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

S.Ranaweera
No.558, Eriyawetiya,
Kelaniya.

1st Defendant–Appellant

Mohammed Hussain
No.480/34, 47th Lane,
Wellawatte.

2nd Defendant –Appellant

C.A. NO.940/98 (F)
C.A. NO.940B/98 (F) **VS**
D.C.MT.LAVINIA CASE NO.2169/L

A.K.Alawatugoda (nee) Fernando
North Kebiliwela School Quarters,
Bandarawela.

1.(a) Substituted – Plaintiff – Respondent

And Others

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : Ranjan Suwandaratne for the 1st Defendant- Appellant in 940/98(F)
Shiral Lakthilaka for the 2nd Defendant- Appellant in 940B/98
S.N.Wijithsinghe for the Plaintiff-Respondents in both appeals

ARGUED ON : **02.09.2013**

WRITTEN SUBMISSIONS FILED ON : 11th September 2013 by the 1st Defendant-Appellant
9th September 2013 by the 2nd Defendant-Appellant
11th September 2013 by the Plaintiff-Respondents

DECIDED ON : **11.12.2013**

CHITRASIRI, J.

Being aggrieved by the order dated 3rd July 1998 of the learned District Judge of Mt.Lavinia, two separate appeals have been filed by the two defendant-appellants. By the said impugned order, learned trial Judge disallowed the two applications of the two appellants that were made to have the *ex parte* judgment vacated. In the two appeals, in addition to have the aforesaid order dated 03.07.1998 set aside, the appellants have also sought to have the said *ex parte* judgment dated 04.05.1994, vacated. At this stage, it must be noted that when this matter was taken up in this Court on 7th June 2013, two separate numbers namely 940/98(F) and 940B/98(F) were assigned to the two appeals filed by the 1st defendant-appellant (hereinafter referred to as the 1st defendant) and the 2nd defendant-appellant (hereinafter referred to as the 2nd defendant) respectively since only one number was allocated till then to both the appeals.

Both Counsel for the two appellants submitted that the learned District Judge has failed to consider the circumstances that has taken place before the case was fixed for *ex parte* trial. Accordingly, they sought to have the impugned order and the *ex parte* judgment set aside.

Admittedly, the original case record had got destroyed due to the fire gutted in the record room of the District Court in Mount Lavinia. Subsequently, it was reconstructed and was put in order. However, when

the case was called on 8th November 1991, it was informed to the Court that the 3rd plaintiff-respondent is dead. Accordingly, the other plaintiffs were directed to take necessary steps to effect substitution in the room of the deceased 3rd plaintiff. However, the learned District Judge thereafter has made order to lay by the case since no steps were taken for several dates to effect the substitution.

On the 25th November 1992, a motion along with a petition and an affidavit to effect the substitution had been filed by the plaintiffs. By that motion, the plaintiff-petitioners having issued notices to the two defendants had moved Court to call the case on the 27th November 1992 in order to support the application for substitution. The said notices sent to the two defendants along with the relevant two registered articles are found at pages 247,248 and 249 in the appeal brief. These two notices sent to the two defendants clearly show that the application to effect the substitution was to be supported on 27.11.1992. **Accordingly, it is clear that the two defendants had been directed to appear in Court on 27.11.1992 and not on 25.11.1992.**

However, the journal entry (9) clearly shows that the case had been called on 25.11.1992 though it should have been called on 27.11.1992. Against such a background, it is wrong to have expected the defendants to appear in Court on 25.11.1992. Learned District Judge, having failed to appreciate this situation has made order assuming that the case had been

called on the 27.11.1992 and not on 25.11.1992 despite the fact that the journal entry (9) clearly shows that it was called on 25.11.1992. In coming to such a conclusion he has relied upon the entries made in the day book maintained in the Registry. The said day book had never been produced in evidence enabling the defendants to examine the same. Learned Trial Judge *ex mero motu* has gone on a voyage of discovery which he should not have done within an adversarial legal system such as ours. When the proceedings are clear and without any ambiguity, Court shall accept it in that manner unless it is corrected in the way permissible under the Civil Procedure Code.

Learned District Judge also has taken into consideration of the appearance marked by one Mrs.Zoysa on behalf of the 2nd defendant when he decided that proper notice had been given to the 2nd defendant of the application for substitution. The 2nd defendant has categorically denied that he has instructed a lawyer by the name of Mrs.Zoysa to appear on his behalf and has further said that she is not even his registered attorney. Merely because a lawyer whose identity has not been established has marked an appearance and particularly when that party had denied giving instructions to such a person, it cannot be made use of, to make orders affecting the party concerned. Hence, it is clear that the learned District Judge has misdirected himself when he made orders affecting the 2nd defendant relying upon the appearance alleged to have made on his behalf by one Mrs. Zoysa.

Moreover, both Counsel for the two appellants brought to the notice of Court that there had been an admission recorded in this connection at the beginning of the inquiry in respect of the application to have the *ex parte* judgment vacated. On that date the parties have admitted the contents of paragraph 4 in the petition dated 21.09.1994 filed in connection with the said application to have the *ex parte* judgment vacated. In that paragraph, it is specifically stated that the case was not called in open court on 27.11.1992. Therefore, the learned District Judge should not have deviated from such an admission by the parties in this civil suit. Accordingly, the learned District Judge is in error when he decided that the case had been called on 27.11.1992 despite the aforesaid admission by the parties.

At this stage, it must also be noted that no material what so ever is available to show that the other defendant, namely the 1st defendant was informed of the date (25.11.1992) on which the case had been called. Under those circumstances, it is wrong to have made orders on 25.11.1992, affecting both the defendants.

When orders have been made without proper notice to the defendants, particularly when there was an order in force to lay by the case by then, those orders as well as the other orders made subsequently becomes null and void. This position in law had been discussed by

Sharvananda, J. (as he then was), in **Ittepana Vs. Hemawathie. [1981 (1) S.L.R. at page 476]** In that decision it was held thus:

> *"The principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant.*
>
> *'Jurisdiction' may be defined to be the power of a court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged the Court is competent to determine the question of jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.*
>
> *Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity. The proceedings being void, the person affected by them can apply to have them set aside ex debito justitiae in the exercise of the inherent jurisdiction of the Court which is saved by Section 839 of the Civil Procedure Code. Hence the District Judge acted within his jurisdiction in inquiring into the question of non-service of summons".*

As described hereinbefore, the facts of the case at hand show that the Court has made orders affecting the two defendants without informing them of the application which was considered on 25th November 1992. Therefore, having regard to the decision by Sharvananda J, it is my opinion that the learned District Judge has obviously acted in violation of the rules of natural justice and without jurisdiction. Hence, the orders made on 25.11.1992 and

thereafter should be made invalid as those have no effect or force in law. Accordingly, I set aside the order dated 03.07.1998.

Learned Counsel for the respondents also has submitted that the learned District Judge is correct when he dismissed the application made by the 1st defendant under Section 839 of the Civil Procedure Code since a clear section namely Section 86(2) in the Code is available to make such an application. In support of his contention, he has referred to the decision by Wimalachandra J in **Wijesekera vs. Wijesekera and others. [2005 (1) S.L.R. at page 58]** In that case, it was held that;

> *"once the ex parte decree is served it is section 86(2) is applicable to set aside the ex parte decree and in the best interest of justice, the judges should not ignore or deviate from the procedural law and decide matters on equity and justice".*

I have carefully looked at the said judgment of Wimalachndra J. The application to vacate the *ex parte* judgment in that case had been made orally while the *ex parte* trial being held. The facts in the case at hand are quite different to the aforesaid facts in the case referred to by the learned Counsel for the respondents. Therefore, it is wrong to apply the law referred to therein to the case at hand without a proper analysis.

However, I also wish to concur with the *ratio decidendi* in the decision of Wimalachandra, J. It is correct to say that the judges should not deviate

from the procedural law and decide matters on equity and justice. However, the facts in this case as referred to earlier, show that the Court having made orders to lay by the case has made orders affecting the two defendants without giving them proper notice. In such a situation the affected parties should be able to present the matters invoking jurisdiction even under Section 839 of the Civil Procedure Code. Also, it must be noted that in the event their applications are rejected on a ground as envisaged by the learned Counsel for the respondent, the orders made without jurisdiction would prevail causing greater injustice to the parties. As Sharvananda J has observed, failure to serve notices is a failure that affects the jurisdiction of the Court. Such a matter cannot override the procedural law. In the circumstances, I am not inclined to agree with the contention of the learned Counsel for the respondents.

For the aforesaid reasons, I set aside the order dated 3rd July 1998 and the ex parte judgment dated 11th March 1994 and direct the learned District Judge of Mount Lavinia to allow the two defendants to file answers. Parties are to bear their own expenses of this appeal.

Appeals allowed.

JUDGE OF THE COURT OF APPEAL