

1939

Present : Nihill J.

DE SILVA *v.* DE ZOYSA *et al.*

40—C. R. Balapitiya, 21,239.

*Court of Requests—Rejection of evidence—Point taken in appeal—Failure to raise point in petition of appeal—Civil Procedure Code, s. 833A.*

A question relating to the rejection of evidence offered at the trial of an action for debt in the Court of Requests is a matter of law which may not be argued at the hearing of an appeal from the judgment of the Court unless the question has been expressly raised in the petition of appeal. *Gordon Brooke v. Peera Veda* (9 N. L. R. 302) followed.

APPEAL from a judgment of the Commissioner of Requests, Balapitiya.

*J. E. M. Obeyesekere* (with him *P. H. Goonetilleke*), for defendant, appellant.

*M. C. Abeywardene*, for plaintiff, respondent.

October 6, 1939. NIHILL J.—

I have considered the preliminary objection taken by respondent's Counsel that at the hearing of the appeal, appellant's Counsel must confine himself to the point of law raised in the appeal petition. This appeal has had a somewhat chequered career, this being the second preliminary objection taken before this Court.

Mr. Obeyesekere for the appellant has now intimated that he wishes to raise also a question concerning an alleged wrongful rejection of evidence, which, had it been admitted by the learned commissioner would have shown that the debt alleged to be due from the first defendant-appellant had been settled. From the facts quoted to me, it appears that certain account books kept by the second defendant could not be produced at the trial as objection was taken to his being called on the ground that his name had not been listed as a witness. The learned Commissioner upheld this objection.

Mr. Obeyesekere argued that in doing so, the learned Commissioner must have overlooked the second proviso to section 175 of the Civil Procedure Code where it is stated that any party to an action may be called as a witness without his name having been included in the list of witnesses.

In this case it should be noted that it was the second defendant's Counsel who took the objection to his client being called, nevertheless the point made by Mr. Obeyesekere may be a good one, and it is unfortunate that it was not raised in the appeal petition. The question for my determination now is—that not having been so raised, can it be argued in these proceedings? In *Gordon Brooke v. Peera Veda*<sup>1</sup>, Layard C.J. held that in an appeal from a Court of Requests, the Court could only hear arguments on the matter of law stated in the petition of appeal.

<sup>1</sup> (1905) 9 N. L. R. 302.

Mr. Obeysekere asks me to distinguish between that case and this on the grounds that here it is a question which arises from the admission or rejection of evidence and that as all the facts are before me as completely as they were at the trial, the principle enunciated by Lord Herschell in the House of Lords case of *The Tasmania* tells in his favour.

With regard to the first of these submissions, it is true that the wording of section 833A of the Civil Procedure Code suggests that there may be a distinction between "a matter of law" and a question arising upon the admission or rejection of evidence, but if there is, it is a distinction with very little difference. Questions concerning the admissibility or inadmissibility of evidence are surely questions of law and as such could be raised under section 833A even if the words "or upon the admission or rejection of evidence" were not there and if that be so, the principle enunciated in *Gordon Brooke v. Peera Veda* (*supra*) has equal applicability.

With regard to *The Tasmania* (*supra*), it may well be that this is a matter which an Appeal Court might properly consider in deciding an appeal even although it is not stated in the petition of appeal (section 758 (2) of the Civil Procedure Code) but Chapter LXVL provides special rules as to procedure in Courts of Requests and section 801 gives precedence to the special rules where there is inconsistency.

It is one of these special rules that there shall be no right of appeal from any final judgment unless upon a matter of law, and judicial decision has determined that this Court cannot hear arguments on matters of law not directly and succinctly stated in the petition of appeal and I am not prepared to go beyond that. I therefore uphold the objection.

Let the case be relisted for argument on the point of law raised in the petition.

*Objection upheld.*

