REV. MINUWANGODA DHAMMIKA THERO
v
REV. GALLE SARADHA THERO

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A.1080/93 (F)
D.C. GALLE 10562/L
SEPTEMBER 30, 2002
MARCH 25, 2003

Civil Procedure Code – Sections 88(2) and 187 – Should the Order be accompanied by a Judgement – Order and Judgment not pronounced on the same day – Validity? Can an exparte judgment be entered without a hearing and adjudication? – Constitution Article 138(1) – Evaluation of evidence – Failure of justice – Substantially prejudiced?

The inquiry in respect of the application to purge default by the defendant-appellant was concluded on 15.2.1993 and at the conclusion of the inquiry the trial Judge had made order dismissing the application but postponed the giving of reasons decision to 15.3.1993.

It was contended that the Order and the Judgement should be pronounced on the same day, and the trial Judge has violated a mandatory requirement.

Held:

(i) There is no positive rule of law that requires or makes it mandatory to pronounce reasons forthwith after the order is pronounced.

(ii) Even in an *ex parte* trial the Judge must act according to law and ensure that the relief claimed is due in fact and in law.

(iii) Though there is no evaluation of the evidence led, on an examination of the evidence led at the *ex parte* trial, it appears that the trial Judge was correct.

APPLICATION for Leave to Appeal from the order of the District Court of Galle.

Cases referred to:

1. *Mrs. Sirimavo Bandaranayake* v *Times of Ceylon* 1995 1 Sri LR 22
2. *Victor and Another* v *Cyril de Silva* 1998 1 Sri LR 41

Dr.Jayatissa de Costa with *D.D.P. Dassanayake* for the defendant-appellant.

Hemasiri Withanachchi with *Ms. Safaya Hussain* for the plaintiff-respondent.

Cur.adv.vult

October 17, 2003

SOMAWANSA, J.

This is an appeal preferred from the order of the learned Additional District Judge of Galle dated 15.02.1993 dismissing the application of the defendant-appellant to set aside the *ex parte* judgment and decree entered in the said case.

When the appeal was taken up for hearing on 30.09.2002 parties agreed to resolve the matter by way of written submissions and accordingly written submissions have been tendered.

In the written submissions, counsel for the defendant-appellant strenuously contends that this appeal deals with section 88(2) of the Civil Procedure Code which clearly presupposes a judgment adjudicating upon the facts and specifying the grounds upon which it is made to accompany the order made in respect of a dispute and that in the instant case, the learned Additional District Judge has clearly violated this mandatory requirement, in that the order has been made on 15.02.1993 whereas reasons for his order had been pronounced one month later viz.15.03.1993. He submitted that on this ground alone the said order of the learned Additional District Judge is liable to be set aside.

On an examination of the record, it is apparent that the inquiry in respect of the application to purge the default by the defendant-appellant had commenced on 15.02.1993 and at the conclusion of the inquiry on the same day the learned Additional District Judge had delivered her order dismissing the application of the defendant-appellant. However the reasons for the said order was reserved for 15.03.1993 and on the said date reasons for the order were pronounced.

The relevant section applicable to the issue at hand is section 88(2) which reads as follows:

> 88(2) "The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal."

Applying the provisions contained in the said section 88(2) of the Civil Procedure Code to the issue at hand it would appear that the learned Additional District Judge has complied with the requirements in the said section. In that she has made an order refusing to set aside the judgment entered upon default and the said order is accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made. The only objection if at all that could be taken against non compliance is that the order and the judgement not being pronounced on the same day, in that judgment or reasons were delivered one month after the order was made. But the question that needs to be answered is whether there is a positive rule of law that requires or makes it obligatory to pronounce reasons forthwith after the order is pronounced. I am yet to come across any such requirement. The counsel for the defendant-appellant also has failed to cite any authority dealing with such a requirement. In fact, he has only cited section 88(2).

On a plain reading of this section it appears the requirement spelt out by that section is that the order setting aside or refusing to set aside the judgment entered upon default, should be accompanied by reasons for such order made under the said section. In the instant case, if the order and the reasons for the order were pronounced on the same day then one cannot attack the order on the basis of a defect or irregularity. However has this defect or irregularity complained of by the defendant-appellant caused any prejudice to the substantial rights of the defendant-appellant or occasioned a failure of justice? There was no such complaint forthcoming from the defendant-appellant and there is no material to come to such a finding.

On the other hand, it is to be seen that the order dated 15.02.1993 was made by the learned Additional District Judge soon after the inquiry was concluded and no doubt the impression created by the witnesses were fresh in her mind.

On an examination of the reasons given by her on 15.03.1993 and the evidence led at the inquiry, it appears that the learned Additional District Judge upon an analysis of the evidence led at the inquiry and upon observation of credibility and the demeanour of the defendant-appellant and his witness the physician has come to

a correct finding that the defendant-appellant failed to satisfy Court that he had reasonable grounds for his default. It is also to be seen that dismissal of the application of the defendant-appellant on 15.02.1993 and the reasons setting out the grounds on which the dismissal was made were consistent and had not caused any prejudice or miscarriage of justice.

It is also to be noted that the defendant-appellant on being served with the *ex parte* decree on him made an application to Court to set aside the same on the ground that his absence at the trial was owing to his ill health. However at the inquiry under cross examination he also admitted that the date of trial was not known to him and nobody informed him of the date of trial. Ayurvedic Physician who treated the defendant-appellant also gave evidence and produced a medical certificate issued by him to the defendant-appellant. His evidence revealed that though on 22.07.1992 he started treating the defendant-appellant the medical certificate marked A was issued by him on 24.10.1992 which stated that the defendant-appellant was under his treatment for 2 weeks. His evidence also revealed that though he was in possession of an official medical certificate book he issued the said medical certificate marked A on his letterhead as he could not trace the official book. It appears that on an examination of the evidence led at the inquiry the learned Additional District Judge has come to a correct finding that the defendant-appellant failed to satisfy Court that he had reasonable grounds for default.

Counsel for the defendant-appellant has also cited the decision in *Mrs. Sirimavo Bandaranayake* v *Times of Ceylon* [1] wherein the Supreme Court held that even in an *ex parte* trial the Judge must act according to law and ensure that the relief claimed is due in fact and in law and must dismiss the plaintiff's cause if he is not entitled to it. An *ex parte* judgement cannot be entered without a hearing and adjudication. Applying the principle laid down in that case to the instant action he complains that there was no adjudication and the learned trial Judge had only stated that he accepts the evidence given by the substituted-plaintiff-respondent and had given judgment in favour of the plaintiff-respondent.

It is conceded that the judgment does not contain an evaluation of the evidence led. However on an examination of the evidence

led at the *ex parte* trial it appears that the learned Additional District Judge was correct when she came to a finding that the substituted-plaintiff-respondent was entitled to the relief prayed for in the prayer to the plaint.

In the case of *Victor and Another* v *Cyril de Silva* [2] a similar situation was considered whether the learned District Judge failed to evaluate the evidence in terms of Section 187 of the Civil Procedure Code. Reference was made to:

> "Article 138(1) of the Constitution which deals with the jurisdiction of Court of Appeal is on the following terms:
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> 138(1) - The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any court of first instance....
>
> Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.
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> *Per* Weerasuriya, J. at page 46
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> "It is evident on a close examination of the totality of the evidence that the District Judge is correct in pronouncing a judgment in favour of the plaintiff-respondent as prayed for in the plaint. However, the learned District Judge was in obvious error when she failed to evaluate the evidence in terms of section 187 of the Civil Procedure Code. The failure of the learned District Judge to comply with the imperative provisions of section 187 of the Civil Procedure Code has not substantially prejudiced the rights of the defendants-appellants, or has not occasioned a failure of justice to the defendants-appellants".

In the circumstances I see no reason to interfere with the *ex parte* judgment dated 24.07.92.

For the foregoing reasons, I see no basis to interfere with the order of the learned Additional District Judge dismissing the application of the defendant-appellant to set aside the *ex parte* judgment

and the decree. The appeal of the defendant-appellant is dismissed with costs fixed at Rs.5000/-.

The Registrar is directed to send the case record to the appropriate District Court forthwith.

DISSANAYAKE, J. – I agree.

Appeal dismissed.