JOYCE PERERA
v.
LAL PERERA

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 251/2000
DC COLOMBO NO. 20300/D
AUGUST 20, 2001

Civil Procedure Code, sections 55 (1), 84, 85 (1), 377, and 754 (1) – Summons not served – Order nisi served in respect of alimony pendente lite – Objections filed – Answer not filed – Application for alimony pendente lite withdrawn – Case fixed for ex parte trial – Legality – Is this order a judgment?

The plaintiff-respondent instituted proceedings against the defendant-appellant for the dissolution of the marriage. Thereafter, an order *nisi* in respect of an application for alimony *pendente lite* and cost of litigation was served on the defandant-appellant. The defendant-appellant filed proxy and lodged objections to the application and counter claimed alimony *pendente lite*. Thereafter, parties agreed not to pursue their respective applications for alimony. The plaintiff-respondent thereafter moved that the case be taken *ex parte* and the trial Judge fixed the matter for *ex parte* trial. The defendant-appellant sought to canvass this order.

Held:

(1) Service of summons on the defendant is a fundamental and imperative requirement and a precondition before a case is fixed for an *ex parte* trial by Court.

(2) If there is non-observance of this imperative requirement of service of summons, it cannot be said even obliquely that the service of an order *nisi* on the defendant in regard to alimony and cost under section 377 consequent to which the defendant-appellant has entered her appearance through an Attorney-at-Law and filed her objections along with her counter claim for alimony making reference to the plaint amounts to sufficient

compliance under the provisions relating to service of summons. In this case there was no service of summons.

(3) The order is not an *ex parte* judgment but an order made in fixing the case for *ex parte* trial. There is a wide divergence between an *ex parte* judgment and an incidental order of fixing the case for *ex parte* trial. Section 88 (1) would not apply.

APPLICATION for Leave to Appeal.

Cases referred to :

1. *Senanayake v. Appu & Others* – 2 SCR 135.
2. *ABN Amro Bank NV v. Conmex (Pvt) Ltd. and Others* – 1996 1 Sri LR 8.
3. *Siriwardena v. Air Ceylon Ltd.* – 1984 1 Sri LR 286 at 297.

Chandana Prematileka for petitioner.

Hugo Anthony for respondent.

Cur. adv. vult.

November 07, 2001

NANAYAKKARA, J.

This is an application by way of leave to appeal by the defendant- 01
petitioner (wife) against an order made by the learned District Judge on 18. 08. 2000 whereby she fixed the case for *ex parte* trial on the basis that the petitioner had failed to file answer in response to the facts alleged in the plaint by the plaintiff-respondent (husband).

The basic facts of the case are briefly as follows :

The plaintiff instituted proceedings in the District Court of Colombo against the defendant praying for dissolution of the marriage subsisting between the plaintiff and the defendant. As the plaint was deficient

in requisite stamps at the time action was instituted, the Court had directed the plaintiff to apply for summons, once the deficiency in stamps has been made good, which order the plaintiff has subsequently complied with.

When this was taken up on 23. 07. 99 the Court had issued an order *nisi* in terms of section 377 of the Civil Procedure Code in respect of an application for alimony *pendente lite* and cost of litigation which order was directed to be served along with the summons on the defendant.

Thereafter, for some reason or other as the fiscal had reported that the defendant could not be traced the order *nisi* had been served on the defendant by way of substituted service.

The defendant on receipt of the order *nisi* along with the petition, affidavit and the notice, filed her proxy through an Attorney-at-Law on 02. 03. 2000 and had moved for time to lodge her objections to the order *nisi* and consequently she filed on 29. 06. 2000 her objection to the order *nisi* along with her counter claim for alimony *pendente lite* and for cost of litigation.

When the plaintiff's application for alimony and cost of litigation was taken up on the day on which it was called for the purpose of fixing it for inquiry, after both Counsel for the plaintiff and Counsel for the defendant had indicated to Court that they were not pursuing their respective applications for alimony and cost, Counsel for the plaintiff had applied to have the main case, which is for the dissolution of the marriage, fixed for *ex parte* trial, as the petitioner had not filed her answer. Thereupon, on this matter both parties had made their submissions, and the learned District Judge had thereafter made an order on 18. 08. 2000 fixing the case for *ex parte* trial.

It is this order made by the learned District Judge, fixing the case for *ex parte* trial, that is being canvassed by way of leave to appeal in this application.

Learned Counsel for the petitioner in his submissions has urged that only the order *nisi* and its notice were served on the defendant, and at no stage a copy of the plaint and summons were served on the defendant as required by the provisions of the Civil Procedure Code. As there was no service of summons on the defendant, after the institution of the action, the defendant cannot be expected to respond by way of an answer to the averments in the plaint and hence the Court cannot fix the case for *ex parte* trial in terms of section 84 of the Civil Procedure Code on the grcund that no answer has been filed by the defendant.

Counsel further contended it is only when the Court is satisfied that the defendant is duly served with summons or has received due notice of the day fixed for the subsequent filing of answer, but defaults that the Court will proceed to hear the case *ex parte*.

Responding to the main contention of Counsel for the defendant, the learned Counsel for the plaintiff has submitted to Court that the appearance by the defendant in response to the order *nisi* and filing objections along with counter claim for alimony by the defendant will regularize the non-service of summons on the defendant. Counsel has further argued that the reference the defendant had made in her objections to the plaint is indicative of the knowledge the defendant had that an action has been filed against her and she is estopped from canvassing the issue of non-service of summons, at this stage.

The pith and substance of her argument is that, the service of the order *nisi* in respect of alimony *pendente lite* and cost of litigation, dispensing with the service of summons, that the service of the said order *nisi* on the defendant alone is sufficient compliance with the provisions of the Civil Procedure Code relating to service of summons on the defendant. This is exactly what the learned Counsel for the plaintiff sought to establish in an oblique manner.

It appears to be the intention of the learned Counsel for the plaintiff that the fact that there was default on the part of the defendant to file answer or move for time to file it after entering an appearance through an Attorney-at-Law consequent to the receipt of order *nisi* in the case obligate the District Judge to fix the case for *ex parte* trial. That in the circumstances it is obligatory on the part of the learned District Judge to fix the case for *ex parte* trial in terms of section 84 of the Civil Procedure Code as there was a failure on the part of the defendant to file answer.

Counsel for the plaintiff in an endeavour to buttress the argument in this regard cited the following cases :

Senanayake v. Appu and Others.[1]
ABN-Amro Bank NV v. Conmex (Pvt) Ltd. & Others.[2]

Counsel for the plaintiff basing his argument on section 88 (1) of the Civil Procedure Code has also submitted that the present application for leave to appeal cannot be maintained inasmuch as section 88 (1) of the Civil Procedure Code stipulates that no appeal shall lie against any judgment entered upon for default of appearance. In an attempt to buttress his argument in this regard learned Counsel has referred us to the criteria spelt out in the case of *Siriwardena v. Air Ceylon Ltd*[3] to determine the question whether order comes within the meaning of section 754 (5) of the Civil Procedure Code.

It is appropriate at this stage to assess the relative merits of the submissions advanced by the respective Counsel in regard to the matters at issue.

It should be observed, initially, that a careful perusal of the case record discloses, although the learned District Judge on 23. 07. 1999 has made an order to serve summons along with the order *nisi* on the respondent, there is neither an indication of tendering summons to Court by the plaintiff nor is there any proof of it having being served

on the defendant. Therefore, it is patently clear that there was no service of summons on the defendant as contemplated by the provisions of the Civil Procedure Code. Besides this, there is an unequivocal acceptance by the learned Counsel for the plaintiff of the fact that there is no service of summons on the defendant.

In such a situation can it be asserted as the learned Counsel for the plaintiff, has done that the service of the order *nisi* in respect of the alimony *pendente lite* and cost of litigation is sufficient to dispense with the requirements necessary for the service of summons under the law?

In this connection, it will be pertinent to consider the imperative requirements of section 55 (1) of the Civil Procedure Code.

Section 55 (1) of the Civil Procedure Code stipulates –

> "Upon the plaint being filed and the copies or concise statements required by section 49 presented, the Court shall order summons in the form No. 16 in the First Schedule to issue, signed by the Registrar of the Court, requiring the defendant to answer the plaint on or before a day to be specified in the summons. The summons, together with such copy or concise statement each translated into the language of the defendant where his language is not the language of the Court, attached thereto, shall be delivered under a precept from the Court in the form No. 17 in the said Schedule, or to the like effect, to the fiscal of the Court or to the Fiscal of a Court of a like jurisdiction within the local limits of whose jurisdiction the defendant resides, who shall cause the same to be duly served on the defendant, or on each defendant, if more than one, and shall as hereinafter provided, return the same and the execution thereof to the Court, duly verified by the officer to whom the actual service thereof has been entrusted."

Therefore, a careful analysis of this section makes it evident that, service of summons on the defendant is an imperative requirement and a precondition, before a defendant is expected to file answer responding to the plaint, and it is only when there is a definite proof of service of summons on the defendant and failure to file answer that the question of fixing the case for *ex parte* trial arises.

In this regard section 84 of the Civil Procedure Code has also to be considered along with section 55 (1) in resolving the matter in issue.

Section 84 of the Civil Procedure Code provides thus :

> "If the defendant fails to file his answer on or before the day fixed for the filing of the answer or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the Court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the Court shall proceed to hear the case *ex parte* forthwith, or on such other day as the Court may fix."

The consideration of this section also makes it abundantly clear that the question of filing answer by the defendant arises only if the Court is satisfied that the defendant has been duly served with summons or received due notice of the day fixed for subsequent filing of the answer.

As far as the instant case is concerned, there is no doubt at all that there was no service of summons but only the service of order *nisi* in respect of the alimony *pendente lite* and cost on the defendant. Non-service of summons on the defendant as pointed out earlier is

an admitted fact in this case. Therefore, it must be observed that service of summons on the defendant, which is a fundamental and imperative requirement and also a precondition before a case is fixed for an *ex parte* trial by Court. If there is non-observance of this imperative requirement of service of summons, it cannot be said, even obliquely that the service of order *nisi* on the defendant in regard to alimony and cost, under section 377 of the Civil Procedure Code, consequent to which the defendant has entered her appearances through an Attorney-at-Law and filed her objections along with her own counter claim for alimony and cost making reference to the plaint amounts to sufficient compliance with the provisions relating to service of summons. Therefore, it is my considered view, that the learned District Judge was in error in fixing the case for *ex parte* trial on the ground of default in filing answer without verifying whether there was in fact service of summons on the defendant. I am also of the view the authorities the learned Counsel for the plaintiff has referred to in the course of his argument has no application to the facts of the present case, as there was proof of service of summons on the defendant in those cases cited, unlike in the present case where there was definite proof of non-service of summons on the defendant, but only the service of the order *nisi* and the notice.

Therefore, I find myself unable to agree with the argument advanced by the learned Counsel for the plaintiff in this regard.

In regard to the argument of the learned Counsel for the plaintiff that the present application for leave to appeal cannot be maintained, it should be observed that the order which is canvassed is not a judgment in terms of section 754 (1) of the Civil Procedure Code, but only an incidental order fixing the case for *ex parte* trial made in the course of proceedings. In other words it is not an *ex parte* judgment as argued by Counsel for the plaintiff but an order made in fixing the case for *ex parte* trial.

It should be pointed out, that there is a wide divergence between an *ex parte* judgment and an incidental order of fixing the case for *ex parte* trial.

The impugned order is only an incidental order which has no effect of a final judgment or qualifies as a judgment in terms of section 754 (5) of the Civil Procedure Code. The case has not disposed of the rights of the parties finally and it has yet to reach finality in due course.

I am unable to agree with the contention of the learned Counsel for the plaintiff, that section 88 (1) applies to the facts and circumstances of this case. Therefore, I am constrained to reject the argument of the learned Counsel that the defendant is precluded from presenting an application for leave to appeal at this stage.

The authority, *Siriwardena v. Air Ceylon Ltd.* (*supra*) relied on by the Counsel in support of his argument in this regard therefore does not deal with the question at issue as the criteria spelt out in that particular case applies to a judgment, or an order which has the effect of a final judgment in terms of section 754 (5) of the Civil Procedure Code.

Therefore, taking into consideration all the facts, relevant authorities, and submissions made in this case, I am of the view that the impugned order of the learned District Judge in fixing his case for *ex parte* trial cannot stand. Therefore, I vacate the order dated 18. 08. 2000 of the learned District Judge fixing the case for *ex parte* trial, and direct him to permit the defendant to file answer after service of summons along with a copy of the plaint, in accordance with the provisions of the law.

I cast the plaintiff in costs in a sum of Rs. 10,000.

UDALAGAMA, J. – I agree.

Application allowed.