KURUNEGALA MERCHANTS LTD AND OTHERS
v
GUNAWARDANE

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
CA 181/80 F.
DC KURUNEGALA 6514/SPL.
OCTOBER 28, 2002.

Constitution, Article, 114(1), 114(4), 114(6) – Evidence Ordinance, sections 91 and 114 – Trial before the District Judge – Judgment not delivered – District Judge assuming duties as High Court Judge in a different jurisdiction – Not gazetted to hear and conclude the case? – Is the judgment a nullity? – Presumption in relation to official and legal acts.

Action was instituted in the District Court of Kurunegala where Mr. Suwaris functioned as District Judge who heard the case. It was concluded on 19.6.1976. He was transferred to Panadura. Mr Swaris was thereafter promoted as High Court Judge, Gampaha and the judgment was signed by Mr Suwaris when he was functioning as a High Court Judge. Mr. Swaris was not gazetted or appointed as a District Judge of Kurunegala to write the judgment. When the appeal was taken up the respondent - appellant raised a preliminary point of law in that the learned District Judge who wrote the judgment did not have jurisdiction to write this said judgment.

Held: *Per* Somawansa, J.

"It appears to me that if in fact Mr. Swaris was not appointed by the JSC to hear and determine this case as a District Judge of Kurunegala after his transfer to Panadura this fact would have been known in 1976 during the course of the hearing and an appropriate objection could have been taken. The absence of any objection by the Counsel who appeared in the original court when further proceedings were taken up before Mr. Swaris upon his transfer to Panadura would indicate that there was no basis for such an objection.

(1) There is a presumption that official and legal acts are regularly and correctly performed. This objection has not been taken at the earlier possible opportunity and not even in the petition of appeal. It is rather late in the day to take such an objection.

(2) Article 114(1) read with Article 114(6) of the Constitution provides for the JSC to appoint a holder of the office of the Judge of the High Court as an additional District Judge to enable him or her to continue hearing a case commenced before him or her as a judicial officer and to deliver judgment in that case,

(3) In the circumstances of this case, it could be presumed that he was duly appointed to hear and determine the instant case even after his transfer out of the said station.

(4) The fact that a person acts in a public capacity is *prima facie* evidence of his having been duly authorized so to do, it is very unlikely that anyone would usurp a public position.

(5) The respondent-appellants have failed to show that their substantial rights have been prejudiced or occasioned a failure of justice Article 138.

APPEAL from the judgment of the District Court of Kurunegala on a preliminary objection taken that the judgment is a nullity.

Cases referred to:

1. *Jayasena* v *Assistant Commissioner of Agrarian Services* 1996 2 Sri LR 70
2. *Hebtulabhoy & Co. Ltd* v *D.C.M. Fernando, High Court Judge and others* 1988 1 Sri LR 91

Romesh de Silva, P.C. with *Palitha Kumarasinghe* for respondent-appellants

P.A.D. Samarasekera, P.C. with *Harsha Soza* for petitioner-respondent

Cur.adv.vult.

August 29, 2003

SOMAWANSA. J,

When this appeal was taken up for hearing counsel for the 01
respondent-appellants raised a preliminary point of law in that the learned District Judge who wrote the judgment did not have jurisdiction to write the said order. On this preliminary point of law parties resolved to tender written submissions and accordingly both parties have tendered their written submissions.

The relevant facts pertaining to the preliminary point of law raised are as follows: The instant action was instituted in the District Court of Kurunegala where Mr. J.B.S.Swaris functioned as District Judge and the case proceeded to trial before him. According to journal entry 26 dated 29.12.1975 there is the following endorsement. "I am on transfer to Panadura as from 01.01.1976 call case before District Judge on 09.01.1976 to fix a date for further trial". Subsequently the case was fixed for trial on 06. 03.1976. Therefore the case record revealed that the trial proceeded before Mr. Swaris on several dates apparently in the District Court of Kurunegala and the inquiry was concluded on 19.06.1976. After the addresses were made by counsel and documents filed on 28.02.1976 directions had been given by the then District Judge of Kurunegala to forward the case record to Mr. Swaris, District Judge of Colombo forthwith. It appears that the order written and signed by Mr. Swaris dated 30.04.80 had been returned to the District Court of Kurunegala from the High Court of Gampaha where Mr. Swaris was functioning as the High Court Judge.

It is contended by the counsel for the respondents-appellants that it is only the District Judge of the District who can hear and or judge a case instituted in that district. In the instant case the moment Mr. Swaris who was the District Judge of Kurunegala was transferred as District Judge of Panadura he lost jurisdiction to hear and determine the cases as District Judge of Kurunegala and in the circumstances Mr. Swaris had to be appointed as a District Judge of Kurunegala by the Judicial Service Commission if he were to have jurisdiction to hear and determine the case. In the instant case it is alleged by the respondents-appellants that Mr. Swaris was not appointed or gazetted as a District Judge of Kurunegala after his transfer to Panadura and therefore he had no jurisdiction to act as District Judge of Kurunegala to hear and conclude the instant action. Furthermore, it is alleged that the record was sent to Mr. Swaris as District Judge of Colombo to write the judgment. Mr. Swaris was then appointed as a High Court Judge by the President. However Mr. Swaris was not gazetted or appointed as a District Judge of Kurunegala to write the judgment. In the circumstances it is contended by the counsel for the respondents-appellants that the

said order prepared and written by Mr. Swaris is in fact a nullity and should be set aside.

It may be noted here that the solitary objection to jurisdiction taken in paragraph 9(ii) of the petition of appeal is as follows:

> ".....though the case was concluded on 28th February 1979 the order was delivered only on the 2nd May 1980 when he did not have jurisdiction to deliver the said order".

Hence it could be seen that in the petition of appeal there is no objection raised on the basis that the learned District Judge was not appointed or gazetted to hear and determine the case but the objection is purely with regard to the learned District Judge's jurisdiction to deliver the judgment on 2nd May 1980. However at the hearing of this appeal, it was also argued by the counsel for the respondents-appellants that Mr. Swaris has not been appointed or gazetted as District Judge of Kurunegala to hear and deliver judgment after he was transferred from the District Court of Kurunegala. On a perusal of the record while conceding the fact that the record does not contain any entry remark or document to show that Mr. Swaris has been appointed or gazetted as an Additional District Judge of Kurunegala, appears to me that if in, fact Mr. Swaris was not appointed by the Judicial Service Commission to hear and determine this case as a District Judge of Kurunegala after his transfer to Panadura this fact would have been known in 1976 during the course of the hearing and an appropriate objection would have been taken. In any event, Mr. Swaris who was functioning as District Judge of Panadura would not have left his station on a working day and come all the way to the District Court Kurunegala to hear the instant case unless he was instructed to do so by the Judicial Service Commission. Certainly he would have had to obtain permission from the Judicial Service Commission to leave his station and function as a District Judge in Kurunegala. The absence of any objection by the counsel who appeared in the original Court when further proceedings were taken up before Mr. Swaris after his transfer to Panadura would indicate that there was no basis for such an objection.

Indeed as counsel for the petitioner-respondent submits if such an objection to jurisdiction had been taken at the earliest possible opportunity it would have been possible for the petitioner-respondent to have effectively met it rather than over 20 years later when the Judicial Service Commission is also not in a position to give a definite reply on this question of appointment and gazetting Mr. Swaris to function as a District Judge of Kurunegala. In the case *Jayaweera* v. *Assistant Commissioner of Agrarian Services* (1) it was held that there is a presumption that official and legal acts are regularly and correctly performed.

I am of the view that objections to the learned District Judge's jurisdiction to hear and determine the instant case not having been taken at the earliest possible opportunity and not even in the petition of appeal, it is rather late in the day to take up such an objection. It is also pertinent to consider at this point the provisions of section 114(d) and explanation 01 to section 91 of the Evidence Ordinance.

Section 114 and Illustration (d) of the said section reads as follows:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case".

Illustration(d)

"that judicial and official acts have been regularly performed:

E.R.S.R. Coomaraswamy on Law of Evidence – First Edition at page 250 states:

Illustration(D)

"The Court may presume that judicial and official acts have been regularly performed: But the Court must also have regard to such facts as that a judicial act, the regularity of which is in question, was performed under exceptional circumstances.

This presumption is based on the *maxim, Omnia praesumuntur rite solemniter esse act*, that is all things are presumed to have been done in the due and wanted manner. The maxim acquires great force when it is applied to public or official acts. Best says that the true principle, intended to be conveyed by this maxim, seems to be that there is a general disposition in courts of justice to uphold official, judicial and other acts, rather than to render them inoperative. Therefore, where there is general evidence of acts having been legally and regularly done, courts tend to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most cases, although in others the assumption rests solely on grounds of public policy.

There is, for example, a presumption that any person, who acts in a public office was duly appointed or authorised to do so. The presumption holds good in proceedings of every description, civil and criminal. But the presumption does not apply to private offices. With regard to public offices, there is a further presumption that the duties of those who fill them are performed with regularity. A presumption also arises under this section as to the legality and correctness of the proceedings of a Court".

Explanation 1 to section 91 of the Evidence Ordinance reads as follows:

"When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved".

Again E.R.S.R. Coomaraswamy on Law of Evidence – First Edition at page 265 states:

This exception is in accordance with the English rule on the point. The fact that a person acts in a public capacity is *prima facie* evidence of his having been duly authorised so to do. It is very unlikely that anyone would usurp a public position, or would be

permitted to fill, even if he were so disposed. Consequently, it is not necessary, at least in the first instance, to produce the document appointing him, or account for its non-production. Thus, in a charge of obstructing a public servant in the discharge of his public duties, if the public servant states that he holds the appointment in question and his assertion is not contradicted, there is no need for him to produce his letter of appointment".

Article 114(1) read with Article 114(6) of the Constitution provides for the Judicial Service Commission to appoint a holder of the office of the Judge of the High Court as an Additional District Judge to enable him or her to continue hearing a case commenced before him or her as a judicial officer and to deliver judgment in that case.

The said provisions of the Constitution were considered in the case of *Hebtulabhoy & Co. Ltd* v *A.L.M. Fernando High Court Judge and Others*. The facts were:

"The 1st respondent as District Judge heard and reserved order in a case where the petitioner was plaintiff. Before the order was delivered the 1st respondent was appointed as a High Court Judge by His Excellency the President. Subsequently, the Judicial Service Commission appointed the 1st respondent as an Additional District Judge to deliver judgment in certain cases heard by him as District Judge. The petitioner's case was that when the 1st respondent was already functioning as a High Court Judge, the Secretary to the Commission (5th respondent) communicated the decision to the 1st respondent stating "I hereby appoint you as Additional District Judge, Colombo to deliver judgment in cases No..... in addition to your other duties as pleased by the Judicial Service Commission". The 1st respondent subsequently delivered judgment in the petitioner's case making an order against him. He applied to the Court of Appeal to quash the order on the ground that the appointment by the J.S.C. was invalid."

Held:

"(1) The Judicial Service Commission was vested with power under Article 114 (1) read with Article 114(6) of the Constitution to appoint the 1st respondent who at the time had been appointed and was holding the office of a Judge of the High Court, as Additional District Judge of Colombo

in order to deliver judgment in case No. 2319/Spl of the District Court of Colombo.

(2) The 5th respondent has no such power under Article 114(4) of the Constitution in the instant case, however the appointment of the 1st respondent was made not by him but the Judicial Service Commission which appointment was communicated by him to the 1st respondent by letter XI.

(3) It is legally competent for the holder of the office of Judge of the High Court to function as a 'judicial officer' upon being appointed as such by the Judicial Service Commission to enable him to deliver judgment and/or to continue and conclude a case commenced by him previously as a 'judicial officer'

In the instant case there is no material to ascertain as to when Mr. Swaris was appointed a Judge of the High Court. The order made by Mr. Swaris in this case has been signed by Mr. Swaris on 30.04.80.The said order had been delivered in the District Court of Kurunegala on 2nd May 1980. As to whether Mr. Swaris was appointed a Judge of the High Court on or prior to 30.04.80 has not been established. If he was appointed a Judge of the High Court on 01.05.80 then there was no need for another appointment to grant him jurisdiction to write the said order for as stated above it could be presumed that he was duly appointed to hear and determine the instant case as a District Judge of Kurunegala even after his transfer out of the said station.

I might also mention here the provisions contained in proviso to Article 138 of the Constitution of the Republic which provides that:

"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice".

In the instant appeal the respondents-appellants have failed to show that their substantial rights have been prejudiced or occasioned a failure of justice.

For the above reasons, I would reject the preliminary point of law raised by the respondents-appellants and hold the main appeal should be listed for hearing.

DISSANAYAKE, J. - I agree.

Preliminary point of law rejected.
Main appeal to be listed for hearing.