ALWIS
v
RAFENSTEIN

COURT OF APPEAL.
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA 205/2001.
DC HORANA 6651/MR.
MARCH 18 AND
MAY 9 AND 23, 2002.

Civil Procedure Code, sections 112,143,(1), 145,153,154 and 158 – Examination on a relevant portion of document when no cross examination had been done on the document – Permissibility – Introduction of documents for first time in re-examination – Permissibility – Postponement sought – Non availability of witness – Refused – Direction of court – No specific prayer for leave to appeal – Is it fatal?

At the trial the counsel for the defendant-appellant sought the permission of court to mark document V12. This was allowed by the trial judge. Relevant portions from V12A to V120 of V12 had been marked by the defendant in the course of cross examination, but the witness was not cross examined on the said portions "V12". After the conclusion of the cross-examination of this witness by the plaintiff the defendant made an attempt to re-examine the witness on the relevant portions of the document V12. This was refused by court. Thereafter, the defendant-petitioner sought to mark document V14 in the course of re-examination of his own witness. This was also refused by court. After further evidence was recorded, the defendant-petitioner made an application for a postponement of the trial on the ground of non availability of the defendant's witness. This too was refused by court.

On leave being sought.-

Held:

(1) A careful reading of section 153 makes it evident, it is only if he had been cross examined on a matter that re-examination is permitted. As the impugned order is concerned, it is evident that there had not been any examination on the portions V12A - V120 of V12.

(2) Introduction of documents for the first time in the course of re-examination of a witness should not be permitted as grave prejudice could be caused to a party who had no opportunity of testing the authenticity of the document.

(3) The discretion whether to adjourn the proceedings or not on an application made by a party is entirely vested in the District Judge and no party can question the Districe Judge's right in regard to the exercise of the discretion. The power vested by section 143(1) should be exercised with due regard to section 145.

(4) Although the petitioner has not made any specific prayer for leave to appeal he has unambiguously set out the provisions of the Code under which he claims his relief. It can be said that the plaintiff-respondent was not prejudiced in any manner by the absence of a specific prayer for leave to appeal in his petition.

Per Nanayakkara, J.

" It is settled law, that rules of procedure in making an application to court should not be used to hinder administration of justice but to eliminate delay and facilitate due administration of justice."

APPLICATION for leave to appeal from an order of the District Court of Horana.

Cases referred to:

(1) *S. Ponnadurai* v *G.C.P. Amerasekera* – LLJ 95

(2) *Perera* v *Avishamy* – 12 NLR 26

(3) *Weerakoon* v *Hewavitharana* – (78 – 79) 2 Sri LR 97

(4) *Kiriwante v Navaratne* – 1996 2 Sri LR 393

V. Kulatunga for appellant.

C.E. de Silva with *Sarath Walgama* for petitioner

Cur. adv. vult

September 03, 2002.

NANAYAKKARA, J.

The defendant-appellant in this case has canvassed by this 01
application three orders made on 28.5.2001 by the learned District Judge in the course of the trial held in an action instituted by the plaintiff-respondent (respondent) against the defendant-appellant

for the recovery of a sum of Rs. 1973410/- which the plaintiff alleged was obtained by the defendant in excess of the actual sum due to him for some construction work (hostel) undertaken by the defendant-appellant. After the institution of the action, the defendent in response to the pleadings in the plaint, filed her answer making a claim in reconvention.

The trial of this action had proceeded on the basis of 17 issues, and of the 17 issues, first four issues had been formulated by the plaintiff, while the rest had been formulated by the defendant.

Thereafter the plaintiff-respondent had commenced her case by leading her evidence. At the end of the plaintiff-respondent's evidence a witness by the name of C. Wedikkara who had carried out an inspection of the building and prepared an estimate consequent to a commission issued by court had given evidence on behalf of the plaintiff.

After the closure of the plaintiff's case the defendant had commenced her case by placing her evidence before court. Thereafter a witness by the name of Sarath Padmasiri Perera whom the defendant-appellant alleges is a Diploma holder in civil engineering and possessed qualifications and experience in the field of quality surveying and building construction had been called as a witness with a view to rebutting the evidence given by Weddikkara, on behalf of the plaintiff-respondent. In the course of the cross examination of this witness by the plaintiff-respondent in response to the following question:

1. ඒ පිළිබඳව විස්තරාත්මක චාර්තාවක් මේ අවස්ථාවේදී ඉදිරිපත් කරන්න පුළුවන්ද?
2. ඇන් ඉදිරිපත් කරන්න බැහැ. කටින් කියන්න පුළුවන්.

the counsel for the defendant-appellant sought the permission of court to mark a document (P12) which had a direct bearing on and arising out of the question posed by the Counsel for the plaintiff. Although the Counsel objected to the production of the document on the ground that it did not bear the name of the author, or its maker, the learned District Judge disallowing the objection had permitted the defedant to mark the said document.

Thereafter relevant portions from V12A to V12O of the document (V12) had been marked by the defendant in the course

of cross examination. But the witness was not cross examined on the said portions of the document (V12) by the plaintiff.

At the conclusion of the cross examination of the witness by the plaintiff the defendant purporting to act under section 153 of Civil Procedure Code had made an attempt to re-examine this witness on the relevant portions of the document marked V12. The learned District Judge had disallowed it on the ground that no cross examination had been done by the plaintiff on the document.

This is one of the orders canvassed by the defendant by this application and it would be necessary at this stage to examine the validity of this particular order before the validity of other 2 orders made on this day are examined. In this connection it would be important to refer to section 153 of the Civil Procedure Code which is relevant to the question in issue. The particular section provides thus:-

> 153. Then shall follow re-examination by the first side if required, for the purpose of enabling the witness to explain such answers given by him on cross examination as may have left facts imperfectly stated by him, and to add such further facts as may have been suggested and made admissible by the cross examination.

A careful reading of this section makes it evident, it is only if they had been cross examined on a matter that re-examination is permitted. As far as the impugned order is concerned, it is evident that there had not been any cross examination on the portions V12A to V120 of the document (V12) sought to be marked by the defendant's Counsel in the course of cross examination of the defendant's witness by the plaintiff.

Therefore, I am of the view that the learned District Judge was correct in disallowing any re-examination on the aforesaid portions of the document (V12) marked by the defendant-appellant as the question of re-examination would arise only if there is cross examination on a matter.

The 2nd order canvassed by this defendant-petitioner by this application relates to a document which the counsel for the defendant-petitioner sought to mark in the course of the re-examination of his own witness.

The learned District Judge had disallowed the defendant-petitioner's application to mark this document (V14) on the ground that the existence of this document (V14) had come to light only in the course of re-examination of his witness Dayasiri Perera, and no attempt had been made to produce it at the time when the witness was under examination-in-chief.

It would be now necessary to examine the correctness of the impugned order.

For this purpose examination of the sections 112 and 154 of the Civil Procedure Code would be pertinent. Section 112 of the Civil Procedure Code provides thus:-

> 112. No documentary evidence in the possession or power of any party which should have been, but has not been produced in accordance with the requirements of section 111, shall be received at any subsequent stage of the proceedings, unless good cause be shown to the satisfaction of the court for the non production thereof. And the court on receiving any such evidence shall record its reason for so doing.

Section 154 of the Civil Procedure Code provides thus:-

> 154. (1) Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness. If it is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means, of and under an order from, the court. If it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy thereof shall be used in evidence instead.

It is clear from a careful reading of the section of the Civil Procedure Code, that introduction of documents for the first time in the course of re-examination of witnesses, should not be permitted, as grave prejudice could be caused to a party who had not had an opportunity of testing the authenticity of the document.

In this regard the decisions of *S. Ponnudurai* v *G.C.P. Amerasekera.* (1) and *Perera* v *Avishamy*(2). would be useful in resolving the issue at hand. Therefore I am of the view that the learned District Judge was correct in not permitting the defendant-appellant to mark this particular document (V14) in the course of re-examination.

As far as this particular document (V14) sought to be marked by the defendant-appellant is concerned, it is evident from a perusal of the proceedings that, it is a document with which the defendant-petitioner had ample opportunity of either confronting the plaintiff when he was giving evidence or when the particular witness summoned on behalf of the defendant-petitioner was giving evidence.

It is only when the defendant-petitioner made an attempt to mark this document during the course of the re-examination, of his own witness that the learned District Judge had disallowed the application.

Therefore placing reliance on the provisions of sections 112 and 154 of the Civil Procedure Code, it is my considered view that the learned District Judge was correct in disallowing this particular document to be marked in re-examination of the witness.

The third order which the defendant-appellant impugns results from the learned District Judge's refusal of an application made for a postponement of the trial on the ground of non availability of the defendant's witness who was expected to give evidence on that day.

It would be now necessary to determine whether the learned District Judge was justified in refusing the defendant-appellant's application for postponement of the trial on the ground of non availability of the witness as alleged by the appellant.

Perusal of the proceedings of the District Court discloses that after many dates of trial, on which the evidence of both the plaintiff and the defendant had been taken, the learned Judge on 17.05.2001 had finally fixed the trial for 25.05.2001 for the purpose of recording further evidence of the defendant-petitioner's husband's evidence. At the conclusion of the defendant-appellant-

petitioner's husband's evidence, his Counsel had moved for a postponement of the trial on the ground that a witness whom the defendant-appellant intended to call had left the court.

In regard to this impugned order, it should be observed that examination of the relevant entries in the record shows that there had not been any attempt on the part of the defendant-petitioner to take out summons on this particular witness to be present in court although trial had been fixed finally for this day. There is also no evidence to show that this particular witness was at least present in court on that day to testify on behalf of the defendant-petitioner.

If at the conclusion of the evidence of a witness the trial court finds that it could proceed with further evidence, it is well within the powers of the trial Judge to call upon a party to lead the evidence of any other witness till the trial is adjourned for the day. The discretion whether to adjourn the hearing or not on an application made by a party entirely is vested in the District Judge and no party can question the District Judge's right in regard to the exercise of that discretion. This is clearly borne out by *Weerakoon* v *Hewavitharana.* (3)

In this connection, reference to section 145 of the Civil Procedure Code would also be pertinent. Section 145 of the Civil Procedure Code reads thus:

> 145. If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith.

It is true, as shown in section 143(1) of the Civil Procedure Code, the court is empowered depending on sufficient cause being shown if any to grant time to any of the parties or may from time to time adjourn the proceedings. But in my view, powers vested by this section should be exercised with due regard to sections 145 of the Civil Procedure Code.

Therefore, considering the circumstances in which the refusal for postponement of the trial was made by the learned District Judge, I am of the view that the learned District Judge was justified

in refusing the postponement prayed for by the defendant-petitioner.

Finally some observations should be made in regard to the preliminary objection taken by the plaintiff-respondent in this case. The plaintiff-respondent taking up a preliminary objection to this application has moved that it be rejected in *limine*, on account of the failure of the defendant-petitioner to pray specifically for leave to appeal by this application. The plaintiff-respondent avers that absence of a specific prayer for leave to appeal in the application and non compliance with the provisions of section 758 of the Civil Procedure Code disentitles the defendant-petitioner to the relief claimed by him.

It is settled law, that rules of procedure in making an application to court should not be used to hinder administration of justice but to eliminate delay and facilitate due administration of justice.

Reasoning adopted by his Lordship Kulatunga in a case of non compliance with the Supreme Court Rules is applicable with equal force to a situation where no compliance with section 758 of the Civil Procedure is alleged. Justice Kulatunge in *Kiriwantha* v *Navaratne* (4) dealing with a case of non compliance with the Rules of the Supreme Court expressed his view in the following terms:- "In exercising its discretion the court will bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. At the same time the court will not permit mere technicalities to stand in the way of the court doing justice". In the same case Justice Fernando expressing his view in the following terms said "Consequence of non compliance (by reason of impossibility or for any other reason) is a matter falling withing the discretion of the court, to be exercised after considering the nature of default, as well as the exercise or explanation thereof in the context of the object of the particular Rule".

Therefore considering the failure of the defendant-petitioner to make a specific claim for leave to appeal in his petition in the light of the reasoning adopted by these authorities should not be a ground for dismissal of the petition *in limine*, unless such failure has caused grave prejudice to a party.

In regard to this objection it should also be observed, although the petitioner has not made any specific prayer for leave to appeal, he has unambiguously set out the provisions of the Civil Procedure Code under which he claims his relief. Therefore it can be said that the plaintiff-respondent was not prejudiced in any manner by the absence of a specific prayer for leave to appeal in this petition.

For the foregoing reasons, although I reject the preliminay objection taken against the maintenance of the application, nevertheless in view of the findings already made by me in regard to the preliminary matters raised by the plaintiff-respondent, I refuse leave and cast the defendent-petitioner in cost in a sum of Rs. 5,000/-. 230

UDALAGAMA, J. - I agree.

Application dismissed.