EDMAN ABEYWICKREMA
v
DR. UPALI ATHAUDA AND ANOTHER

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
SALEEM MARSOOF, J.AND
ANDREW SOMAWANSA, J.
S.C. APPEAL NO. 03/2005
S.C. SPL. L.A. 276/2004
C.A. 1259/96(F)
D.C. KANDY 20619/M.R.
JUNE 6, 2008

Civil Procedure Code – Section 85 (4) – What is the consequence of serving an invalid ex-parte decree – Do the provisions of the Civil Procedure Code apply to the decree when it was not an ex-parte decree – Section 86 – When there is no valid ex-parte decree served on the defendant is there a duty cast upon him to proceed under section 86.

As the appellant was absent and unrepresented, the case was fixed for *ex-parte* trial. Subsequently, the *ex-parte* trial was taken up and concluded and judgment was entered in favour of the respondents. Thereafter a purported *ex-parte* decree had been entered and the same was served on the appellant.

It reads as follows:-

"මෙම නඩුව මහනුවර අතිරේක දිසා විනිසුරු පී.බී. වරාවැව මැතිතුමා ඉදිරිපිට දී වර්ෂ 1994 ක්වූ ජනවාරි මස 12 වන දින පැමිණිල්ල වෙනුවෙන් නීතිඥ කිරිඇල්ල මහතාගේ උපදෙස් පිට නීතිඥ ස ගක්කාර. විත්තිය වෙනුවෙන් නීතිඥ පෙරේරා මහතාද පෙනී සිටිය දී පහත සඳහන් පරිදි නඩුව සමථයකට පත් කිරීමට එකඟ බවට නියෝග කර නින්දු කරනු ලැබේ."

Held:

(1) The decree served on the appellant on the face of it, is not an *ex-parte* decree but an *inter-partes* decree entered of consent and certainly not in accordance with the judgment and as such purging the appellant's default never arose. It does not cast any obligation on the appellant to comply with the provisions in section 86 of the Civil Procedure Code.

(2) Section 85(4) of the Civil Procedure Code provides for serving of an *ex-parte* decree entered in accordance with the judgment only.

(3) Section 85(1) of the Civil Procedure Code provides that the court should enter decree, though it is the practice for the Attorney-at-Law to draw up the decree and tender the same for judge's signature. The Judge is duty bound to satisfy himself of the correctness of the decree before he places his signature to it.

APPEAL from the judgment of the Court of Appeal.

Nihal Jayamanna, PC with *Dilhan de Silva* for the appellant.
P.A.D. Samarasekera, PC with *Rohan Sahabandu* for the respondents.

Cur.ad.vult.

February 28, 2008

ANDREW SOMAWANSA, J.

The defendant-appellant (thereinafter referred to as the appellant) was granted special leave to appeal on the questions of law as enumerated in paragraph 16 of his petition which reads as follows:

a) Was the *ex-parte* decree dated 31.10.1994 served on the defendant in fact a valid *ex-parte* decree?

b) Was the order of the learned District Judge dated 17.11.1994 correct when he acted on the basis that the said decree was an *ex-parte* decree?

c) Did the provisions of the Civil Procedure Code apply to the decree in view of the fact that it was not an *ex-parte* decree?

d) Could the defendant have moved under section 86 of the Civil Procedure Code when the only and valid *ex-parte* decree entered on 19.03.1996 was not served on the defendant?

When the matter was taken up for hearing counsel appearing for both parties made oral submissions and thereafter undertook to tender written submissions within two weeks. Though reminders were sent, no written submissions have been tendered by either party up to date.

The plaintiffs-respondents (hereinafter referred to as the respondents) instituted an action in the District Court of Kandy seeking a declaration of title to the land described in the schedule to the plaint, for ejectment of the appellant and damages. The appellant filed answer praying for a dismissal of the action and also stating that he has already disposed of his rights in the land in question.

It is common ground that the case was fixed for trial on 10.06.1992 on which date as the appellant was absent and unrepresented the case was fixed for *ex-parte* trial on 23.10.1992. On 06.10.1992 the appellant filed a petition and affidavit seeking to have the order for *ex-parte* trial vacated. Thereafter court granted a date for the appellant to support the aforesaid petition on which date too the appellant was absent and unrepresented and the case was re-fixed for *ex-parte* trial. Subsequently the *ex-parte* trial was taken up and concluded and judgment was entered in favour of the respondents. Thereafter a purported *ex-parte* decree had been entered and the same was served on the appellant on 31.10.1994. It is also common ground that the appellant within 14 days of receipt of the said purported *ex-parte* decree filed a motion seeking to set aside the *ex-parte* decree on the basis that it was not in conformity with the judgment and therefore was irregular. The learned District Judge by his order dated 17.11.1995 rejected the said application of the appellant on the basis that the appellant has not followed the correct procedure in making the application as laid down in section 86(3) of the Civil Procedure Code which requires that every application shall be made by petition supported by affidavit.

The purported *ex-parte* decree served on the appellant found on page 59 of the brief reads as follows:

"මෙම නඩුව මහනුවර අතිරේක දිසා විනිසුරු පී.බී. වරාවැව මැතිතුමා ඉදිරිපිට දී වර්ෂ 1994 ක්වූ ජනවාරි මස 12 වන දින පැමිණිල්ල වෙනුවෙන් නීතිඥ වාරයමන් කිරිඇල්ල මහත්මයාගේ උපදෙස් පිට නීතිඥ සංගක්කාර. විත්තිය වෙනුවෙන් නීතිඥ ඩබ්. එන් යූ. ජේ. පෙරේරා මහතාද පෙනී සිටිය දී පහත සඳහන් පරිදි නඩුව සමථයකට පත් කිරීමට එකඟ බවට නියෝග කර තීන්දු කරනු ලැබේ."

It is apparent that on the face of the purported *ex-parte* decree served on the appellant it is not an *ex-parte* order but an *inter-partes* decree entered of consent and certainly not in accordance with the judgment.

It is also common ground that subsequently another decree prepared in accordance with the *ex-parte* judgment had been tendered by the Attorney-at-Law for the respondents and thus a second *ex-parte* decree had been entered on 19.03.1996. The aforesaid second *ex-parte* decree was served on the appellant on 13.05.1996 and the appellant filed petition and affidavit on 21.05.1996 seeking to have the *ex-parte* decree vacated. After inquiry the learned District Judge by his order dated 17.10.1996 refused the appellant's application on the basis that the date of receipt of the first *ex-parte* decree vis: 31.10.94 should be counted as the date of serving the *ex-parte* decree and as such the appellant's application dated 21.05.1996 is made nearly 1 1/2 years after the decree was served on him and therefore is time barred.

The appellant thereafter preferred an appeal from the said order to the Court of Appeal and the Court of Appeal by its judgment dated 30.09.2004 in CA1259/96 dismissed the said appeal of the appellant accepting the reasoning given by the learned District Judge in his order.

It is contended by counsel for the respondents that the whole purpose in serving the *ex-parte* decree on a party who was absent at the trial and on the day the judgment was pronounced was to bring it to his notice or knowledge that there is a decree of court entered against such a party. Therefore when the 1st *ex-parte* decree was served on the appellant on 31.10.1994 it was brought to the notice of the appellant that a decree has been entered in an action against the appellant namely in District Court Kandy case No. 20619/MR to which the appellant was a party. In fact the appellant had prior knowledge of the pending action against him for he had tendered his answer, moreover had made an application to have the first order for an *ex-parte* trial vacated. However having obtained a date to support the said application the appellant failed to appear on the date on which he was due to support his application.

In the circumstances he submitted that the appellant had sufficient knowledge of the *ex-parte* decree that would be entered against him

and the decree served on the appellant on 31.10.1994 though defective was sufficient service in compliance with the provisions contained in section 85(2) of the Civil Procedure Code. Though the aforesaid argument appears to be attractive still I am unable to agree with the learned President's Counsel for the reason that even if one were to accept the contention that serving an *ex-parte* decree was to give notice of the decree entered against such a party, the decree that was served on the appellant was defective and not in conformity with the law and as such was not a valid *ex-parte* decree for on the face of the purported *ex-parte* decree served on the appéllant it was not an *ex-parte* decree but an *inter-partes* decree entered of consent when the appellant never consented to such a decree. On the other hand, as it appears on the face of the decree served on the appellant if the appellant consented there was no necessity to serve the same on the appellant.

Section 85(4) of the Civil Procedure Code provides for serving of an *ex-parte* decree entered in accordance with the judgment only. Though it is the practice for the Attorney-at-Law to draw up the decree and tender the same for the Judge's signature section 85(1) of the Civil Procedure Code provides that court should enter decree and he is duty bound to satisfy himself of the correctness of the decree, that it is in conformity with the judgment before he places his signature to it. I must say the learned District Judge who signed the defective decree has failed to discharge his responsibilities in a proper manner. Be that as it may, when he came to the conclusion that decree served on the appellant on 31.10.1994 was sufficient compliance with section 85(4) of the Civil Procedure Code he did misdirect himself in law for the decree so served on the appellant was not an *ex-parte* decree but a consent decree and as such purging the appellant's default never arose. Unfortunately this aspect of the matter was never appreciated by the learned District Judge nor did the Court of Appeal.

The learned District Judge further misdirected himself in law when he went on to say in his order dated 17.10.1996 that entering of a subsequent corrected *ex-parte* decree and the court making an order to serve the same was superfluous. In fact the learned District Judge failed to appreciate the fact that the first decree served on the appellant on 31.10.1994 was a consent decree and not an *ex-parte* decree. In any event, the aforesaid consent decree cannot be

construed an *ex-parte* decree. In the circumstances, the purported *ex-parte* decree served on the appellant on 31.10.1994 was certainly not a valid *ex-parte* decree and as such does not attract the provisions contained in section 86 of the Civil Procedure Code nor does it cast any obligation on the appellant to comply with the said provisions in section 86 of the Civil Procedure Code if he so desires to purge his default at the trial and proceed with his defence.

For the aforesaid reasons, I would answer the questions of law on which leave was granted in the negative. Accordingly I would allow the appeal and set aside the judgment of the Court of Appeal dated 30.09.2004 and the order of the learned District Judge dated 17.11.1995. The learned District Judge is also directed to make an order in accordance with the law in respect of the application made by the appellant in his petition and affidavit dated 21.05.1996. The appellant is entitled to costs incurred in this Court as well as in the Court of Appeal.

DR. SHIRANI BANDARANAYAKE, J. – I agree.
MARSOOF, J. – I agree.

Appeal allowed.