

MERCANTILE CREDIT LIMITED
V.
SISIRA KUMARA AND ANOTHER

COURT OF APPEAL
WIJEYARATNE J. AND GRERO J.
C.A. APPLICATION NO. 565/91
WITH C.A./L.A. NO. 98/91
D.C. COLOMBO
CASE NO. 5384/M
13 SEPTEMBER, 1991

Civil Procedure - Listing of documents - Applicability of Sections 121(2) and 175(2) of Civil Procedure Code to proceedings unit section 86(2)

Held:

The provisions of sections 121(2) and 175(2) of the Civil Procedure Code relating to listing of documents do not apply to an inquiry under section 86(2) to set aside a decree for default. These provisions are applicable only to trials of actions by way of regular procedure.

Cases referred to:

1. *In re Abdul Aziz* 1 NLR 196, 199
2. *Pitche Bawa v. Meera Lebbe* 2 C.L.R. 174
3. *Subramaniam Chetty v. Soysa* 25 NLR 344
4. *Caspersz v. Ratnayake* 67 NLR 505

APPLICATION for revision of order of the District Court of Colombo

Chula de Silva, P.C. with *R. Deviligoda* and *C. Liyanapatabendi* for plaintiff - petitioner.

K.S. Tillekeratne for 2nd and 3rd defendants-respondents.

Cur. adv. vult.

10 October, 1991

WIJEYARATNE, J

The plaintiff-petitioner filed this action against the 2nd and 3rd defendants-respondents and another claiming a restricted sum of Rs. 1,04,060/67 (together with interest thereon) in respect of a hire purchase agreement.

As the defendants-respondents did not appear on summons, an *ex parte* trial was held and an *ex parte* decree was entered against them.

After the decree was served on them they jointly filed a petition and affidavit dated 25.5.90 to set aside the said *ex parte* decree on the ground that summonses were not served on them.

For the purpose of obtaining summons for this inquiry, the plaintiff-petitioner has filed a list of witnesses and documents dated 30.1.91

The said application to set aside the *ex parte* decree came up for inquiry on 20.5.91 and the 2nd defendant-respondent gave evidence -in-chief and was being cross-examined when he was questioned whether he had received a red coloured letter of demand and he admitted that he did receive one and that set out the amount to be paid for the motor vehicle. When learned counsel for the plaintiff-petitioner sought to show this document to the 2nd defendant-respondent with a view to marking it in evidence, learned counsel for the defendant - respondent objected saying that it had not been listed. Learned counsel for the plaintiff-petitioner had submitted that

for an inquiry under section 86(2) it is not necessary to list documents and this requirement of listing applies only to trials in regular procedure.

On the other hand, on behalf of the defendants-respondents it was submitted that the term "action" has been defined in both sections 5 and 6 of the Civil Procedure Code. It was submitted that having regard to these definitions this inquiry is an action and therefore all documents have to be listed 15 days before the trial as required by section 121(2) of the Civil Procedure Code.

The learned Additional District Judge by his order of the same date, i.e., 20.5.91, has upheld the objection. In his order he has stated that this document does not appear in the list of documents filed by the plaintiff-petitioner dated 30.1.91. He was of the view that this document should be listed as required by section 121(2) and that it cannot be produced in evidence except with the leave of court given under section 175(2).

The plaintiff-petitioner has filed this application to revise and set aside the said order dated 20.5.91.

This application is one made to court under section 86(2) of the Code to set aside a decree entered against the 2nd and 3rd defendants-respondents for default of appearance. Section 86(3) provides that such application should be made by a petition supported by an affidavit.

It cannot be said that this application is one made under Chapter XXIV of the Civil Procedure Code which provides for summary procedure. The Code itself (sec. 8) provides for all cases in which proceedings may be taken by way of summary procedure. - *In re Abdul Aziz* (1). In the case of *Pitche Bawa vs. Meera Lebbe*(2) it was held that the "summary procedure" laid down in Chapter XXIV can only be adopted in cases to which it is expressly made applicable by the Code. There are several sections of the Code which expressly provide that summary procedure is to be followed as, for example, sections 284, 393, 478(2), 480, 481(2), 483(2), 485, 498, 524(1), 530(1), 537, 556(2), 575(1), 583, 589, 591, 593, 595, 608(2) and 670. Even though section 86(3) provides that such an application has to be by petition and affidavit, nevertheless it is not expressly

stated that the application has to be by way of summary procedure.

On a consideration of the matter it appears that this inquiry was held in respect of an application under section 86(2) made in the course of a regular action. The question arises whether the provisions of sections 121(2) and 175(2) are applicable to such an inquiry.

The word "action" in section 121(2) can be given a wide meaning having regard to the definition of "action" in sections 5 and 6 of the Civil Procedure Code. The learned Additional District Judge in this case has held that this inquiry could be considered an "action" and hence the document should be listed under section 121(2).

In the case of *Subramaniam Chetty vs. Soysa* (3) where a Fiscal's sale was set aside under section 282 of the Civil Procedure Code and the purchaser sought leave to appeal to the Privy Council, the question arose whether these proceedings amounted to a "suit" or "action" within the meaning of section 4 of the old Appeals (Privy Council) Ordinance No. 31 of 1909.

Bertram C.J. in the said case at page 348 stated as follows:-

"Now, in our Code of Civil Procedure, a very wide meaning is given to the word "action". In section 5 an action is defined as a proceeding for the prevention of redress of a wrong. In section 6 it is said that every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action. It seems clear to me, therefore, that this application to the Court to set aside the sale instituted by a petition to the Court was an action within the meaning of section 4."

Though the term "action" can be given such a wide meaning to include an inquiry under section 86(2), nevertheless sections 121(2) and 175(2) relating to the listing of documents apply only to actions by way of regular procedure and not to this type of inquiry. One important factor is that these sections 121(2) and 175(2) appear in the midst of the chapters dealing with the trials of actions in regular procedure and they cannot be extended to this type of inquiry. Hence I am of the view that sections 121(2) and 175(2) do not apply to this inquiry.

Support for this view is found in the case of *Caspersz v. Ratnayake* (4) which related to an inquiry where a legatee had filed a petition against an executor under section 720 of the Civil Procedure Code for the payment of a legacy and an inquiry was held thereon. At the inquiry held in the District Court the learned District Judge had refused permission to call certain witnesses and also to produce a document on the ground that they had not been listed. Basnayake C.J. in the said case at page 509 stated as follows: -

"In our opinion the learned District Judge not only placed himself at a great disadvantage when he disallowed the petitioner's application to place that evidence before the Court, but he also acted contrary to law.

The procedure laid down in section 721 of the Civil Procedure Code is of a special nature and is not the 'regular' procedure, and the provisions of sections 121(2) and 175 are not therefore applicable to proceedings thereunder".

Likewise the proceedings under section 86(2) of the Civil Procedure Code to set aside a decree for default is not the regular procedure to which sections 121(2) and 175(2) are applicable. Therefore the learned Additional District Judge should have permitted this document to be admitted and marked in evidence.

In passing I would like to mention that this document was sought to be marked in cross-examination. In any event the proviso to section 175(2) states that the requirement regarding listing is not applicable to documents produced in cross-examination.

I therefore set aside the order of the learned District Judge dated 20.5.91 and permit the document to be marked in evidence.

GRERO, J - I agree.

Order set aside.