W.A.D.N.Chandraguptha, Proprietor of and carrying on business under the name and style of Wanniarachchi Industries, of 164, Kesbewa Road, Boralesgamuwa.

-Defendant Petitioner Petitioner

C.A./L.A. No:508/2005
Leave to Appeal
D.C. Galle No:6778/M

vs.

Gunadasa Suwandaratne, Deputy Chief Secretary (Engineering Services), Office of the Southern Province Engineering Services, Ford, Galle.

-Plaintiff Respondent Respondent

C.A. L.A. 508/2005 **D.C. Galle 6778/M**

Before : **A.H.M.D. Nawaz, J. &**

E.A.G R. Amarasekara, J.

Counsel : Dr. Sunil Coorey with Miss. A.W. Diana Stephanie Rodrigo for the Defendant-Petitioner-Appellant.

Mr. Manohara De Silva, P.C for the Plaintiff-Respondent-Respondent instructed by L.K. Rajapaksha.

Argued &

Decided on : 12.09.2017

A.H.M.D. Nawaz, J.

The Plaintiff instituted this action against the Defendant seeking to recover a sum of Rs. 731,092.34 as damages for an alleged breach of contract, together with legal interest thereon. The Defendant by his answer denied the claim of the Plaintiff and made a claim in reconvention in a sum of Rs. 6,691,247.99 together with legal interest thereon.

The Defendant's Counsel for this action was Mr. Gamini Senanayake, Attorney-at-Law from Colombo. The said Counsel used to travel to Galle for this action and return on the same day. The usual practice was for the Defendant to transport the said Counsel from Colombo to the District Court of Galle and after the case, back to Colombo on the same day.

The trial in this action commenced with the recoding of admissions and issues on 10.02.2004. In all, 60 issues were raised and accepted by the court. The Plaintiff raised issues 1 to 22. The Defendant thereafter raised issues 23 to 58. Finally, the Plaintiff raised issues 59 to 60.

After the issues were raised, two of the issues raised by the Defendant were tried as preliminary issues of law. Both parties tendered written submissions on those two issues, and the Court delivered its order on 16.06.2004, answering both issues in favour of the Plaintiff. Accordingly the trial was to proceed on the balance 58 issues.

When the action was next called for further trial on 01.03.2005 the Defendant moved for a postponement on the personal grounds of his Counsel and further trial was re-fixed for 01.07.2005. On 01.07.2005 further trial was taken up and on that day the plaintiff's evidence in chief was led, and thereafter the trial was adjourned for 11.11.2005.

It is brought to our notice that on 11.11.2005, the Defendant and his Counsel left Colombo for Galle at about 6.30 am by a vehicle in order to participate at the adjourned trial in this action.

While they were so travelling, the Defendant's Counsel began to vomit and fell ill at ease. The vehicle had to be halted at several places along the way, and after travelling to Moratuwa, it was found that the said Counsel was not in a fit condition to proceed to Galle. Accordingly, the Defendant then turned his vehicle in the opposite direction back to Colombo, and took his Counsel for immediate medical attention to Nawaloka Hospital, Colombo. In the meantime, a friend of the said Counsel, Mr. Prasanna Karunasekera, Attorney-at-law, was contacted over the telephone. He helped the Defendant's Counsel to consult a doctor at the said Hospital, and thereafter to obtain for the said counsel the drugs prescribed for him by the doctor.

The Defendant, who was accordingly in Colombo and was unable to travel to Galle, in the meantime made every effort to contact Mr. Anthony Jayawardena, his registered Attorney-at-Law in this action in Galle, in order to apprise him of the situation, and to inform him that the Defendant and his Counsel were unable to travel to Galle for this action. All efforts of the Defendant to contact his registered Attorney-at-Law failed.

The Defendant thereafter came to know what had happened in this action on 11.11.2005. As the Defendant and his Counsel did not come to court, Ms. Nalani

Manatunga, an assistant of Mr. Anthony Jayawardena, who had no knowledge of what had happened that morning and why the Defendant and his Counsel were absent, moved for a postponement of the trial of this action, subject to costs to be fixed by Court, on the ground that the Defendant was not ready for trial.

However, as the reason why the Defendant and his Counsel were not present in court was not disclosed to Court, the learned President's Counsel appearing for the Plaintiff objected to the application for a postponement. The objection was upheld and the application for a postponement was refused on the basis that no acceptable reason was divulged to Court as to why the Defendant was not ready for the case that morning. We have been made aware of these facts through the petition, affidavits and other material that have been filed in this case.

Accordingly, further trial was taken up and concluded on 11.11.2005. The judgment in the case goes as follows:-

> *"According to the evidence of the Plaintiff in this action, and the documents produced, it appears that the Plaintiff ought to be awarded reliefs as prayed for in the prayer to the plaint. Accordingly, I award the reliefs prayed for in paragraphs (a), (b) and (c) in the plaint. I enter judgment in favour of the Plaintiff. Enter decree accordingly."*

It is crystal clear that the said judgment does not comply with the mandatory provisions of Section 187 of the Civil Procedure Code, in that the judgment does not contain a concise statement of the case, the points for determination, the decision on each of the points for determination, or any reason for the decision of any of the points for determination. It has not dealt with any of the 58 issues on which the trial proceeded. It has neither allowed nor disallowed the counter claim of the Defendant. It is not a judgment within the meaning of the Civil Procedure Code-*see* the response to these infirmities in cases such as ***Dona Lucihamy v. Cicilyanahamy*** 59 N.L.R. 214; ***Warnakula v. Ramani Jayawardena*** (1990) 2 Sri L.R. 206.

Being aggrieved by the said judgment delivered on 11.11.2005, the Defendant filed a notice of appeal dated 22.11.2005 against the same. We have been told that an appeal was since filed and it is pending disposal.

Section 839 application

On 22.11.2005 the Defendant-Petitioner made an application by way of a petition and an affidavit in the District Court of Galle under Section 839 of the Civil Procedure Code, praying *inter alia* that, in the exercise of the inherent powers of the Court in the interests of justice and for the ends of justice, all proceedings dated 11.11.2005 and judgment dated 11.11.2005 be vacated and the action be fixed for further trial. The said petition, dated 22.11.2005, is at pp.89-94 in "Z", and the said affidavit is at pp.95-99 in "Z". In the said petition and affidavitthe Defendant-Petitioner-Appellant averred the facts mentioned above. To the said application was attached an affidavit of Mr. Prasanna Karunasekera (pp.167-168 in "Z"), and a medical certificate dated 11.11.2005 of the said Counsel (p.267 in "Z"), as well as the receipt for drugs purchased on 11.1.2005 at Nawaloka Hospital (p.268 in "Z").

When the said application under Section 839 of the Civil Procedure Code was supported in the District Court of Galle on 07.12.2005 (pp.153-154 in "Z"), the Court made order on the same day (p.155 in "Z") as follows:-

> *"While this is not an action tried ex parte, it was tried inter partes and judgment entered. Further, a notice of appeal has been filed against the said judgment. The provisions of section 839 can be made use of only for the ends of justice or to prevent the abuse of the process of the court. For the above reasons, while I hold that this application cannot be instituted or maintained, the application is rejected.'*

In my view, I would not fault the learned District Judge for this conclusion. An *inter parte* judgment had in fact been entered and a notice of appeal was subsequently filed and thus the proceedings in the District Court were at an end and the remedy of the Defendant lay either in the Court of Appeal or the relevant Civil Appellate High Court. So the dismissal of the application under Section 839 was, in my view, properly made

and this leave to appeal application against that order, which has now ripened into this appeal, would ordinarily have to be rejected. But upon the material filed in this appeal against the order made under Section 839, we have been made aware of the circumstances in which the case against the Defendant-Petitioner-Appellant had been concluded in the District Court of Galle. The Defendant's Counsel was on his way to Galle from Colombo but he fell ill during the course of the journey. The affidavits filed in the Section 839 application narrate the concatenation of events as to how the Counsel and Defendant had been placed in an unfortunate and hapless situation. Upon a disclosure of all these facts before us now in this appeal from a Section 839 order, and having regard to the fact that the *inter parte* judgment entered by the learned District Judge suffers from serious deficiencies as I have pointed out in the course of this judgment, I take the view that this Court should exercise its powers of revision under Article 139 of the Constitution to remedy the injustice that befell this hapless Defendant. No doubt the Defendant has preferred an appeal against the *inter parte* judgment entered on 11.11.2005 and it is yet pending disposal, as notified to this Court.

Exercise of Revisionary Jurisdiction

But the circumstances in the case do shock the conscience of this Court so as to impel us to exercise the revisionary jurisdiction of this Court and remand the main case to the District Court of Galle for a retrial. Our course of action is not without precedents. In ***Attorney General v. Gunawardena*** (1996) 2 Sri L.R. 149 an application in revision by the Attorney General of an order made by the High Court of Kandy, Samarawickrama, A.C.J (with Rajaratnam, J. Wanasundera, J. Vythialingam, J. and Tittawela, J. agreeing) declared that in exercising the powers of Revision the Court would not be trammelled by technical rules of pleading and procedure. In doing so the Court has power to act whether it is set in motion by a party or not and even *ex mero motu*.

The Court adverted to the often cited *locus classicus* on revision of Dias S.P.J in ***Attorney General v. Podisingho*** 51 N.L.R. 385, where the learned Justice alluded to the ability of Court to exercise revision when a case comes "to the knowledge" of the Supreme Court

while an appeal is being argued as in ***Soysa v. Punchirala*** (1995) 1 S.C.R 199 and ***Clara v. Pedrick*** (1900) 1 Browne at p.215.

We are accordingly of the view that this Court possesses the power to act in revision in this matter. There is such clear and manifest error and material irregularity as would call for the intervention of this Court to redress or remedy an inequitable exercise of original jurisdiction and I thus proceed to set aside the judgment dated 11.11.2005 and direct the learned District Judge of Galle to commence a trial *de novo* on the same pleadings and conclude this case as expeditiously as possible.

It has been brought to our notice that the Defendant has already filed a final appeal in regard to this mater and the Counsel for the Defendant-Appellant states that they would not proceed with the final appeal that had been filed in regard to this matter, now that this Court has exercised its revisionary jurisdiction.

JUDGE OF THE COURT OF APPEAL

E.A.G.R. Amarasekara, J.
I agree.

JUDGE OF THE COURT OF APPEAL