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

T.G. Sarojini Wimalasuriya,
Galkotuwa,
Moratita.
PLAINTIFF

-Vs.-

C.A. Case No. 642/ 2000 F)
D.C. Kurunegala: 5659/M

S.D. Ajith Nandana Kumara,
Udumulla,
Moratita.
DEFENDANT

-AND-

S.D. Ajith Nandana Kumara,
Udumulla,
Moratita.
DEFENDANT-PETITIONER

-Vs.-

T.G. Sarojini Wimalasuriya,
Galkotuwa,
Moratita.
PLAINTIFF-RESPONDENT

-AND NOW BETWEEN-

S.D. Ajith Nandana Kumara,

Udumulla,

Moratita.

DEFENDANT-PETITIONER-APPELLANT

-Vs-

T.G. Sarojini Wimalasuriya,

Galkotuwa,

Moratita.

PLAINTIFF-RESPONDENT-RESPONDENT

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

COUNSEL : Shyamal A.Collure with A.Adachi for the Defendant-Petitioner-Appellant

Medha de Alwis for the Plaintiff-Respondent-Respondent

Decided on : 31.08.2016

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

The issue that arises in this case is whether the absence of subscription of the answer by the defendant or his duly constituted representative can be treated as if there is no answer and whether such absence of the signature of the attorney-at-law for the defendant can form the foundation for an order to begin an *ex parte* trial against the defendant. The plaintiff-respondent-respondent

(hereinafter sometimes referred to as the plaintiff) instituted action in the District Court of Kurunegala praying inter alia for:

a) recovery of a sum of Rs 50,000 from the Defendant- Petitioner- Appellant (hereinafter sometimes referred to as the defendant) for the delict of seduction;
b) recovery of legal interest on the said sum of money from the date of the plaint until the said amount is paid in full.

The Defendant- Petitioner- Appellant filed his answer dated 12 June 1998 denying the cause of action and prayed inter alia that the action be dismissed. After the case was fixed for trial to be conducted on 15.09.1998, the defendant filed his list of witnesses and documents on 10.08.1998 in terms of Section 121 of the Civil Procedure Code (hereinafter sometimes referred to as the CPC).

When the trial was taken up on 10.03.1999, 11 issues were raised on behalf of the plaintiff and 7 issues were framed on behalf of the defendant, whilst the admissions were recorded.

It would appear that the learned Additional District Judge of Kurunegala discovered at this stage that the answer of the defendant had not been signed by is attorney-at-law-see page 43 of the appeal brief. Upon that fact being brought to the notice of the parties, the Counsel for the defendant sought permission of Court to rectify the mistake attributing the lapse to inadvertence, whilst the attorney-at-law for the plaintiff moved Court that the matter be fixed for *ex parte* trial, as there was no answer. The learned Additional District Judge allowed the application of the Counsel for the plaintiff and fixed the *ex parte* trial to be taken up forthwith as he took the view that there was no proper answer before Court since the answer carried no subscription by the attorney-at-law.

The learned Additional District Judge also made order to strike down the issues raised by the defendant and thereafter began the *ex parte* trial in which the

plaintiff gave evidence upon the conclusion of which the learned judge pronounced judgment and ordered decree to be entered.

The defendant, by a petition and affidavit dated 16.06. 1999, moved the District Court to have the *ex parte* judgment vacated and trial to be had *inter partes*. This application was disallowed by the learned Additional District Judge in an order pronounced on 3-10-2000. This appeal is against the said judgment dated 3.10.2000.

As could be seen, it is the failure to subscribe to the answer that led to the matter being fixed for an *ex parte* trial. It is noteworthy that at the time when the learned Additional District Judge detected the deficiency in the answer, the deficient answer had crystallized into issues. Be that as it may, would the missing signature of an Attorney-at-law in an answer entail the serious consequence of a rejection and dismissal of the answer? Was it a *per incuriam* order when the Additional District Judge rejected the answer for want of the signature of the Attorney-at-law for the defendant? Or was the order made rightly? These are questions that come up for resolution in the case.

The requirement for signature is spelt out in Section 75 of the Civil Procedure Code. The chapeau of Section 75 states the following:

> *Every such answer shall be distinctly written upon good and suitable paper, shall be duly stamped, shall be subscribed by the defendant or his duly constituted representative as in the case of a plaint is provided for the plaintiff's subscription, or if he is represented by a registered attorney, by such registered attorney.*

This is the first component part of Section 75 or the chapeau of the Section. What follows this component part or chapeau is the enumeration of particulars that an answer must contain namely (a)-(e). According to section 75 of the Civil Procedure Code, the answer must contain the *following particulars:*

(a)the name of the court, the number of the case and the date of filing of the answer;

(b) the name of the plaintiff;

c) the name, description, and residence of the defendant;

(d)a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence;

e) when the defendant sets up a claim in reconvention the answer must contain a plain and concise statement of the facts constituting the ground of such claim which the defendant makes in reconvention.

It is these particulars that Section 77 of the CPC hits in the event of non-compliance. Non-compliance with the essential particulars (a) to (e) results in either a rejection or return for amendment of the answer. Section 77 does not penalize the absence of the signature of the relevant signatories referred to in the chapeau of section 75.

REJECTION OR RETURN OF ANSWER

Section 77 provides the grounds for rejection or return of the answer, namely, if the answer is,

(i) *substantially defective in any of the particulars required by the Code in section 75, and 76 or,*

(ii) *argumentative, or*

(iii) *prolix, or*

(iv) *contain matters irrelevant to the action,*

the court has the power to make order, to be endorsed thereon, rejecting or returning it to the defendant for amendment within a period not exceeding one month from the date on which the answer was so returned, and the court may impose such terms as to costs or otherwise as it thinks fit.

Section 77 makes it explicit when a District Court can treat the defendant as having failed to file answer. Only when the answer is rejected or left unamended as ordered, the defendant will be regarded as having failed to file answer-see 2nd paragraph of Section 77 which reads thus:

> *If the answer is rejected or left unamended as ordered, the defendant shall be regarded as having failed to file answer.*

The rejection of the answer by the Learned Additional District Judge in this case on 10.03.1999 was not actuated by the grounds set out in Section 77. The rejection was for non-signature of the attorney-at-law in the answer. Signature is no doubt referred to in the chapeau of Section 75. But non-signature of a defendant or his attorney-at-law in an answer is not a recognized ground for rejection in Section 77 and therefore I take the view that the answer cannot be rejected for want of the relevant signature of the defendant or defendant's attorney-at-law.

It has to be noted that non-compliance with Section 76 of the CPC too may result in rejection or return of the answer for amendment. Section 76 imposes the obligation to set out a separate and distinct plea if jurisdiction of Court is to be traversed. That is beside the point and that issue does not arise in this case.

In the instant appeal before me the Learned Additional District Judge had no complaint about the particulars that had to be set out in terms of Section 75 (a) to (e) of the CPC. His only complaint was that the answer was not signed as required by the 1st component part of Section 75.

Section 77 makes it crystal clear. Only when the answer lacks in substantial particulars (a) to (e) of Section 75, the answer could be rejected or returned for amendment. There is no such rejection when the answer lacks in a relevant signature. Even in regard to particulars (a)-(e) of Section 75 there is a discretion vested in the District Judge to return the answer for amendment. A rejection for non-compliance with particulars (a) to (e) of Section 75 is not the only sanction. If at all, a rejection of the answer has to be on grounds specified in Section 77 which does not refer to absence of a signature in the answer. This reasoning should be dispositive of the issues before me but I find that my conclusions can also be fortified by legal principles.

Expressio Unius est Exclusio Alterius

I will have recourse to one of the secondary aids to construction -*Expressio Unius est Exclusio Alterius* which simply means the expression of one thing is the exclusion of another-sometimes expressed as *inclusio unius est exclusio alterius:* the inclusion of one thing is the exclusion of another. Using this canon of interpretation one can argue that if the legislature produces a list of items, then it is logical that all other items are excluded. Why else would the legislators have provided a list?

If Section 77 of CPC sets out a list of grounds for rejection or return for amendment of an answer, it must be taken to mean that the expression of that list has excluded other grounds such as non-subscription of the answer by an attorney-at-law. When non-signature of the defendant or his attorney-at-law is not specified at all in that list of Section 77, it cannot be relied upon as a ground to strike down an answer. As Lord Dunedin observed in ***Whiteman v. Stanley*** (1910) AC 514 at page 527, "*Express enactment shuts the door of further implication*". One cannot imply the non-signature of a signatory in an answer into the exclusions which are expressly provided for in Section 77 of the CPC. This would be the

main application of the principle of *expressum facit cessare tacitum* (what is expressly made (provided for) excludes what is tacit) that lies in the so-called principle of *expressio unius est exclusio alterius* (the expression of the one is the exclusion of the other).

Non-signature in an answer is a curable defect

In light of the distinction that the legislature has made between the chapeau of Section 75 and its other component parts namely (a) to (e), I would further hold that the signing of answers as in the case of plaints is merely a matter of procedure. If an answer is not signed by the defendant or by a person duly authorised by him in that behalf, and the defect is discovered at any time before judgment, the court may allow the defendant to amend the answer by signing the same. The trial court ought not to reject the answer or strike off the defence merely because the answer has not been signed. The omission to sign an answer is not such a defect as could affect the merits of a case or the jurisdiction of the court. The defect only goes to procedure and not to the jurisdiction of Court to hear the defendant out on his defence. The defect is only procedural and not jurisdictional. In any event if the answer has not been signed, it is only a curable defect. Non-signing of an answer cannot result in a reject of the same. The defect is only an irregularity and not an illegality.

Striking off the answer is available only in the case of the specific non-compliance grounds as set out in Section 77 of the CPC. A rejection of an answer should be sparingly resorted to when the CPC provides a curable alternative namely the answer can be returned for amendment. Striking off an answer is not the sanction that is contemplated by the CPC if the answer has not been signed.

Across the Palk Strait the Indian equivalent to an answer is a written statement which is provided for in Order VIII of the Indian Civil Procedure Code. In a Bombay case, the defendant filed a written statement which was not signed by

him. As happened in this case, the written statement (the answer) was not taken on record, and an *ex parte* decree was passed by the trial court. On appeal, the *ex parte* decree was set aside and the defendant was directed to file his written statement by a specified date. The plaintiff contended that the defendant could file only the earlier written statement. It was held that the defendant should be allowed to file a written statement (not necessarily the earlier one)-see ***Vinayak v Shantabar*** AIR 1983 Bom 172.

It appears that the contest between the parties in the court *a quo* has also turned on the use of the word "shall" in the chapeau of Section 75 of the CPC.

> *Every such answer shall be distinctly written upon good and suitable paper, shall be duly stamped, **shall be subscribed** by the defendant or his duly constituted representative as in the case of a plaint is provided for the plaintiff's subscription, or if he is represented by a registered attorney, by such registered attorney.*

The use of the word "Shall"

The use of the word 'shall' by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. Therefore the distinction between mandatory and directory nature of a provision does not depend on the language in which it is couched.

The procedural rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are tailored to promote fair play and advance the cause of justice and not to undermine it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred.

I have already observed that the legislature has not placed the non-compliance with the chapeau of Section 75 on the same footing as an infringement of particulars (a) to (e) mentioned in the same Section. This diarchy is manifest in Section 77. Having regard to the intention of the CPC displayed in such a manner, I would hold that an infringement of the chapeau is not fatal to the maintainability of the answer.

In the overall analysis I take the view that a defect in matter of signing of the answer is merely an irregularity and not an illegality and can be corrected at a later stage of the suit with the leave of the court and an answer cannot be dismissed nor an order be passed against a party on the ground of defect or irregularity in signing of the answer. So the initial decision to strike down the defence as if no answer had been filed, though the deficient answer had crystallized into issues, was patently wrong and made *per incuriam* and this case ought not to have been fixed *ex parte*. The irregularity should have been permitted to be cured and if it was not done then, this Court in its appellate jurisdiction could also direct the District Court to have the answer rectified. As a result of this omission and the *ex parte* trial that took place forthwith, certainly the rights of the defendant to be accorded a fair trial have been infringed. The rule *nunc pro tunc* (now for then) is based on the maxim *actus curiae neminem gravabit* – i.e. "An act of the Court shall prejudice no man". The import of the maxim is that no man should suffer because of the fault of the court. The tome Broom's Legal Maxims (11th Edition, 2011) states thus at P74:-

> "The maxim is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law"-Cresswell J., in *Freeman* v *Tranah*, 12 C.B. 406. page 415.

Even as far back as 1871 it was an established rule that no party should suffer due to an act of Court. It was succinctly set out thus in the case of ***Rodger v Comptoir D'Escompte de Paris*** (1871) LR 3/1 4C 405:

> *"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors."*

So if the rectification of the answer was not done then, it could be done now. The refusal to vacate the so called *ex parte* judgment and decree is thus vitiated by the initial vice of treating the deficient and curable answer as no answer.

In the circumstances I would set aside both orders namely the *ex parte* judgment dated 10.03.1999 and the order dated 03.10.2000 which refused to vacate the *ex parte* judgment and decree. I would allow the appeal of the defendant and direct the Learned District Judge of Kurunegala to permit the defendant to file the same answer that is already on record but subject to time being granted to the defendant to have it signed and tendered to Court. Thereafter the trial can proceed on the same issues that were raised on 10.03.1999.

JUDGE OF THE COURT OF APPEAL