

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

1A Rambukkana Gardiye Gunasekara

Arachchige Dona Jayawathi of

Thalgampala

Substituted-Defendant-Appeallant.

C.A.No.854/2000 (F)

D.C.Galle No.8051/L.

Vs.

01. Kusumawathi Runge of Walhanduwa,
Manawila and presently at

Thelijjawila, Kape

02. Pandithage Leelawathi alias

Leelawathi Panditha of Thalgampala.

Plaintiff-Respondents.

C.A. No.854/2000 (F)

D.C. No.Galle No. 8051/L

Before : Deepali Wijesundara,J. &

M.M.A.Gaffoor,J.

Counsel : Ravindra Anawarathne for the

Substituted-Defendant-Appellant.

H.Farooq with Nalinie Arunapperuma for
the Plaintiff-Respondent

Argued on : 28.01.2004

Decided on : 02/04/2014

M.M.A.Gaffoor, J.

The Substituted-Defendant-Appellant by way of this appeal seeks to have the plaint filed in this action dismissed and the order of the Additional District Judge of Galle dated 14th July 2000 set aside. The Plaintiff-Respondents had filed this action against the original defendant appellant in 1972 for a declaration of title, ejectment from the land described in the 4th paragraph of the plaint, restoration of possession and damages. At an earlier stage of the case, there had been default in appearance on the part of the defendant and the case had been fixed for ex parte trial but upon the

defendant purging his default, he had been permitted to file answer and prosecute his case.

When the inter parte trial commenced on 17.11.1997, both parties raised issues and no admissions had to be recorded. When the case proceeded to trial on the above issues on 06.02.1998, the plaintiff had led the evidence of surveyor and another witness and thereafter the case had been postponed for further trial to be held on 22.06.1998.

On 22.06.1998 the plaintiff had led the evidence of two other witnesses and when further trial was about to be taken up on 06.03. 2000, the defendant had been absent but his counsel had moved for a date whereupon the Court granted a date subject to an order of prepayment of Rs.1000 to be made to the plaintiff in cash before 9.45 a.m. on the next trial date namely 14.07.2000 . The Court also made order that if the defendant could not made the payment as aforesaid he would not be able to participate any further at the trial.

When the trial was taken up on 14.07.2000, the defendant had not complied with the above order and the learned Additional District Judge had barred the defendant from further participating at the trial. Thereafter the learned Additional District Judge of Galle had permitted the plaintiff to lead one witness and on the same day he had pronounced judgment which contains just two paragraphs allowing the claims of the plaintiffs.

It is this judgment that is sought to be impugned in these proceedings, Both parties have filed their written submissions and upon a careful consideration of the issues arising in this appeal, I take the view that the order of the learned District Judge made on 06.3.2000 subjecting the absent defendant to a prepayment and ordering an ex parte trial in the event of non compliance with the order of prepayment is a nullity.

A full Bench decision of the Supreme Court – *Mamnoor v Mohamed* 23 N.L.R. 493 lays down – “ apart from consent of parties, the Court has no power to order, when granting an adjournment, that if costs were not paid before the adjourned hearing, judgment will be entered against the party failing to pay costs.”

It is quite clear from the judgment that if there is no consent of a party as to costs when granting the adjournment, the Court cannot proceed to hear the case ex parte or enter judgment against the party failing to pay costs.

If one peruses the order made on 06.3.2000 ordering the prepayment, no consent of the substituted Defendant Appellant had been recorded. In my view there could not have been any consent as the substituted Defendant Appellant had been absent. The order made by the Additional District Judge on 06.3.2000 could not have been made as no consent of the defendant had

been obtained either to the order of payment or fixing the case ex pate. The above judgment of **Mamnoor v Mohamded** had been followed in **Piyaseeli v Prematilleke** (1986) (1) Sri LR 47.

L.C.Perera v D.J.Nawanage S.C. Appeal No.75/94 C.A. Appeal No.90/02 D.C.Colombo No.7331/RE, the Supreme Court has recently set aside the order of a District Court which was affirmed by the judgment of the Court of Appeal entering judgment against the defendant who did not comply with the order for costs. The Supreme Court has pointed out that no where does the Code confer on a judge the power to give judgment against a party merely because he fails to pay costs, without an adjudication on the merits- because adjudication is the essence of judicial duty, the purpose for which the costs exist.

In the circumstances the order of prepayment and ex pate trial made on 06.03.2000 is a nullity and any further proceedings held thereafter will consequently be of no force or avail resulting in a violation of the rules of natural justice inherent in civil trials. As a result the judgment entered on 14.07.2000 consequent to the erroneous order made on 06.03.2000 should be set aside.

I accordingly set aside the judgment delivered on 14.07.2000 and order that and expeditious further trial takes place from the point where the nullity

arose and after the adoption of evidence that has been recorded up to the point of 06.03.2000.

We make order that during the further trial the substituted Defendant-Appellant should be given an opportunity to place his case subject to the rules contained in the Civil procedure code and the matter be brought to an end as expeditiously as possible as the parties have not been without any kind of relief for a long time.

Subject to this variation the appeal of the Substituted Defendant-Appellant is allowed and the Court does not deem it appropriate to order costs.

JUDGE ~~ON THE~~ COURT OF APPEAL

Deepali Wijesundara,J.

I agree.

JUDGE OF THE COAURT OF APPEAL

WC/-