

1945

Present: Soertz A.C.J. and Rose J.

ABNER & CO., Appellant, and CEYLON OVERSEAS
TEA TRADING CO., Respondent.

104—D. C. Colombo, 15,725.

Commission to examine witnesses—Application for evidence to be taken on commission—Requirement of due diligence in making it—Discretion of Court—Civil Procedure Code, s. 422.

Where the plaintiff, a merchant residing in Cairo, was desirous of having his evidence and that of certain of his witnesses taken on commission but the Court refused his application principally on the ground that the plaintiff had shown want of due diligence in making his application—

Held, that, although the granting or withholding of a commission is a matter within the discretion of the Court, it is the duty of the Appellate Court to examine the principles which should govern the exercise of a discretion in cases where it is alleged that a plaintiff has failed to show due diligence in making his application.

A PPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *D. W. Fernando* and *C. E. L. Wickremasinghe*), for plaintiff, appellant.—In this case the plaintiff, who is a merchant residing in Egypt, sued the defendant for breach of contract. The plaintiff made an application under section 422 of the Civil Procedure Code to have his evidence taken on commission. The District Judge refused his application on the ground that he had shown a want of due diligence. This appeal is against that refusal. It is submitted that delay *per se* is not a ground for refusing the issue of a commission. Only such delay as effects the postponement of a trial can be a valid ground for refusal— *Armour v. Walker*¹; *Steuart v. Gladstone*². Further, no reason has been adduced to show why the granting of a commission would prejudice the respondent.

¹ (1883) 50 L. T. (N. S.) 292.

² L. R. (1877-85) 7 Ch. 394.

N. K. Choksy (with him *Izadeen Ismail*), for defendant, respondent.—The question is whether the plaintiff has been guilty of unreasonable delay in making his application. The case was taken off the trial roll for the purpose of an issue of a commission. The matter is in the discretion of the trial Judge, and where that discretion has been exercised substantially in a manner conducive to justice a Court of Appeal will not interfere—*Ameresekere v. Cannangara*¹; *Kenny v. Wickremesinghe*².

H. V. Perera, K.C., replied.

Cur. adv. vult.

December 19, 1945. ROSE J.—

The plaintiff-appellant, who is a merchant residing in Cairo, instituted an action for damages alleged to have been sustained by him in consequence of the failure of the respondent to fulfil certain contracts for the supply of tea and desiccated coconut oil. The appellant is desirous of having his evidence and that of certain of his witnesses taken on commission. The learned District Judge, however, refused his application principally on the ground that the appellant had shown a want of due diligence in pursuing the matter. The present appeal is against that refusal.

The history of the matter appears to have been as follows:—On February 7, 1945, application was made on behalf of the plaintiff for a postponement of the trial date, February 27, 1945, to suit the convenience of plaintiff's Counsel. The defendant's Proctor seems to have consented to the proposed adjournment; the trial date was then fixed for May 11, 1945. On May 3, 1945, the following journal entry appears:—

“ 3.5.45.—

As the plaintiff's evidence will have to be recorded on Commission Proctors for plaintiff move that pending the issue of such Commission the trial fixed for the 11th instant be postponed.

Take case off trial roll.

Intd. S. C. S.

Later—

Case called in open Court.

Adv. D. W. Fernando for plaintiff.

Adv. Choksy for defendant says he has no objection to the case being taken off the trial roll but that he may object to the issue of a commission.

The order last made will be without prejudice.

Sgd. S. C. Swan.”

On May 11, 1945, appears the following journal entry:—

“ 11.5.45.—

Case called.

Put by.

Intd. S. C. S.”.

On July 3, 1945, the appellant's Proctor filed a petition that the Court be pleased to allow a Commission to issue to a Mr. Edward Haym of

¹ (1939) 41 N. L. R. 333.

² (1936) 16 C. L. Rec. 135.

Cairo empowering him to examine the appellant and certain other witnesses. The order, which is the subject matter of this appeal, was made on August 27, 1945.

The granting or withholding of a Commission is, of course, a matter within the discretion of the Court and normally an Appellate Court would be slow to interfere with the exercise of this discretion. In the present matter, however, it is quite clear that the discretion was exercised in substance for one reason only and I am therefore in agreement with the contention of Counsel for the appellant that it is the duty of this Court to examine the principles which should govern the exercise of a discretion in cases where it is alleged that a plaintiff has failed to show due diligence in making his application. In *L. R. 1877, 7 Ch.D.* at page 394, Fry J. says—

“ Now, I have a very strong opinion that when a plaintiff comes to ask that the hearing of his cause may be postponed he must show due diligence on his own part in making the application. I think it is a great hardship upon defendants to have the hearing of causes postponed and suspended, and, so far as I am concerned, I shall always endeavour to avoid granting the indulgence of postponing a trial unless the plaintiff has used due diligence in applying, and has some good and strong reason for seeking a postponement ”.

It is to be noted that Fry J. considers the matter from the point of view whether the application for the issue of a Commission involves a postponement of the trial date. Now, in the present matter had Counsel for the respondent on May 3, 1945, taken up the position that he objected to the postponement of the trial which was then fixed for May 11, 1945, on the ground that the appellant had at that time shown a lack of due diligence having regard to his passivity between February 27, 1945, which was the earlier trial date, and the date of the application, I am of opinion that the learned Judge could properly have refused the appellant's application. In fact, however, learned Counsel for the respondent took up a different position in that he agreed to the case being taken off the trial roll. It is true that the order of removal was made “ without prejudice ” and that respondent's Counsel intimated that “ he may object to the issue of a Commission ” but it seems to me that the only reasonable interpretation to be given to that matter is that it only remained open for respondent's Counsel to object to the issue of a Commission on grounds existing at the time of the new application, that is to say, in the event, on July 3, 1945. It seems to me that on the latter date the appellant's application did not necessarily involve any or any appreciable postponement of the trial date, inasmuch as at that time the case had not been replaced on the trial roll, and it was then too late for the respondent's Counsel to revert to the state of affairs existing prior to the order of Court of May 3, 1945, of which of course, as I have already said, he could then have availed himself.

Having regard therefore to the state of affairs existing on July 3, 1945, I am of opinion that there was no material on which the learned Judge could properly hold that the appellant had shown a lack of due diligence

in making his application. I would add that on the merits nothing has been adduced to us in argument to show that the appellant's request for a Commission to issue is unreasonable or would prejudice the respondent nor was this aspect of the matter pressed before the learned District Judge.

In my opinion, therefore, the appeal must be allowed and the matter remitted to the District Court for the necessary order to be made on such conditions as may seem fit to the learned Judge. In all the circumstances I am of opinion that the fair order is that the costs of this appeal and those involved in the hearing of the application before the District Judge should be in the cause.

SOERTSZ A.C.J.—I agree.

Appeal allowed.

