

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

C.A. No. 771/1998 (F)
D.C. Kegalle No. 22869/P

P. Dingirihami
Walawita
Hettimulla.

And Others

Appellants

-Vs-

S.A. Sirisena
Walawita
Hettimulla.

And Others

Respondents

C.A. No. 771/1998(F)

D.C. Kegalle No. 22869/P

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

Counsel : Rohan Sahabandu P.C. with Hasitha
Amarasinghe
for the 6th and 9th to 13th Defendant-Appellants
Parakrama Agalawatta
for the Plaintiff-Respondent and
for the 1st to 5th Defendant-Respondents

Argued &

Decided on : 24.03.201

K.T.Chitrasiri, J

This is an appeal seeking *inter alia* to set aside the judgment dated 26.08.1998 of the learned District Judge of Kegalle. In that judgment, learned District Judge has answered 10 points of contest, out of which the 6th to 9th points of contest had been raised on behalf of the appellants. However, two sets of points of contest had been raised on behalf of the appellants on two different dates and those are found at

page 87 and at page 89 in the appeal brief. Learned District Judge has answered 10 points of contest without specifying whether those relate to the points of contest raised on 13.09.1988 or on 22.10.1990.

Ten points of contest have been raised by the parties when the trial was taken up on 13.09.1988 and 3 new points of contest also have been raised on behalf of 6th, 7th, 8th to 15th defendants when the case was taken up for trial on 22.10.1990. Those 3 points of contest raised subsequently were given the numbers 7, 8, 9. Therefore, it is clearly seen that there are two sets of issues which had been allocated the same numbers 7, 8, 9.

Looking at the record, nothing is found, clarifying this confusion as to the acceptance of the points of contest upon which the trial in this case had been proceeded with. Learned District Judge who delivered the judgment also has not addressed her mind as to the acceptance of the correct points of contest. Furthermore, when the case was taken up on the 22.10.1998, learned District Judge before whom it came up on that date, has recorded 3 more points of contest without looking at the proceedings recorded on the previous trial date and has proceeded to record 3 more points of contest which are almost similar to those that had already been recorded by then.

In view of the above, it is not clear as to the points of contest that had been answered by the learned District Judge. Also, it is difficult to

understand the particular issues upon which the trial has proceeded with. Considering the above circumstances, both Counsel submit that this matter be referred back to the District Court of Kegalle to recommence the trial after accepting the correct points of contest.

In the circumstances, it is clear that the trial in this case had been conducted without accepting the correct points of contest as required by Section 146 in the Civil Procedure Code.

Aforesaid Section 146(1) reads thus:

“On the day fixed for the hearing of action, or on any other day to which the hearing is adjourned, if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and the court shall proceed to determine the same”.

Hence, it is mandatory on the part of the trial judge to determine and accept the questions raised by the parties before recording the evidence. Such a determination of issues must be seen at least by implication, if not recorded in clear words. The trial Judge in this instance has failed to accept the points of contest upon which this case has proceeded with. It is impossible to decide the exact points of contest raised in this case, by implication either, since two sets of points of contest have been raised on two different dates by the appellants. Hence, one cannot reconcile the answers given in the impugned judgment with the points of contest raised by the appellant on those two occasions.

Therefore, it is clear that the learned District Judge has misdirected as to the exact issues that he has answered. Under those circumstances, it is wrong to allow the judgment to stand. Accordingly, the judgment dated 26th August 1998 of the learned District judge of Kegalle is set aside.

At this stage, Mr. Rohan Sahabandu P. C. appearing for the Appellants submits that the points of contest raised on behalf of the 6th, 7th, 9th to 15th defendants on 22nd October 1990 be accepted as the points of contest of the said defendants and to disregard the points of contest framed on behalf of the 6th defendant on the 13.09.1998. However both Counsel submit that if the parties so desire, they may raise additional points of contest. Both Counsel also submit that the parties are agreeable to adopt the proceeding that had already been recorded before the sitting Judge in the District Court of Kegalle.

Accordingly, the learned District Judge of Kegalle is directed to hold a *trial de novo* having taken into consideration of the above submissions of the two Counsel particularly as to the adoption of the proceedings and the raising of new points of contest. Moreover, if the parties so wish, they are entitled to make an application to record further evidence as well.

Learned District Judge of Kegalle is directed to have a fresh trial subject to the conditions referred to above. The learned District Judge is also directed to conclude this case expeditiously.

For the reasons mentioned above, Re-Trial is ordered. No costs.

Appeal allowed.

/mds

JUDGE OF THE COURT OF APPEAL