

MUNIDASA

v.

GUNADASA

COURT OF APPEAL
WEERASEKERA, J.
WIGNESWARAN, J.
C.A.NO. 257/93(F)
D.C. EMBILIPITIYA 3053/L
SEPTEMBER 25, 1996.

Ejection - Plaintiff and his Attorney-at-Law absent on trial date - Action dismissed-Application under S. 87(3) of the Civil Procedure Code to set aside Order - Order set aside, case fixed for trial - Appeal against Order restoring case to Roll - Is it a Final Order-S. 88(2), S. 754(1), S. 754(2)(5), S. 761, S. 763, S. 87(1), S. 85(1) Civil Procedure Code.

Held :

- (i) According to S. 754(5) "Order" means the final expression of any decision in any civil action, proceeding or matter which is not a judgment.

In this instance the statute has specifically stated that the order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a Judgment and that such Judgment shall be liable to an appeal. Thus what was delivered was an "Order" accompanied by a judgment.

The dismissal of the Plaintiff's action must amount to a judgment since in terms of S. 87(2) it precludes the Plaintiff from bringing a fresh action in respect of the same cause of action.

A Judgment means the statement given by the Judge of the grounds of a Decree or Order. When under S. 87(1) of the Code a Judge dismisses the Plaintiff's action he is in effect saying that the Plaintiff having made default in appearance on such a day fixed for trial, the Judge using the powers ascribed to him under S. 87(1) of the Code is dismissing the Plaintiff's action.

A decree would be entered in terms of the Judgment.

- (ii) It would be erroneous to distinguish arbitrarily between a Judgment under S. 85(1) and under Sec. 87(1).

No appeal lies against any judgment entered upon default - S. 87(2). Yet if the court which acts under S. 87(3) acts erroneously or arbitrarily the statute has quite rightly thought it fit to make available an immediate right of appeal to a party not bound on the discretion of the Court of Appeal but as of right.

Per Wigneswaran J.,

"The provisions of Cap. XII of the Code are statutorily enacted proceedings where consequences of default and cure are enumerated independent of the main case based on rights of parties."

AN APPEAL from the judgment of the District Court of Embilipitiya.

Cases referred to :

1. *Siriwardena v. Atir Ceylon* - 1984, 1 SLR 286
2. *A. S. Sangarapillai and Brothers v. Kathiravelu* - (Srikantha's Law Reports Vol. 2 - 99)
3. S.C. 45/76 (D.C. Panadura - 1403/RE)
4. S.C. 17/83 (D.C. Mt. Lavinia - 1105/RE)
5. *Wijenayake v. Wijenayake* - 5 Srikantha Law Reports 28.

W. P. Gunatilake with J. A. J. Udawatte and O. R. Samaranyake for Defendant-Appellant.

Manohara R. de Silva with Samantha Abeyjeewa for Plaintiff-Respondent.

Cur. adv. vult.

May 06, 1997.

WIGNESWARAN, J.

The plaintiff-respondent instituted this action on 02. 09. 87 against the defendant-appellant who was his tenant, to obtain an order of ejection from the business premises described in the schedule to the plaint.

The defendant filed answer and the case was fixed for trial on 16. 08. 90. The trial date was thereafter postponed for 03. 01. 91, 06. 06. 91 and 01. 08. 91.

On 01. 08. 91 the plaintiff and his Attorney-at-Law being absent the Court dismissed the plaintiff's action with costs.

Thereafter an application under Section 87(3) of the Civil Procedure Code was made to set aside the said order of dismissal.

By order dated 22. 07. 93 the order of dismissal was set aside and the case was fixed for trial again.

The defendant-appellant thereafter filed this appeal against the order restoring the case to the roll.

The plaintiff-respondent at the hearing of this appeal took up a preliminary objection that the application to this Court should have been by way of leave to appeal in terms of Sec. 754(2) and not by way of a direct appeal in terms of Sec. 754(1).

In support of his contention the learned Counsel for the plaintiff-respondent has submitted as follows :-

- (1) The order dated 22. 07. 93 did not finally dispose of the rights of parties and therefore not a final order. The decision in *Siriwardena v. Air Ceylon*¹ mentioned.
- (2) Though Section 88 refers to appeal to the Court of Appeal it does not say whether it should be with or without leave of Court. In this instance it should be construed to be with leave of Court.
- (3) An order dismissing the plaintiff's action is not a "judgment entered upon default" as contemplated by Sec. 88. When a plaintiff defaults no judgment is entered upon.
- (4) In the present Civil Procedure Code judgment is entered only when the defendant defaults and not when the plaintiff defaults. Sec. 88 thus applies only when the defendant defaults. It has no application therefore to the facts of this case.

- (5) Since the order setting aside the dismissal of the plaintiff's action reopens the case such order is not a final order.

These submissions would now be examined.

The main contention of the learned Counsel for the plaintiff-respondent is that the order dated 22. 07. 93 was not a final order and therefore appeal lies only in terms of Sec. 754(2) of the Civil Procedure Code and not Sec. 754(1) as a direct appeal.

Sec. 88 of the Civil Procedure Code as amended by Act No. 53 of 1980 states as follows:

- "88 (1) No appeal shall lie against any judgment entered upon default.
- (2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal.
- (3) The provisions of sections 761 and 763 shall, *mutatis mutandis*, apply to and in relation to the execution of a decree entered upon default, where an order refusing to set aside such decree has been made."

There is no doubt that what was delivered on 22. 07. 93 was an order. In fact Sec. 88(2) refers to such a determination as an order setting aside or refusing to set aside the judgment entered upon default. But what is of special significance in Sec. 88(2) is that such an "order" is expected to be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made. In other words a mere order is raised in level by the statute and given a special position because of the accompanying judgment. The speciality is that such an order accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, is liable to an appeal to the Court of Appeal.

In terms of Sec.754(1) of the Civil Procedure code "any person who shall be dissatisfied with any judgment pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law." In terms of Sec. 754(2) "any person who shall be dissatisfied with any order made by any original Court in the course of any civil action, proceedings or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correctness of any error in fact or in law, with the leave of the Court of Appeal first had and obtained."

According to Sec. 754(5) "'order' means the final expression of any decision in any civil action, proceeding or matter which is not a judgment."

In this instance the statute has specifically stated that the order setting aside or refusing to set aside the judgment entered upon default "shall be accompanied by a judgment" and that such judgment shall be liable to an appeal to the Court of Appeal. Thus what was delivered on 22. 07. 93 was an "order" accompanied by a "judgment".

It is to be noted that an order can be a judgment in terms of Sec. 754(5) but not vice versa. In other words a judgment for purposes of appeal must be governed by the provisions of Sec. 754(1) of the Civil Procedure Code. Sec. 88(2) of the Civil Procedure Code gives the status of a judgment to the determination adjudicating upon the facts and specifying the grounds upon which it is made. This judgment accompanies "the order setting aside or refusing to set aside the judgment entered upon default." Thus it is not "the order setting aside or refusing to set aside the judgment entered upon default" which is relevant to the present argument but the "judgment adjudicating upon the facts and specifying the grounds upon which it is made". The order dated 22. 07. 93 in this case did have such an adjudication and such adjudication was not a mere order.

It is wrong to say that Sec. 87(1) of the Civil Procedure Code does not contemplate of a judgment unlike Sec. 85(1) of the Civil Procedure Code. The dismissal of the Plaintiff's action must amount to a judgment since in terms of Sec. 87(2) it precludes the plaintiff from bringing a fresh action in respect of the same cause of action. A "judgment" means the statement given by the judge of the grounds of a decree or order. When under Sec. 87(1) of the Civil Procedure Code a judge dismisses the plaintiff's action he is in effect saying that the plaintiff having made default in appearance on such and such a day fixed for trial, the judge using the powers ascribed to him under Sec. 87(1) of the Civil Procedure Code is dismissing the plaintiff's action. A decree would be entered in terms of this judgment.

It would thus be erroneous to distinguish arbitrarily between a judgment under Section 85(1) and under Section 87(1). The determination entered upon default in whichever way it may be, forms proceedings within proceedings which are given certain sanction by the statute. Generally only if the matter in dispute has been heard and determined between parties would it form *res judicata*. But Sec. 87(2) of the Civil Procedure Code precludes a fresh action in respect of the same cause of action even though the main matter in dispute had not been heard and determined by Court.

Serious consequences thus follow for the plaintiff when his action is dismissed due to default. No appeal lies against any judgment entered upon default [Sec. 87(2)]. Yet if the Court which acts under Sec. 87(3) of the Civil Procedure Code acts erroneously or arbitrarily the statute has quite rightly thought it fit to make available an immediate right of appeal to a party not based on the discretion of the Court of Appeal but as of right. If the Appellate Courts would find the order restoring the case to the roll under Sec. 87(3) arbitrary, unreasonable, perverse or erroneous they would reverse such an order and the plaintiff's case would stand dismissed with no right to bring a fresh action on the same cause of action.

It is therefore wrong to assert that the order made under Sec. 87(3) is an order made in the course of proceedings. It is the final order made in the course of proceedings within proceedings. The provisions of chapter XII of the Civil Procedure Code are statutorily enacted proceedings where consequences of default and cure are enumerated independent of the main case based on right of parties. Thus the words "order", "judgment", "decree", "appeal" etc. have to be interpreted more or less autochthonously within the ambit of the provisions of chapter XII and in its context. The inclusion of Sec. 88(3) to the Civil Procedure Code by Act No. 53 of 1980 strengthens the interpretation given above.

Sec. 88(3) makes provision for execution of decree pending appeal in terms of Sections 761 and 763 of the Civil Procedure Code where an order refusing to set aside such decree has been made. As stated by the learned Counsel for the defendant-appellant the provisions of Sec. 88(3) of the Civil Procedure Code makes it abundantly clear that the order contemplated in Sec. 88(2) of the Civil Procedure Code is an order having the effect of a final judgment as envisaged by Sec. 754(5) of the Code sufficient enough to warrant the invocation of Sections 761 and 763 to obtain execution of decree pending appeal.

Needles to say the decision of the Supreme Court in *Striwardene v. Air Ceylon* (Supra) would thus have no relevance to this matter. An order under Sec. 87(1) of the Civil Procedure Code is not "an order finally disposing of the rights of the parties". In fact the stage of examining the right of parties has still not arisen. These are special proceedings unrelated to the rights of parties.

A long line of cases too support the interpretation above given. In *A. S. Sangarapillai and Brothers v. Kathiravelu*⁽²⁾ it was held that due to the special provision contained in Sec. 88(2) of the Civil Procedure Code and the inbuilt safeguard provided therein and considering the tenor of the judgment of *Vattilingam, J. in S.C 45/76*⁽³⁾ *Abdul Cader, J. in S.C. 17/83*⁽⁴⁾

and *O. S. M. Seneviratne* in C.A.L.A. 34/80 a direct appeal is provided for in the circumstances and an application by way of leave to appeal does not lie.

In *Wijenayake v. Wijenayake*⁽⁵⁾ it was held that a right of appeal has been given under Sec. 88(2) of the Civil Procedure Code by the words "shall be liable to an appeal to the Court of Appeal". It was further said that one cannot conceive it to be an order to appeal from with leave from the appellate Court first had and obtained as set out in Sec. 754(2) of the Civil Procedure Code.

Thus the arguments put forward by the learned Counsel for the plaintiff-respondent do not appear to have much weight.

The preliminary objections are therefore over-ruled and the case would now be fixed for hearing.

WEERASEKERA J. - I agree.

Preliminary objections over ruled case fixed for hearing.