SIVAYANAMA AND ANOTHER
vs
PEOPLE'S BANK AND 7 OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
N. G. AMARATUNGA, J. AND
SALEEM MARSOOF, J.
S.C. APPEAL NO. 71/2007
S. C. (SPL) L. A. NO. 218/2006
C. A. NO. 592/2001
D.C. MATALE NO. 4349/L
MAY 16TH, 2008

Fair hearing - A Court ought not to make an order without hearing and determination of the matter before Court - Auti alteram partem Rule.

The Plaintiff-Appellants-Appellants appealed against the order of the Additional District Judge of Matale dated 26.06.2001. By that order the learned Judge upheld the preliminary objections relating to jurisdiction raised by the 1st Respondent Bank and dismissed the action. The Plaintiffs-Appellants appealed against the aforesaid order of the Additional District Judge.

When the appeal came up for hearing in the Court of Appeal, the 1st Respondent Bank raised a preliminary objection on the ground that the impugned order of the Additional District Judge was not an appealable order.

The Court of Appeal having heard the submission only on the preliminary objection raised by the 1st Respondent-Bank dismissed same but went on to dismiss the appeal on its merits without hearing the Appellants on the main question raised in the petition of appeal. No opportunity had been given to either party to make their submissions on the merits of the appeal.

Held:

(1) A decision of a Court of Law should be based on a fair hearing of the matters before Court and cannot contain orders of issues where parties were not given an opportunity to be heard.

Per Dr. Shirani Bandaranayake, J.

> "The decision of the Court of Appeal, which had decided on the merits of the appeal cannot be accepted, as it had not observed the rudimentary norms, which are applicable in hearing an appeal".

Cases referred to:-

1. *Ranasinghe vs. Ceylon State Mortgage Bank* 1981 1 S.L.R. 121.
2. *Siriwardena vs. Air Ceylon Limited* 1984 1 Sri L.R. 286.
3. *White vs. Brunton* (1984) 2 All E.R. 606.
4. *Ridge vs. Baldwin (1964)* A.C. 40
5. *Anisminic Ltd. vs. Foreign Compensation Commission* (1969) 2 A.C.147
6. *A.G vs. Ryan* [1980] A.C. 143
7. *State Graphite Corporation vs. Fernando* 1982 2 Sri L.R. 590.
8. *Board of Education vs. Rice* (1911) A.C. 179.

APPEAL from judgment of the Court of Appeal.

A. R. Surendran, PC with *K. V. S. Ganesharajan, Nadarajah Kandeepan* and *Ms. Dharshini* for Plaintiffs-Appellants-Appellants.

Manohara de Silva, PC with *D. Weeraratne* for 1st Defendant-Respondent- Respondent.

Cur. adv.vult

May 13, 2009

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 31.07.2006. By that judgment, the Court of Appeal had held that the order made by the learned District Judge dated 20.06.2001 is a final order as it had disposed of the rights of the parties, and had dismissed the appeal filed by the plaintiffs-appellants-appellants (hereinafter referred to as "the appellants"). The appellants filed a special leave to appeal application before this Court against the order made by the Court of Appeal for which special leave to appeal was granted by this Court on the following question:

"Is the judgment of the Court of Appeal which proceeded to decide the appeal on its merits having directed the parties to file written submissions only on the preliminary objection raised by the 1st respondent Bank without giving the appellants an opportunity of being heard on the merits of their appeal, in violation of the principles of natural justice?"

The facts of this appeal, as submitted by the appellants, *albeit* brief, are as follows:

The 1st and 2nd appellants are two brothers, who are the owners of the land and premises, which is the subject matter of this appeal. The 1st defendant-respondent-respondent (hereinafter referred to as the 1st respondent) is the People's Bank and the 2nd defendant-respondent-respondent (hereinafter referred to as the 2nd respondent) had been the Authorized officer of the 1st respondent Bank. The 3rd to 8th defendants-respondents-respondents (hereinafter referred to as the 3rd to 8th respondents) were the 3rd to 8th defendants of the D. C. Matale case No. 4349/L.

The appellants' father had been the owner of the land and premises bearing No. 300, Main Street, Matale for over 30 years and had been in possession and occupation of the place in question during that period. By Deed of Gift No. 3397, dated 02.05.1990 attested by S. M. Haleemdeen, the appellants became the owners of the said land and premises and they have been in possession and occupation of the said land and premises for well over 25 years.

In February 1991, The appellants received undated notices from the 1st respondent Bank, issued in terms of Section 72(5) of the Finance Act, No. 11 of 1963, as amended, with a copy to one Suppammal, which stated *inter alia*, that pursuant to a decision made by the Board of Directors of the 1st respondent Bank acting under the Finance Act, No.

11 of 1963 as amended, the land and premises in suit was vested in the 1st respondent Bank on the publication of an order in the Government Gazette of 11.07.1979. The said notices requested the appellants to hand over the land in suit on 15.03.1991 to the 2nd respondent.

The appellants thereafter instituted action bearing No. 4349/L in the District Court of Matale, praying *inter alia*,

1. For a declaration against the 1st respondent Bank that the property in suit is not liable to be acquired under the provisions of the Finance Act, No. 11 of 1963;

2. For an order declaring that the appellants have a right to possession and ownership of the land and premises in suit;

3. For an injunction restraining the 1st respondent Bank from evicting the appellants from the said land and premises.

In the said plaint, the appellants averred the circumstances under which they and their predecessors in title became entitled to the said land and premises and produced their documents of title along with the plaint. The 1st respondent Bank had filed its statement of objections and answered stating, *inter alia*, that pursuant to a vesting order being published in the Gazette dated 11.07.1979, the said land and premises had vested in the 1st respondent Bank. Accordingly the 1st respondent Bank had pleaded that it was entitled to serve the said notice in terms of Section 72(5) of the Finance Act and evict the appellants from the said land and premises.

When the said case came up for inquiry before the learned Additional District Judge, Matale on 20.06.2001 learned

Counsel for the 1st respondent Bank had raised a preliminary issue pertaining to the jurisdiction of the District Court to hear and determine the said action. The said preliminary issue was based on the provisions of Section 70(B)5 of the State Mortgage and Investment Bank Act, which purports to oust the jurisdiction of Courts in respect of certain steps taken by the People's Bank under the provisions of the said Act.

Both parties had thereafter made submissions on the said preliminary issue. The learned Additional District Judge of Matale, by his order dated 20.06.2001, upheld the preliminary objection relating to jurisdiction raised by the 1st respondent Bank and dismissed the said action No. 4349/L stating, *inter alia,* that in view of the finality clause contained in the statute, the Court did not have jurisdiction to hear and determine the said action.

Thereafter, the appellants came before the Court of Appeal against the said order of the learned Additional District Judge of Matale dated 20.06.2001, *inter alia,* on the ground that the failure of the learned Additional District Judge to follow the judgment of the Supreme Court in the case of *Ranasinghe v. Ceylon State Mortgage Bank*[1] was erroneous inasmuch as the learned Additional District Judge was not entitled to ignore a binding judgment of the Supreme Court merely on the basis that the facts of the instant case were different from the facts of *Ranasinghe v. Ceylon State Mortgage Bank (supra).*

When this appeal came up before the Court of Appeal for hearing on 23.08.2004, Counsel for the 1st respondent Bank raised a preliminary objection on the basis that the appellants could not maintain the said appeal as the impugned order of the District Court of Matale was not an appealable order.

The Court of Appeal had reserved order on the preliminary objection. Thereafter by its order dated 31.07.2006, the Court of Appeal had dismissed the 1st respondent Bank's preliminary objection and had held that the appellants were entitled to a right of appeal from the order of the Court of Appeal and having heard submissions only on the preliminary objection and after having reserved its order only on the preliminary objection had proceeded to adjudicate on the merits of the case as well, and had dismissed the appeal without hearing the appellants on the main question raised in the application.

Having set out the facts, let me now turn to consider this appeal.

The contention of the learned President's Counsel for the appellants was that when the appeal came up for hearing before the Court of Appeal on 23.08.2004, learned President's Counsel for the 1st and 2nd respondents had raised a preliminary objection that the order against which the appeal had been lodged was not a final order, but only an interlocutory order and therefore the appellants could not have lodged an appeal against the said order. However, irrespective of the fact that both Counsel had been heard only on the preliminary objections raised by the learned President's Counsel for the respondents, the Court of Appeal had dismissed the appeal on its merits.

Learned President's Counsel for the 1st and 2nd respondents had not disputed the contention of the learned President's Counsel for the appellants.

In fact the judgment of the Court of Appeal dated 31.07.2006 clearly supports the contention of the learned President's Counsel for the appellants, as it had stated thus:

"When the Appeal came up for hearing before this Court on 23.08.2004, Counsel for the Respondent raised a preliminary objection that the order against which this Appeal has been lodged is not a Final Order, but only an Interlocutory Order. He further submitted that thus the Appellants could not have lodged this Appeal against the aforesaid Order. **This Court directed the parties to tender Written Submissions on the aforesaid Preliminary Objections"** (emphasis added).

Thereafter the Court of Appeal had considered the provisions in Section 754(5) of the Civil Procedure Code, Section 71(3) of the Finance Act and Section 22 of the Interpretation Ordinance and the principle laid down in the decision in *Siriwardena v. Air Ceylon Ltd.*[2] *White v Brunton* and *Ranasinghe v. Ceylon State Mortgage Bank (supra).* Thus a careful reading of the judgment of the Court of Appeal clearly indicates that it was not restricted to the preliminary objection raised by the learned President's Counsel for the 1st and 2nd respondents. The final paragraph of the judgment, which reads as follows, clearly indicates this position,

"In *Ranasinghe v. State Mortgage Bank* the Court held that notwithstanding the provisions of the Interpretation Ordinance, Declaratory relief is available against the Bank where there is a total lack of jurisdiction. Hence the learned District Judge's decision is correct in law. It is my view that the order made by the learned District Judge on 20.06.2001 is a Final Order as it finally disposed of the rights of parties. Although on a Preliminary issue there exists a right of appeal, an Appeal would be futile for the aforesaid reasons. Hence for the aforesaid reasons I see no reason to interfere with the Order of the learned District Judge dated 20.06.2001,

and hence I dismiss the appeal filed by the Appellants without costs."

It is therefore quite evident that although both parties were heard only on the preliminary objections and both parties had filed their written submissions only on the preliminary objections raised by the learned President's Counsel for the 1st and 2nd respondents, the Court of Appeal had decided the matter not on the basis of the preliminary objection so raised, but on the merits of the appeal.

It is an accepted fact that 'a man's defence must always be fairly heard' (Prof. H. W. R. Wade, Administrative Law, 9th edition, p. 440). A fair hearing, which is regarded as 'a rule of universal application' (*Ridge v Baldwin*[4] has been referred to by Lord Loreburn in his oft -repeated words, as 'a duty lying upon every one who decides anything' (*Anisminic Ltd. v Foreign Compensation Commission* [5] *A. G. v. Ryan* [6].

The said need to give a proper hearing prior to the determination of the matter in issue was considered in *State Graphite Corporation v Fernando*[7] where it was stated that,

> "The Court of Appeal can dispense with a hearing on granting leave *ex mero motu*. In other cases it seems to me where a party wishes to be heard, or the issues involved are such that the Court ought not to make an order without hearing and determination of the application, would generally require a hearing, however summary or brief that hearing may be."

Considering the facts and circumstances of this appeal, it is quite clear that both parties had made their submissions only on the preliminary objection raised by the learned

President's Counsel for the 1st and 2nd respondents. No opportunity had been given to either party to make their submissions on the merits of the appeal. It is not disputed that the arguments were confined only to the said preliminary objections. It is also not disputed that the judgment of the Court of Appeal dated 31.07.2006, whilst as stated earlier, referring to the preliminary objections so raised had not ruled on the said preliminary objections, but had considered the merits of the appeal and had dismissed it.

The Court of Appeal was correct in its approach when it decided to first consider the preliminary objection taken by the learned President's Counsel for the 1st and 2nd respondents. However, what it should have done thereafter was to consider the said objections and make order on the said preliminary objection. Therefore the decision of the Court of Appeal, which had decided on the merits of the appeal cannot be accepted, as it had not observed the rudimentary norms, which are applicable in hearing an appeal. A decision of a Court of law should be based on a fair hearing of the matters before the Court and cannot contain orders of issues, where parties were not given an opportunity to be heard.

The generality of the application of the maxim *audi alteram partem,* commonly known as the rule that no man is to be condemned unheard, and its flexibility in its operations were succinctly pronounced by Lord Loreburn L. C. in the well known decision of *Board of Education v. Rice*[8], where it was stated that it applied to 'everyone who decides anything'. As stated by Loreburn L. C. in *Rice(supra)*

> "I need not add that in doing (deciding) either, they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

On a consideration of all the aforementioned material of the appeal and for the aforementioned reasons, the question on which special leave to appeal was granted is answered in the affirmative.

This appeal is accordingly allowed and the judgment of the Court of Appeal dated 31.07.2006 is set aside. The Court of Appeal is directed to hear this case *de novo*. Since the appeal against the order of the District Court was dismissed on the merits after considering the preliminary objections, respondents, if they so desire, could raise the said preliminary objection to the appeal in the Court of Appeal.

There will be no order as to costs.

AMARATUNGA, J - I agree

MARSOOF, J. - I agree.

Appeal allowed.

Court of Appeal directed to hear case de novo.