

DHARMASENA AND ANOTHER

v.

THE PEOPLE'S BANK

SUPREME COURT
FERNANDO, J.
WIGNESWARAN, J., AND
WEERASURIYA, J.
SC LA 10/2002
COMMERCIAL HIGH COURT (CIVIL)
CASE No. 13/2002 (1)
11TH SEPTEMBER 2002

Civil Procedure Code – Section 84 of the Code – Failure to file proxy or enter an appearance on summons returnable date – Pre-requisites for ordering ex parte trial – Natural justice.

The plaintiffs (“the petitioners”) filed action against the defendant (“the respondent”) on 1.2.2002. Notice of interim injunction was granted and summons was issued returnable 5.4.2002. Summons was actually served on the defendant

only on 3.4.2002. On 5.4.2002 an attorney-at - law appearing on behalf of the defendant stated that the proxy was not ready. The judge gave a date for proxy, objections and answer to be filed namely, on 10.5.2002. The plaintiffs raised no objection; nor applied for *ex parte* order on 5.4.2002.

On 29.4.2002 the plaintiffs moved for an order for *ex parte* trial on the ground that the defendant failed to appear on 5.4.2002 and the defendant's attorney-at-law who was not duly authorized was not entitled to move for time. On 10.5.2002 the judge refused that application.

Held:

There was proof that the defendant had been duly served with summons as required by section 84 of the Civil Procedure Code ("the Code"). Hence the order granting time on 5.4.2002 and the refusal of the application for *ex parte* trial on 10.5.2002 were correct.

Per Fernando, J.

"The Code must be interpreted as far as possible, in consonance with the principles of natural justice, and the court can only be satisfied that summons had been "duly served" where the defendant has been given a fair opportunity of presenting his case in his answer. If not, the court has the power to give further time for answer even if the defendant does not ask."

APPLICATION for leave to appeal from the order of the High Court

Kuvera de Soysa with Malini Rajapaksha for plaintiffs - petitioners.

M.Ronald Perera for respondent

Cur.adv.vult

September 11,2002

FERNANDO, J.

The Plaintiff-Petitioner ("the Plaintiff") filed action against the Defendant-Respondent Bank ("the Defendant") on 1.2.2002. Notice of interim injunction was granted and summons was issued, returnable on 5.4.2002. Summons was actually served on the Defendant

only on 3.4.2002. On 5.4.2002 an attorney-at-law appeared on behalf of the Defendant and stated that the proxy was not yet ready. Without any further inquiry the learned trial Judge gave a date for proxy, objections and answer to be filed, namely 10.5.2002. The Plaintiff neither objected nor moved for *ex parte* trial on 5.4.2002. On 29.4.2002 the Plaintiff filed a motion seeking an order for *ex parte* trial. On 10.5.2002 the learned trial Judge refused that application.

Learned counsel for the Plaintiff submitted that where a defendant does not appear in person or by an authorized representative, and is not represented by an attorney-at-law holding a valid proxy, an attorney-at-law is not entitled to appear on behalf of the Defendant and move for time to file proxy and answer, and *ex parte* trial must be ordered.

The principal question is whether the order of 5.4.2002 was contrary to the provisions of section 84 of the Civil Procedure Code, which insofar as this case is concerned, provides that "if the defendant fails to file his answer on or before the date fixed for the filing of the answer... and if the court is satisfied that the defendant has been duly served with summons....the court shall proceed to hear the case *ex parte*..." The first point to note is that this section does not apply to a default in filing proxy. Secondly, *ex parte* trial can be ordered only if the court is satisfied that the defendant has been duly served with summons. The question then is whether the court shall proceed to hear the case *ex parte* even where the summons is served so soon before the date for answer that it is not reasonably possible for the defendant to prepare and file his answer. The Code must be interpreted, as far as possible, in consonance with the principles of natural justice, and the court can only be satisfied that summons has been "duly" served where the Defendant has been given a fair opportunity of presenting his case in his answer. If not, the court has the power to give further time for answer even if the Defendant does not ask. In this case summons was served at such short notice that the Defendant hardly had time even to grant a proxy to an attorney-at-law. An attorney-at-law having actual authority to appear was entitled to move for further time to file a proxy, and any irregularity in that regard was cured by the subsequent filing of a proxy within the time granted by the court.

The orders made on 5.4.2002 and 10.5.2002 were correct. There is no question of law for determination, and leave to appeal is refused without costs.

WIGNESWARAN, J. - I agree

WEERASURIYA, J. - I agree.

Leave to appeal refused .