LESLIE SILVA
vs
PERERA

COURT OF APPEAL,
SOMAWANSA, J (P/CA)
C. A. 304/2004 (REV)
DC MT. LAVINIA 139/L
MAY 13, 2005

Civil Proceduere Code - Section 40(d), 147, 454(2) - Issues of Law to be tried first - when ? Refusal by trial court - No leave to appeal application filed - Is revision available ? - Court of Appeal (Appellate Procedure Rules 1990) Rule 46 Supreme Court Rules.

The defendent-Petitioner sought to revise the order of the trial court refusing to hear and determine issue No. 13 as a preliminary Issue-whether the Plaint has conformed to the provisons of Section 40D of the Civil Procedure Code. The trial court held that the said issue is not a pure question of law and in order to answer the said issue the Court has to consider the evidence that would be held at the trail but went to answer the said issues in the negative

The Defendant moved in Resivion

HELD:

(i) The Court after deciding that Issue No. 13 is not a pure question of law erred by answering the issues in the negative

(ii) In terms of Section 40(d), the Plaint should contain a statement as to where and when the casue of action arose and is not a fact which should be kept to be disclosed at the trial. The Plaint, it is apparent does not say as to when the purported action arose.

(iii) No other evidence/documents are required to decide whether the plaint is drawn out in compliance with Section 40(d) - this is a fatal defect which goes to the root of the case.

(iv) The Defendant Petitioner has invoked the revisionary jurisdiction to avert a miscarriage of jutice caused to him by the error committed by the trial Judge, and in the circumstances, this is a fit and proper instant to exercise the revisionary jurisdiction.

PER SOMAWANSA, J. (P/CA)

"the error committed by the trial judge by answering Issue No. 13 in the negative without giving a hearing and in fact according to the reasons given by her she could not have answered the said Issue in any event without considering evidence..... is a clear and unforgivable error committed by the trial Judge....."

APPLICATION in Revision from the Order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Mutukrishna vs Gomes, 1994 3 Sri LR 1*
2. *Atukorale vs Samyanathan* - 41 NLR 165
3. *Silva vs Silva* - 44 NLR 494
4. *Sinnathangam vs Meera Mohideen* –60 SLR 394
5. *Gnanapandithan vs Balanayagam* - 1998 1 Sri LR 391
6. *Manam Bee Bee vs Syed Mohamed* - 68 NLR 36 at 38
7. *Somawathie vs Madawala* –1983 2 Spl LR 15 at 30 and 31

May 13, 2005

Lasitha Kanuwanaratchi for Defendent Petitioner
Ranjan Suwandaratne with Malinda Nanayakkara for Substitued -Plaintiff-Respondent

Cur.adv.vult

ANDREW SOMAWANSA, J.

This is an application for revision and or restitutio in integrum under Article 138 of the Constitution seeking to revise and set aside the order of the learned Additional District Judge of Mt. Lavinia dated 23.05.2003 refusing to hear and determine issue No. 13 as a preliminary issue of law and to direct the learned Additional District Judge to try the aforesaid issue No. 13 as preliminary issue of law, to answer the same in favour of the defendant-petitioner and to dismiss the plaint in limine.

At the hearing of the application both parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

Issue No. 13 පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 40වැ වගන්තියේ ප්‍රතිපාදනවලට පටහැනිව ඉදිරිපත් කර ඇත් ද ?

Section 40(b) of the Civil Procedure Code reads as follows :

> "A plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered paragraphs ; and where two or more causes of action are set out, the statement of the circumstances constituting each cause of action must be separate, and numbered"

When consel for the defendant-petitioner made an application to Court to try issue No. 13 as a preliminary issue of law in terms of Section 147 of the Civil Procedure Code, the plaintiff-respondent objected to the said application and consequently parties had agreed to tender written submissions on the question of whether the aforesaid issue No. 13 should be tried as a prelimary issue. Both parties had tendered their written submissions only on the question whether the said issue No. 13 could be tried as a preliminary issue of law. However as submitted by counsel for the defendant-petitioner the learned Additional District Judge has come to a finding that the said issued No. 13 is not a pure issue of loaw and in order to answer the said issue the Court has to consider the evidence that would be adduced at the trial. Having come to this conslusion that this particular issue No. 13 cannot be answered without consjdering the evidence, the learned Additional District Judge proceeded to answer the aforesaid issue No. 13 in the negative. I would hold that the aforesaid finding is a gross misdirectin of law on the part of the learned Additional District Judge.

It is submitted by counsel for the defendant-petitioner that the only matter the learned Additional District Judge was called upon to decide was whether issue No. 13 should be tried as a preliminary issue of law. This fact is borne out by the journal entry No. 57 dated 28.01.2003 which reads as follows :

විභාගය (08)

විසඳිය යුතු ප්‍රශ්ණ ඉදිරිපත් කරන ලදී. ඒ අනුව අංක 13 දරන විසඳිය යුතු ප්‍රශ්ණ මූලික විසඳිය යුතු ප්‍රශ්ණ ලෙස විභාග කළ යුතු ද නැද්ද යන්න විමසීම ලිඛිත දේශණ සඳහා දින දෙමි

ලිඛිත දේශන : 2003.03.04

And also as per proceedings and the order made by the learned Additional District Judge dated 21.01.2003 marked P5 which reads as follows :

නියෝගය :-

මේ අවස්ථාවේ දී මෙම අංක 13 දරන විසඳිය යුතු ප්‍රශ්ණය මූලික විසඳිය යුතු ප්‍රශ්ණයක් ද, නැද්ද යන්න විභාග කිරීමට ඒ සම්බන්ධයෙන් විමසා බැලීමට කරුණු ඉදිරිපත් කළ යුතුය.

ඒ සඳහා ලිඛිත දේශන : 2003.03.04

Vide also paragraph 05 of the written submissions tendered by the plaintiff-respondent marked P7 and the final paragraph on page 14, it is to be seen that first paragraph of the written submisisons of the defendent-petitioner marked P6 also corroborates this fact which reads as follows :

මෙම නඩුවේ වර්ෂ 2003.01.28 දිනට විභාගයට ගත් අවස්ථාවේ අධිකරණ බලය පමණක් පිළිගන්, අතර, පැමිණිල්ල වෙනුවෙන් 1 සිට 6 දක්වා විසඳිය යුතු ප්‍රශ්ණ ද විත්තිය වෙනුවෙන් 7 සිට 14 දක්වා විසඳිය යුතු ප්‍රශ්ණ ද ඉදිරිපත් කරන ලදී. විත්තිය වෙනුවෙන් යෝජනා කරන ලද 13 වන විසඳිය යුතු ප්‍රශ්ණය මූලික විසඳිය යුතු ප්‍රශ්ණයක් ලෙස පිළිතුරු දීම උදෙසා සිවිල් නඩු විධාන සංග්‍රහයේ 147 වගන්තියේ ප්‍රතිපාදන ප්‍රකාරව පිළිතුරු දීම උදෙසා විත්තිකරු වෙනුවෙන් මා අධිකරණයෙන් අයැද සිටින ලදී. අධිකරණයට මා සහ මගේ මිත්‍රයා විසින් කරුණු දැක්වීමෙන් අනතුරුව 13 වන විසඳිය යුතු ප්‍රශ්ණය මූලිකව විසඳිය යුතු ප්‍රශ්නයක් ලෙස ගත යුතුද නැද්ද පිළිබඳව කරුණු ඉදිරිපත් කිරීමට අධිකරණය අවස්ථාව ලබා දෙන ලෙස

Vide also the first paragraph of the order of the learned Additional District Judge dated 23.05.2003 which reads as follows :

මෙම නඩුවේ නඩු විභාගයේ දී පැමිණිල්ල සහ විත්තිය විසඳිය යුතු ප්‍රශ්ණ ඉදිරිපත් කර ඒ අනුව විත්තිය ඉදිරිපත් කළ අංක 13 දරන විසඳිය යුතු ප්‍රශ්නය මූලික විසඳිය යුතු ප්‍රශ්ණයක් ද නැද්ද යන්න මත නියෝගයක් කිරීමට දෙපාර්ශවය එකඟ වී, ඒ අනුව නියෝගයක් කළ යුතුව ඇත.

Thus the only matter that the Addmitional District Judge had to decide was whether issue No. 13 should be tried as a preliminary issue of law or whether it shuld be tried along with the other issued raised by parties on the evidence to be placed before her by both parties.

On an examination of her order dated 23.05.2003, it is to be seen that the learned Additional District Judge having come to a conclusion that issue No. 13 is not a pure question of law and that it involves facts which has to be considered after calling evidence had prceeded to answer the aforesaid question in the negative before any evidence was led and without a hearing. The last two paragraphs of her order reads as follows :

නව ද පැමිණිල්ලේ 6. 7. 8 වන ඡේදවලට අදාළ කරුණු ඉහත සඳහන් කළ පරීදි සිවිල් නඩු විධාන සංග්‍රහයේ විධිවිධානවලට ද අදාළ බව සාකෂි මගින් එළිදරව් වීමය ඉදිරිපත මෙන්ම ඉහත සඳහන් කළ 86697 දරන නඩුවට අදාළ ලියවිලි මෙම නඩුවේ කොටසක් සේ සලකන ලෙස පැමිණිල්ල අයැදී ඇත

මේ අනුව 13 වන විසඳිය යුතු ප්‍රශ්නයට 'නැත' යනුවෙන් පිළිතුරු සපයමි.

මෙම විසඳිය යුතු ප්‍රශ්නය මූලික විසඳිය යුතු ප්‍රශ්නයක් නොවන බවත්. මෙයින් නියෝග කරමි.

In *Mutukrishna* vs. *Gomes* [1] it was held as follows :

> "Under Section 147 of the Civil Proceudre Code for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case".
>
> Judges of original courts should, as far as practible, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case"

In the instant action, it is to be seen that the learned Additional District Judge after deciding that issue No. 13 is not a pure question of law and it involves facts which have to be considered after calling evidence has erred in law by answering the said issue in the negative.

In view of the aforesaid provisioons contained in Section 40(d) of the Civil Procedue Code it is clear that the plaint itself should contain a satement as to where and when the case of action arose and is not a fact whihc should be left to be disclosed at the trail. For if this procedure is adopted it would certainly result in undue hardship and injustice to the defendant-petitioner in formulating his defence.

In the instant action the plaint does not say as to when the purported action arose. The relevant paragraph in the plaint *viz.* paragraph 4 reads as follows :

මෙම නඩුවේ විත්තිකරු ඔහුට කිසියම් අයිතියක් හෝ හිමිකමක් නොමැතිව පැමිණිලිකරුගේ නැගෙනහිර මායිම ඔස්සේ තිබූ වැට ක්‍රමයෙන් වෙනස් කර පැමිණිලිකරුට අයත් එකී 31/1999 දරන පිඹුරේ ලොට් 2 දරන ඉඩමේ කොටස් යා කරගෙන පැමිණිලිකරු සම හබ කරයි.

Thus it is to be seen that no other evidence or documents are required to decide whether the plaint is drawn out in compliance with Section 40(d). The plaint itself would speak to this fact. However as to whether the failure of the plaintiff-respondent to comply with this provision contained in Section 40(b) of the Civil Procedure Code is a fatal defect which goes to the root of the case has to be decided by the learned Additional District Judge.

For the foregoing reasons my considered view is that the learned Additional District Judge's order dated 23.05.2003 should not be permitted to stand

At this point, I would also consider the objections taken by the plaintiff-respondent to the maintainability of this application. One of the matters raised by the counsel for the plaintiff-respondent is that the defendant-petitioner should have invoked the provisions of Section 754(2) of the Civil Procedure Code by way of leave to appeal and having failed to do so the defendant-petitioner is not entitled to invoke the revisionary jurisdiction of this Court. For this proposition of law counsel for the defendant-petitioner has made reference to relevant decisions in paragraph 22 of his written submissions. However I would rather incline to follow the following decisions in this respect.

Atukorale vs. Samyanathan[2]

"The powers given to the Supreme Court by way of revision are wide enought to give it the right to revise any order made by an original court whether an appeal has been taken against it or not.

This right will be exercised in a case which an appeal is pending only in exceptional circumstances as for example, to ensure that the decision given on appeal is not rendered nugatory"

Silva vs Silva

"The Supreme Court has the power to revise and order made by an original court even where an appeal has been taken against that order.

In such a case the court will exercise its jurisdiction only in exceptional circumstances and in order to ensure that the decree given in appeal is not rendered nugatory"

Sinnathangam vs. Meeramohaideen[4]

"The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though and appeal agaisnt such decision has been correctly held to have abated on the ground on non compliance with come of the technical requirements in respect of the notice of security.

In this respect I would say it is settled law and our Courts time and again has held that the revisionary jurisdiction of this Court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability of alternative remedy or inordinate delay.

In the case of *Ganapandithan Vs. Balanayagam*an application was made to the Court of Appeal to set aside the judgment in a partition action after 2 1/2 years was disallowed mainly on the ground of undeu delay which remained unexplained. In appeal to the Supreme Court the appeal was allowed as the judgment of the learned District Judge was manifestly wrong and the order of the Court of Appeal also was set aside as it had focussed only on the question of delay and not on the merits. Per G. P. S. de Silva, CJ at pages 397/398

"On a consideration of the proceedings in this case. I hold that there has been miscarriage of justice. The object of the power of revision as stated by Sansoni, CJ in Marian beebee vs. Seyed Mohamed[6] at 389 "is the due administration of justice....." In the words Soza J, in Somawatie vs. Madawala and others at 30 and 31. "The court will not hesitate to use its revisionary powers to give relief where as miscarriage of justice has occured..... *Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice.* "The words underlined above are equally applicable to the present case. I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case."

Also per sansoni, CJ in the case of Marian Beebee Vs. Seyed Mohamed (Supra)

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometines committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in come case by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injutice will result. The Partition Act has not, conceive, made any change in the respect, and the power can still be exercised in respect of any order or decreed of a lower Court."

The defendant-petitioner in the instant action has invoked the revisionary jurisdiction of this Court to avert a miscarriage of justice caused to him by the error committed by the learned Additional District Judge by answering issue No. 13 raised by the defendant-petitioner in the negative without giving a hearing and in fact according to the reasons given by her she could not have answered the aforesaid issue in any event without

considering evidence. I would say this is a clear and unforgivable error committed by the trial Judge. In the circumstances my considered view is that this is a fit and proper instant to exercise the revisionary jurisdiction of this Court.

Objection has been taken by counsel for the plaintiff-respondent to the maintainability of this application in view of not complying with the provisions contained in Rule 3(1)(b) of the Court of Appeal (Appellate Procedure Reul 1990 or Rule 46 of the Supreme Court Rules of Appellate Procedure). I would say that I am quite satisfied that all the relevant documents have been made avialabe to this Court and the documents referred to in paragraph 25 of the written submissions of the plaintiff-respondent are irrelevant to htis application. Hence there is no merit in this objection.

Another objection taken by the plaintiff-respondent is that when there is an objection in relation to the Rules of Procedure as set out in the Civil Procedure Code they must be taken up prior to the farming of issues with notice to the respondent. This requirement appears to have been complied with by the defendant-petitiner in paragraph 12 of his answer.

For the foregoing reasons, I would allow this application for revision and set aside the order of the learned Additional District Judge 23.05.2003 and direct the learned Additional District Judge to try the aforesaid issue No. 13 as a preliminary issue. The plaintiff-respondent will pay to the defendant-petitioner Rs. 5,000 as costs of this application.

President of the Court of Appeal