567/99(F)

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

Otta Pahuwe Priyaratna Thero

Rajamaha Viharaya, Ambanpola.

Plaintiff

C.A.Case No:-567/99(F)

D.C.Kurunegala Case No:-5549/M

V.

1.H.W.Jayaratne,

Jayanthi Mawatha,

Ihala Malwila, Dompe.

2.Kadawatha Janatha Santhaka Pravahana Sevaya, Kadawatha

Defendants

AND BETWEEN

H.W.Jayaratna,

Jayanthi Mawatha,

Ihala Malwila Dompe.

Petitioner

V.

1. Janatha Santhaka Pravahana Sewaya

2.Otta Pahuwe Priyaratna
Thero, Rajamaha Viharaya
Ganegama.

3.Gampaha Bus Company
Limited, Kandy Road,
Nittambuwa.

Respondents

1.Sri Lanka Transport Board,
No.200, Kirula Road,
Colombo 5.

2.H.W.Jayaratna,
Jayanthi Mawatha,
Ihala Malwila Dompe.

Appellants

V.

Otta Pahuwe Priyaratna
Thero, Rajamaha Viharaya
Ganegama.

Respondent

Before:- H.N.J.Perera,J.

Counsel:-Uresha Fernando S.S.C with Ruchirani Jayakodi for

the appellants

Niranjan de Silva for the plaintiff-respondent

Argued On:-19.03.2014

Written Submissions:-27.06.2014

Decided On:-20.11.2015

H.N.J.Perera, J.

This is an appeal from the order of the learned Additional District Judge of Kurunegala dated 03.06.1999 refusing to set aside the judgment entered upon the default of the defendant-appellants. On the summons returnable date none of the defendants appeared and the matter was fixed for ex-parte trial and the trial was taken up on 03.06.1999.It was contended on behalf of the defendant-appellants that the learned Additional District Judge entered ex-parte judgment against the defendant-appellants without having regard to the fact that the plaintiff-respondent had failed to duly issue notice to the respondent-appellants.

According to the plaintiff-respondent on or about 30th January 1995 , the plaintiff-respondent was a passenger travelling in a bus bearing registered No. 61-3491, owned by the Kadawatha Janatha Santhaka Prawahana Sevaya and operating along Kurunegla Nittambuwa route when it was subject to a road accident causing injuries to the plaintiff-respondent.The present action was filed by the plaintiff-respondent claiming damages against the 1st defendant-appellant the driver and the said Kadawatha Janatha Santhaka Pravahana Sewaya as the 2nd defendant-appellant in its capacity as the employer of the 1st accused-appellant.

It was the position of the defendant-appellants that while action was pending before court and with the passage of the National Transport

commission (amendment) Act No.30 of 1996, peopliesed companies were amalgamated, and new legal entities were created. The plaint of this case was filed before court on 30.09.1996, where one and a half months after the said filing, the aforesaid amendment was certified on 12.11.1996. Consequent to the said amendment, the 2nd defendant Kadawatha Janatha Santhaka Pravahana Sevaya was abolished and the Gampaha Bus Company Ltd emerged as a new legal entity in its place comprising an amalgamation of several bus companies. It was the contention of the defendant-appellants that however despite this change of legal status, the plaintiff-respondent neglected and failed to amend the caption and issue notice on the legal successor to the said action.

The purported summons dated 05.11.1997 had been issued, in the name of Kadawatha Janatha Santhaka Prawahana Sevaya which was not a valid legal entity and which was not in existence at that time. It is not in dispute that the said Kadawatha Janatha Prawahana Sevaya was abolished in 12.11.1996 and the Gampaha Bus Company Ltd emerged as a new entity in its place.

In the instant case after ex-parte evidence had been led of the plaintiff on 30.03.1998 the Counsel for the plaintiff-respondent, before the pronouncement of the judgment by the learned Additional District Judge had made an application to amend the caption stating that the 2nd defendant had been amalgamated comprising several Bus companies. Thereafter the plaintiff proceeded to amend the caption naming the Gampaha Bus Company as the 2nd defendant to the case. Thereafter the ex-parte judgment had been entered against the present defendant-appellants on 05.05.1998.

It is very clear that no notice of the said application had been given to the defendant-appellants in this case. The evidence of the plaintiff had

been led on the basis that the 1st defendant was an employee of the original 2nd defendant to this case and was therefore liable to pay the said damages to the plaintiff.

Admittedly with the passage of the National Transport Commission (amendment) Act No 30 of 1996, "all liabilities of a peopliesed company referred to in such order and subsisting on the day immediately preceding the day such order shall, with effect from the date of such order, be deemed to be the liabilities of the new company specified in such order."

The plaintiff-respondent in this case had merely moved to amend the caption of the plaint and brought in the present 1st defendant-appellant as a defendant to this case. No proper application had been made by the plaintiff-respondent by way of petition and affidavit and no notice or summons had been served on the 1st appellant of the said application and the defendant-appellants were not made aware of the said application. It is evident that no summons had been issued or served on the substituted 2nd defendant (1st appellant). The plaintiff had failed to follow the proper procedure to substitute the 1st appellant to this case. It is imperative that both the defendant-appellants should be given notice of the said application and an opportunity be given to the 1st defendant-appellant to file objections if any to the said application or answer in this case.

In Joyce Perera V. Lal Perera 2002 (3) S.L.R 8 it was held that service of summons on the defendant is a fundamental and imperative requirement and a precondition before a case is fixed for an ex parte trial by court.

In Leelawathie V. Jayaneris and Others 2001 (2) S.L.R 231 it was held that:-

(1) unless summons in the form 16 in the 1st schedule to the C.P.C issues, ,signed by the Registrar requiring the defendant to answer the plaint, on or before a day specified in the summons and is duly served on the defendant, there cannot be due service of summons.

(2)Unless summons were served, all the consequences of default in appearance would not apply to them.

(3)It was the service of notice of the application for interim injunction that had been served on the 1-3 defendants. Interim injunction had been properly entered against them. But an ex parte trial on the substantial matters referred to in the amended plaint could not have been ordered without due service of summons.

Wigneswararan, J. further observed:-

"There is no question of implying or presuming that the defendants were aware of the case filed, since statutory provisions apply to service of summons and unless the summons are duly served, the other statutory consequences for non-appearance on serving of summons, would not apply to defendants."

In this case all proceedings as from 30.03.1998 when the plaintiff – respondent moved to amend the caption of the plaint and such application was allowed without notice to the defendant-appellants, became tainted with illegality.

In Fernando V. Sybil Fernando and Others 1997 3 Sri.L.R 1.

Per Dr.Amerasinghe, J.

"There is substantive law and there is the procedural law. Procedural law is not secondary. The maxim ubi ius ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion,

and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action."

"The concept of the laws of civil procedure being a mere vehicle in which parties should be safely conveyed on the road to justice is misleading, for it leads to the incorrect notion that the laws of civil procedure relatively minor importance , and may therefore be disobeyed or disregarded with impunity."

"Judges do not devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly. On the contrary, as the indispensable vehicle for the appointment of justice civil procedural law has a protective character. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. In this sense the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure."

Further it was submitted by the Counsel for the defendant-appellants that the entirety of the judgment is based on hearsay evidence of the plaintiff-respondent and the plaintiff-respondent had failed to adduce any material what so ever in proof of the positions led in evidence nor corroborated by any other witness.

The other matter that had drawn the attention of this court is that the ex-parte judgment is extremely brief. The learned Additional District Judge has merely stated that he had considered the evidence and documents tendered by the plaintiff and that the plaintiff had proved his case and therefore entered judgment in favour of the plaintiff as prayed for in the plaint. This is contrary to section 187 of the Civil Procedure

Code. Whether the judgment is ex-parte or inter parte the requisites of judgment required under section 187 would be mandatory.

In Sirimavo Bandaranaike VC. Times of Ceylon 1995 (1) S.L.R 24 it was held that:-

"Section 85(1) requires that the trial judge should be 'satisfied' that the plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the Judge's opinion is that the entirety of the relief claimed cannot be granted. Further, sections 84, 86, 87 all refer to the judge being 'satisfied' on a variety of matters in every instance; such satisfaction is after adjudication upon evidence."

In Letchi Raman Balasundram and Others V. Kalimuttu Letchi Raman and Others 79 N.L.R 361 Pathirana, J observed thus:-

"A judgment of a court must be a judicial pronouncement in which at least the trial Judge should deal with all the points in issue in the case and pronounce definite findings on the issues. Even though the judgment may not on a reading on the face of it disclose that the trial Judge has considered and subjected to examination and critical analysis the evidence of witnesses, but has chosen to act only on the documentary evidence, an appellate court can still uphold such a judgment if it is satisfied that the reasons , however brief, and conclusions reached have been on the hypothesis that there had been a rational examination and analysis in his mind of relevant evidence and the rejection of what is irrelevant and the rejection of what is irrelevant."

Adopting this test I am of the view that there had not been a fair ex-parte trial, and that the said judgment is contrary to section 187 of the

Civil Procedure Code and a failure of justice had resulted, and that it would be a gross injustice to allow the judgment to stand.

I, therefore, set aside the orders dated 28.04.98, 05.05.98 and 03.06.99 and quash all proceedings thereafter undertaken and direct the District Judge, Kurunegala, to give notice to all defendants if and when an application is made by the plaintiff-respondent to substitute the 2nd defendant in this case and receive any objections that may be tendered, inquire into same and proceed therefrom according to law. Parties shall bear their own costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL