IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

K.P. Leelasena of
No. 105, Seeduwa Road,
Kotugoda.

PLAINTIFF

C.A 432/1998 (F)
D.C. Negombo 501/L

Vs.

T.A Beatrice Mary of
No. 36, Kasagahawatta
Settlement, Kotugoda.

DEFENDANT

T.A Beatrice Mary of
No. 36, Kasagahawatta
Settlement, Kotugoda.

DEFENDANT-PETITIONER

Vs

K.P. Leelasena of
No. 105, Seeduwa Road,
Kotugoda.

PLAINTIFF-RESPONDENT

K.P. Leelasena of
No. 105, Seeduwa Road,
Kotugoda.

PLAINTIFF-RESPONDENT-APPELLANT

Vs.

T.A Beatrice Mary of
No. 36, Kasagahawatta
Settlement, Kotugoda.

DEFENDANT-PETITIONER-RESPONDENT

BEFORE; Anil Gooneratne J.

COUNSEL: D. S. Ferdinandaz for the
Plaintiff-Respondent-Appellant

S. Dassanayake for the Defendant-Petitioner-Respondnet

ARGUED ON: 29.11.2011

DECIDED ON: 17.01.2012

GOONERATNE J.

This was an action filed in the District Court of Negombo for a declaration of title and ejectment of the Defendant-Respondent. The case went ex-parte since the Defendant was absent and unrepresented, on the summons returnable date. An attempt was made by the Defendant to negotiate with Plaintiff and purge the default but it was not successful. Therefore ex-parte trial was held and ex-parte judgment was entered on 1.12.1995 in favour of the Plaintiff. On service of decree on the Defendant-Respondent steps were taken by the Defendant-Respondent to purge the default and the matter was fixed for inquiry. The inquiry to vacate the ex-parte judgment and decree was held on 5.6.1998 and evidence of Defendant was led. In the petition of appeal filed of record and the submissions before me by learned counsel for Plaintiff-Appellant, attention of this court was drawn to the fact that on the same date (5.6.1998) learned District Judge delivered order allowing the application of the Defendant-Appellant by setting aside the ex-parte judgment and permitting the Defendant to file answer without the Defendant being re-examined and before the closure of the Defendant case. Further the Plaintiff-Appellant's case had also not commenced.

Perusal of the proceedings I note that paragraph 6 of the Petition of Appeal is correct and the proceedings do not indicate re-examination of the witness and as such proceedings have come to an abrupt end. The learned trial Judge need to follow the accepted procedure and practice of the civil courts with the provisions embodied in the Evidence Ordinance, i.e examination in chief, cross-examination and re-examination. Courts should strictly follow the Civil Procedure Code. The trial Judge cannot depart from above without recording cogent and valid reasons (only in the interest of justice). However Plaintiff-Appellant had the opportunity to cross-examine the Defendant and one could argue that no prejudice had been caused to the Plaintiff. But one should bear in mind that at every turn in a civil suit either party has a right to listen to evidence and remain silent or object to improper and or irrelevant evidence. Merely because the opposing party has concluded cross-examination of a witness, would not mean that counsel's role is at the end. Failure to follow and conform to the rules of court and practice of court would amount to a breach of the rules of natural justice. Further any matters that need to be explained should be done in re-examination. Proceedings do not indicate re-examination of the witness.

Though this type of inquiry is not regulated by any specific section of the Civil Procedure Code, such inquiries must be conducted

consistently with the principles of natural justice and the requirement of fairness. Court can also make an order in terms of the inherent powers (Section 839) as may be necessary to meet the ends of justice. De Fonseka vs. Dharmawardena 1994(3) SLR 49. Nevertheless it would not mean that court should take away the right to re-examine a witness. Fairness and natural justice would be to comply with rules of evidence and not to ignore it. Basic requirements of the law must be fulfilled 1993(3) SLR 197.

The learned counsel for Appellant in his submissions to court referred to the order of the learned District Judge and stated that the trial Judge has come to an erroneous conclusion when he state that the fiscal report does not suggest the address where the summons had been served. The trial Judge does not rely on the fiscal report and state he is suspicious of the report. Learned Appellant's counsel state that the precept and summons to the Defendant clearly describe the name and address of the Defendant. learned counsel for Defendant-Respondent does not seriously contest this position. It was the position of the Appellant that the Defendant evaded summons though the Defendant was at the house at the time of service of summons. He refer to the evidence in cross-examination, (last few questions and answers) where Defendant replies මගේ අතට දුන්නේ නෑ. මම ගෙදර සිටියා.

Trial Judge should have considered all the circumstances of the case, without only looking at the fiscal report in isolation and fault it for not having the address of the Defendant. There is the other matter stressed by the District Judge, that the oath before the Registrar had been sworn on a Saturday. This court was provided with the relevant diary by counsel for Appellant for the year 1995. However I do not appreciate the trial Judge's findings on that aspect. (8.6.1996 was a Saturday). Public officials are expected to furnish proper information to court. If court had been misled trial Judge should have dealt with the official according to law. The District Judge could not have done so, since 8.5.1996 (should read as 1995) was not a Saturday. He had erred on that.

There is no doubt that the inquiry conducted in the District Court is an incomplete inquiry. Trial Judge has acted with much haste and made order ignoring the usual practice that need to be followed in a court of law. Though an inquiry of this nature is not regulated by any specific section of the Civil Procedure Code, yet a court of law must act reasonably and fairly and follow the practice and procedure of court. A party to a suit should never be denied a right of hearing. However irksome the task, court is expected to conduct a full and an all inclusive inquiry.

The Defendant-Respondent position throught the inquiry seems to be that she was not available at her residence and was not served with summons. But the last answer given by her makes her position inconsistent with her position and create a doubt. As such it is not possible to accept that summons had not been served. Order in this inquiry was delivered about 12 years ago. If there was no long lapse of time, it would have been a proper direction to direct the District Court to rehear the parties and arrive at a conclusion after a complete inquiry. When I consider all the circumstances, no useful purpose would be served in giving directions to hold an inquiry de nova. Therefore this court take the view having resort to Section 839 of the Civil Procedure Code, to make order to meet the ends of justice.

As such I set aside the order dated 5.6.1998 of the learned District Judge, but in the interest of justice I direct that the Defendant-Respondent be permitted to file answer only on payment of a prepayment order for cost in a sum of Rs. 7500/- payable to Plaintiff-Appellant. Learned District Judge, Negombo to nominate a date and time for the payment of costs (Rs.7500/-). Failure to comply with such direction by Defendant would result in an automatic entering of judgment in favour of Plaintiff.

Registrar of this court is directed to forward the entire record of the Original Court to the respective Registrar of the District Court, forthwith.

JUDGE OF THE COURT OF APPEAL