express a valid judicial decision. To perform the functions of a Judge a person must hold that office. (*Kanetgey v. Ookoovalle* [1]; *Davidson v. Silva* [2]).

Section 185 of the Civil Procedure Code empowers a Judge to pronounce a judgment written by his predecessor, but not pronounced. It is evident from the words "but not pronounced" that the section contemplates the case of a judgment written by a Judge while holding judicial office and at a time when he is qualified to pronounce it, and not to a judgment written after he ceases to hold such office. The view I have taken finds support in the cases of *Thamotharampillai v. Ponniah* [3] and *Wijesekera v. Dabarera et al.*[4]. In the former case De Sampayo J. held that a judgment written after a Judge had ceased to hold judicial office is not a judgment that can be validly pronounced under section 185 by his successor. De Sampayo J. also indicates that there are other decisions of this court to the same effect although he has not referred to them by name. In the latter case Schneider J. after making the following observation—

> "Having regard to the provisions of Sections 184 to 187 of the Civil Procedure Code the law seems to be that the judgment must be written by the Judge who has heard the case. If he writes this judgment while still holding office his successor may pronounce it."

proceeded to state—

> "Mr. Seymour evidently wrote out his judgment after he ceased to be the District Judge of Chilaw and before he was appointed as Additional District Judge for the 14th of May 1920, when his order was pronounced by Mr. Coomaraswamy the then District Judge."

This statement cannot be reconciled with the earlier part of his judgment wherein he states—

> "His order in writing signed by him and dated the 28th of February 1920 was delivered by his successor on the 14th of May 1920. Mr. Seymour ceased to act as District Judge of Chilaw after the 28th of February 1920. He was gazetted as Additional District Judge of Chilaw for the 14th of May to enable his order to be pronounced."

The other decision of this court to which reference should be made is the case of *Fernando v. The Syndicate Boat Company Limited* [5]. That decision proceeds on section 88 (then section 89) of the Courts Ordinance. It does not appear that the Judge wrote his judgment at a time when he had ceased to hold office. He ceased to hold office after hearing the evidence. He was again appointed to the office of District Judge and on that day he pronounced his judgment. The report does not show that

[1] *2 Lorenz Reports 49.*
[2] *(1893) 2 S. C. R. 10.*
[3] *1 C. W. R. 68.*
[4] *(1921) 3 C. L. R. 111.*
[5] *(1896) 2 N. L. R. 206.*

the Judge performed any judicial function at a time when he was not qualified to do so.

In regard to the second point I am of opinion that the submission of counsel that the long delay has prejudiced the appellant is not without justification. The learned Judge appears to have not only lost the advantage he had of seeing and hearing the witnesses, but his recollection of the fine points in the evidence also seems to have become faint at the time he wrote the judgment.

The judgment of the learned District Judge is therefore set aside and the case is sent back for hearing *de novo*. As the successful party is the husband I make no order for costs.

SINNETAMBY J.—

I agree with the order which my Lord the Chief Justice proposes to make in this case.

In a case which turns more on the impressions created by the conduct and evidence of witnesses as in divorce proceedings, than on the construction of documents as in commercial cases, the importance of making a decision when the facts and the impressions on the mind of the Judge are fresh and clear cannot be too strongly stressed. In this case the long delay has been demonstrated to have manifestly affected the Judge in arriving at his findings and I agree that on this ground alone the judgment cannot be allowed to stand. I also agree that a judgment written by a Judge who was " functus officio " on the day on which he signed and dated it is invalid.

For the decision of this case it is not necessary to go any further but I understand from my Lord the Chief Justice that he proposes to state his views on the validity of a judgment prepared by a Judge while he was " functus officio " but signed and dated by him on a day on which he was specially gazetted to deliver the judgment. With great respect I find myself unable to agree with the views which my Lord the Chief Justice holds upon this question ; and, lest it be thought that I agree with them, I desire to place my own opinion on record.

In my view a judgment prepared by a Judge while he was " functus officio " would be valid if he signs and dates it on the day on which he is subsequently gazetted as a Judge of the Court to deliver it. By signing and dating his judgment on the day on which he is appointed, a Judge merely adopts and confirms *qua* Judge an opinion he had formed while he was not a Judge of that particular court. In my opinion it makes no difference that he was holding judicial office in some other judicial division : so far as the court having jurisdiction over the case is concerned such a person is in no different position to that of any ordinary citizen.

The case of *Wijesekera v. Dabarera et al.* [1] is relevant in this connection. It was sought to obtain a declaration that an order made in the circumstances detailed by Schneider, J. was invalid. The order was held to be valid and in this connection Schneider, J. made the following observations :—

> " Having regard to the provisions of Sections 184 to 187 of the Civil Procedure Code the law seems to be that the judgment must be written by the Judge who has heard the case. If he writes this judgment while still holding office his successor may pronounce it . . . . . Mr. Seymour evidently wrote out his judgment after he ceased to be the District Judge of Chilaw and before he was appointed as Additional District Judge for the 14th of May, 1920, when his order was pronounced by Mr. Coomaraswamy the then District Judge. If Mr. Seymour himself had delivered his judgment on the 14th of May 1920 and signed and dated it no objection could have been taken as he was Additional District Judge on that day. That he should have written out his judgment beforehand and brought it to the Court should make no difference whatever. "

In *Fernando v. The Syndicate Boat Co. Ltd.* [2] the facts show that Mr. Grenier heard a case when he was acting District Judge, Colombo. When he ceased to be acting District Judge he had not delivered his judgment. Subsequently he was appointed Additional District Judge for one day for the express purpose of delivering judgment. Bonser, C.J. held that the judgment was valid.

These cases show that what matters is that the person who writes the judgment should be a Judge of the Court when he hears the case as well as on the day on which he signs and dates it for the purpose of delivery. I am aware that this practice has been in existence for quite a long time and that there are several judgments in existence today which have been signed and dated by Judges in similar circumstances. They have always been regarded as perfectly valid. To take any other view may have the effect now of rendering all these judgments invalid and ineffective. Even if this practice is in fact incorrect I do not think it desirable that at this late date it should be reviewed or dissented from. In any event whatever views we express upon this question, having regard to the matters we are called upon to decide in this case, would, it seems to me, be merely obiter.

Judgment set aside.

[1] *(1921) 3 C. L. Rec. 111.*

[2] *(1896) 2 N. L. R. 206.*

the Judge performed any judicial function at a time when he was not qualified to do so.

In regard to the second point I am of opinion that the submission of counsel that the long delay has prejudiced the appellant is not without justification. The learned Judge appears to have not only lost the advantage he had of seeing and hearing the witnesses, but his recollection of the fine points in the evidence also seems to have become faint at the time he wrote the judgment.

The judgment of the learned District Judge is therefore set aside and the case is sent back for hearing *de novo*. As the successful party is the husband I make no order for costs.

SINNETAMBY J.—

I agree with the order which my Lord the Chief Justice proposes to make in this case.

In a case which turns more on the impressions created by the conduct and evidence of witnesses as in divorce proceedings, than on the construction of documents as in commercial cases, the importance of making a decision when the facts and the impressions on the mind of the Judge are fresh and clear cannot be too strongly stressed. In this case the long delay has been demonstrated to have manifestly affected the Judge in arriving at his findings and I agree that on this ground alone the judgment cannot be allowed to stand. I also agree that a judgment written by a Judge who was " functus officio " on the day on which he signed and dated it is invalid.

For the decision of this case it is not necessary to go any further but I understand from my Lord the Chief Justice that he proposes to state his views on the validity of a judgment prepared by a Judge while he was " functus officio " but signed and dated by him on a day on which he was specially gazetted to deliver the judgment. With great respect I find myself unable to agree with the views which my Lord the Chief Justice holds upon this question ; and, lest it be thought that I agree with them, I desire to place my own opinion on record.

In my view a judgment prepared by a Judge while he was " functus officio " would be valid if he signs and dates it on the day on which he is subsequently gazetted as a Judge of the Court to deliver it. By signing and dating his judgment on the day on which he is appointed, a Judge merely adopts and confirms *qua* Judge an opinion he had formed while he was not a Judge of that particular court. In my opinion it makes no difference that he was holding judicial office in some other judicial division : so far as the court having jurisdiction over the case is concerned such a person is in no different position to that of any ordinary citizen.

The case of *Wijesekera v. Dabarera et al.* [1] is relevant in this connection. It was sought to obtain a declaration that an order made in the circumstances detailed by Schneider, J. was invalid. The order was held to be valid and in this connection Schneider, J. made the following observations :—

> " Having regard to the provisions of Sections 184 to 187 of the Civil Procedure Code the law seems to be that the judgment must be written by the Judge who has heard the case. If he writes this judgment while still holding office his successor may pronounce it . . . . . Mr. Seymour evidently wrote out his judgment after he ceased to be the District Judge of Chilaw and before he was appointed as Additional District Judge for the 14th of May, 1920, when his order was pronounced by Mr. Coomaraswamy the then District Judge. If Mr. Seymour himself had delivered his judgment on the 14th of May 1920 and signed and dated it no objection could have been taken as he was Additional District Judge on that day. That he should have written out his judgment beforehand and brought it to the Court should make no difference whatever. "

In *Fernando v. The Syndicate Boat Co. Ltd.* [2] the facts show that Mr. Grenier heard a case when he was acting District Judge, Colombo. When he ceased to be acting District Judge he had not delivered his judgment. Subsequently he was appointed Additional District Judge for one day for the express purpose of delivering judgment. Bonser, C.J. held that the judgment was valid.

These cases show that what matters is that the person who writes the judgment should be a Judge of the Court when he hears the case as well as on the day on which he signs and dates it for the purpose of delivery. I am aware that this practice has been in existence for quite a long time and that there are several judgments in existence today which have been signed and dated by Judges in similar circumstances. They have always been regarded as perfectly valid. To take any other view may have the effect now of rendering all these judgments invalid and ineffective. Even if this practice is in fact incorrect I do not think it desirable that at this late date it should be reviewed or dissented from. In any event whatever views we express upon this question, having regard to the matters we are called upon to decide in this case, would, it seems to me, be merely obiter.

Judgment set aside.

[1] *(1921) 3 C. L. Rec. 111.*

[2] *(1896) 2 N. L. R. 206.*