VANIK INCORPORATION LTD.
v.
JAYASEKARA

COURT OF APPEAL.
EDUSSURIYA, J.
C.A. (REV) 198/97.
D. C. COLOMBO 4827/SPL.
MAY 27, 1997.

Enjoining Order – Revision – Applicability of section 666 of the Civil Procedure Code as amended by Act, No. 19 of 1988 – Revisionary powers – Miscarriage of justice – Is there a violation of a fundamental rule of procedure?

The defendant-petitioner seeks to set aside the Order issuing an enjoining order on the ground that the learned District Judge acted illegally in not hearing the petitioner's Counsel who was present in Court prior to issuing the said enjoining order.

The plaintiff-respondent, took the objection that, the present application should be dismissed in as much as the petitioner had failed to avail himself of section 666 of the Act, No. 79 of 1988, to have the enjoining order set aside.

Held:

(1) Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.

(2) Even if the learned District Judge erred in proceeding on the basis that the defendant-petitioner could not be heard because the plaintiff-respondent was entitled to support an application for enjoining order *ex parte*, no prejudice has been caused to the petitioner. The impugned Order issuing the enjoining order does not suggest that there was an end to the matter and that the learned District Judge is not prepared to hear the petitioner, if he came under section 666 to have the enjoining order set aside, even now it is open to the defendant-petitioner to avail himself of section 666.

If it is contended that had the petitioner been heard, the enjoining order would not have been issued, that has been done and is over. Therefore, that cannot now be corrected, as the meeting scheduled for 05.03.97 was stayed.

(3) In the circumstances even though the learned Additional District Judge refusing to hear the Counsel may be termed an illegality, this is not a case in which Court should exercise its revisionary powers.

APPLICATION in revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Perera v. Muthalib*, 45 NLR 412.
2. *Attorney-General v. Podi Singho*, 51 NLR 385.
3. *Finnegen v. Galadari Hotels (Lanka) Ltd.*, [1989] 2 SLR 272.

K. N. Choksy P.C. with *Nigel Hatch* for defendant.

Wijedasa Rajapakse with *Kurera de Zoysa* and *Dhammika Abeygunawardena* for plaintiff-respondent.

Cur. adv. vult.

June 29, 1997.

EDUSSURIYA, J.

This is an application to this Court to act in revision and set aside the order of the learned Additional District Judge of Colombo dated 5th March, 1997 issuing an enjoining order as prayed for in paragraph (e) of the prayer to the plaint dated 5th March 1997, on the ground that the learned Additional District Judge acted illegally in not hearing the petitioner's Counsel who was present in Court, prior to issuing the said enjoining order.

At the hearing of this application the respondent's Counsel took the objection that the petitioner's present application should be dismissed in as much as the petitioner had failed to avail himself of the procedure laid down in section 666 of the Civil Procedure Code as amended by Act, No. 79 of 1988 to have the enjoining order set aside.

On the question of what exactly took place when the petitioner's instructing Attorney sought to file proxy, the only material available to me are (1) the affidavit filed on behalf of the petitioner in this Court, (2) the affidavit filed by the plaintiff-respondent in the Supreme Court when the plaintiff-respondent sought special leave to appeal from the Supreme Court against the interim order issued by the Court of Appeal and (3) the proceedings of 05th March, 1997.

The plaintiff-respondent to this application has stated in her affidavit that when the petitioner's instructing Attorney moved to file proxy he was told by Court that he could do so after the plaintiff-

respondent was heard. That, thereafter, although the instructing Attorney informed Court that he had retained Counsel Mr. Kanag-Iswaran, that Mr. Kanag-Iswaran was not in Court. That, thereafter, although the instructing Attorney was told that he can file proxy the instructing Attorney informed Court that he did not wish to file proxy and that the learned Additional District Judge made the impugned order subsequently.

However, the defendant-petitioner's affidavit sets out that when the instructing Attorney sought to file proxy and moved that he be heard though Counsel Nigel Bartholermeuz, the Judge disallowed the application.

That, after the plaintiff-respondent's counsel had made submissions, the instructing Attorney once again sought to tender the proxy and be heard but the Judge said that the defendant-petitioner's proxy could be tendered and he be heard only after the order, and that thereafter the instructing Attorney did not tender the proxy.

The proceedings of the relevant date only show that the learned Additional District Judge had informed the defendant-petitioner's instructing Attorney that he could tender the proxy after the *ex parte* application is made. The proceedings therefore are not helpful in ascertaining exactly what happened.

It so happens in Courts almost every day that some Attorneys-at-Law and Counsel make submissions and address Court in Sinhala while others in the same case address Court in English and the stenographers leave out parts of the submissions made, in English, since the Stenographers in the District Court are conversant only in Sinhala.

Only last week I dictated an order in English and almost at the very end Counsel for the respondent made a further submission which I told the stenographer to record. Then the Counsel after having started out to repeat his submission stopped half way and said it was not necessary. I then, told the stenographer to score that off and very much later on the following day I came to know that the stenographer had struck-off my entire order up to that point and I left it at that rather than have someone for his benefit saying that I

dictated the order later. This is due to the so called "English stenographers" available being hardly competent and not understanding what we dictate. Thus, as hereinbefore mentioned, it appears that what the defendant-petitioner's instructing Attorney said has not been recorded because it may have been said in English.

In the circumstances, I will for the present proceed assuming only for the purpose of this order that the learned Additional District Judge did not allow the defendant-petitioner's instructing Attorney to file proxy and consequently did not allow the defendant-petitioner to be heard though Mr. Bartholermeuz, although the plaintiff-respondent does not concede this and further it is her position that the defendant-petitioner's instructing Attorney wanted Counsel Mr. Kanag-Iswaran to be heard but that Mr. Kanag-Iswaran was not in Court.

Learned Counsel for the petitioner drew the attention of this Court to Article 145 of the Constitution and submitted that this Court is empowered to call for a record *ex mero motu* or on application and make any order thereon in the interests of justice and submitted further that the 1978 Constitution conferred on the Court of Appeal much wider powers than it had up to that time.

Counsel also drew attention of this Court to the amended section 753 of the Civil Procedure Code, and contended that special circumstances warranting the exercise of the revisionary powers of this Court existed in that the impugned order is illegal and invited the Court to quash the impugned order on the ground of illegality. Learned Counsel for the petitioner also referred to the cases of *Perera v. Muthalib*[1], *Attorney-General v. Podi Singho*[2] and *Finnegen v. Galadari Hotels (Lanka) Ltd.*[3] in support of his contentions.

In Perera v. Muthalib (*supra*) Soertsz, J. set out that the revisionary powers of the Supreme Court are not limited to those cases in which no appeal lies or in which no appeal has been taken for some reason and that the Court would exercise revisionary powers where there has been a miscarriage of justice owing to the violation of a fundamental rule of procedure, but that this power would be exercised only when a strong case is made out amounting to a

positive miscarriage of justice. In that case the bond of surety had been forfeited without an inquiry.

In the case of *Attorney-General v. Podi Singho (supra)* Dias, J. held that even though the revisionary powers should not be exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as (a) miscarriage of justice (b) where a strong case for interference by the Supreme Court is made out or (c) where the applicant was unaware of the order. Dias, J. also observed that the Supreme Court in exercising its powers of revision is not hampered by technical rules of pleading and procedure.

That was a case where a sentence below the minimum sentence prescribed by law had been imposed.

Although both those cases were decided long before the present Constitution was promulgated (incorporating Article 145) and the amendment to section 753 of the Civil Procedure Code in 1988, the Supreme Court expressed the view that its revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of judicial procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice. A common feature in both those cases was that there was no procedure available to the aggrieved party, by which he could seek to have that order set aside or varied in the original Court itself. So that, although the aggrieved parties had failed to appeal, the Supreme Court exercised its powers of revision due to the reasons mentioned in those judgments. In the present case too it is the contention of the Petitioner's Counsel that there has been a violation of a fundamental rule, that the defendant-petitioner should have been heard prior to the enjoining order being issued, as the defendant-petitioner was present and that is an illegality, although the Additional District Judge was empowered to grant an injunction *ex parte* in the absence of the defendant-petitioner. However it was not contended that a miscarriage of justice had occurred.

In the case of *Finnegen v. Galadari Hotels (Lanka) Ltd.* (*supra*), the Court had suspended an enjoining order on the *ex parte* application

of the party who had been enjoined, and it was held that the mere presence of the junior Counsel appearing for the plaintiff and stating that he came to know about the application only that morning and he had no papers with him and moving for a postponement did not make the proceedings *inter partes*. The Supreme Court held that the plaintiff was questioning the legality of that order on fundamental issues including the failure to hold a fair inquiry amongst other things and were exceptional circumstances warranting the exercise of the revisionary jurisdiction of the Court of Appeal.

The legality of the learned District Judge in that case, making order suspending the enjoining order issued at the instance of the defendant, without giving the plaintiff an opportunity of being heard was questioned in that case.

On the question whether the plaintiff could have maintained the application for revision in the Court of Appeal without first seeking to have the order suspending the enjoining order canvassed before the District Court, both Bandaranayake, J. and Kulatunge, J. observed that as the District Court had formed an opinion *ex parte* on the fundamental issue of the maintainability of the action without giving the plaintiff an opportunity of being heard, and thereafter fixed the case to be called on the date on which notice of the application for interim injunction was returnable, suggested that the Court was not ready and willing and did not intend to hear the plaintiff on the question of the suspension of the enjoining order, the plaintiff was entitled to come by way of revision to the Court of Appeal without first canvassing that order before the District Court.

In the present case if at all, the learned Additional District Judge has erred in proceeding on the basis that the petitioner could only be heard after the enjoining order is granted. However it must be borne in mind at this juncture that, as hereinbefore mentioned the affidavits of the petitioner and the respondent are at variance and the proceedings of 5th March, 1997 too do not bear out what is stated in the petitioner's affidavit but sets out only that the petitioner can file proxy after the plaintiff-respondent's application. The proceedings do not state that the petitioner's proxy would be accepted after an order is made on the plaintiff-respondent's application. There is also the

deference in the respondent's affidavit regarding the petitioner's registered Attorney mentioning that President's Counsel Kanag-Iswaran was appearing for the petitioner and Mr. Kanag-Iswaran not being in court at that time, whereas the petitioner's affidavit states that the petitioner's registered Attorney stated that Counsel Nigel Bartholemeuz was appearing for the petitioner. So that even if the learned Additional District Judge erred in proceeding on the basis that the defendant-petitioner could not be heard because the plaintiff-respondent was entitled to support an application for enjoining order *ex parte* no prejudice has been caused to the petitioner, unlike in the Galadari case (supra) where the Court expressed its view on a matter which should have been decided at the trial and also made what appeared to be a final order regarding the suspension of the enjoining order suggesting that there was an end to the *ex parte* enjoining order matter. Further, the impugned order issuing the enjoining order in this case does not suggest that there was an end to the matter and that the learned Additional District Judge is not prepared to hear the petitioner if he came under section 666 of the Civil Procedure Code to have the enjoining order set aside, even now it is open to the petitioner to avail himself of section 666 of the Civil Procedure Code. If it is contended that had the petitioner been heard the enjoining order would not have been issued, that has been done and is over. Therefore that cannot now be corrected as the meeting scheduled for 5th March, 1997 was stayed. In the circumstances even though the learned Additional District Judge refusing to hear the petitioner's Counsel may be termed an illegality, it is my view that this is not a case in which this Court should exercise its revisionary powers. The application is dismissed with costs fixed as Rs. 3150/-.

Application dismissed.