

**FINANCE & LAND SALES LTD
VS
PERERA**

COURT OF APPEAL
AMARATUNGA J
WIMALACHANDRA J
CA APPL 1397/2003 (REV)
D.C. KALUTARA 4546/L
MAY 21, 2004.

Ex Parte Decree - Application to set aside same - dismissed - Does Revision lie against the Judgment entered Exparte? Judgment palpably wrong - Miscarriage of Justice - actus curiae neminem gravabit - ex debito Justitiae to set aside Judgment - Re - trial -in the interest of Justice.

The trial Judge entered Judgment exparte granting all the reliefs prayed for by the Plaintiff including the relief claimed in the alternative. Application to purge default by the Defendant was dismissed by the trial Judge.

The Defendant sought to canvass the validity of the exparte Judgment on its merits in Revision.

Held :

- (i) Although an appeal is not available against an Exparte Judgment, it is possible to move in Revision against an exparte Judgment on its merits.

Held further :

- (ii) When the Plaintiff claimed relief in the alternative, the trial Judge has given him all the reliefs set out in the prayer to the Plaint. The Judgement shocks the conscience of this court and that is sufficient for this Court to exercise the Courts extra - ordinary revisionary powers. If the Judgment is not set aside, it would cause serious injustice to the Defendant Petitioner amounting to a miscarriage of justice, accordingly he is entitled to ex debito justitiae to have the Judgment set aside.
- (ii) When the Judgment is set aside, it is the end to the Plaintiffs case, a fresh action on the same cause of action will be time barred, that would cause prejudice to the Plaintiff Respondent, the Judgment is set aside due to the serious mistake made by Court - Actus curiae neminem gravabit - as this Court has to ensure that the Court's mistake does not result in prejudice to the Plaintiff, a retrial is ordered on the original plaint. The Defendant Petitioner is entitled to appear and file answer and to participate in the new trial.

Application in Revision from the Judgment of the District Court of Kalutara.

1. *Sirimavo Bandaranaike vs Times of Ceylon Ltd.*, - 1995 1 Sri LR 22 at 35

Ranjan Gunaratne for Petitioner.

W. Dayaratne for Respondent.

January 13, 2005

GAMINI AMARATUNGA J.

The facts relating to this revision application are as follows. The plaintiff - respondent (hereinafter called the plaintiff) guaranteed the due payment of lease rentals by one Thilakawardana who has taken a vehicle on lease from the defendant - petitioner, (hereinafter called the defendant). Thilakawardana defaulted to pay the rentals due to the defendant. The plaintiff on learning that the defendant had got deed No. 31 dated 4.7.1995

executed, conveying his land described in the Schedule to that deed in favour of the defendant instituted case No. 4546/L (the present action) against the defendant seeking the following reliefs.

- (a) a declaration that deed No. 31 is null and void.
- (b) For a declaration that the defendant is holding the property described in the schedule to the plaint in trust for the plaintiff.
- (c) In the alternative a decree against the defendant for Rs. 830,000 (being the actual value of the land) on the basis of unjust enrichment and Laesio Enormis.

After summons were served the defendant failed to appear. The trial was taken up ex-parte. The plaintiff gave evidence and closed his case. The learned trial Judge on 29.12.1997 entered judgment in favour of the plaintiff. At the end of the judgment the learned trial Judge has stated "I enter judgment in favour of the plaintiff as prayed for in the plaint." It is obvious that when the trial Judge wrote the above sentence he has overlooked the fact that the plaintiff has claimed relief in the alternative. When a plaintiff has claimed relief in the alternative the trial Judge has to specify the specific relief granted to the plaintiff. As the judgment now stands,

- (1) Deed No. 31 is declared null and void.
- (2) There is a declaration that the defendant holds the property in trust for the plaintiff.
- (3) The plaintiff is entitled to recover Rs. 830,000 from the defendant.

After the ex parte decree was served the defendant appeared and sought to purge its default. The Application to set aside the ex-parte decree was dismissed after inquiry. The defendant has filed this revision application to canvass the validity of the ex-parte judgment on its merits. Although an appeal is not available against an ex-parte judgment, it is possible to move in revision against an ex-parte judgment on its merits. Vide *Sirimavo Bandaranaike vs. Times of Ceylon Limited*¹¹.

Mr. Dayaratna, the learned counsel for the plaintiff took up a preliminary objection in limine to the effect that there are no exceptional circumstances to exercise revisionary powers of this Court in favour of the

defendant petitioner. As I have already pointed out the learned District Judge's Judgement was manifestly wrong. When the plaintiff claimed relief in the alternative, the learned judge has given him all the reliefs set out in the prayer to the plaint. In other words more than what the plaintiff has asked for. The judgment of the trial Judge shocks the conscience of this Court and that is sufficient for this Court to exercise the Court's extraordinary revisionary powers in favour of the defendant - petitioner. If the judgment of the District Court is not set aside, it would cause serious injustice to the defendant - petitioner, amounting to a miscarriage of justice. Accordingly the defendant - petitioner is entitled *ex debito justitiae* to have the judgment of the District Court set aside.

However this Court has to look at the other side of the coin as well. In giving relief to the petitioner, we have to ensure that it would not result in prejudice to the plaintiff respondent. When we set aside the judgment of the District Court, it is the end of the plaintiff's action. A fresh action, on the same cause of action will be time barred. That would cause prejudice to the plaintiff - respondent. The judgment of the District Court is to be set aside due to the serious mistake made by Court. "*Actus curiae neminem gravabit*" (an act of Court shall prejudice no man). Accordingly this Court has to ensure that the Court's mistake does not result in prejudice to the plaintiff.

Section 753 of the Civil Procedure Code states that "The Court of Appeal may,..... upon revision,..... pass any judgment or make any order..... as the interests of justice may require". In the exercise of this wide power I make the following order. I allow the revision application and set aside the judgment dated 09.12.1997 and the decree. I order a re-trial and direct the learned District Judge of Kalutara to hold the re-trial on the plaint filed by the plaintiff - respondent in November 1996. The defendant - petitioner is entitled to appear and file answer and to participate in the new trial. However before filing the answer the defendant - petitioner shall pay to the plaintiff - respondent taxed costs of the abortive trial upto the date (18.06.2003) on which the defendant - petitioner's application to purge default was dismissed. In respect of this revision application the parties shall bear their own costs.

WIMALACHANDRA J. — I agree.

Application allowed, Trial de novo ordered.