CINEMAS LIMITED
v.
SOUNDERARAJAN

COURT OF APPEAL
JAYASURIYA, J.
CA.LA 66/97
CA NO. 382/987 (REVISION)
DC KANDY CASE NO. 2365/RE
JUNE 12, 1997.

Civil Procedure Code – s. 154, Explanation s. 404 – Failure to object to document when first tendered – Failure to contradict by cross–examination and lead evidence in rebuttal – Evidence Ordinance – Proof – Omnia praesumuntur rite et solenniter esse acta, donec probetur in contrarium.

(1) In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal – S. 154 CPC (explanation).

(2) Where one party to a litigation leads prima facie evidence and the adversory fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, it is a "matter" falling within the definition of the word "proof" in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting, to a misdirection.

(3) Once a Court accepts and acts on a proxy or a power of attorney presumably because no defect appears on the face of such document, any party who desires to question the authority of that document has the onus of showing, the want of authority. This rule is based on the pre-sumption – *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium.*

(4) In the determination on an issue in regard to substitution under section 404, the trial judge has the discretion.

Cases referred to:

1. *Perera v. Seyed Mohomed* 58 NLR 246.
2. *Adaicappa Chettiar v. Thomas Cook & Sons* (1930) 31 NLR 385.
3. *Silva v. Kindersley* 18 NLR 85.
4. *Eldrick Silva v. Chandradasa* 70 NLR 169.
5. *Wijesinghe v. Incorporated Council of Legal Education* 65 NLR 368.

APPLICATIONS for leave to appeal and revision.

S. Mahenthiran for petitioner.

A. K. Premadasa, PC with *C. E. de Silva* for respondent.

Cur. adv. vult.

June 12, 1997.

JAYASURIYA, J.

I have heard the learned counsel for the petitioner in the revision application and for the applicant in the leave to appeal application. The learned counsel for the petitioner is seeking to impugn the order made by the learned District Judge of Kandy dated 20.03.1997 which had been produced marked A. His principal contention is that the learned District Judge had relied in his order on documents marked P2 and P2A which is a certificate of heirship in succession issued by Regional Controller of Revenue Ejodu dated 20.09.1994. The learned counsel contends that this document does not come within the category of public documents of a foreign country, in that there

is no certificate under the seal of a notary public or British consul or diplomatic agent, that the said officer is a functionary having an official character and that it is certified by an officer having the legal custody of the original which is referred to in section 78 (6) (11) of the Evidence Ordinance. What is paramount in considering this submission which has been trotted out in appeal for the first time is that this objection was never taken when this document was adduced before the District Judge at the inquiry. In those circumstances this Court has necessarily to consider the provisions of section 154 in regard to tender of documents in evidence at trial or inquiries and the effect of the explanation to section 154 of the Civil Procedure Code which applies to all inquiries and trials in the District Court. Explanation reads thus: "If the opposing party does not, on the document being tendered in evidence, object to it being received and if the document is not such as is **forbidden by law** to be received in evidence, the Court should admit". Thus, in civil proceedings it is of paramount importance for the opponent to object to a document if it is inadmissible having regard to the provisions of the Evidence Ordinance. Where he fails to do so, the objections to admissibility cannot be raised for the first time in appeal. The principle and rationale behind this rule is easily understood. Had objection been taken, the party proposing to adduce the document would have tendered to the Court evidence aliunde and by the failure to take the objection the opposing party has waived the objection. Clearly, document P2 is not a document which **is forbidden by law** to be received in evidence. Justices Sinnetamby and L. W. de Silva (acting Judge) in *Perera v. Seyed Mohomed*[1] proceeded to distinguish between a document which is inadmissible having regard to the provisions of the Evidence Ordinance and a document which is forbidden by law and their Lordships held the failure to object by the opponent to certain deeds belonging to strangers to the action which were inadmissible having regard to the provisions of the Evidence Ordinance at the trial, rendered those deeds and documentary evidence admissible evidence in the case and their Lordships were of the considered view that no objection can be taken to them in appeal. This is a point of difference between criminal proceedings and civil proceedings. In a civil case when a document is tendered the opposing party should **immediately** object to the document. Where the opposing party fails to object, the trial Judge has to admit the document unless the document is forbidden by law to be received and no objection to its admission can be taken up in appeal. Vide as authorities for this proposition *Adaicappa Chettiar v. Thomas Cook and Sons*[2]; *Silva v. Kindersley*[3]; *Perera v. Seyed Mohomed*[1] *(supra)*. Therefore, I hold that it is not

open to learned counsel for the petitioner and the applicant to object to the adduction of document P2 in appeal, inasmuch as no objection was taken to this document when it was sought to be immediately marked in evidence at the inquiry.

At the inquiry witness Govindasamy Krishnamoorthy gave evidence and in the course of his evidence in-chief he has stated that the party proposed to be substituted – V. R. Sounderarajan is the eldest son of A. R. L. S. Ramanathan Veerappan Ramanathan Chettiar, the deceased hereditary trustee. When he stated that the proposed party to be substituted is the eldest son of the said deceased, that oral testimony has not been contradicted by the process of cross examination. Equally, at the inquiry, when the defendant-respondent had the unfettered and unrestricted opportunity and right to lead rebutting evidence on this point the defendant-respondent has completely failed to lead such rebutting evidence. In this situation the principles laid down by Justice H. N. G. Fernando in *Eldrick Silva v. Chandradasa*[4] come into operation – "where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, that is a special feature in the case and it is a "matter" falling within the definition of the word "proof" in the Evidence Ordinance and if any Court were to fail to take cognizance of this feature and matter, that would be a non-direction amounting, to a misdirection." I am in respectful agreement with the principles laid down by Justice H. N. G. Fernando and I hold that these principles are applicable to the situation under consideration. The defendant-respondent failed to contradict by cross-examination, the oral evidence of Govindasamy Krishnamoorthy when he stated that V. R. Sounderarajan, the proposed substitute was the eldest son of the said deceased trustee – Ramanathan Veerappan Ramanathan Chettiar. Neither was evidence in rebuttal led therefore the District Judge was entitled to act on this prima facie evidence which became cogent and overwhelming evidence by reason of the failure to contradict the witness and by the failure to lead evidence in rebuttal. The order of the District Judge is tenable and could be upheld having regard to these two considerations. In addition, there were three other documents marked, that is, P1 which is the Decree in DC Kandy Case Number 10804/X, P3 the power of Attorney dated 9.1.1995 and P5 the declaration dated 20.08.94; when all these documents were tendered and marked, they were not objected to and the provisions of the aforesaid explanation to section 154 of the Civil Procedure Code would be applicable to these documents.

In the petition the petitioner has attempted to impugn before this Court, the power of Attorney which has been produced and marked in evidence as P3. The principles laid down by Justice Sansoni in *Wijesinghe v. Incorporated Council of Legal Education*[5] with regard to powers of Attorney and proxies, answer the matters raised in the revision petition. Once a Court accepts and acts on a proxy or a power of Attorney presumably because no defect appears on the face of such document, any party who desires to question the authority of that document has the onus of showing, the want of authority. Justice Sansoni relied upon and applied the presumptions which attach to a power of Attorney or a proxy in such situation. Vide His Lordship's remarks at page 368. This rule is based on the presumption *omnia praesumunturr ite et solenniter esse acta donec probetur in contrarium.* This is a complete answer to the matter raised in the petition of the revision application. In the determination of an issue in regard to substitution under section 404 of the Civil Procedure Code, the trial judge has a discretion and I hold in the instant situation the District Judge of Kandy has correctly exercised his discretion on a consideration of the material placed before him.

In the circumstances I refuse notice to issue on this revision application and I proceed to dismiss this revision application without costs. I also refuse leave to appeal against the order of the learned Distict Judge of Kandy dated 20.03.1997.

Notice refused.