

COOMARASWAMY

v.

MARIAMMA

COURT OF APPEAL
WEERASURIYA, J.
DISSANAYAKE, J.
C.A. 890/93(F)
D.C. KANDY 2235/RE
FEBRUARY 23, 2001
MAY 4, 2000
JUNE 22, 2000
AUGUST 29, 2000

Civil Procedure Code - S.85(4), S.86(2)(3) - Exparte Decree - Application to purge default - Application made before service of decree - maintainability - strict compliance with mandatory requirements.

Exparte Judgment was entered in favour of the Plaintiff Appellant and a direction was made to serve the copy of the decree on the Defendant Respondent. It was contended that there is no application before Court in terms of S.86(2) read with S.86(9) as the Defendant Respondent herself contended that she did not place her signature on the proxy and the affidavit. The District Court held that, it is a mere technicality and permitted the Defendant Respondent to file answer.

Held :

- (1) On the admission of the Defendant Respondent there was no valid proxy and a valid affidavit. In the circumstances there has been no compliance with the mandatory requirements stipulated in S.86(3).

Per Weerasuriya, J.

"It is manifest that the application to purge the default had been made prior to the service of the decree. However, it would appear that the requirement for the party to make the application within 14 days of the service of the decree does not preclude the Defendant to make an application before service of the decree and for the Court to inquire into such application after decree was served."

APPEAL from the Judgment of the District Court of Kandy.

Cases referred to :

1. *Sally v. Mohamed* - 66 NLR 175

S. F. A. Cooray with *C. Llyanage* for Plaintiff Appellant.

Vidura Gunaratne for Defendant Respondent.

Cur. adv. vult.

November 17, 2000.

WEERASURIYA, J.

This appeal arises from the order of the District Judge dated 17. 11. 1993, vacating the *ex parte* decree entered against the defendant - respondent and permitting him to proceed with his defence.

The facts leading upto this appeal are briefly as follows:

The plaintiff - appellant by his plaint dated 01. 11. 1989, instituted action against the defendant - respondent, seeking his ejection from the premises described in the schedule to the plaint and damages.

The defendant - respondent failed to appear before the District Court on 14. 02. 1990 and upon the report from the Fiscal of the Central Province that summons had been served on the defendant - respondent, learned District Judge fixed the case for *ex parte* trial against the defendant - respondent for 16. 02. 1990. The case was taken up for *ex parte* trial on 16. 02. 1990 and at the conclusion of the evidence of the plaintiff - appellant, judgment was entered in his favour and in terms of Section 85(4), direction was made to serve the copy of the decree on the defendant - respondent.

On 14. 03. 1990, defendant - respondent made an application by way of petition and affidavit seeking to vacate the *ex parte* decree. This matter was supported on 21. 03. 1990 and the plaintiff - appellant was directed to file objections on 27. 04. 1990. Meanwhile, as evident from journal entry dated 15. 05. 1990, Fiscal Kandy reported that a copy of the *ex parte*

decree was served on the defendant - respondent. On the application of the defendant - respondent, case was called on 31. 05. 1990 and the plaintiff - appellant was directed to tender objections on 27. 06. 1990. In terms of journal entry No. 12 dated 27. 06. 1990 upon the filing of objections, inquiry was fixed for 20. 08. 1990. Thereafter, at the conclusion of the inquiry on 18. 12. 1991, the impugned order was made allowing the application of the defendant - respondent.

At the hearing of this appeal, learned Counsel appearing for the plaintiff - appellant contended that the defendant - respondent has failed to make an application under Section 86(2) read with Section 86(3) of the Civil Procedure Code seeking to set aside the *exparte* decree.

The contention that there is no application before Court in terms of Section 86(2) read with Section 86(3) of the Civil Procedure Code was solely dependent on the evidence of the defendant - respondent that her signature did not appear on the proxy and the affidavit. The defendant - respondent whilst giving evidence having being shown the proxy, stated that her signature does not appear on the proxy. This position was further complicated when she stated that signature appearing on the affidavit is not her signature. It was her position that she had never gone before a Justice of Peace to sign an affidavit.

Therefore, the question arises whether the learned District Judge could disregard this lapse of the defendant - respondent by describing it as a mere technicality and gloss over its significance. It would appear to be a non - compliance with a mandatory requirement relating to the invocation of jurisdiction of the District Court to deal with the application of the defendant - respondent.

Section 86(2) of the Civil Procedure Code reads as follows:

"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter

satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper"

Section 86(3) reads as follows:

"Every application under this section shall be made by petition supported by affidavit."

The defendant - respondent on being shown the proxy and the affidavit specifically stated that her signature does not appear on the proxy and the affidavit and that she had never gone before a Justice of Peace to sign the affidavit.

Therefore, on the admission of the defendant - respondent there was no valid proxy and a valid affidavit before the District Judge. In the circumstances, there had been no compliance with the mandatory requirement stipulated in Section 86(3) of the Civil Procedure Code.

The contention that there was no valid application before the District Judge was based on the ground that, the defendant - respondent has made the application seeking to vacate the *ex parte* decree before the service of the decree.

In *Sally v. Mohamed*⁽¹⁾ it was held that where a case is fixed for *ex parte* trial in terms of Section 85 of the Civil Procedure Code, the reasons for the default of the defendant cannot be considered by Court before the *ex parte* trial is held.

It is manifest that the application to purge the default by way of petition and affidavit had been made prior to the service of the decree. However, it would appear that the requirement for the party to make an application within 14 days of the service of the decree does not preclude the defendant to make an application before service of the decree and for the Court to inquire into such application after decree was served.

However, inasmuch as the defendant - respondent has failed to comply with the imperative provisions of Section 86(3) of the Civil Procedure Code, the application for relief must necessarily fail.

For the foregoing reasons, the order of the District Judge dated 17. 11. 1993 is set aside and this appeal is allowed with costs.

DISSANAYAKE, J. - I agree.

Appeal allowed.