

**WICRAMARATNE
VS.
SENANAYAKE**

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
C.A. 136/2001
D.C. GAMPAHA 43449/M
MAY 12, 2004

Civil Procedure Code Cap. LIII sections 85, 85(1) 704(1), 705(1) and 710 – Affidavit imperative – Sum justly due – Summons returnable date – Defendant absent – Copy of decree served on defendant – Non existent order nisi made absolute – Validity – Decree not signed by judge – Is it a nullity?

The plaintiff respondent instituted action under Cap. 53 of the Code to recover a sum of money alleged to be due on a cheque. No affidavit was filed. The trial court ordered that summons be served on the defendant, and when the defendant failed to appear in court the court made order nisi absolute.

HELD :-

(i) Section 705(1) of the civil Procedure Code makes it mandatory for the plaintiff to make an affidavit that the sum which he claims is justly due to him from the defendant. Whole of the proceedings commencing with the institution of the action are bad.

(2) There was no summons returnable date, if the defendant is absent, the court should proceed to hear the case ex parte and enter decree in favour of the plaintiff in terms of section 85.

(3) After entering the decree under section 85(1) the court shall cause a copy of the decree to be served on the defendant.

(4) It is only after entering the decree properly signed by the judge, the court can issue the writ of execution. A writ of execution not founded on a valid decree is a nullity - proceedings thereunder are void.

APPLICATION in revision from an order of the District Court of Gampaha.

S.A.D.S. SURAWEERA for defendant petitioner petitioner.

P.C. Gunawardena for plaintiff respondent respondent.

Cur. adv. vult.

June 4, 2004

L. K. WIMALACHANDRA., J.

This is an action filed by way of summary procedure under chapter LIII of the Civil procedure Code, to recover a sum of money alleged to be due on a cheque.

The plaintiff instituted this action by presenting a plaint along with summons in Form No. 19 in the first schedule to the Civil Procedure Code, the cheque, proxy and the documents annexed to the plaint (vide Journal Entry No. 1 of the case record of the District Court).

It is to be observed that the plaintiff has not filed an affidavit which is a mandatory requirement in terms of section 705(1) of the Civil Procedure Code. Section 705(1) of the Civil Procedure Code makes it mandatory for the plaintiff to make an affidavit that the sum which he claims is justly due to him from the defendant. In order to entitle a person to sue under Chapter LIII of the Civil Procedure Code it is essential that the facts set out in the affidavit must show that the sum claimed was rightly and properly due. According to the journal entry dated 06.01.1999 in the District Court case record, the learned District Judge has ordered that summons be served on the defendant. According to the Journal entry dated 28.04.2000 summons was served on the defendant. The summons read as follows :

“පැමිණිලිකරු තමාට අයවිය යුතු මුදල් මුදල් සහ/පොළිය වන රුපියල් සඳහා ඉහත සඳහන් පැමිණිලිකරු විසින් සිවිල් නඩු විධාන සංග්‍රහයේ LIII වන පරිච්ඡේදය යටතේ ඔබට විරුද්ධව මේ අධිකරණයේ නඩුවක් පවරා ඇති හෙයින්.

අධිකරණයෙහි පෙනී සිට විත්තිවාචක ඉදිරිපත් කිරීමට මෙය භාරකරවන දිනය ඇතුළුව මෙය භාරකරවීමේ දින සිට දින 14ක් ඇතුළත අධිකරණයෙන් අවසර ලබාගැනීමටද, ඒ කාලය තුළ ඔබ පෙනී සිටි බව වාර්තාගත කරවීම සඳහාද, ඔබට මෙයින් සිතායි නිකුත් කරනු ලැබේ. එය පැහැර හැරියහොත් එකී වෙක්පතේ සඳහන් ප්‍රමාණය අනුව ගෙවන දිනය දක්වා සම්පූර්ණ පොළියත් සමඟ රුපියල් 214816/66 කට වැඩි නොවන මුදලක්ද ගාස්තුව වශයෙන් රුපියල් 5112.50 ක මුදක් ද සඳහා වූ තින්දු ප්‍රකාශයක් ලබා ගැනීමට පැමිණිලිකරුට හිමිකම ඇති වන්නේය.

යථාර්ථ වශයෙන් නඩුවට විත්තිවාචකයක් ඇති බව හෝ නඩුවෙහි පෙනී සිටීමට ඔබට ඉඩදෙනු ලැබීම යුක්ති සහගත බව දැක්වෙන දිවුරුම් පත්‍රයකින් සනාථ කරනු ලැබූ ඉල්ලීමක් කිරීමෙන් ඔබට පෙනී සිටීම සඳහා අවසර ලබාගත හැකිය”

This summons is in prescribed Form 19 in the first schedule to the Civil Procedure Code. On 15.5.2000 the defendant failed to appear in Court although summons had been served on him. (vide – journal entry No. (4) dated 28.4.2000). On that day, i.e. 15.5.2000, the learned District judge had made the following order (journal entry No. 5).

“චින්තිකරු නැත. පෙත්සමක් නැත. නෛසයි ආඥාව නියත කරමි”.

It is to be noted that in this case there was no order nisi to be made absolute. On the summons returnable date if the defendant fails to appear, the Court is required to enter decree (vide – Section 704(1) of the Civil Procedure Code). In my opinion, in this situation the Court should proceed to hear the case *ex-parte* and enter decree in favour of the plaintiff in terms of section 85 of the Code, as at this stage section 710 of the Code applies. Section 710 reads as follows :

“Except as provided in this chapter, the procedure under this chapter shall be the same as the procedure in actions instituted under Chapter VII”

The Chapter VII deals with the institution of actions of regular procedure.

After entering the decree in terms of section 85(1) of the Code, the Court shall cause a copy of the decree so entered to be served on the defendant in the manner prescribed for the service of summons. (vide section 854 of the Code).

In the circumstances, the order made by the learned judge making a non-existent order nisi absolute was wrong and must be set aside.

Another fundamental error made by the learned judge was the issue of a writ of execution without a decree being signed by the judge. It is only after entering the decree properly signed by the judge, the Court can issue the writ of execution. A writ of execution not founded on a valid decree is a nullity and the proceedings thereunder are void.

In the circumstances, I am of the opinion that the whole of the proceedings commencing with the institution of this action are altogether bad mainly for the reason that the plaint has not been accompanied by an affidavit that the sum which he claims is justly due to him from the defendant. If I may say so, the whole of the proceedings were altogether bad and ineffectual and all acts done by the Court in the course of the proceedings must fall through. Moreover the writ of execution taken out against the defendant before entering the valid decree is void and of no effect. Accordingly, all orders made by the learned Judge cannot be allowed to stand.

For these reasons, I set aside the orders of the learned District Judge made in this case and send the case back with direction that the plaintiff shall make an affidavit in terms of section 705(1) of the Civil Procedure Code if he so desires to proceed against the defendant by way of summary procedure under Chapter LIII of the Civil Procedure Code. The learned District Judge is directed to proceed with the case upon the plaintiff complying with the provisions of Chapter LIII of summary procedure on liquid claims. Accordingly the appeal is allowed.

The defendant is entitled to the costs of this appeal.

AMARATUNGA, J. – I agree

Appeal allowed ; case sent back.
