SHEILA SENEVIRATNE

v.

SHEREEN DHARMARATNE

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
P.R.P. PERERA, J.,
S.C. APPEAL NO. 122/94
C.A. 656/83(F)
D.C. MT. LAVINIA NO. 2051/M.
JUNE 29, 1995.

Civil Procedure Code – Ex parte trial – Section 84 and 85 of the Code – Ex-parte Judgment and decree – Duty of the Court to act on legal evidence – Section 60 of the Evidence ordinance.

The plaintiff sued the defendant for damages in a sum of Rs. 78,000/- for failure to grant her a Diploma Certificate in Montessori Training for which she claimed to have qualified at a course conducted by the Defendant. At the ex-parte hearing of the action under Section 84 of the Civil Procedure Code, the only evidence

adduced was that of the Plaintiff's sister. There was nothing in her evidence which showed that she was testifying to the facts from her own knowledge. All the transactions which led to the dispute had been between the plaintiff and the defendant. There was no evidence that the witness herself played a direct role in that regard.

Held:

The evidence led is clearly hearsay and hence 'no evidence at all' on which a judgment may be entered under Sec. 85(1) of the Civil Procedure Code. Consequently, the *ex parte* decree entered by the District Judge is illegal.

Cases referred to:

1. *Amerasekera v. Fernando* – 49 NLR 60.
2. *Sarabjit Singh v. Special Manager, Court of Wards Rampur Mathra Estate* AIR 1917, Oudh 194, 196
3. *Monmatha Kumar Ray v. Josda Lal Podder*, AIR 1924, Cal. 647, 648
4. *Gurunath Iknath Sukre v. Laximibai Govind Kanista* AIR 1942 Bom. 344
5. *State of West Bengal v. Lakshmi Narayan Singh* AIR1956 Cal. 87, 89.
6. *Eliyathamby v. Eliyathamby* – 27 NLR 396, 401 (PC)
7. *Fernando v. Jaward* – 77 NLR 554, 558

APPEAL from the judgment of the Court of Appeal

Faisz Musthapha, P.C., with *G.L. Geethananda* for plaintiff-appellant.

R.E. Thambiratnam with *Herman J.C. Perera* for defendant-respondents.

Cur. adv. vult.

September 6, 1995.
KULATUNGA, J.

The plaintiff-appellant is seeking the restoration of the *ex parte* decree entered by the District Judge in the above action which decree was set aside by the Court of Appeal. By its judgment, the Court of Appeal also directed an inter partes trial, according to law.

The defendant had filed answer with a claim in reconvention; whereupon, the plaintiff filed replication. The case was then fixed for trial. It was heard *ex parte* on the ground that the defendant failed to appear on the date fixed for trial. The defendant's application to set aside the *ex parte* decree was refused by the District Judge on the ground that the application was not made according to law and was

out of time, having been filed after the period of 14 days permitted by law.

The defendant's appeal to the Court of Appeal was resisted *inter alia* on the ground that the defendant had failed to hypothecate security for costs of appeal, which default the Court of Appeal purported to excuse in terms of S. 759(2) of the Civil Procedure Code. In the end, the Court of Appeal set aside the *ex parte* decree in the exercise of revisionary jurisdiction for the reason that the said decree is based on a judgment given on the basis of hearsay evidence. This was an objection which the defendant had consistently urged at every stage of proceedings, before the trial Court and the Court of Appeal.

Special leave to appeal herein has been granted on a number of grounds but I propose to decide the matter on one ground alone namely, whether the *ex parte* decree is illegal as it is based on a judgment entered on hearsay evidence; if so, whether the Court of Appeal was justified in setting it aside, by way of revision. I have adopted this course particularly in view of the submission of Mr. Musthapha P.C. for the plaintiff-appellant that the defendant had failed to properly pursue the specific remedy which S.86(2) of the Code provided, to have the *ex parte* decree vacated, due to her negligence or her own folly. However, in fairness to the defendant it must be stated that the alleged negligence in the case was that of her registered Attorney. If there was any such negligence, the defendant had to suffer by reason of the acts of her agent. This is a fact which I consider is relevant to the decision of this case.

The plaintiff had followed a course in Montessori Training Methods conducted by the defendant. The plaintiff claims that she sat a test and qualified for a Diploma and was awarded a certificate at a ceremony presided over by Mrs. Siva Obeysekera. Later she realised that the so-called certificate was a blank sheet of paper. She claims damages in a sum of Rs. 78,000/-. The defence is that the plaintiff did not pass the test. So she was not entitled to a Diploma. But the plaintiff desired it to be known she had qualified for the Diploma and requested that she be photographed at the award ceremony as receiving a certificate. She undertook to repeat the test. Hence, the pretence of an award when only a blank certificate was given. At the second attempt also, the plaintiff failed to pass the test.

According to the record, on 15.07.81 the registered Attorney of the plaintiff was present. The lawyer sister of the plaintiff says in an affidavit that she appeared for the plaintiff that day, tendered the plaintiff's replication and obtained a date for the trial on behalf of senior Counsel; she communicated the date of trial namely, 02.10.81 to the Counsel; the registered Attorney for the defendant was not present in Court.

The record shows that although the trial was fixed for 02.10.81 the first entry made was 02.11.81 after which the reference to "11" had been altered to "10" in such a way that at a glance one may still misread it as "11". In fact, the clerk who had entered the date in the "Day Book" had himself first entered it as 02.11.81 and then corrected it as 02.10.81.

On 02.10.81 the plaintiff was absent but represented by Counsel; the defendant was absent and unrepresented; whereupon, the District Judge tried the case *ex parte*. The evidence of the lawyer sister was led on the facts averred to in the plaint which evidence was hearsay, except perhaps as regards one matter namely a letter addressed to the plaintiff's Attorney-at-Law in which the defendant had replied the plaintiff's claim wherein the defendant admits the award of a blank certificate to the plaintiff. However, the letter states that this was for the reason that the plaintiff had not qualified for a Diploma; and that the plaintiff failed the examination when she sat for it a second time; so that the plaintiff was never entitled to a Diploma. The said letter is consistent with the defence raised in the answer. After recording that evidence, the Court postponed judgment to enable the filing of documents.

Before the Court proceeded to deliver its judgment, the registered Attorney for the defendant filed an affidavit dated 16.10.81 (together with an affidavit of the defendant) explaining that he took down the date as 02.11.81 and later learnt that the case had been fixed for *ex parte* trial. He also noted an alteration of the date. More relevantly, he drew the attention of the Court to the fact that the sole witness for the plaintiff had given hearsay evidence in breach of the provisions of S.85(1) of the Code; and that there is nothing in her evidence which shows that she was testifying to the facts from her own knowledge. He moved that the entering of the *ex parte* judgment be stayed, pending investigations into the said alteration; in any event, judgment be entered dismissing the plaintiff's action, for breach of S.85(1).

On 27.11.81 the District Judge entered *ex parte* judgment. Almost the entirety of the judgment is devoted to explaining the circumstances in which the entry of the trail date had been altered. The objection that hearsay evidence had been led was not considered. The Judge said that "on the evidence given . . . the plaintiff had established a *prima facie* case for the recovery of a sum of Rs. 78,000/- from the defendant". Accordingly he gave judgment for the plaintiff and directed that a decree be entered under S.85(4).

The *ex parte* decree was served on 18.09.92. Next, there is an application dated 29.09.92 by the registered Attorney for the defendant seeking to vacate the *ex parte* decree but there is no accompanying affidavit. On 07.10.82 a motion has been filed moving that the said application be entertained on the basis of the affidavit "previously filed". The application itself bears the date stamp 07.10.82. In the written submissions filed on behalf of the defendant, the point was made that District Judge had given *ex parte* judgment *per incuriam*, without considering the submission that *ex parte* judgment had been entered on the evidence of the plaintiff's sister, in breach of S.85(1).

On 18.10.83, the District Judge rejected the application to vacate the *ex parte* decree on the ground that the said application was not in conformity with S.86(2) and that it was time barred. The submission that the *ex parte* judgment was *per incuriam*, and had been entered on the evidence of the plaintiff's sister, in breach of S.85(1), was not considered.

Mr. Musthapha's criticism of most of the grounds on the basis of which the Court of Appeal reversed the order of the District Judge is valid. Mr. Musthapha relies primarily on the lapses of the registered Attorney for the defendant in respect of which the District Judge has made specific findings of fact. There is force in the submission that the Court of Appeal was not justified in reversing those findings. Hence this Court would normally not have affirmed the judgment of the Court of Appeal. However, the allegation that the District Judge had given judgment on hearsay evidence raises a serious question as to the legality or the propriety of that judgment. The question is whether that judgment and the decree which followed it are illegal and void for lack of legal evidence. If so, the Court of Appeal was right in setting aside the said decree.

S.84 of the Code requires the Court to proceed to hear the case *ex parte inter alia*, where the defendant is absent on the day fixed for the hearing of the action. S.85 which prescribes the procedure for *ex parte* trial states that the plaintiff may place evidence before the Court in support of his claim by affidavit or by oral testimony; and the Court, if satisfied that the plaintiff is entitled to the relief claimed by him may enter such judgment for him as to it shall seem proper and enter decree accordingly. In *Amerasekera v. Fernando* [1] Soertsz J. expressed the view that the evidence in support of the plaintiff's claim at an *ex parte* trial should, as a rule, be given orally, and affidavits should be resorted to only in exceptional cases.

In India, the principles applicable to the hearing of a case *ex parte* have been set out as follows: –

(1) A Court ought not to rely in an *ex parte* case on evidence otherwise unreliable, simply because the case is *ex parte*. *Sarabjit Singh v. Special Manager, Courts of Wards, Rampur Mathra Estate* [2].

(2) If a case is heard *ex parte*, the Court cannot pass a decree except on proof by the plaintiff that he is entitled to that decree *Monmatha Kumar Ray v. Josda Lal Podder* [3].

(3) A direction that the Court may proceed *ex parte* means that the Court can hear evidence in the absence of the defendant, and make such order as that evidence justifies. *Gurunath Iknath Sukre v. Laximibai Govind Kanista* [4].

(4) If there is no such evidence the claim is liable to be dismissed, though the defendant has not chosen to appear *State of West Bengal v. Lakshmi Narayan Singh* [5].

In the instant case, the District Judge gave judgment on the evidence of the plaintiff's sister. As pointed out earlier, that evidence was oral evidence except as regards two letters. The case rested mainly on oral evidence. In terms of S.60 of the Evidence Ordinance, oral evidence must, in all cases whatever, be direct meaning, that it must be given by a witness who has seen, heard or perceived any fact which is sought to be proved. There are exceptions to the hearsay rule but they have no application to this case.

As urged by the defendant, there is nothing in the evidence of the witness called at the *ex parte* hearing which shows that she was

testifying to the facts from her own knowledge. All the transactions which led to the dispute had been between the plaintiff and the defendant. There is no evidence that the witness herself played a direct role in that regard. Such evidence is clearly hearsay and hence no evidence at all on which a judgment may be entered under S.85(1) of the Code.

In *Eliyathamby v. Eliyathamby* [6], the Privy Council whilst affirming that the rule against hearsay is part of the law of Ceylon said:

> "The principle is one so reasonable in itself, fundamental and so long established, that Their Lordships cannot conceive of its being overthrown and discarded except designedly, and by words so plain that their meaning would not be open to any manner of doubt.".

Well before the delivery of the *ex parte* judgment, the defendant had drawn the attention of the Court to the fact that the evidence led at the *ex parte* hearing was hearsay. But the District Judge proceeded to give judgment for the plaintiff without considering that submission. It is true that once a case is fixed for *ex parte* hearing, the defendant cannot seek to have such order vacated until he receives the *ex parte* decree. But in the instant case, the defendant was not seeking to have any order vacated. According to the affidavits filed, the defendant only applied –

(a) that in view of the alteration of the date of hearing, the Court should stay the making of the *ex parte* judgment, pending investigation as to the circumstances of such alteration;

(b) that in view of the hearsay evidence, the Court should make order dismissing the plaintiff's action.

It seems to me that the application made by the defendant was perfectly legitimate and in conformity with the relevant statute and authorities. Counsel for the plaintiff-appellant has submitted on the authority of *Fernando v. Jaward* [7] that the evidence led in an *ex parte* trial is of the bearest minimum. But in the instant case, there is no evidence at all. Hence that decision has no application.

I hold that *ex parte* decree entered by the District Judge is illegal. Therefore, the Court of Appeal was justified in setting it aside and directing a trial inter partes. Accordingly, I dismiss the appeal and

affirm the judgment of the Court of Appeal. In all the circumstances, I make no order as to costs.

G. P. S. DE SILVA C.J. – I agree

P. R. P. PERERA, J. – I agree

Appeal dismissed.