SENEVIRATNE

v

SAMPATH BANK LTD.

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A. 895/93F
D.C. COLOMBO 12516/MR
APRIL 1, 2002

Civil Procedure Code – S. 143, S. 146, S.184(1), S. 839 – Adjournment of hearing – Sufficient cause – Evidence Ordinance S. 58 – Proof of facts.

The trial was fixed for two days – day 1 and day 2 (afternoon), application made by the defendant-appellant, to postpone case to day 2 was refused.

The plaintiff-respondent after the recording of the admission and the issues indicated to court that in view of the admissions he will not be leading any evidence. The counsel for the defendant-appellant moved for a further date to lead evidence. This was refused by the trial judge and a date granted to file written submissions. After the written submissions were tendered, the trial judge delivered judgment.

It was contended by the defendant-appellant that, the trial judge erred in law in refusing to grant an adjournment.

Held :

The court was correct in refusing the application in view of the fact that the defendant-appellant failed to show any sufficient cause for adjournment.

Per Somawansa, J.

> "If as the counsel submits that there is a practice of our courts to grant a date on the first date of trial, I think it is time that we get rid of that practice."

(i) In view of the admissions there was no need to call any witness to give evidence or mark or produce any document, S. 58 of the Evidence Ordinance and S. 184(1) C.P.C. are applicable.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to :

1. *Hanafii* v *Nallamma* 1998 1 SRI LR 73
2. *Mackinon Macanzie* and *Company* v *Grindlays Bank Ltd.* 1986 2 SRI LR 272

W. Dayaratne for defendant-appellant.

Aruna Samarajeewa for plaintiff-respondent.

Cur.adv.vult

May 22, 2002

SOMAWANSA, J.

The defendant-appellant has lodged this appeal seeking to set aside the judgment of the Addl. District Judge of Colombo dated 01.10.1993 entered in favour of the plaintiff-respondent in case No. 12516/MR.

The plaintiff-respondent's pleaded case was that the defendant-appellant who was running a service station entered into the agreement marked P1 with the plaintiff-respondent to provide service to the Master Card holders and that although not obliged to place any deposit in terms of the said agreement P1, consequent to entering into further agreement with the defendant-appellant marked P2 the plaintiff-respondent deposited a sum of Rs. 10,000/- on the specific understanding that the defendant-appellant would accept Master Cards issued by the plaintiff-respondent. However despite placing the aforesaid deposit, the defendant-appellant continued to refuse to accept Master Cards and therefore the plaintiff-respondent terminated the said agreement marked P1 and P2 and in terms of the agreement marked P2 requested the defendant-appellant to return the said deposit of Rs. 10,000/- However by letter dated 7 July 1992 marked P3 the defendant-appellant refused to return the said deposit. The defendant-appellant while admitting

that he entered into the said agreement marked P1 and P2 went on to say that the plaintiff-respondent verbally agreed to give a commission of Rs. 500/- per month for accepting Master Cards and pleaded that the total sum due to him as commission from the plaintiff-respondent is more than double the claim of the plaintiff-respondent and it is the defendant-appellant to whom a loss has been caused in the said transaction.

When the case was taken up for trial on 7 July 1993 the counsel for the defendant-appellant moved that the trial be taken up in the afternoon as the defendant-appellant was unable to attend court in the morning. However the learned Additional District Judge refused the said application on the ground that there were no other trials to be taken up in the morning and proceeded to hear the case.

At the commencement of the trial 5 admissions were recorded and on behalf of the plaintiff-respondent only one issue was raised while on behalf of the defendant-appellant 6 issues were raised. After recording the admissions and the issues counsel for the plaintiff-respondent indicated to court that in view of the admissions recorded, he will not be leading any evidence on behalf of the plaintiff-respondent. Thereafter counsel for the defendant-appellant moved for a further date to lead evidence on behalf of the defendant-appellant. This application too was refused by the learned Addl. District Judge and a date was granted to tender written submissions. Thereupon both parties tendered their respective written submissions and the learned Addl. District Judge by his judgment dated 1.10.1993 held in favour of the plaintiff-respondent.

At the hearing of this appeal one of the matters urged by the counsel for the defendant-appellant was that the learned Addl. District Judge has erred in law in refusing to grant an adjournment to the defendant-appellant in contravention of sections 143, 146 and section 839 of the Civil Procedure Code. Section 143 of the Civil Procedure Code deals with the adjournment of hearing of a case while section 146 deals with the determination of issues and section 839 deals with the inherent power of the court. On an examination of the brief, it appears that the trial in this case has been fixed for two days to wit: day 1 and day 2 of 07.07.1993. When the trial was taken up on day 01 of 07.07.93 counsel for the defendant-appellant moved that the trial be taken up on day 02 (in

the afternoon) as the defendant-appellant had informed him over the telephone that he was unable to attend court in the morning. The learned Addl. District Judge having observed that the case has been fixed for trial on day 01 and day 02 of 07.07.1993 refused the application for a postponement on the ground that there were no other trials remaining to be taken up on that day.

After the recording of admissions and issues, counsel for the plaintiff-respondent had indicated to court that in view of the admissions recorded he was not leading any evidence on behalf of the plaintiff-respondent. At this stage again counsel for the defendant-appellant moved for a further date to lead evidence. The learned Addl. District Judge refusing to grant an adjournment also referred to the earlier application and observed that though the defendant-appellant has informed his Attorney-at-Law over the telephone that he was unable to attend court in the morning he had not given any reason as to why he was unable to be present in court in the morning and it was for the defendant-appellant to satisfy court that he had a reasonable and just cause that prevented him from attending court which the defendant-appellant has failed to do.

The learned Addl. District Judge further goes on to say that even as regards the second application for an adjournment, the defendant-appellant has failed to satisfy court the existence of a just and reasonable cause. Section 143 of the Civil Procedure Code which deals with adjournment of the hearing of an action reads as follows:

> "(1) The court may if sufficient cause be shown, at any stage of the action grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the action.
>
> (2) In all such cases the court shall, fix a day for further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:"

It is clear from the wording of this section that for an adjournment to be granted in terms of this section sufficient cause must be shown. Consequently applying the provisions of section 143 of the Civil Procedure Code to the two applications made in this case for

an adjournment, it is clear that the learned Addl. District Judge was correct in refusing the two application in view of the fact that the defendant-appellant failed to show any sufficient cause for an adjournment. I might also say that **if as the counsel for the defendant-appellant submits that there is a practice of our courts to grant a date on the first date of trial, I think it is time that we got rid of that practice.** It may also be noted here that the defendant-appellant did not prefer a leave to appeal application or a revision application against the said order of the learned Addl. District Judge.

The two cases cited by the defendant-appellant *Hanafii* v *Nallamma*[1] and *Mackinon Macanzie and Company* v *Grindlays Bank Ltd.*[2] which deals with section 146 (1) and (2) of the Civil Procedure Code has no relevance to the question of adjournment of the hearing of an action.

It is also contended by the counsel for the defendant-appellant that there is no cause of action disclosed in the plaint. It must be mentioned here that this objection was not taken up or challenged in the original court. No issue was raised on this point. It must also be noted that though in paragraph 7 of the plaint, it is pleaded that by letter marked P3 the defendant-appellant informed that he would set off the sum of Rs. 10,000/- deposited with him for the commission due to him on oral agreement, the letter marked P3 do not contain such an averment.

However on an examination of this letter marked P3, it appears that the defendant-appellant has informed the plaintiff-respondent that he would refund the said sum of Rs. 10,000/- once the commission due to him is settled . Be that as it may, by letter marked P3 the defendant-respondent admits that a sum of Rs. 10,000/- was deposited with him and that the said deposit has not been returned to the plaintiff-respondent. It is also the position of the plaintiff-respondent that there was no such oral agreement to pay a commission on this transaction. Thus it would appear that the plaint disclose a cause of action.

It is also contended by the counsel for the defendant-appellant that since the plaintiff-respondent neither called any witnesses to give evidence nor marked or produce any document at the trial there is no evidence placed before court and therefore the judg-

ment of the learned Addl. District Judge is *ex facie* bad in law. However this argument of the defendant-appellant fails to impress in view of the provisions contained in section 58 of the Evidence Ordinance which reads thus:

> "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."

Also section 184(1) of the Civil Procedure Code states:

> "The court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsel, or registered attorneys (or recognized agents), shall, after consultation with the assessors (if any), pronounce judgment in open court".

In the instant case 5 admissions were recorded. They are as follows:

1. Paragraphs 1 and 2 of the plaint (incorporation of the plaintiff-respondent and the registration of the defendant-appellant.
2. Jurisdiction
3. That the defendant-appellant entered into the agreement morefully stated in paragraph 4 of the plaint. (Agreement marked P1)
4. That the defendant-appellant received a sum of Rs. 10,000/- as a deposit as morefully stated in paragraphs 05 and 06 of the plaint. (including document marked P2).

5. The document marked P3 annexed to the plaint. (the letter dated 7.7.1993). By admission of letter marked P3, the defendant-appellant also admit the plaintiff-respondent demanded the repayment of the deposit of Rs. 10,000/- by the letter of demand dated 2nd July 1992 and that the defendant-appellant has not repaid the said sum to the plaintiff-respondent.

The plaintiff-respondent raised one issue only.

In view of the above admissions is the plaintiff entitled to judgment as prayed for?

On an examination of the judgment, it appears that the learned Addl. District Judge has correctly considered the admissions and facts placed before him and has arrived at a correct finding. As it is clear that all elements that the plaintiff-respondent was called upon to establish in order to obtain judgment against the defendant-appellant were in fact admitted by the defendant-appellant.

The counsel for the defendant-appellant also argued that there was no proof of a proper demand made by the plaintiff-respondent for the said sum of Rs. 10,000/- However in view of letter marked P3 addressed to the Attorney-at-Law for the plaintiff-respondent by the defendant-appellant himself wherein he says–

"Reference to the letter of demand of 2nd July 1992 I have written to Mr. D.A. Amarasiri, Investigating Officer, Sampath Bank Card Centre re the deposit of Rs. 10,000/-. I agree that a sum of Rs. 10,000/- was deposited.

I request you to inform your client that on receiving the sum of Rs. 500/- per month from the date of issuing petrol to their card holders to the date of withdrawing this facility, I will refund the amount of Rs.10,000/- to the Bank."

The defendant-appellant cannot be heard to say that there was no proof of a proper demand in terms of the Agreement marked P2.

Counsel for the defendant-appellant also contended that the Court was in a position to infer that the defendant-appellant was entitled to receive a commission since he would not have agreed to accept Credit Cards if he did not receive a commission. This is only a speculation or would amount to conjecture and surmise.

For the foregoing reasons, I see no reason to disturb the judgment of the learned Addl. District Judge dated 01.10.1993. Accordingly, I dismiss the appeal with costs.

DISSANAYAKE, J. - I agree

Appeal dismissed.