ANUSHKA WETHASINGHE

v.

NIMAL WEERAKKODY AND OTHERS

COURT OF APPEAL
SOZA, J. AND SENEVIRATNE, J.
C. A. APPLICATION NO. LA. 106/81
AUGUST 31, 1981

Appeal – leave to appeal – when will the Court grant leave to appeal.

The granting of leave to appeal will depend on the circumstances of each case. But the guidelines are:

(1) The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage.

(2) Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the floodgates to interminable litigation. But if the incidental order goes to the root of the matter it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage; then leave to appeal will be granted.

(3) Another test is, will a decision of the Appellate Tribunal on the incidental order obviate the necessity of a second trial ?

(4) The main consideration is to secure finality in proceedings without undue delay or unnecessary expense.

Cases referred to :

(1) Fernando v. Fernando (1920) 8 CNR 43, 44.
(2) Balasubramaniam v. Valliappar Chettiar (1938) 39 NLR 519, 521.
(3) Girantha v. Maria (1948) 50 NLR 519, 521.
(4) Goonewardena v. De Saram (1962) 64 NLR 145, 151.
(5) Arumugam v. Thampu (1912) 15 NLR 253, 255.

H. W. Jayewardene Q. C. with H. L. de Silva and Herman J. C. Perera for Petitioner.

B. J. Fernando for 1st and 2nd respondents.

Mark Fernando for 3rd Respondent.

Cur. adv. vult.

September 9, 1981.

SOZA, J.

After hearing argument on 31.8.1981 we granted leave to appeal in this case from the order of the learned District Judge of Colombo made on 30.7.1981 and directed the Registrar to take the consequential steps. We now give our reasons for the order made by us on 31.8.1981. The petitioner before us sued the three defendant-respondents in the District Court of Colombo praying for an injunction restraining them from screening and exhibiting the film entitled 'Amme mata sama wanna' and for damages in a sum of Rs. 3 million. The basis of her claim is that she was one of the principal actresses in the film and by the juxtaposition of certain scenes and sequences in the film the wrong impression would be given to the viewers that she was ravished in the nude in a hotel bed-room by the "villain" in the story. She accordingly complains that she has suffered pain of mind, loss of reputation and humiliation and has been brought into hatred, ridicule and contempt. On this basis she seeks an injunction restraining the screening and exhibition of the film by the three defendant-respondents and, while averring that the damages she had suffered are irreparable, she claims damages in a sum of Rs. 3 million.

The 1st defendant is the producer of the film, the 2nd defendant directed it and the 3rd defendant the State Film Corporation was responsible for its release. This action was filed on 14.7.1981. On 15.7.1981 on the application of the plaintiff-petitioner the court issued an interim injunction restraining the three defendants from screening and exhibiting the said film. The 1st and 2nd defendants filed joint proxies and on 17.7.1981 moved by way of summary procedure for the dissolution of the interim injunction naming the present plaintiff-petitioner as respondent to their application. The court entered order *nisi* under section 377(a) of the Civil Procedure Code and directed the plaintiff-petitioner to show cause if any against making the order absolute. In addition the court ordered a suspension of the interim injunction that had been issued.

The matter came up for inquiry on 24.7.1981 and thereafter on 30.7.1981 the court made the order which is the subject of the present complaint. The order apparently represents the learned trial Judge's interpretation of the provisions of sections 384 to 386 of the Civil Procedure Code governing the procedure that the court should follow where both parties appear before it in proceedings taken by way of summary procedure. The procedure which the court laid down which it said it would follow at the inquiry consists of 7 sequential steps:

1. Firstly, the application of learned counsel for the 1st and 2nd respondents to cross-examine the plaintiff-petitioner as to the truth of her two affidavits (which the court said are very relevant to the inquiry) was allowed.

2. The plaintiff-petitioner would be entitled to adduce such documentary evidence as may be admissible.

3. The plaintiff-petitioner would be permitted to adduce oral evidence in support of her objections.

4. In the interests of justice and to reach a correct decision, at the conclusion of 1, 2 and 3 above learned counsel for the plaintiff-petitioner would be permitted to cross-examine the plaintiff if he so desired in order to "rebut and refute" the evidence of the 1st and 2nd defendant-petitioners.

5. The 1st and 2nd defendant-respondents would be permitted to adduce additional evidence if the court considered that it should be permitted.

6. Learned counsel for the plaintiff-petitioner would be permitted to comment upon the 1st and 2nd defendant-respondents' case though there was no right to do so on a strict interpretation of the legal provisions. This would be permitted in order to achieve a just and correct conclusion.

7. Learned counsel for the 1st and 2nd repondents would be permitted to comment upon plaintiff-petitioner's case as provided in section 385 of the Civil Procedure Code.

In the present application before us the petitioner seeks leave to appeal against this order.

Learned counsel for the 3rd respondent, that is the State Film Corporation stated that he is not objecting to leave to appeal being granted but he reserves his right to be heard at the appeal itself. The 1st and 2nd defendant-respondents appearing by their counsel objected to the application on the following grounds:

1. The court will not grant leave to appeal from the orders of the original court on incidental matters which do not go to the root of the case. Such matters should be held over to be taken up in appeal if necessary when the trial court makes its final order.

2. One test the court will apply is, will a second trial be obviated ?

3. Under article 138 of our Constitution an order of Court should not be set aside on the ground of error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

He submitted that the steps proposed to be taken by the learned trial Judge do not run counter to the provisions laid down in the Civil Procedure Code in regard to summary procedure. If there are any defects in the procedure proposed by the Court these are not far-reaching and do not go to the root of the case and could be canvassed after the conclusion of the trial.

The attitude of the Court will no doubt depend on the circumstances of each case. Yet from the decided cases to which we were referred the following guidelines could be deduced:

1. The court will discourage appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage *(Fernando v. Fernando,*[1] *Balasubramaniam v. Valliappar Chettiar,*[2] *Girantha v. Maria*[3] and *Goonewardena v. De Saram*[4] *)*.

2. Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the floodgates to interminable litigation *(Balasubramaniam v. Valliappar Chettiar* (supra) at p. 560). But if the incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage then leave to appeal will be granted *(Arumugam v. Thampu,*[5] *Girantha v. Maria* (supra) at p. 521).

3. Another test is, Will a decision of the Appellate tribunal on the incidental order obviate the necessity of a second trial *Arumugam v. Thampu* (supra) at p. 255, *Girantha v. Maria* (supra) at p. 521 and *Goonewardena v. De Saram* (supra) at p. 152).

1. (1920) 8 C.W.R. 43, 44.
2. (1938) 39 N.L.R. 553, 560.
3. (1948) 50 N.L.R. 519, 521.
4. (1962) 64 N.L.R. 145, 151.
5. (1912) 15 N.L.R. 253, 255.

4. The main consideration is to secure finality in the proceedings without undue delay or unnecessary expense *(Girantha v. Maria* (supra) at p. 521).

I would like to add that the cases under reference were decided before the amendments effected by the Civil Procedure Code (Amendment) Law No. 20 of 1977. In fact in sections 754(2) and 756(2) to (7) brought in by the amendments the Legislature has recognised the desirability of controlling appeals from incidental orders and provided that leave to appeal be first obtained. But the principle emerging from the earlier decisions are still applicable when the court considers the question of granting leave to appeal from an incidental order.

In the instant case the complaint is that the learned District Judge has spelt out a procedure which is completely different from that set out in sections 384 to 386 of the Civil Procedure Code which govern proceedings by way of summary procedure under chapter 24 of the Civil Procedure Code. For example, the first step which the learned District Judge proposes is that the plaintiff-petitioner should be tendered for cross-examination. The question arises whether the rights of the plaintiff petitioner given by s. 384 of the Civil Procedure Code to read the affidavits confer also a right on the defendant-respondents to test the averments in them by cross-examination. These are far-reaching questions of procedure raised in the instant case meriting immediate consideration by this Court.

If the plaintiff is committed to a procedure which is found to be wrong, her quest for relief by way of an interim injunction so as to minimise the damages she alleges she is suffering in this case may well be stymied and this may seriously affect the remedy she may ultimately be granted. Indeed it is in the best interests of both parties that the dispute concerning procedure be resolved as early as possible.

The petitioner, it has been pointed out, has not complained of prejudice or failure of justice such as is envisaged in article 138 of the Constitution. But it is not necessary for a party to so aver. It is for the court to decide whether the substantial rights of the party are affected or whether a failure of justice has been occasioned by the error, irregularity or defect complained of. But this is a consideration that will apply at the hearing of the appeal. In the instant case if an entirely wrong procedure is proposed to be adopted then certainly a party is entitled to complain and have the case set on the right course so far as procedure goes. The matter raised if decided now will obviate the necessity of a second trial which it is likely will be ordered if it is found that the entire proceedings

stand tainted by serious procedural defects such as are being complained of in this case. In our view this is a fit case for the granting of leave to appeal. Accordingly we granted leave to appeal. Section 756(7) of the Civil Procedure Code will now be in operation. Let the Registrar carry out our direction to perfect this appeal and list it in due course. Costs of the proceedings before us will abide the result of the appeal.

SENEVIRATNE, J.

I agree.

Leave to appeal granted.