

1H. Medagoda Dasilikamage Sunethra.

Defendants.

Medagoda Dasilikamage Indrani.
Sirinimal Raod, Arakawela, Handapangoda.

1 F Defendant- Petitioner-Appellant.

Vs.

Wanasundara Muhandiramlage Dayalatha
Wanasundara.
Watapoth Road, Nivithigala.

Plaintiff-Respondent Respondent.

2. 1A Walawatta Lekamlage Saumayawathi
Nivithigala.

3.1B Medagoda Dasilikamage Somalatha Podi
Menike

4.1C. Medagoda Daslikamage Anula Malathi

5.1D. Medagoda Dasilikamage Wickrmasinghe

6. 1E. Medagoda Dasilikamage Upali
Wijeratna.

7. 1G. Medagoda Dasilikamage Kamani
Chandrika.

8. 1H. Medagoda Dasilikamage Sunethra.

Defendants– Respondents.

Before : A.H.M.D. Nawaz J.
E.A.G.R. Amarasekara J.

Counsel : Samantha Vithana with N. Mendis for the Plaintiff- Respondent.
C.G. Jayaweera Bandara for the Substituted-Defendant-Appellant.

Decided on : 19.10.2018.

E.A.G.R. Amarasekara J.

This is an appeal filed by the 1F substituted Defendant Petitioner appellant (hereinafter sometimes referred to as the Appellant) praying inter alia:

- a) For a declaration that all the proceedings and step taken in Ratnapura D.C. Case No. 5643/Land after 22.09.1994 are null and void and avail no force of law.
- b) For an order allowing him to appoint a new lawyer in place of his lawyer who is dead and to take part and proceed with the case.
- c) Cost and other reliefs that this court shall deem fit.

The prayers in the petition do not request that any specific order or Judgment made by the learned District Judge should be vacated. However, the body of the Petition of appeal reveals that the cause for the filing of this appeal is the dissatisfaction of

the Appellant with the decision dated 09.03.2000 made by the learned District Judge of Rathnapura in case No. 5643/Land. By the said order the learned District Judge rejected the application made by 16th Defendant-appellant who sought an order from the District Court to suspend the execution of the writ in the aforesaid case. However, the learned District Judge has ordered the execution of writ by the said order.

When this matter was taken up for argument, the Plaintiff- Respondent raised a preliminary objection stating that this appeal has been erroneously preferred by the Appellant as a final appeal where she should have filed a leave to appeal application. Therefore, the Plaintiff- Respondent argue that this appeal should be dismissed *in limine*. The said objection was raised in terms of the sub sections 754(1), (2) and (5) of the civil procedure code.

Background to this appeal.

1. The Plaintiff Respondent instituted D.C. Case No. 5643/Land by a plaint dated 25.10.1982 against the original Defendant, namely M.D. Mohottihamy.
2. Mr. Nihal Wettasinghe, Attorney-at-Law filed proxy on behalf of the Defendant.
3. The Defendant filed his answer dated 22.08.1983 appearing by his Registered Attorney, the said Mr. Nihal Wettasinghe, AAL
4. Prior to the commencement of the trial before the learned District Judge, on the 19th March 1987, it was informed to court that the original Defendant had died. Hence 1A to 1H Defendants were substituted in place of the said original Defendant.

5. As per the Journal Entry No. 27 dated 24.08.1987, the order Nisi had been served on the 1A to 1H substituted Defendants but only 1A and 1C substituted Defendants appeared in Courts but the other defendants, namely 1B and 1D to 1H substituted Defendants were not present in courts on that day. However, the same registered Attorney who represented the original Defendant filed proxy on behalf of all the substituted Defendants. Thus, they were represented in Court by the said register^{ed} Attorney.
6. However, it was informed to court on 22.09.1994 (vide J.E. 56 at page 32) that the said Registered Attorney of the Substituted Defendants, Mr. Nihal Wettasinghe had passed away. On the said date none of the substituted Defendants was present in court but, one Mr. Hennayaka AAL has informed court that he would be tendering proxy on behalf of the Substituted Defendants on the next date which he never did.
7. No notice was served on any of the substituted Defendants as required by Section 28 of the Civil Procedure Code.
8. Thereafter, Mr. P. Bamunuarachchi Attorney-at-Law filed proxy on behalf of the 1A substituted Defendant (vide J.E. No. 57 at page 32 and the proxy filed by the said Attorney-at-Law) and other Substituted Defendants were not represented by any Attorney-at-Law.
9. Thereafter, when the case was taken up for trial on 12.12.1996, the Attorney-at-Law Mr. Bamunuarachchi informed Court that he has no instruction from the Defendants. As per the type written proceedings of 12.12.1996, the learned District Judge has decided to proceed exparte against **the Defendant** (“විත්තිකරුට විරුද්ධව ඒකපාක්ෂිකව විභාගයට ගනිමි”) However, in his exparte Judgement he has decided against **the Defendants**

but in favour of the Plaintiff. (“.... පැමිණිලිකරුගේ වාසියට විත්තිකරුවන්ට එරෙහිව මෙම නඩුව නින්දා කරමි.”)

10. The decree entered on the first instance was amended to include all the Defendants and it was served on the 1a, 1c, 1d, 1e, 1g and 1h substituted Defendants and later on it was served on 1b and 1f Substituted Defendants by substituted service.
11. 1A substituted Defendant filed a Petition dated 06.10.1999 to get the exparte order vacated but after an inquiry the learned District Judge dismissed the said petition and affirmed the said exparte Judgement. Thereafter, a writ of execution was granted by the Learned District Judge.
12. Therefore, 1F substituted Defendant (the Appellant) filed a Petition dated 06.10.1999 along with an affidavit to object to the writ of execution and prayed inter alia for;
 - a) Vacation of the exparte Decree entered already and annulment of proceedings from 22.09.1994 onwards, i.e. the date on which it transpired that the Registered Attorney of the 1F substituted Defendant had passed away.
 - b) A declaration that the 1F substituted Defendant is not bound by the said Judgment and Decree already delivered and entered.
 - c) Recall the writ of execution issued to the Fiscal until her application is decided.
13. The learned District Judge thereafter by order dated 09.03.2000 refused to grant the reliefs prayed for by the 1F substituted Defendant and the Fiscal was ordered to execute the writ.

14. Thereafter the 1F Substituted Defendant has preferred this appeal to this Court.

The Plaintiff- Respondent's position is that the appellant cannot maintain this appeal as he has preferred this as a direct appeal against an interlocutory order without filing a leave to appeal application as required by law.

As per the Petition dated 06.10.1999 filed by the 1F Substituted Defendant Appellant in the District Court, one of the prayers was for a declaration that he is not bound by the Judgment and decree entered in the district court case. Therefore, the application of the 1F Defendant appellant in the District Court case appears to be incidental to the purported Judgment of that case. Other prayers were to get the proceedings in D.C. Case from 22.09.1994 onwards vacated and to recall the writ of possession. If the learned District Judge granted those reliefs, the District Court would have to go on with the action, from the point of time when the death of the Attorney-at-law occurred, to decide the rights of the parties. Therefore, the order made by the learned District Judge on the aforesaid application of the 1F Defendant-Appellant is an interlocutory order and it is not a Judgment as contemplated by Section 754(1) of the Civil Procedure Code.

As per the Section 754(5) of the Civil Procedure Code, 'Judgment' means any judgment or order having the effect of final judgment made by any civil Court and as per the Section 754(2) of the Civil Procedure Code, one who is dissatisfied with any other order which does not fall within the category of Judgment, can prefer an appeal only with leave of this Court first had and obtained.

The learned Counsel for the Plaintiff – Respondent has brought this court's attention to the decisions in *Siriwardana Vs Air Ceylon (1984) 1 SLR 286*, *Ranjith Vs Karunawathie (1998) 3 SLR 232*, and *Dona Padma Priyanthi Senanayake Vs. H.G. Chamika Jayantha and two others S.C. Appeal No. 41/2015*, and *SC/CHC Appeal 37/2008*.

The aforementioned *Dona Padma Priyanthi Senanayake Vs. H.G. Chamika Jayantha and two others* was decided by a bench comprising of 7 Judges of the Supreme Court. In that Judgment his Lordship the Chief Justice Priyasath Dep, PC concludes as follows;

“In order to decide whether an order is a final Judgement or not it is my considered view that the proper approach is the approach adopted by Lord Escher in Salaman Vs Warner (Supra) which was cited with approval by Lord Denning in Salter Rex Vs Gosh (Supra). It stated;

“If the decision whichever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purpose of these rules it is final. On the other hand, if their decision if given one way, will dispose the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory”

As mentioned before if the application relevant to this appeal was decided in favour of the appellant it would have allowed the action to go on.

Therefore, it is my considered view that the order relevant to this appeal is an interlocutory order. Thus, the preliminary objection has substance. There was no right for a direct appeal to be lodged in this court but in his written submissions the counsel for the appellant argue that this a suitable case to here and determine

exercising revisionary jurisdiction. Section 753 of the Civil procedure Code describing the revisionary powers states as follows;

*“The court of appeal, of its own motion or on any application made,
..... and may upon revision of the case brought before it pass any
judgment or make any order thereon, as the interest of the justice may require”.*

In AG Vs Gunawardena (1996) 2 SCR 149, it was held that in exercising powers of revision the Appellate Court is not trammled by technical rules of pleadings and procedure. In doing so the Court has power to act whether it is set in motion by a party or not and even ex mero motu.”

It appears this Court has power to exercise revisionary jurisdiction even of its own motion where it sees a miscarriage of justice. As per the incidents that have taken place before the learned District Judge, it appears that the learned District Judge has not served notices on the Substituted Defendants after the death of their registered Attorney. Only one of the Substituted Defendants has filed a proxy thereafter. In that situation, as per the said section 28, it appears that no further proceedings should have taken place against the other Substituted Defendants without giving notices of the death of their registered attorney. In such a situation one can argue that the learned District Judge entered the exparte Judgment against the other Defendants without Jurisdiction and therefore judgment is a nullity against them. However before making any order on such grounds, this Court must give an opportunity to the Plaintiff- Respondent to make submissions on whether this court should act in revision in this matter as the Plaintiff- Respondent did not have any opportunity to reply the Defendant- appellant’s written Submissions which moves this court to exercise its power of revisionary jurisdiction.

Therefore, this Court decides that the 1F Defendant- Appellants could not have filed a direct appeal based on the order dated 09.03.2000 made by the learned District judge but before making a final decision on this matter this court gives an opportunity to the Plaintiff- Respondent to make further submissions on why this Court shall not act in revision on the facts revealed before this court.

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E.A.G.R. Amarasekara
Judge of the Court of Appeal.

I agree.

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A.H.M.D. Nawaz
Judge of the Court of Appeal.