# IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

**Appeal No.C.A.1047/95 (F)**
**D.C. GALLE Case No.12348/L**

Malinda Withanachchi

**Defendant - Appellant**

**- VS.-**

Chandrani Karunarathna

**Plaintiff - Respondent**

**Before:** **Janak De Silva J.**

**&**

**N. Bandula Karunarathna J.**

**Counsel:** Athula Perera with Poorni Rupasinghe for the Appellant

Chathura Galhena with M. Gunawardhana for the Respondent.

**Written Submissions:** Filed on 2nd October 2019 for the Defendant – Appellant.

Filed on 18th January 2019 for the Plaintiff – Respondent.

**Argued on:** 26/08/2019

**Judgment on:** **22/06/2020.**

**N. Bandula Karunarathna J.**

The Plaintiff Respondent (hereinafter sometimes referred to as the Plaintiff) instituted the present action to obtain the declaration of title in respect of the land referred to in paragraph 2 of the plaint. The Plaintiff in her plaint set out her pedigree and stated that she became the owner of the land in dispute as stated in the plaint.

The Defendant Appellant (hereinafter sometimes referred to as the Defendant) in her answer denied the averments in the plaint and sought the dismissal of same and as a claim in reconvention, sought a declaration that she is the owner of the land referred to in lot 6 of the plan 1038 of the Licensed Surveyor Anton Samararathna.

Thereafter the case was fixed for trial on 10.05.1995 and on that day the trial of the case was re-fixed on personal grounds of the Attorney-at-law of the Defendant. Thereafter the case was fixed for trial on 10.11.1995.

The factual setting to this case is as follows;

On that day (10.11.1995) when this matter was first called in the morning for trial the Defendant was absent. However as per the proceedings of that day Attorney-at-Law for the Defendant Mr. A.J.P.M. Jayawardana had informed Court that he has no instructions from the Defendant.

In the circumstances, at that time the case has been fixed ex-parte against the Defendant and had kept down the matter to be taken up for trial subsequently. As per the case record when the case was again called for the trial around 10.25 am, the Defendant appeared before Court and there was no representation for the Defendant.

However as per the proceedings of the day it had been recorded that, the Defendant had not made any application. Thereafter the Plaintiff had given evidence in chief and it has been recorded after the examination in chief, no cross examinations from the Defendant.

In the meantime, the Learned District Judge has cut the word ඒකපාක්ෂවික by one line as seen from the journal entry No. 17 dated 10.11.1995 at page 16 of the brief and had left only the balance part namely නඩු විභාගයට ගන්නා ලදී. After the evidence in chief of the Plaintiff on 10.11.1995 it is recorded that හරස් ප්‍රශ්න ඇසීම : නැත

Thereafter the Plaintiff had closed his case leading in evidence documents P1 to P5 and then the Learned District Judge had reserved the judgment for 27.11.1995. The judgment was again postponed to 29.11.1995 and on that day the Learned District Judge had delivered the judgment.

The Defendant had tendered the notice of Appeal against the said judgment and had sought to call the matter in the open Court to support the filing of the said notice of Appeal.

Thereafter the case was called on 22.01.1996 and on that day both parties had submitted to the Court that the trial was taken up on 10.11.1995 ex-parte against the Defendant and thereafter the ex-parte judgment had delivered and the Defendant had sought from Court to consider the judgment as a ex-parte judgment and wanted to take steps accordingly to serve the decree on the Defendant etc.

After hearing both parties however the Learned District Judge on 02.02.1996 delivered the order and submitted that this is the judgment delivered inter-parte and directed the parties to take steps accordingly.

However, in the meantime the Plaintiff had submitted the Plaintiff Appeal on 26.01.1996. This is in order to file the petition in time. If the Defendant had to wait until the order is delivered. In this regard the Learned District Judge the filing of the petition Appeal would have been out of time.

The main standpoints of the Plaintiff, are as follows;

The Plaintiff in her evidence marked 'පැ.01' the commission plan relating to the identification of the corpus. The Plaintiff states that the Plaintiff's title was derived from a partition decree which was marked 'පැ.02'. In the said partition decree lot No. 6 of the final scheme was allocated to the 4th Defendant of the case named

*Peella Kamkanamge Emaliya alias Ema Nona.* The said *Ema Nona* by deed marked 'පැ.04' transferred 22.6 perches of lot No. 6 to *Pushpa Chandrani Karunarathna* who is the Plaintiff of the instant action. Thereafter the remaining 10.04 perches of lot No. 6 was transferred by the said *Emaliya* to Plaintiff by the deed marked 'පැ.05'. By the deeds marked 'පැ.04' and 'පැ.05' the Plaintiff became the title holder of lot 4 of the partition plan marked 'පැ.03'.

The Plaintiff in her evidence stated that the Defendant without any right, title or interest to the said land is in illegal occupation since 28th September 1988 and pleaded for the relives as prayed for in the Plaint.

The Plaintiff states that the Defendant in her answer claimed prescriptive title to the said lot 06 but has not listed any document to substantiate the purported prescriptive title. (the said list is also being filed out of time and in contrary to the section 121 of the Civil Procedure Code).

The Plaintiff further states that the Learned Trail Judge has to consider evidence and enter the judgment in terms of section 187 of the Civil Procedure Code which requires a concise statement of the case, the points of determination, the decision and reasons.

The Plaintiff states that when analyzing Section 187 of the Civil Procedure Code it is clear that the term 'the points of determination' must be there in the judgment. It is submitted that the points of determination do not mean to set up issue since framing of issues arises only when there is a contest between the parties.

The Plaintiff states that in the instant case the Learned Trail Judge has clearly set up the points of determination as whether the Plaintiff entitled for the declaration of title, eviction and damages. The term 'points of determination' by no mean refers to framing of issues. Framing of issues is referred in Section 146(2) of the Civil Procedure Code which refers to as 'the issues shall refer to the points that are not agreed by the parties. Further Section 146 (3) refers as no issues are required when the Defendant makes no defence. In the instant action even though the Defendant filed an answer she did not maintain any defence at the trail which comes within the ambit of Section 146(3) of the Civil Procedure Code.

Therefore, the Plaintiff submits that the Learned Trail Judge has acted within the scope of the provisions of the Civil Procedure Code in deciding the matter which is in conformity with the Section 146(3) and 187.

Subsequent to a thorough analysis of the facts of the case, it is pertinent to note that originally as per the journal entry of 10.11.1995, the case has been fixed ex-parte against the Defendant as the Defendant was absent and the counsel for the Defendant had informed Court that he had no instructions to appear before Court on behalf of the Defendant. When the case called around at 10.25 am the Defendant was present and the counsel was not present. The Defendant had not made any application as per the Learned District Judge on that day. Whether the Learned District Judge has given an opportunity to the Defendant to cross examine the Plaintiff is in question.

In any event, cutting off the word "ඒකපාක්ෂවික" from the journal entry fundamentally changes the case.

Once the counsel had informed that he has no instructions from the Defendant, the Learned District Judge had taken up the case ex-parte against the Defendant.

It is important to note that once the case is fixed ex-parte against the Defendant there was no reason available for the counsel to stay and watch what is happening in the case. Therefore, the counsel has left the Court after informing that he had no instructions from the Defendant. In the circumstances one cannot expect that the counsel would wait in Court to look after the interest of the Defendant once the case was fixed ex-parte against the Defendant.

The Learned District Judge by cutting the word "ඒකපාක්ෂවික" from the journal entry would have intended to take the case inter-parte subsequently.

It is doubtful as to why the Learned District Judge would take the case inter-parte once the order is made in the presence of the counsel of the Defendant, to take the matter ex-parte against the Defendant.

It is also relevant to note that by cutting off the word "ඒකපාක්ෂවික by the Learned District Judge and subsequently the matter is taken up inter-parte is serious

prejudice to the rights of the Defendant and the case has been taken up without any legal representation on behalf of the Defendant.

I therefore concede that the Defendant may have been prejudiced by the act of the Court and in fact there is a miscarriage of justice.

In NANDANA v ATTORNEY-GENERAL 2008 (1) SLR 51, it was held that

the trial Judge has committed a very serious and fundamental misdirection of law by attaching a burden on the defence to rebut the prosecution evidence, and due the flimsy nature of the evidence and due to the long lapse of time since the date of the incident, ordering a retrial would not meet the ends of justice.

In K. J. M. EDWIN Vs. K. L. D. A. DE SILVA 62 NLR 44 too, a retrial was ordered and the justification for the same is as follows;
The judgment of a judge of first instance written after the impression created by the witnesses has faded is not of the same value to the appellate court as a judgment written while that impression is fresh. We accordingly quash all the proceedings on and after 19th June 1956 and remit the record with a direction that the case be reheard.

In WIJESENA SILVA AND OTHERS v. ATTORNEY GENERAL 1998(3) SLR 309,

It was held that for all purposes even in a retrial which is no different from the first trial every provision of law applicable to any trial before a High Court would be mutatis mutandis applicable at a retrial
Therefore, I reiterate that the Learned District Judge by striking off words would have meant to take the case inter-parte subsequently. The Learned District Judge has no right whatsoever to take the case inter- parte once the order is made in the presence of the counsel of the Defendant to take the matter ex-parte against the Defendant. Therefore, the Defendant has not been afforded an equal opportunity

to present his case. Owing to the aforesaid reasons, my viewpoint is that the Learned District Judge erred in law by ordering an ex parte judgment.

We accordingly set aside the judgment and direct a retrial.

Considering the circumstances, we make no order for cost.

The learned District Judge of Galle is further directed, to give priority and conclude this matter as this case is fairly an old case.

**Judge of the Court of Appeal**

**Janak De Silva , J**

**I agree.**

**Judge of the Court of Appeal**