

DHARMASENA

v

RAJENDRA

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A. NO.1283/96 (F)
D.C. GALLE L/11592
NOVEMBER 4, 2003

Civil Procedure Code – Sections 86(2), 88(1), 88(2), 754(1), (2) and (5) - Is the Order setting aside the ex-parte Judgment – A Judgment or an order having the effect of a final Judgment – Direct right of appeal or Leave to Appeal? – Order approach and the application approach.

Held:

- (i) The plaintiff-appellant has a right of final appeal under section 88(2) of the Code against the Order of the trial Judge setting aside the *ex parte* Judgment entered in the case.

APPEAL from the Judgment of the District Court of Galle

Cases referred to:

- 1 *Siriwardane v Air Ceylon* 1984 1 Sri LR 286
- 2 *Ranjith v Kusumawathie* – 1998 3 Sri LR 232
- 3 *A.S.Sangarapillai & Brothers v Kathiravelu* – 2 Sirkantha Law Reports 99
- 4 *Peter Singho v Wydeman* – 1 Srikantha Law Reports 88

Hemasiri Withanachchi for plaintiff-appellant

Ananda Kasthuriarachchi for defendant-respondent.

Cur.adv.vult

December 19, 2003

DISSANAYAKE, J.

A preliminary objection had been taken by the defendant-respondent regard to the propriety and validity of the plaintiff-appellant exercising a right of final appeal against the order of learned District Judge of Galle setting aside the *ex parte* judgment entered by the District Court earlier. 01

Learned counsel appearing for the defendant-respondent contended that the order of the learned District Judge setting aside the *ex parte* judgment entered earlier was not a judgment or an order having the effect of a final judgment as defined in section 754(5) of the Civil Procedure Code. Therefore it was contended that in terms of section 754(2) of the Civil Procedure Code the plaintiff-respondent has no direct right of final appeal. He has to obtain leave of court to tender an appeal in terms of section 754(2). 10

Learned Counsel for the defendant-respondent contended that the following 2 tests have been followed by our courts in order to ascertain whether the order vacating the *ex parte* judgment is an order having the effect of a final judgment:-

- 1) Order approach
- 2) Application approach

He cited the judgment of His Lordship Sharvananda, C.J., in *Siriwardane v Air Ceylon*⁽¹⁾ and a few other English and a few other judgments by our courts where he contended the order approach test was utilized. 20

He cited the decision of Dheeraratne, J. in *Ranjith v Kusumawathie*⁽²⁾ and a few English decisions where he contended that the application approach test was utilized.

In my view since there is clear provision in the Civil Procedure Code which spells out clearly the rights of parties to tender a final appeal, if they are dissatisfied by an order of the District Court setting aside or refusing to set aside an *ex parte* judgment, it is necessary for this court to embark on the aforesaid tests as contended by learned counsel for the plaintiff-respondent. 30

Section 88(2) of the Civil Procedure Code provides:

88(1).....

(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 specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal.

It is interesting to note that the facts of *A.S.Sangarapillai & Brothers v Kathiravelu*⁽³⁾ where the facts were very similar to the instant case, Siva Selliah, J. at 103 observed: 40

“In the instant case I am of the view that the determination of the District Judge made on 01.09.83 setting aside the judgment entered against the defendant for default of appearance due to non-service of summons and allowing him to file answer is an order made under section 88(2) of the Civil Procedure Code and that due to the special provision contained therein and the in-built safe guard provided thereby and considering the tenor of the judgments of Vythilingam, J., and Abdul Cader, J., and O.S.M.Seneviratne, J., quoted above, I hold that a direct appeal is provided for in the circumstances and that an application by way of leave to appeal does not arise.” 50

Further it is to be observed that in the case of *Peter Singho v Wydeman*,⁽⁴⁾ Abdul Cader, J. at 89 observed;

“To give the word “default” the restricted meaning contended for would be to place the defendant who had received summons

and kept away from Court at an advantage over a defendant who had not received summons altogether.”

It may be noted that section 88(2) has no reference expressly to section 86(2).”

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At page 90 Abdul Cader, J. stated further, “when a defendant complains that summons had not been served on him and nevertheless a decree had been entered against him, he challenges the foundation of the default decree. He moves the Court to reverse its finding that he was in default to hold with him that summons was not served on him. It is to be noted that he makes application after service of the decree against him for default. “The corresponding word in the Code of Indian Civil Procedure Code is non-appearance (e.g.R7) which is the sense in which the word “default” has been used in our Code. I am of the view that when a defendant attempts to satisfy Court that the decree entered against him for “default” is not based on valid evidence for that finding that summons was served on him, he falls within the ambit of section 86(2). I have therefore, come to the conclusion that section 86(2) would apply. I do not agree with the view of the Court of Appeal that section 86(2) is confined to cases where the defendant is in default is after summons have been admittedly served on him.”

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Therefore I am of the view that the plaintiff-appellant has a right of final appeal under section 88(2) of the code against the order of the learned District Judge setting aside the *ex parte* judgment entered in the case.

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Under the circumstances, it is not necessary to go into the question whether the order made by the learned District Judge is an “order” or a “judgment” in view of section 88(2) read with of section 754(1) of the Code.

Hence, the preliminary objection of the defendant-respondent cannot be sustained. I overrule the said preliminary objection and fix the main matter for arguments.

SOMAWANSA, J. I agree.

Preliminary objection overruled.

Matter fixed for argument.