

TRANSLATION

IN THE DISTRICT COURT OF COLOMBO

Nihal Sri Ameresekere
of 167/4, Sri Vipulasena Mawatha
Colombo 10.

Case No : 21819/MR

PLAINTIFF

Vs

1. Gamini Lakshman Peiris
of "Visumpaya", Staples Street
Colombo 2, and also of
37 Kirula Place
Colombo 5.

and another

DEFENDANTS

ORDER

17.05.1999

This instant Case has been filed as a derivative action by the Plaintiff for reliefs against the 1st Defendant.

The 2nd Defendant, Hotel Developers (Lanka) Ltd., has already filed an Answer and has prayed for dismissal of the Plaint, including the reliefs sought in the prayer to the Plaint.

However, the 1st Defendant has already filed an Answer in this Case and having filed a Motion dated 16.02.1999, had moved that the acceptance of the Plaint be dismissed *in limine* for reasons stated in the said Motion.

For convenience, the facts of the 1st Defendant's said Motion in the very same manner as contained therein are quoted below. The Motion of the 1st Defendant is as follows:

- " 1. We respectfully bring to the notice of the Court that the Plaint has been accepted per incuriam and that the Plaint must be rejected and/or action dismissed, in that, inter-alia.
- (a) inter-alia, among other reasons, for reasons set out below the Plaint does not disclose a cause of action, in that,
 - (i) the Plaint ex facie does not disclose a derivative action.
 - (ii) in any event no action would have been available for Hotel Developers (Lanka) Ltd. on the facts set out in the Plaint.
 - (b) the Plaintiff's purported claim and/or purported cause of action is prescribed on the face of the Plaint.
 - (c) ex facie, no claim and/or relief is available against the Defendant in his personal capacity.
2. In the aforesaid circumstances, we move that the Court be pleased to reject the Plaint and/or dismiss the action.

We respectfully Move Your Honour's Court be pleased to call this Case on 19th February 1999, for the support of this Motion. "

The Attorneys-at-Law for both parties made oral submissions and filed written submissions in respect of the matters averred in the said Motion and the 2nd Defendant Company has agreed to accept in the very same terms whatever Order that would be given on the said Motion.

The present Order is in relation to considering as to whether the 1st Defendant would be entitled to the reliefs sought in the aforesaid Motion

The basis of the Motion of the 1st Defendant is that the Plaint in question has been accepted by Court per incuriam and for that reason alone, the Plaint should be dismissed even at this stage on the doctrine of nunc pro tunc", i.e. "to be done now what should have been done in the past".

The matter that has the primary hearing in this connection, is the procedure that ought to be followed in the exercise of the powers referred to in the aforesaid paragraph. The 1st Defendant's argument is that such a matter can be raised by a Motion.

In this connection, I decide that I am bound to accept as precedents the judgement in Avurra Ummah Vs Casinader reported in NLR 199 and judgments in Fonseka Vs Fonseka (reported in 1989 -2 L.A.R. - 95) and Mudali Appuhamy Vs Tikarala (reported in 2 C.L.R 30), where the aforesaid judgement has been indirectly or otherwise adopted.

The Plaintiff's stand is that since the 1st and 2nd Defendants have filed their Answers respectively on 22.01.1999 and 21.01.1999 (before filing the Motion) and for that reason, without determining the matters on the said Motion, the matters therein ought to be considered under Chapter XIX of the Civil Procedure Code.

This argument of the Plaintiff, prima-facie, is more elegant and striking than that of the defence. Prima-facie it can be accepted as a creditable argument because according to the judgement in Fonseka Vs Fonseka, any request for rejection of the Plaint by a Motion should be made before the filing of the Answer to a Plaint. This legal requirement appears at page 100 of the said judgment as follows:-

"The defendant should move to have the Plaint taken off the file for want of particulars before pleading to the merits."

Upon the perusal of the Journal Entries too, it is clearly observed that after the service of Summons, together with the Plaint on the 1st Defendant, the 1st Defendant had asked for time to file his Answer and thereafter he, in fact has filed Answer on 22.01.1999.

In submitting their defence, what the 1st and 2nd Defendants have chosen at their discretion had been the preference to file Answer under Section 75 read with Section 55, of the Civil Procedure Code (and not the filing of a Motion). Such a situation, the Court is of opinion, is a strong legal bar to the dismissal of the Plaint without acting under Section 146 of the Civil Procedure Code.

For these reasons, I make note of all matters averred in the aforesaid Motion for consideration after the commencement of the Trial, since all matters set out in the Motion have already been raised in the Answer.

Accordingly, I reject the Motion filed by the 1st Defendant seeking dismissal of the Plaint.

Sgd.
(A.W.A. Salam)
District Judge, Colombo
17.05.99

Translation certified correct

W. A. Samaratinga

W. A. SAMARATUNGA

(28) 17.05.99

Order :-

Attorney-at-Law, Mr. Sumanthiran appears for the Plaintiff.

Mr. Sudath Perera for the 1st Defendant.

Mr. Arulpragasam, Attorney-at-Law for the 2nd Defendant.

Order delivered.

Submission of written Issues and Trial – 09.06.99.

I inform parties that written Issues should be submitted one week prior to the date of Trial with notice to the opposite party.

Sgd.
D.J.

Translation certified correct.

W.A. Samaratinga

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