RATNAYAKE AND ANOTHER
v.
KARUNAWATHIE

COURT OF APPEAL
H. A. G. DE SILVA, AND ABEYWARDENA, J.
C.A. 307/77 F
D.C. COLOMBO CASE NO. 1/955/M
JULY 07, 1983.

Delict — Negligence — Prescription — Affidavit evidence of witness in contested trial — Sections 151, 166, 167, 179 and 180 of the Civil Procedure Code.

In a running-down case, the accident and negligence and that the plaintiff was injured were admitted. The only question was damages. The plaintiff called the doctor and thereafter informed Court that only the plaintiff's evidence remained to be led and this would be done by means of an affidavit. Counsel for the defendant had no objection but requested that he be given an opportunity to cross-examine the plaintiff. The judge allowed this and gave a date for production of the affidavit. The affidavit was filed and the plaintiff was cross-examined.

Held —

Section 151 of the Civil Procedure Code enacts that after starting his case the party shall produce his evidence, calling his witness and by questions eliciting from each the relevant and material facts to which such witness can speak of his own observation. Under section 167 the evidence of the witness must be given orally, as prescribed, in open Court in the presence and under the personal direction and superintendence of the judge. Under section 166 the Court may for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in sections 146 to 165.

Under section 179 the Court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit instead of *viva voce* testimony. Under the proviso to this section when either party, *bona fide* desires the production of a witness before the court for examination *viva voce* and such witness can be so produced an order shall not be made authorising the evidence of such witness to be given otherwise than *viva voce*. Section 180 enacts that if the order has been made for proof of facts by affidavit, the Court may nevertheless at the instance of either party, order the attendance of the declarant or deponent at the hearing of the action for *viva voce* examination, if he is in Ceylon and can be produced.

Thus where after an order for the affidavit to be admitted has been made the necessity arises at a later stage for cross-examination of the declarant and an application is made in that behalf by the opposing party, the Court is empowered to permit such cross-examination even where it has initially made an order permitting the affidavit to be led under section 179.

It is not in every instance that a Court is permitted to depart from the provisions contained in sections 151 and 167. It must be for sufficient reasons to be recorded. There must be grave cause and this must be recorded.

The fact that the other side consents does not relieve the court from the duty of satisfying itself that there is sufficient reason for it to so depart from the procedure laid down.

The affidavit of the plaintiff must be ruled out despite the other side not objecting to it.

Cases referred to :

1. *Vinayak Pandurangrao v. Shoshadasacharya*
   AIR 1945 Bombay 60

2. *Mohamed Faus and another v. Satha Umma and Another* 58 CLW 46

N. S. A. Goonetilleke for defendants-appellants.

Ranjith Abeysuriya for plaintiff-respondent.

Cur. adv. vult

September 09, 1983
H. A. G. DE SILVA, J.

The plaintiff instituted this action against the defendants claiming from them jointly and severally a sum of Rs. 51,500/- comprising of Rs. 50,000/- as general damages and special damages by way of loss of income, medical expenses and other consequential damages, in a sum of Rs. 1,500/-. The learned District Judge awarded a sum of Rs. 65,000/- to the plaintiff as damages. It is from this order that the defendants have appealed.

The plaintiff in her plaint averred that on or about 31st October 1974 at about 11.30 a.m. at Maligawatte whilst she was walking on the left hand side of the road when one faces Maradana,

Motor lorry No. 24 Sri 96 driven by the 2nd defendant knocked her down causing her severe injuries and pain of body and mind. She further averred that she was knocked down by the said motor lorry due to the negligence of the 2nd defendant. She stated that she was 21 years of age at that time.

By reason of the said accident caused by the negligence of the 2nd defendant, the plaintiff averred that she had sustained grave injuries including head injuries. She had been rendered unconscious and had to be hospitalised and treated for concussional brain injury and injury to the ear, and scalp laceration on the right side of the head. In consequence of the said injuries, she stated that she had suffered and continued to suffer pain of mind, body discomfort, loss of general health and amenities of life. Consequently she had to give up her training resulting in loss of career and earning capacity.

She also averred that the 1st defendant was the owner of the said motor lorry and the 2nd defendant its driver, who was an employee or agent of the 1st defendant and drove the said motor lorry in the course of and within the scope of his employment under the 1st defendant, within the limits of his authority under the 1st defendant or with the express or implied permission of the 1st defendant.

She further averred that the 2nd defendant was charged in the Magistrate's Court of Narahenpitiya in case No. 19856/B and on 22.8.75 he pleaded guilty and was convicted on his own plea.

The defendants in their answer admitted the fact of the accident and that it was due to the negligence of the 2nd defendant. The main defence taken up by them was that the plaintiff's action was prescribed in law.

At the trial the following admissions were recorded:—

(1) That lorry No. 24 Sri 96 is owned by the 1st defendant.

(2) That at the time the accident occurred it was driven negligently by the 2nd defendant.

(3) That as a result of the accident injuries were caused to the plaintiff.

(4) That at the time of the accident the 2nd defendant was in the employment of the 1st defendant.

The case went to trial on one issue viz: as a result of the admitted facts to what sum is the plaintiff entitled in damages?

The plaintiff called Dr. Sarathchandra Abeysuriya, the Neuro Surgeon of the General Hospital, Colombo, to speak to the injuries she had been treated for at the General Hospital, Colombo, and the fact that she was suffering from Neuralgia as a result of the injuries caused to her. Thereafter the Counsel for the plaintiff informed Court that the only other evidence that would be led on behalf of the plaintiff would be her evidence and that her evidence would be led by means of an affidavit. Counsel for the defendants had no objection to this course of action but he requested that he be given an opportunity to cross-examine her. The learned trial Judge allowed this and gave a date for the production of the affidavit. An affidavit dated 13th May 1977 appears to have been filed on that day and on 15th August 1977, the plaintiff was cross-examined by the defence Counsel.

At the hearing of this appeal, learned Counsel for the defendants-appellants submitted that:—

(1) there was no provision to act on affidavit evidence in a contested case and that consent given to the leading of affidavit evidence does not bind the defendant and hence that the evidence contained in the affidavit must go out of the case in its entirety;

(2) the learned trial Judge's order does not state the basis of computation of the damages awarded, and

(3) though special damages have been asked for in the plaint, there was no evidence of special damages. The capacity

to earn Rs. 500/- per month as stated in para 10 of the plaintiff's affidavit was not a statement of fact but of belief.

Learned Counsel for the plaintiff-respondent in reply submitted that:—

(1) the evidence of Dr. Abeysuriya disclosed that the plaintiff had been hospitalised for one week and that she had attended the out-patient's clinic for 1½ years. The evidence of the Doctor and of the plaintiff as regards the injuries and consequential disabilities were the same.

(2) The defendants had not cross-examined the plaintiff on para 10 of her affidavit. i.e. as regards her earning capacity and therefore those facts as stated by her must be regarded as admitted. Section 58 of the Evidence Ordinance was a complete answer to the submission that there was no evidence as regards the earning capacity of the plaintiff.

(3) It was not permissible for the appellants to now canvass the facts in the affidavit which were not the subject-matter of cross-examination.

(4) The damages awarded were reasonable.

Learned Counsel for the appellants submitted that at a trial evidence has to be led by a party in conformity with Section 151 of the Civil Procedure Code.

Section 151 enacts that " after stating his case in person, or by his Proctor or Counsel, the same party shall produce his evidence, calling his witnesses and by questions, eliciting from each of them the relevant and material facts to which such witness can speak of his own observation."

Section 167 states that " the Court may for grave cause to be recorded by it at the time, permit a departure from the course of trial prescribed in the foregoing rules ", i.e. rules contained in sections 146-165.

Section 167 enacts that " the evidence of the witnesses shall be given orally, as above prescribed, in open Court in the presence and under the personal direction and superintendence of the Judge."

Mr. Abeysuriya for the respondent contended that the admission of the evidence of the plaintiff contained in her affidavit was warranted by the provisions of Section 179. This Section states that " the Court may, at any time, for sufficient reasons, order that any particular fact or facts may be proved by affidavit . . . instead of by the testimony of witnesses given *viva voce* before it, or that the affidavit, . . . of any witness may be read at the hearing of the action on such conditions as the Court shall think reasonable—

Provided that when it appears to the Court that either party bona fide desires the production of a witness before the Court for cross-examination *viva voce,* and that such witness can be so produced, an order shall not be made authorising the evidence of such witness to be given otherwise than *viva voce."*

Section 180 enacts that " in the event of an order having been made for the proof of facts by affidavit, . . . the Court may, nevertheless, at the instance of either party order the attendance of the declarant or deponent at the hearing of the action for *viva voce* examination, if he is in Ceylon and can be produced."

Mr. Gunatilaka for the appellants contends that affidavits which are admitted under Section 179 can never be the subject of cross-examination and that the stage contemplated in Section 180 is subsequent to the Section 179 stage.

I think there is much in what Mr. Gunatilaka states. If at the stage that an affidavit is sought to be produced under Section 179,

the opposing party desires that the witness be tendered for cross-examination, as has happened in this case, the very terms of the proviso to that Section precludes the Court from permitting the affidavit to be read in evidence. When one reads Section 180 with Section 179 and its proviso, the situation contemplated in Section 180 is where after an order for the affidavit to be admitted has been made, the necessity arises at a later stage for cross-examination of the declarant and an application is made in that behalf by the opposing party, the Court is empowered to permit such cross-examination even where it has initially made an order permitting the affidavit to be led under Section 179. To give a different interpretation, that is to say, that if a request for cross-examination is made at the time permission is sought for affidavit evidence to be led, the Court could permit the admission of the affidavit under Section 179 and at the same time permit cross-examination under Section 180 would in my opinion be contradictory to the terms of the proviso to Section 179.

A further matter that appears to me to be relevant is that, it is not in every instance that a Court is permitted to depart from provisions such as contained in Sections 151 and 167 but only " for sufficient reasons ", i.e. there must be a reason which the Court considers sufficient to depart from the normal procedure. Section 166 states that " the Court may for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in the foregoing rule ", i.e. Sections 146 and 165. In this case no reason at all appears to have been given or recorded for the affidavit of the plaintiff to be led instead of her *viva voce* evidence. The fact that the other side consents to such a procedure does not obviate the Court from satisfying itself that there is sufficient reason for it to so depart from the procedure laid down in the preceding Sections of that Chapter.

In the case of *Vinayak Pandurangrao v. Shoshadasacharya* (1) — it was held that " under the provisions of 0.19, R.I. no doubt it is open to the Court to allow a fact to be proved by affidavit, but where either party bona fide desires the production of the

witness for cross-examination and such witness can be produced, it is not open to the Judge to allow the matter to be proved by affidavit ". It may be mentioned that 0.19 R.I. of the Indian Civil Procedure Code is analogous to Section 179 of our Civil Procedure Code.

In *Mohamed Faus and another v. Satha Umma and another* (2) it was held inter alia that inadmissible evidence does not become legal evidence by the mere fact that it passed into the record of the proceedings unnoticed by the Judge or without objection being taken by the opposite side.

A *fortiori,* the admission of inadmissible evidence even with the consent of the opposing party would not make it legal evidence.

I am therefore of the view, that a consideration of the relevant Sections of the Civil Procedure Code indicates that the admission of the evidence of the plaintiff contained in her affidavit is not warranted by law and the entire affidavit must be ruled out. This connotes that all facts stated therein which have not been admitted by the defendants disappear from the case which would mean that all the evidence of her injuries, earning capacity and the grounds for her claim for damages, other than those elicited from her in cross-examination and those spoken to by Dr. Abeysuriya would not be available. In effect the facts averred in paragraphs 6 to 12 of the affidavit would disappear and with them, the basis for a proper computation of the images prayed for by the plaintiff can no longer stand. I therefore set aside the order of the learned District Judge and send the case back for a re-trial, subject to the admissions already recorded, on the issue of the quantum of damages to which the plaintiff would be entitled. The defendants-appellants will be entitled to the costs of this appeal.

ABEYWARDENA, J. — I agree.

Appeal allowed
Case sent back for re-trial.