

DHAMMASIRI THERO
v.
SUGATHA THERO

COURT OF APPEAL
WEERASURIYA, J.,
DE SILVA, J.,
C.A. NO. 263/96
D.C. AVISSAWELLA NO. 19322/L
OCTOBER 27, 1998

Civil Procedure Code – SS 85 (4), 86 (2), 404 – Viharadhipathi – Declaration – Ex parte – Defendant no longer a priest – Decree served on defendant in the capacity of a layman – Substitution – Refused.

The plaintiff respondent instituted action seeking a declaration that he was the Viharadhipathi of temple 'S' and sought the ejection of the defendant. One Soratha Thero moved Court to substitute himself in the room of the defendant on the ground that the defendant had disrobed himself. No Order was made on this application. The matter proceeded *ex parte*, and when the Fiscal reported that the Defendant had disrobed himself, Court made order to serve the decree on the Defendant in the capacity of a layman. The plaintiff-respondent filed a Motion, moving for writ and stating that no inquiry in respect of the Application of Rev. Soratha was necessary. The petitioner moved Court to be substituted in place of the defendant. The Application was refused.

Held :

- (i) The failure of Court to make an order on the application of Rev. Soratha who claimed to be the Viharadhipathi had the effect of overlooking a fundamental issue upon the maintainability of the action to a change of status of the defendant due to disrobing.
- (ii) The plaintiff was under a duty to take steps in terms of the provisions of cap. XXV CPC.

- (iii) The order to serve the *ex parte* decree on the defendant, in his new capacity as a layman when he was sued on the basis of holding wrongfully the position of Viharadhipathi of the temple in suit is wrong.

APPLICATION in Revision from the Order of the District Court of Avissawella.

Cases referred to :

1. *Gooneratne v. Perera* – 2 NLR 185.
2. *Kulasekera Appuhamy v. Malluwa* – 28 NLR at 249.
3. *Punnanda v. Welivitiya Soratha*, 51 NLR 372.
4. *Dammaratena Unnanse v. Sumangala Unnanse* – 14 NLR 402.

J. W. Subasinghe, PC with *G. L. Geetananda* for the petitioner-petitioner.

Gamini Marapona, PC with *Nishanthi Mendis* for the plaintiff-respondent.

Cur. adv. vult.

December 18, 1998.

WEERASURIYA, J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) by plaint dated 29.08.94 instituted action against Makure Vijithasiri Thero (hereinafter referred to as the defendant) seeking a declaration that he was the Viharadhipathi of Sri Vidya Sanwardanarama Viharaya morefully described in the schedule to the plaint, ejection of the defendant therefrom and damages. The defendant, having served with summons by his proxy filed in Court appointed Chandrani Ranawaka, Attorney-at-law to appear on his behalf and he was permitted to file answer on 05.06.95. On 05.06.95, an Attorney-at-law by the name of Wijemanna tendered a proxy along with a petition and affidavit on behalf of Hisselle Soratha Thero praying that he be substituted in place of the defendant on the ground that the defendant had disrobed himself. The plaintiff opposed this application and he was granted time till 31.07.95 to file objections. Attorney-at-law for the

defendant also moved for time to seek further instructions from the defendant and she was given time till 31.07.95 to file answer. On 31.07.95, plaintiff filed his statement of objections and the defendant was given further time till 23.08.95 to file answer. However, on 23.08.95 Attorney-at-law for the defendant informed Court that, she had no instructions from the defendant and upon the application of the plaintiff, the case was fixed for *ex parte* trial on 10.09.95. The case proceeded to trial *ex parte* on 26.10.95 and the Additional District Judge by her judgment dated 15.11.95 entered judgment for the plaintiff. Thereafter the fiscal reported that the defendant had disrobed himself and the Additional District Judge made order to serve the decree on the defendant in the capacity of a layman after his new address was furnished by the plaintiff. Thereafter, *ex parte* decree was served on the defendant on 21.12.95 as evident from the journal entry dated 12.01.96 and the plaintiff filed an application for a writ of execution. Further, the plaintiff on 06.02.96 filed a motion with a copy of the death certificate of Hisselle Soratha Thero and moved for a writ alleging that no inquiry in respect of the application of Hisselle Soratha Thero was necessary. On 12.02.96, the petitioner-petitioner (hereinafter referred to as the petitioner) by his petition and affidavit, prayed that he be substitute in place of the defendant and the learned Additional District Judge by her order dated 29.03.96, refused this application. It is from the aforesaid order of the Additional District Judge that the present application for revision has been filed.

At the hearing of this application, learned President's Counsel appearing for the petitioner, presented the case of the petitioner as follows:

- (a) that the learned Additional District Judge had erred in fixing the case for *ex parte* trial;
- (b) That the learned Additional District Judge had erred by directing the *ex parte* decree to be served on the defendant, when he had disrobed himself; and

- (c) that the learned Additional District Judge had misdirected herself by holding that section 86 (2) of the Civil Procedure Code was applicable.

Learned President's Counsel appearing for the plaintiff submitted that the learned Additional District Judge had rightly held that the petitioner was not entitled to relief in terms of section 86 (2) of the Civil Procedure Code.

It would be seen that Hisselle Soratha Thero by his petition and affidavit, made an application to Court on 05.06.95 that the defendant had disrobed himself and that he be substituted as the defendant on the basis that he was the Viharadhipathi of the temple in suit. To this application, the plaintiff filed his statement of objections on 31.07.95. It is to be observed that the learned Additional District Judge had failed to appreciate the need and the significance of making an order on this application before she could make an order for *ex parte* trial upon the application of the plaintiff on 23.08.95.

Learned President's Counsel for the plaintiff submitted that the defendant had disrobed on 01.12.95 as evident from an endorsement in his Upasampada declaration. It is to be noted that, this document and other documents tendered by the petitioner to counter this position had not been produced in the District Court. It seems to me that what is significant is the application made by Hisselle Soratha Thero on 05.06.95 praying that he be substituted as the defendant due to the change of status of the defendant, as he had ceased to be a Buddhist priest. The application of Hisselle Soratha Thero was kept in abeyance, when in fact the question of the status of the defendant to participate in the action was in issue. The failure of the learned District Judge to make an order on that application had the effect of overlooking a fundamental issue upon the maintainability of the action owing to a change of status of the defendant due to disrobing.

It is appropriate at this point to refer to section 404 of the Civil Procedure Code which is in the following terms :

"404 – In other cases of assignment, creation or devolution of any interest pending the action, the action may, with the leave of the Court given either with the consent of all parties, or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require."

In the case of *Gooneratna v. Perera*⁽¹⁾ at 185, *Kulasekera Appuhamy v. Malluwa*⁽²⁾ at 249 it was laid down that pending the action in Section 404, mean during the progress of the suit and before the passing of the final decree.

The Additional District Judge had observed that pupils of the defendant could have made an application in terms of section 404 of the Civil Procedure Code when the defendant disrobed himself. However, it is to be observed that when in fact, Hisselle Soratha Thero purporting to be the Viharadhipathi, made an application to have him substituted in place of the defendant, learned Additional District Judge failed to make an order on that, before she made order to fix the trial *ex parte*.

In the circumstances, it seems to me that Additional District Judge was in error when she failed to inquire into the application of Hisselle Soratha Thero to have him substituted in place of the defendant before the order was made for *ex parte* trial.

It is noteworthy that after the conclusion of the evidence by her judgment dated 16.11.95, Additional District Judge directed to serve the *ex parte* decree on the defendant. Pursuant to this direction, the fiscal reported that the defendant had disrobed and thereupon the Additional District Judge directed that the *ex parte* decree should be served upon the defendant in his new address in his capacity as a layman.

Section 85 (4) of the Civil Procedure Code provides that the Court shall serve a copy of the decree on the defendant in the manner provided for the service of summons and that such copy shall bear an endorsement that any application to set aside the decree shall be made to Court within fourteen days of such service. Thus, it would appear that it is a mandatory requirement to have the *ex parte* decree served on the defendant who could thereafter within 14 days as of right could appear in Court and make an application to have such decree set aside on satisfying Court that he had reasonable grounds for such default. It was contended that the defendant did not avail himself of the opportunity so afforded to purge his default.

The question that arises is whether, the defendant in the instant case could have appeared in Court within 14 days of the service of the *ex parte* decree, when Hisselle Soratha Thero had explicitly stated in his affidavit that the defendant had disrobed. The defendant's act of giving up the priesthood consequent upon disrobing was never disputed. However, if the question was, as to the effective date of disrobing, such matter could have formed the basis of an inquiry by the Additional District Judge. Further, the question whether or not Hisselle Soratha Thero had *locus standi* to make the application could have been inquired into and a decision made thereon.

It is relevant to refer to the observations of Windham, J. in *Punнанanda v. Weliwitiye Soratha*⁽³⁾ at 376 on the effect of disrobing as follows:

"Disrobing with the intention of giving up the priesthood, is the equivalent, ecclesiastically, of personal demise and it does not entail, any more than death entails, an abandonment of rights, but merely a personal incapacity to exercise them. These rights can accordingly descend to a pupillary successor."

It was held in *Dammaratana Unnanse v. Sumangala Unnanse*⁽⁴⁾ that the fact that a tutor disrobes himself for immorality or other reason does not affect the pupil's status as regards the right of pupillary succession.

In the circumstances, Additional District Judge was in error when she made order to serve the *ex parte* decree on the defendant, in his new capacity as a layman, when he was sued on the basis of holding wrongfully the position of Viharadhipathi of the temple in suit. The Additional District Judge was possessed of material that the defendant had disrobed himself from 05.06.95 on the information furnished by Hisselle Soratha Thero and by the fiscal in his report.

Therefore, the plaintiff was under a duty to take steps in terms of the provisions of chapter XXV of the Civil Procedure Code. The Additional District Judge had come to a finding that the defendant had failed to take steps in terms of section 86 (2) of the Civil Procedure Code to purge his default. It would appear that Additional District Judge was in error when she made a finding that provisions of section 86 (2) would apply.

For the foregoing reasons, I set aside the orders of the District Judge dated 29.03.96 and 23.08.95 and proceedings thereafter and direct that the petitioner be substituted in the room of the defendant and to permit him to tender his answer and proceed with the action thereafter in accordance with the law.

I allow the application with costs.

DE SILVA, J. – I agree.

Application allowed.