DHARMARATNE
VS
DASSENAIKE AND OTHERS

COURT OF APPEAL.
SOMAWANSA., J (P/CA).
WIMALACHANDRA. J.
CALA 304/2004. (LG)
DC COLOMBO 16858/L.
MARCH 17, 2006.

Judicature Act, 2 of 1978 - Amended by Act No.27 of 1999 - trial de novo - Section 48 - Case concluded before a different judge - Could the judgment be written by another – Applicability of Section 48 - Civil Procedure Code' Section 184 and Section 185.

The judgment was fixed for 02.09.2003. Before the judgment could be delivered the trial tudge was elevated as a judge of the High Court and proceeded abroad on leave. On 12.03.2004 the successor in office as District judge transferred the case to the Additional District judge for the purpose of delivering the order. When the case was called the 1st and 2nd defendants made an application to Court that the case be heard *de novo*. The plaintiff objected. The Additional District judge refused the application for a trial *de novo* and fixed the case for judgment.

HELD:

(1) In view of the provisions of section 48 of the Judicature Act - as amended a party to an action has no right to demand a trial *de novo* but where an application is made for a trial *de novo* there is a discretion vested in the judge to decide whether a trial *de novo* should be ordered or not.

(2) The 1st defendant - respondent has set up a claim on the basis of prescriptive title and the 2nd defendant- petitioner claimed on a

title deed coming from the 1st defendent. The claim of prescription depends to very great extent upon oral testimony which in turn makes the impression created by the witness an important factor in determining the question of fact.

(3) The District judge has erred in law in not considering that the case for the defendants mainly depend on evidence and not documents, and the District judge should have given consideration to this aspect of the matter when he was apprised of these facts.

Per Andrew Somawansa. J, (P/CA) :

" Discretion given to a judge must be exercised according to the rules of reason and justice, not according to private opinion, according to law and not humour, its exercise must be uninfluenced by irrelevant consideration must not be arbitrary, vague and fanciful but legal and regular, and it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself".

APPLICATION for leave to appeal from an order of the District judge of Colombo., with leave being granted.

Cases referred to :

(1) *Mohota vs Sarana* - 62 CLW 37
(2) *Saravanamuttu vs Saravanamuttu* - 61 NLR 1
(3) *Kulathunga vs Samarasinghe* 1990 - 1 Sri LR 244
(4) *Edwin vs De Silva* - 62 NLR 44
(4) *Sharp vs. Wakefield* 1891 AC 173 at 179
(6) *Wijewardena vs Lenora* - 60 NLR 457 at 463
(7) *Osenton and Co. vs. Johnson* 1941 2 All ER 245 at 250

Parakrama Agalawatte with *M. de Gunatilake* for defendant - petitioner.
Gamini Marapana PC with *Kushan de Alwis* for plaintiffs - respondents.

Cur adv. vult.

March 17, 2006.

ANDREW SOMAWANSA, J. (P/CA).

This is an application seeking leave to appeal but the prayer does not specify from which order leave is sought, thereafter to hear the appeal and make order that the instant case be heard *de novo*. The 2nd defendant- petitioner also supported and obtained interim relief staying proceedings in the District Court operation of which has been extended from time to time.

As per minute dated 21.09.2004 leave to appeal has been granted on the following question :

Has the learned Additional District judge correctly exercised his discretion in terms of section 48 of the Judicature Act when he refused the application for a trial *de novo* ?.

The relevant facts are, at the conclusion of the trial the learned District judge fixed the date of pronouncement of judgment for 02.09.2003. However before the judgment could be delivered the learned District judge who heard the case was elevated as a judge of the High Court and proceeded abroad on leave. On 12.03.2004 the successor in office as District judge of Colombo transferred the case to the learned Aditional District judge of Colombo sitting in Court No.2 for the purpose of delivering judgment on the evidence already recorded. On the same day when the case was called in Court No.2 counsel for the 1st and 2nd defendants made an application to Court that the case be heard *de novo* in as much as the entire trial had been concluded before the predecessor in office of the District Judge of Colombo. Counsel for the plaintiff - respondent objected to the said application on the basis that rights of a party to move for a trial *de novo* had been taken away by the Judicature (Amendment) Act No.27 of 1999. Parties were permitted to file written submissions and the learned Additional District judge by his order dated 03.07.2004 refused the application for a trial

de novo and fixed the case for judgment on the evidence already recorded holding that Court has power to hear the case *de novo*, if Court considers it appropriate but that great prejudice will be caused specially to the plaintiff- respondent if the trial *de novo* takes a long time to conclude. In appears that it is from this order that the 2nd defendant- petitioner is seeking to appeal.

Counsel for the 2nd defendant - petitioner submits that the learned District Judge erred and/or misdirected himself when he arrived at the finding that great prejudice will be caused especially to the plaintiffs by the delay involved in the event of a trial *de novo*. He submits that even though the action had been filed as far back as 1994, the trial had commenced only by about 1999, the period in between having been consumed by the various pre-trial stages. The hearing of the said trial had concluded prior to 02.09.2003. If a trial *de novo* were to be held, no time would be spent on pre-trial stages as those steps have already been taken and no inordinate delay is likely under normal circumstances. No greater prejudice if any will be caused to the plaintiff than to the defendants by the delay involved in trial *de novo* and that the defendants are not in any way responsible for the present delay in concluding the case.

Counsel also submits that the learned Additional District Judge erred and/or misdirected himself when he arrived at the finding that the authorities cited on behalf of the 1st and 2nd defendants have no application as they have all been decided prior to the enactment of the Judicature (Amendment) Act No. 27 of 1999 which amended the proviso to Section 48 of the Judicature Act No.02 of 1978. It is submitted that the said authorities which laid down as being imperative the requirement that the judge who saw and heard the witnesses should write the judgment while the impression created by the witnesses and the finer points of the evidence was still fresh in his mind, are judicial interpretations not of section 48 of the Judicature Act but of sections 184 and 185 of the Civil Procedure Code and that they continue to be good law. I would say there is force in this argument.

It would be useful at this stage to examine section 48 of the Judicature Act No.02 of 1978 as amended by Act No.27 of 1999 which reads as follows :

"In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh :

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and re-heard."

It could be seen that in view of the provisions contained in section 48 of the Judicature Act No.02 of 1978 as amended a party to an action have no right to demand a trial *de novo* but where an application is made for a trial *de novo* there is a discretion vested with the judge to decide whether a trial *de novo* should be ordered or not.

It is contended by counsel for the plaintiffs - respondents that the only basis upon which the impugned order of the learned District Judge could be challenged by the 2nd defendant - petitioner is on the basis that he had not properly exercised the discretion vested in him by section 48 of the Judicature Act No.02 of 1978 as amended. But if Court were to examine the several averments in the petition tendered by the 2nd defendant - petitioner Court will observe that the 2nd defendant does not challenge the validity of the order on that score at all. This appears to be an incorrect statement for it appears that grounds of appeal urged in paragraph 12(c) and(d) pertain to the question of

exercise by the learned District judge of the discretion conferred by the aforesaid section 48 of the Judicature Act No.27 of 1999 as amended. The aforesaid paragraph 12(c) and (d) reads as follows :

" As is reflected in their respective answers "P2" and "P3" the defence of the 1st and 2nd defendants was based upon a claim of prescription which, it is submitted, by its very nature depends upon oral testimony which, in turn makes the impression created by witnesses an important factor in determining questions of fact. It is respectfully submitted that the said principle which has hitherto been applied by the Appellate Courts of this county will be completely negated in the event of the learned successor judge who has not seen even a single witness testifying were to write the judgment in terms of the order "P8"

It is submitted with respect that the learned Additional District judge erred and/or misdirected himself when he arrived at the finding that the authorities cited on behalf of the 1st and 2nd defendants have no application as they had all been decided prior to the enactment of the Judicature (Amendment) Act No.27 of 1999 which amended Section 48 of the Judicature Act No. 02 of 1978 It is submitted that the said authorities which laid down as being imperative the requirement that the judge who saw and heard the witnesses should write the judgment while the impression created by the witnesses and the finer points of the evidence was still fresh in his mind are judicial interpretations of Sections 184 and 185 of the Civil Procedure Code and continue to be the law and are applicable in respect of the present case."

The aforesaid averments would show that the 2nd defendant - petitioner is in fact challenging the validity of the impugned order.

It is to be seen that the 1st defendant - respondent has set up a claim on the basis of a prescriptive title and whereas the 2nd defendant petitioner claimed on a title deed coming from the 1st defendant. In

the circumstances the case of the 2nd defendant- petitioner had to stand or fall on the sucess or otherwise of the 1st defendant's defence. The claim of prescription depends to a very great extent upon oral testimony which in turn make the impression created by the witnesses an important factor in determining questions of fact. Basnayake, C. J. in his decision in *Mohota* vs. *Sarana*[1] upheld the view that where the decision in a case depends on oral testimony the impression created by witnesses on the judge are important; again in the case of *Saravanamuttu* vs. *Saravanamuttu*[2].

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.

Also in the case *Kulathunga* vs. *Samarasinghe* [3]

A judgment delivered two years and four months after the tender of written submissions cannot stand. The case depended on the oral testimonies of witnesses. The impression created by the witnesses on the judge is bound to have faded away after such a long delay; the learned Judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard and his recollections of the fine points in the case would have faded from his memory by the time he comes to write the judgment.

In *Edwin* vs. *de Silva* [4]Court held that :

"Even if the judge refreshed his memory of the facts by reading the typescript of the evidence after such a long interval of time he is bound to have lost the advantage of seeing and hearing the witness giving evidence and the impresion created by them could no longer be vivid in his mind. A judgment of a judge of first instance based on a mere reading of the typescript is not of the same value to this Court as a

judgment delivered while the recollection of the trial and of the demeanour and attitude of the witnesses and the impression created by them on him are fresh in his mind. In our view the judgment must be set aside and the case should go back for a retrial"

It is contended by counsel for the plaintiff - respondent that the learned District judge has taken into consideration the aforesaid cases cited and has correctly held that the said cases have been decided prior to the amendment of the Judicature Act and therefore has no relevance to the instant action. I am unable to agree with this submission for two reasons. The first reason being that the aforesaid cases dealt with not Section 48 of the Judicature Act but with Sections 184 and 185 of the Civil Procedure Code and the other being that the principle laid down in those cases hold good law even now and Courts have continued to act and follow the aforesaid decisions. However the situation would be quite the opposite if the evidence to be considered by Court consists mainly of documentary evidence in which case the principle laid down in the aforesaid cases will have no relevance for the succeeding judge only need to examine the documentary evidence placed before Court. In the instant action, the case for the defendants mainly depend on evidence and not on documents and the learned District judge should have given consideration to this aspect of the matter when he was appraised of these facts. I would say the learned District Judge erred in law in not considering this important factor when exercising the discretion given to him in terms of Section 48 of the Judicature Act as amended.

While I agree with the view expressed in the case of *Sharp* vs. *Wakefield*[5] at 179 that discretion given to a judge must be exercised according to the rules of reason and justice, not according to private opinion ; according to law and not humour. Its exercise must be uninfluenced by irrelevant consideration, must not be arbitrarily, vague and fanciful but legal and regular. And it must be exercised

within the limit to which an honest man competent to discharge his office ought to confine himself.

In the instant action it is very clear that the learned District Judge has exercised its discretion not according to the rules of reason and justice but taking into account irrelevant matters such as the great prejudice that would be caused specially to the plaintiffs - respondents by the delay involved in the evidence of a trial *de novo* and the length of time the trial in the instant action had taken *viz* : nearly 10 years from the date of institution of the action. Further, the learned District judge has come to a conclusion that the aforesaid decisions cited by the 2nd defendant - petitioner has no application to the instant application for a trial *de novo*. These are the matters that has persuaded the learned District Judge to exercise his discretion in refusing the application of the 2nd defendant-petitioner for a trial *de novo*.

Counsel for the plaintiffs - respondents has cited two other cases in support of his contention that this Court should not interfere with the exercise of the discretion vested in the original Court.

The first case being *Wijewardena* vs. *Lenora*[6] at 463 per Basnayake, J.

"The mode of approach of an Appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the judge has acted illegally,arbitrarily or upon a wrong principle of law or allow extraneous or irrelevant consideration to guide or affect him, or that he has mistaken the facts, or not taken into account some material

consideration. Then only can his determination be reviewed by the appellate Court."

The case is *Osenton* and Co. Vs. *Johnston*[7] at 250 wherein the Court observed :

"The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well established, and any difficulty which rises is due only to the application of well settled principles is an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant then the reversal of the order on appeal may be justified".

I have no bone to pick with the aforesaid observations for they are sound principles of law. However it appears that the learned District Judge in exercising his discretion vested in him in terms of Section 48 of the Judicature Act as amended has acted arbitrarily upon wrong principles of law and has allowed extraneous and irrelevant matters to guide him.

Another matter raised by counsel for the plaintiffs - respondent is the 2nd defendant - petitioner's conduct in the District Court. He submits that the 2nd defendant - petitioner who did not object to the learned District Judge of Colombo before whom no evidence in the said action has been led from delivering the judgment is not entitled to object to the Additional District Judge of Court No.2 delivering judgment

on the same basis. The statement appears to be incorrect for journal No.95 dated 05.03.2004 which reads as follows :

තීන්දුව

මා ඉදිරිපිට මෙම නඩුව තීන්දු කරනවද යන්න පිළිබඳ සලකා බැලීමට පැමිණිල්ල දින නියම කැදවන්න 12.03.2004

Thereafter journal entry No.96 dated 12.03.2004 reads as follows :

කා. ස. (95) පරිදි කැදවන ලදී.

මෙම නඩුව විභාග කර ඇත්තේ පූර්වගාමී දිසා විනිසුරුතුමිය ඉදිරිපිටයි.

තීන්දු ප්‍රකාශ කිරීමට නියමිතව ඇති නමුත් විනිසුරුතුමිය රටින් බැහැරව සිටින නිසා මෙම නඩුවේ තීන්දුව ඉදිරිපත් කර ඇති සාක්ෂි අනුව තීරණය කිරීම සඳහා අංක 2 අධිකරණයේ විනිසුරුතුමා වෙත යොමු කරමි.

On the same day when the case was taken up in Court No. 02 before the Additional District Judge to fix a date of judgment the 2nd defendant - petitioner has made the applications for a trial *de novo* at the appropriate time.

For the foregoing reasons, I would answer the question of law formulated in the negative and set aside the order of the learned District judge and make order for a trial *de novo* with directions to the learned District Judge to hear and conclude the action as expeditiously as possible. In all the circumstances of the case, I make no order as to costs.

WIMALACHANDRA, J. — *I agree*

Appeal allowed.

Trial de novo ordered.