

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

H.R.R.Upananda Senanayake,
No.04, Courts Road,
Kegalle

Petitioner

C.A. (Writ) No.892/2009

Vs.

01. N.P.Wijayananda,
The Chairman, Geological
Survey & Mines Bureau,
No.04, Senanayake Building,
Galle Road, Dehiwala

02A.S.M.A.T.B.Mudunkotuwa,
Director General, Geological
Survey & Mines Bureau,
No.04, Senanayake Building,
Galle Road, Dehiwala

Respondents

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

L.T.B.DEHIDENIYA, J

COUNSEL : M.S.A. Shaheed for the Petitioner.

N. Wigneswaran SSC for the 1st &
2A Respondents

ORDER ON : 12.08.2015.

ORDER

K.T. CHITRASIRI, J.

When this matter was mentioned in Court on 24.03.2015, learned Senior State Counsel moved to support the motion tendered to Court on 30.06.2014. In that motion, an application had been made to have this matter re-listed for argument afresh. Having supported the application made in that motion, learned Senior State Counsel referring to the journal entry made on 26.02.2013, submitted that the manner in which it was recorded on that date cannot be constituted to interpret that the Court has delivered the judgment in this case. The aforesaid minute made on 26.02.2013 reads thus:

*“M.S.A. Shaheed for Petitioner
Petition is allowed.”*

Learned Counsel for the petitioner submitted that the Court, on 26.02.2013 pronounced its judgment in his presence. He, therefore contended that the said journal entry shows that this Court has delivered the judgment in this case.

However, no judgment with reasons is found in the docket maintained in this Court. Therefore, this Court directed the Registrar to find the judgment and inform Court whether the judgment in this case is available. Accordingly, the Registrar on 12.05.2015 has made a minute to the effect that:

"12/05/2015

For the information of Court

Judgment dated 26.2.2013 in this case is not available in the registry.

As per direction of Your Lordship's Court I inquired from the judges who were present on the day the argument was concluded. But the judgment is not available with Her Ladyship.

Submitted for Your Lordship's information and directions please"

Aforesaid minute made by the Registrar was informed to both Counsel on 28.05.2015 and both of them then moved that this matter be fixed for inquiry and invited Court to make a decision on the application for re-listing made in the motion tendered on 30.06.2014. Thereafter, this matter was taken up on 13.07.2015 and on that date both Counsel made their respective submissions on the application for re-listing.

I will now advert to the issue at hand. Section 771 of the Civil Procedure Code stipulates the manner in which re-hearing of an appeal could be ordered. The said section allows the Court to exercise its discretion and then to make an order for re-hearing. Such a cause of action under Section 771 of the Civil Procedure Code could be adopted when a respondent was prevented by sufficient cause from attending Court when the appeal was called for hearing. Hence, it is seen that an application for re-listing is possible only

when the party concerned was not present in Court on the day, the appeal was taken up for argument.

On the question of re-listing Dr. Amarasinghe, J, in a comprehensive judgment delivered in the case of ***Jinadasa and Another vs. Sam Silva and Others*** [1994 1 SLR at 232] has held thus:

“It cannot order the re-instatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order re-instatement on compassionate grounds.”

In that judgment Dr. Amarasinghe, J has referred to 153 judicial pronouncements on this point. In all those cases, application for re-listing had been made when a party has failed to come before Court. Therefore it is clear that an application for re-listing is necessarily being made when a party was not present in Court. Hence, it is seen that an application for re-listing is limited to the instances where a party was prevented from being present in Court.

Admittedly, this application is made not on the basis of the absence of any party. Therefore, it is my opinion that this application for re-listing made in the motion tendered on 30.06.2014 cannot be entertained by this Court.

Be that as it may, it is important to note that it is due to a mistake on the part of the Court that the detailed judgment with reasons is not found. Therefore, this Court is much concerned as to the consequences that may arise in this instance since the unavailability of the judgment was not due to any fault on the part of any party to the action. Accordingly, this Court is much concerned of the consequences of the issue and therefore very much inclined to take necessary steps to prevent any injustice being caused to the parties due to the non-availability of the judgment.

Keeping that it in mind, this Court considered whether it is lawful to make an order to reopen the case even at this stage. If an order is made to prevent injustice being caused to the respondents on the ground that the judgment with reasons are not found, then that may prejudice the petitioner since he has already having a judgment in his favour. It will become more serious, particularly when it comes to the implementation of the reliefs prayed for in the petition. Therefore, this Court is not in a position to make an order with the view of ensuring justice since such an order may lead to cause injustice to the petitioner in this case.

Moreover, by looking at the journal entry made on 26.02.2013, it is clear that this Court has made an order allowing the reliefs prayed for in the prayer to the petition and the said decision had been pronounced in open Court in the presence of the Counsel for the petitioner. In such a situation, the

respondents, on one hand, had every right to file an appeal exercising his right of appeal, challenging the said decision which the respondent has failed to do. On the other hand, this Court cannot in law pronounce another judgment in this case when the same Court has finally concluded the matter. In such a situation, the option available for the respondents was to file an appeal. If this Court makes an order reopening this case, then it may amount reconsidering a decision made by the same forum which is unlawful.

For the reasons set out above, this Court is compelled to refuse the application made by motion tendered on 30.06.2014 to re-list this matter for argument.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

L.T.B.DEHIDENIYA, J

I agree

JUDGE OF THE COURT OF APPEAL