

ATTORNEY-GENERAL
v
AUSLANKA DEVELOPMENT AND CONSTRUCTION
COMPANY LTD.

COURT OF APPEAL
WIJAYARATNE, J. (P/CA)
CA 789/1995 (F)
CA 790/1995 (F)
DC COLOMBO 6449/M, 6195/M
SEPTEMBER 22, 2006
JANUARY 12, 2007

Civil Procedure Code – Section 75 (e), section 84, section 85, section 87(2) – section 143 Action dismissed – Counsel gone abroad – Not a personal ground – Claim in reconvention postponed – Application to purge default dismissed as earlier application was on the same ground.

The plaintiff-appellant (State) instituted two actions against the defendant-respondent. The State Counsel made an application for postponement of the trial on personal grounds – Counsel going abroad. This was refused by Court. The claim in reconvention inquiry was postponed as State was not ready.

The application made under section 87(2) was refused by Court stating that, the application is made on the same facts as earlier, Court has no jurisdiction to make any order on the same facts.

Held:

- (1) The District Judge completely misdirected herself on law when she stated that Court had no jurisdiction to vacate the *ex parte* decree. The Court was unmindful of the fact that it inquired into an application entertained by Court on specific provisions of section 87 vesting jurisdiction in the same Court which entered decree *ex parte* to make an order either setting aside *ex parte* decree or refusing to set aside same. There is a clear error of law.
- (2) The adjournment of the hearing of an action is governed by section 143 and undisputedly it is the discretion of the Court to grant an adjournment or not.
- (3) The correct procedure in terms of section 75(e) read with section 84 and section 85 would have been to proceed with the hearing *ex parte* of the claim in reconvention immediately upon the dismissal of the plaint. Instead the trial Judge had adjourned the hearing of same thereby placing the defendant at an advantage against the plaintiff because even in the event of defendant not been ready to proceed with his claim he gained an adjournment at the expense of the plaintiff who was caused prejudice and loss and damage in the process.

Per Wijayaratne, J. (P/CA)

"This process which cannot by any measure of reasoning, be described or presumed as judicious is a special circumstance of this case that warrants the interference by this Court sitting in appeal over the matter in issue here."

Per Wijayaratne, J. (P/CA)

"The fact that the plaintiff has made an application by way of motion 5 days earlier has no mention whatsoever on the days proceedings and from the content it is apparent that the Counsel who objected to the application chose to keep mum about this motion a copy of which was received by his client and the Court which received the motion however minuted it much after the trial date."

- (4) If the fact of the plaintiff not being ready for hearing is not good ground for granting adjournment of trial of the plaintiff's case, it should not justifiably be considered as good ground for adjournment of hearing of the claim in reconvention.

APPEALS from two orders made by the trial Judge in the District Court of Colombo.

Case referred to:

(1) *Colgate Palmolive Co. v Hemas (Drug) Ltd.*

Sobitha Rajakaruna SSC for plaintiff-appellants.

Geoffrey Alagaratham for defendant-respondent.

February 19, 2007

WIJAYARATNE, J. P/CA

The plaintiff-appellant instituted two actions relevant to these two appeals against the defendant-respondent. Both actions, after the filing of defendants answer and the replications fixed for trial on the same day on the understanding of the parties that the two cases being among the same parties and on similar facts, be tried together. However, the trial of the two cases had been postponed on two occasion at the request of the Counsel for the plaintiff and the date appointed for the trial also had been changed to suit the convenience of the Counsel for the plaintiff and ultimately fixed for trial on 12.12.1994.

On 12.12.94 State Counsel appeared in Court and made application for postponement of the trial on personal grounds of Senior State Counsel who represented plaintiff. The President's Counsel representing defendant objected to any adjournment being granted on the basis that in terms of the Judicial Service Circulars, a Counsel going abroad is not considered a personal ground.

The Court observing that plaintiff has been given two adjournments on application by the Counsel for the plaintiff, accepting the objections of the Defence Counsel based on J.S.C. Circular refused the application for adjournment and dismissed the plaintiffs actions subject to costs. When the Counsel for the defence mentioned that the claim in reconvention too is fixed for trial, it was noted that the State Counsel representing the plaintiff is not ready for the trial of the claim in reconvention, adjourned the trial of the claim in reconvention and appointed another day for *ex parte* trial of the same. However the Court has not recorded anything in relation to the fact whether the Counsel for the defendant was ready to proceed with the trial of the claim in reconvention *ex parte* or not, before adjourning the same on the footing that the Counsel for the plaintiff is not ready stating that the adjournment is for the above reasons. (ඉහත කරුණු මත).

The plaintiff then made an application in terms of section 87(2) of the Civil Procedure Code supported by the affidavits which included an affidavit from the Senior State Counsel concerned dated 23.04.1994. The same was objected to by the defendant by its statement of

objections which was countered by the plaintiff by a statement supported by further affidavits of the Senior State Counsel dated 24.04.1995.

When the matter came up for inquiry the learned additional District Judge made order dated 11.12.1995 stating that the application is made on the same facts as averred on 12.12.94 and considered by the Court which made order dismissing plaintiff action and therefore the Court did not have jurisdiction to make any order on the same fact and vacate that order dismissing the plaint. Aggrieved by the said order, the plaintiff preferred these appeals in the two respective cases.

When the appeals are taken up for argument both Counsel representing respective parties agreed on facts which are matters of record and further agreed that in view of similarity of facts and the law relevant to both matters are the same and as matters between the same parties, both appeals be argued together and one judgment should be binding on both cases. Thereafter they made submissions in writing.

It is observed that all the submissions made are on the order of dismissal of the plaint on 12.12.94 and nothing is mentioned on the order appealed from i.e. the order dated 11.12.1995 refusing to vacate the *ex parte* decree made on the basis of lack of jurisdiction of Court. It should be noted first and foremost that the learned Additional District Judge has completely misdirected herself on law. When she stated that Court had no jurisdiction to vacate the decree *ex parte*. The Court was obviously unmindful of the fact that it inquired into an application entertained by Court on specific provisions of section 87 of the Civil Procedure Code vesting jurisdiction in the same Court which entered decree *ex parte*, to make an order either setting aside the decree *ex parte* or refusing to set aside the same. The refusal to set aside the decree *ex parte* not on facts, but on grounds that Court lacked jurisdiction therefore is a clear error of law and accordingly set aside in appeal.

The learned trial Judge, refused to vacate *ex parte* decree not upon a consideration of relevant facts, but on an erroneous basis of lack of jurisdiction only. It is therefore necessary to consider the application of the plaintiff-appellant on its merits.

Perusal of the proceedings and the order dated 12.12.94 it is apparent that the facts of the trial being adjourned twice before and

travel abroad is not considered a personal ground in terms of JSC Circular are two main factors that received consideration of the trial judge. It is conceded that the adjournment of the trial was sought on 'personal grounds' of the Senior State Counsel who was said to have travelled abroad "for the participation as an official of the Sri Lanka" of the contingent of participants at 12th World Karate Championship-Malaysia on the approval by the Minister – Vide copy of letter of Senior Asst. Secretary to the Ministry of Youth Affairs ... etc, dated 28.11.94 marked ¶ and produced along with the application.

The adjournment of the hearing of an action is governed by the provisions of section 143 of the Civil Procedure Code and undisputedly it is the discretion of the Court to grant an adjournment or not. In the case of *Colgate Palmolive Company v Hemas (Drugs) Ltd.*⁽¹⁾ and another.

The Supreme Court held

"an order fixing the trial or reusing grant of an adjournment is a typical exercise of pure discretionary power and would be interfered with by a Court sitting in appeal only in exceptional circumstances."

Accordingly my task will be to ascertain whether there are exceptional circumstances that warrant interference by this Court sitting in appeal and in such exercise it is prudent to consider whether the trial Judge used his discretion judiciously and in keeping with the practices of the Court.

In examining the order dismissing the plaint itself, it is clear that the practice of the Court in granting adjournments was to consider convenience of the Counsel and the fact of a party not being ready for trial on the date appointed. In this particular instance of Junior Counsel for the plaintiff seeking adjournment was on the basis of inconvenience of the Senior Counsel for the plaintiff occasioned by his travel abroad as an official of the Sri Lanka contingent of participant of an event taking place in Malaysia. Though the application was categorized as a "personal ground application" it is not a 'personal ground' in its strict sense as regulated by rules.

The fact that the plaintiff has made an application by way of motion dated 06.12.1994 has no mention whatsoever on the days of

proceedings and from the content of the proceedings it is apparent that the Counsel who objected to the application chose to keep mum about this motion a copy of which was received by his client and the Court which received this particular motion however minuted it much after the trial date (Vide JE No. 29 dated 04.01.1995 in case No. 6195/M and JE No. 27 of the same date in case No. 6449/m). The fact of the plaintiff-appellant seeking an adjournment by way of motion has not been brought to the notice of the trial Judge obviously due to the registry of the Court not keeping to the due practice of submitting such application to the Judge in due course.

The learned District Judge considering the objection of the Counsel for the defendant considering such grounds of objection appear to have accepted the same in the exercise of his discretion in refusing the adjournment, however did not consider such grounds with regard to the adjournment of the trial *ex parte* of the claim in reconvention of the defendant. He did not even record whether the defendant was ready to lead evidence in support of his claim in reconvention. On the face of the order it appears that the trial Judge has adjourned the hearing of the claim in reconvention on ground that the Counsel who represented the plaintiff is not ready for trial of claim in reconvention either.

To me this appears as an instant of the trial Judge exercising his discretion in a manner which is not judicious, because, if the fact of the plaintiff not being ready for hearing is not a good ground for granting adjournment of trial of the plaintiff's case, it should not justifiably be considered as a good ground for adjournment of hearing of the claim in reconvention. Further the adjournment of the hearing of the claim in reconvention was granted even without ascertaining whether defendant is ready for the hearing. The days proceedings are silent on such fact. The Counsel for the defendant who strenuously objected the application of the plaintiff for an adjournment, does not appear to have at least indicated to Court whether he is ready to proceed with the prosecution of his claim in reconvention. The correct procedure in terms of the provisions of section 75(e) read with sections 84 and 85 of the Civil Procedure Code would have been to proceed with the hearing *ex parte* of the claim in reconvention immediately upon the dismissal of the plaint. Instead the learned trial Judge adjourned the hearing of the same and thereby placing the defendant at an advantage against the plaintiff because even in the event of defendant not being ready (which facts were not ascertained by court) to proceed

with his claim, he gained an adjournment at the expense of the plaintiff who was caused prejudice and loss and damage in the process.

This process which cannot by any measure of reasoning, be described or presumed as judicious is a special circumstances of this case that warrant the interference by this Court sitting in appeal over the matter in issue here.

In all the circumstances of this case, I am of the view that the learned District Judge has not used his discretion in refusing to grant the adjournment, judiciously and in the interest of justice it is necessary that this Court sitting in appeal should set aside the order dated 12.12.94 dismissing plaintiff's action.

In the result the appeals are allowed and the order dated 12.12.94 and the order refusing to vacate order dismissing plaintiff's action and dated 11.12.1995 are both set aside and vacated. Further order is made that the two actions should proceed from the stage before the dismissal of the plaintiffs action, according to law.

Appeal allowed.