1976 *Present :* **Deheragoda, J., Wijesundera, J. and Ismail, J.**

BALASURIYAGE SARANAPALA PERERA, Plaintiff-Petitioner

*and*

THE TOWN COUNCIL OF MAHARAGAMA, Defendant-Respondent

*S.C. 32/74 (Inty.)—D.C. Mt. Lavinia 73325/M*

*Administration of Justice Law, No. 44 of 1973, section 53—Transfer of case from one District Court to another—Latter a newly constituted Court within whose jurisdiction case now fell—Absence of defendant on trial date—Decree entered ex-parte—Requirement that parties should have been given notice of the trial in such Court.*

This action was pending in the District Court of Colombo and had come up for trial on several occasions, the parties being represented on all dates and the plaintiff present. On 22nd June, 1973, after issues were framed both parties moved for a postponement and the trial was refixed for 20th September, 1973, on which date it was once again postponed for 20th March, 1974.

On 1st January, 1974, the case was transferred to the newly constituted District Court of Mt. Lavinia. A journal entry of 9th January, 1974, stated that the case was to be called on 25th January, at Mt. Lavinia and that the Attorneys-at-Law be noticed for that date. On 25th January, the case was called in the District Court of Colombo and fixed for trial at Mt. Lavinia on the same date as before. There was no record that any of the Attorneys was present.

On 20th March, 1974, the trial date, the plaintiff was present but the defendant, the Town Council, was absent and was not represented. Evidence was led *ex parte* and *decree nisi* entered in favour of the plaintiff. The defendant made an application to the District Court to have the *decree nisi* set aside. Evidence was given by the Attorney-at-Law for the defendant, and the Chairman and Secretary of the Town Council in support of the application. They stated that no notice had been received that this case was to be heard at Mt. Lavinia. The learned trial Judge accepted the evidence led on behalf of the defendant Town Council and vacated the *decree nisi* and fixed the case for trial. The plaintiff appealed from that order.

It was submitted at the hearing of the appeal on behalf of the plaintiff that inasmuch as the petition to vacate the *decree nisi* was filed in the name of and by the Attorney-at-Law for the defendant, the District Court could not have acted on it. No objection was taken at the inquiry to the form of the petition.

*Held :* (1) That the District Court of Mt. Lavinia should have given notice to the parties that the case was being taken up for hearing in that Court on a particular date.

(2) That the objection regarding the form of the petition could not be sustained as to uphold it now would cause grave injustice to the defendant. The evidence led and the course the inquiry took in the District Court would have been the same even if the petition was in the name of and by the Town Council and no prejudice had been caused to the plaintiff.

Case referred to:

*Velupillai v. The Chairman, Urban District Council, 36 N.L.R. 464.*

APPEAL from a judgment of the District Court, Mt. Lavinia.

*H. W. Jayewardene, Q.C.*, with *D. R. P. Goonetileke*, for the plaintiff-appellant.

*C. Ranganathan, Q.C.*, with *T. B. Dillimuni*, for the defendant-respondent.

*Cur. adv. vult.*

October 5, 1976. DEHERAGODA, J.

The facts relating to this appeal have been fully set out by my brother, Wijesundera, J.

While agreeing with my brothers, Wijesundera, J. and Ismail, J. that this appeal should be dismissed, I too, wish to add a few words on one aspect of the argument vehemently urged on behalf of the appellant. It is the evidence of the defendant's attorney that when a few days before 20.3.1974 he looked up the trial roll in the District Court of Colombo he discovered that the case had been transfered to the Court at Mt. Lavinia and that he was informed (we do not know by whom) that he would receive a notice from Court. Basing his argument on this evidence, learned Counsel for the plaintiff-appellant urged that there was lack of due diligence on the part of the defendant-Council's attorney in not having rushed to the Mt. Lavinia Courts to verify the date of trial. Lack of due diligence can be urged in this case only if the District Judge of Mt. Lavinia need not have served notice on the parties informing them of the next date of trial, before resuming the hearing in that Court. It is the evidence of the defendant-Council's attorney that no notice was served on him of the next date of trial at the Mt. Lavinia Courts, although the journal entry states that notices had issued.

I agree with my brother Justice Ismail's view that section 53 (5) of the Administration of Justice Law (which serves the purpose of only a proviso to section 53 (3), although it is numbered a sub-section) enabled the District Judge of Colombo to continue and complete the hearing of the case if he was so inclined. In those circumstances, it is my view that the District Court of Mt. Lavinia was under a duty to notice the parties

and to verify whether the notices had been served before resuming the case there, as one could not have expected the parties to find out whether or not the District Judge of Colombo had decided in terms of sub-section (5) to continue to hear this case at Colombo. The mere fact that the defendant-Council's attorney happened to inspect the trial roll of the District Court of Colombo a few days before 20.3.1974 should not, therefore, be urged against him and an inference of lack of due diligence drawn from it.

I, accordingly, agree that this appeal should be dismissed with costs.

ISMAIL, J.

I have had the benefit of having read the judgment of my brother Wijesundera, J. and find that I am in agreement with him in the ultimate issue of this appeal for the reason given by him. I would however respectfully add that consideration of section 53 (5) of Administration of Justice Law, No. 44 of 73, is necessary to put matters arising in this appeal in their correct perspective.

Section 53 (5) reads —

> Where by virtue of the provisions of this Law, any area previously forming part of the jurisdiction of any District Court or Magistrate's Court is excluded therefrom, and any action, proceeding or matter in that court on the day preceding the appointed date ceases to be within the jurisdiction of that Court by reason only of the exclusion of that area, such action, proceeding or matter may, notwithstanding anything in this Law, be heard and determined or continued and completed by that Court as if such area had not been so excluded from the jurisdiction of that District Court or Magistrate's Court, as the case may be.

It will therefore be seen that what sub-section (5) really does is to reaffirm the existence of courts under the old Law, which have been given a new lease of life by this Law, less those areas which may have been excluded for the purpose of creation of new courts under the Administration of Justice Law. Thus by virtue of the provisions of this law the area, over which the new District Court of Mt. Lavinia now has jurisdiction, has been excluded from the jurisdiction of the District Court of Colombo, and therefore this matter which was pending in the District Court of Colombo before this Law came into force can under this sub-section (5) be heard and determined in the District Court of Colombo.

When this sub-section was enacted it must be presumed that the legislature intended this sub-section to apply to certain particular circumstances. This sub-section could not have been intended to be a dead letter without any application to any set of circumstances. Therefore it appears when one analyses the provisions of the sub-section, what was really intended was that cases similar to this which were originally heard in one court but had been transferred by the operation of sub-section (3) to a newly created court could be heard either in the original court where it was filed or in the new court created by this Law. Therefore it appears to me that this case could under the provisions of section 53 (5) be continued to be heard in the District Court of Colombo.

Now section 53 (5) contemplates the immediate transfer of jurisdiction from 1.1.74 of cases which fall within the jurisdiction of newly created courts to such new courts. This transfer would be automatic by operation of law. This being so, when one considers section 53 (3) and section 53 (5) the litigant would be placed in position of uncertainty as to which forum would hear and determine his case, in this particular instance whether it is the District Court of Colombo or the newly created District Court of Mt. Lavinia. In this state of doubt and uncertainty it is necessary that parties to an action should have notice as to in which forum a particular case would be taken up in. In this case the District Court judge of Mt. Lavinia had thought it necessary to issue notice of the hearing of this case in the District Court of Mt. Lavinia. Thus notice had issued though there is no evidence to indicate that notice has been served on the defendant. I am therefore of the view that this order to issue notice in this case was correctly made and in the interests of justice. I agree that this appeal be dismissed with costs.

WIJESUNDERA, J.

The question that arises for consideration in this appeal is whether the District Judge of Mt. Lavinia was correct in setting aside the *decree nisi* entered by him and fixing the case for trial. It involves the consideration of section 53 (3) of the Administration of Justice Law, and has been argued at length.

The plaintiff-petitioner sued the defendant-respondent in the District Court of Colombo to recover a sum of Rs. 39,456.50 as damages for breach of contract. The respondent denied liability and the case was fixed for trial on 21.10.71. From then on the case was postponed on many occasions, and on the 22nd of June 1973, after the issues were framed both parties, so the record reads, one of whom was a Town Council, moved for a postpone-

ment. Accordingly the trial was fixed for the 20th September, 1973. On that date too the trial was once again postponed for the 20th March, 1974. On all those dates the parties were represented and the plaintiff-petitioner was present. On the 1st of January, 1974, the case was transferred to the newly constituted District Court of Mt. Lavinia. A journal entry dated 9th of January, 1974, states that the case is to be called on the 25th of January, 1974, at Mt. Lavinia, and the attorneys to be noticed for that date. On the 25th of January the District Judge had called the case and fixed the trial at Mt. Lavinia for the same date as before. But there is no record that any of the attorneys was present. On the 20th March the plaintiff-petitioner was present but the defendant-respondent was absent and not represented, and so evidence was led *ex parte* and *decree nisi* entered in the favour of the plaintiff-petitioner. By petition dated the 28th March, 1974, supported with an affidavit by him, the attorney for the defendant-respondent applied to the District Court to have the *decree nisi* set aside. At the inquiry into this application the attorney, the chairman, and the secretary of the defendant Town Council gave evidence. The plaintiff-petitioner called no evidence and the District Judge vacated the *decree nisi* and fixed the case for trial. The plaintiff-petitioner now appeals from that order.

The learned attorney for the plaintiff-petitioner submitted that there was no application by the defendant-respondent to have the *decree nisi* vacated. He submitted that the petition was in the name of and by the attorney and therefore the District Court could not have acted on it. The petition filed in the District Court bears the caption of the case and below that appears :—

> " D. de S. Kurukulasooriya, Attorney-at-Law, 61/1, Austin Place, Colombo 7. Petitioner. "

It is signed by the attorney. No objection was taken to the petition in the form it was. At the inquiry the attorney, the chairman, and the secretary of the defendant council gave evidence. They stated that no notice was received that the case was to be heard at Mt. Lavinia. The chairman and the secretary were expecting the case to be taken up in Colombo, and stated that the attorney acted in their behalf in making that application. The secretary admitted receiving a notice to produce some documents at the Mt. Lavinia courts for the 20th March, 1974. But he said that he passed it over to the revenue inspector. The plaintiff-petitioner himself and the court treated it as an application on behalf of the defendant-respondent. It has to be kept in mind that the party who has to purge the default is a

corporation and its failure to appear can only be explained through its officers like the chairman and the secretary and through its agents like the attorney, unlike in the case of a natural person. Even if the petition was in the name of, and by the council there could have been no change in the evidence elicited and the course the inquiry took. Hence this is no doubt an error but not one that has caused any prejudice to the plaintiff-petitioner. It was ignored in the lower court. To uphold the objection now would be to cause a grave injustice to the defendant-respondent.

The learned District Judge vacated the *decree nisi* because he accepted the evidence of the attorney and the other two witnesses that they thought that the case was to be taken up in the District Court of Colombo and they received no notice of the removal of the case to Mt. Lavinia. It was the submission that the order made by the District Court of Colombo postponing the case for the 20th March is deemed to be an order of the District Court of Mt. Lavinia made under the Administration of Justice Law and therefore no notice was necessary and no question can now arise of notice having been served or received.

When the Administration of Justice Law came into operation on the 1st of January, 1974, the cases that were pending in the District Court of Colombo stood removed to the appropriate court by virtue of the provisions of section 53 (3) of the Law. A new District Court of Mt. Lavinia, established under the Law exercises jurisdiction over some areas which formed part of the jurisdiction of the District Court of Colombo. The parties to this action reside and the cause of action as averred on the plaint arose within the jurisdiction of the new court, and consequently the appropriate court for this case is the new District Court of Mt. Lavinia. Then this sub-section provides that the District Court of Mt. Lavinia "shall have jurisdiction to hear and determine the case" and that all judgments and orders given or made by the District Court of Colombo shall have the same force and effect as if they were given or made by the new District Court and under the Law. The learned attorney for the defendant-respondent submitted that the order postponing the case is not an order contemplated in the sub-section, and it was necessary for the District Court of Mt. Lavinia to have given fresh notice and refixed the case. He submitted that that word in the context meant a decision in the nature of a judgment and drew our attention to the defiinition of that word in the Civil Procedure Code, section 5. The Law does not define that word in chapter I. It is defined in the chapter on Appeals Procedure. That definition has no application here. Equally the

definition of that word for the purpose of the Civil Procedure Code cannot have any application in interpreting the words in the Law. It is further significant that the same term "judgments and orders given or made" occurs in all the sub-sections to section 53. The intention of the legislature appears to be that all the cases pending in the various courts of the island on the 31st December, 1973, should be removed to the appropriate court to enable that court to continue with the proceeding or action from where it was on the 31st December. This cannot be achieved if the word order meant or means only a decision in the class of a judgment. It would be a special meaning. Where a special meaning was intended to be given the Law has defined it, e.g., the definition of the word order in section 356 of the Law. In any action or proceeding from the moment of its institution there are decisions made or directions given or other acts done by a court. If the restricted meaning be adopted there will be a class of "judgments and orders" in the cases removed having the same force and effect "as if delivered or made under the Law", and another class of acts or orders not having that same legal effect. This is incompatible. Then it seems to me that the restricted meaning cannot be given to that word. It includes all that which a court is called upon to perform during the course of a case from the moment of institution up to its final termination. Hence the order fixing the case for trial is an order within the meaning of the sub-section and has the same force and effect as if made by the District Court of Mt. Lavinia and under the Law. Then there was no positive requirement that notice had to be given in the sub-section. But for any court to have proceeded to trial where a case had been removed from Colombo to Mt. Lavinia, without adequate notice to the parties would be to defeat the purpose set ont in section 2(b) of the Law, viz., "fairness in the administration".

However in this case the court did direct that notice be given and rightly so. The question before the District Court when the application to vacate the *decree nisi* was made was whether the court was satisfied that the notice was not received and that was reasonable ground for default. There was a new system of courts and a new District Court of Mt. Lavinia established. There were no courts functioning from the 1st to the 23rd January, 1974. The Court listened to the evidence and "in the circumstances of the case" the court vacated the *decree nisi* and fixed the case for trial. It was not subject to any terms and conditions. Any other order would have denied the defendant-respondent the right to contest the action, and "it would appear as if the shortcomings of his legal adviser (at that time), the peculiarities of law and procedure, and (the establishment of a

new system of courts) have all combined to deprive him of his defence and I for one refuse to be a party to such an outrage upon justice." per Abrahams, C. J. in *Vellupillai v. The Chairman, Urban District Council*, 36 N.L.R. 464, at page 465.

I dismiss the appeal and affirm the order of the District Court setting aside the *decree nisi* and fixing the case for trial. The defendant-respondent will be entitled to the costs of this appeal

*Appeal dismissed.*