

**WIJERATNE
v
WIJERATNA**

COURT OF APPEAL
WIMALACHANDRA, J.
CALA. 421/2003
D.C. PUGODA 579/L
JUNE 8, 2004

Civil Procedure Code, section 75(d) – No denial of an averment – Is it an admission? – Non admission of the averment – Does it amount to a specific denial?

Held:

- (i) In terms of section 75(d) where a defendant does not deny an averment in the plaint he must be deemed to have admitted that averment.

Per Wimalachandra, J.,

“Each allegation of fact, which has been admitted by the respondent, has been expressly and specifically dealt with by him. In my view it is only in instances where the facts alleged by the plaintiff are not specifically dealt with either by an express denial or by a specific statement of non admission that they will be taken as admitted.”

- (ii) A general denial of an averment of the opponent or a general statement of non admission of such delegation does not amount to a specific denial, but a distinct and specific statement of non admission of the averment of the opponent, amounts to specific denial.
- (iii) There must be a specific denial or a definite refusal to admit. It must be unambiguous and not evasive.

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

Case referred to:

1. *Fernando v Samarasekera* – 49 NLR 285 (distinguished)

Aravinda R.I. Athurupana for plaintiff-petitioner.

R.K.S. Sureschandra for defendant-respondent.

Note by Editor: The Supreme Court in SC Spl/LA.refused special leave to appeal to the Supreme Court.

Cur.adv.vult

August 04, 2004

WIMALACHANDRA, J.

This is a leave to appeal application against the order of the District Judge of Pugoda dated 23.10.2003.

The plaintiff-petitioner (hereinafter referred to as the petitioner) instituted action in the District Court of Pugoda against the defendant-respondent (hereinafter referred to as the respondent) *inter alia* for a declaration of title to the portions of land described in the 3rd, 4th and 5th schedules to the plaint. The portions of land described in the 3rd, 4th and 5th schedules were parts of the land described in the 2nd schedule to the plaint. The plaintiff has also sought a declaration that the respondent was not entitled to a right of way over the said lands described in the 3rd, 4th and 5th schedules to the plaint.

The respondent in his answer set up a claim in reconvention seeking a declaration of title to the right of way in respect of the lands described in the 3rd, 4th and 5th schedules to the plaint.

The facts relevant to this application are, briefly as follows:

When the case was taken up for trial on 14.11.2002 the petitioner moved court to enter judgment as prayed for in the plaint for the reason that the paragraph 21 of the plaint had not been expressly denied by the respondent in his answer. In respect of this application, after hearing both parties, the learned Judge made order on 22.4.2003 that the said question would be decided at the end of the trial.

The case was again taken up for further trial on 23.10.2003 and on that day after the admissions were recorded the petitioner's counsel submitted to Court that the respondent had not expressly denied the averments in paragraphs 2,3,4,5,6,7,8,9,10,15,16,17 and 18, and move Court that by operation of law the respondent be declared as deemed to have admitted the said averments. The learned Judge after hearing both parties made order on 30 23.10.2003, that the answer of the respondent complied with the provisions of section 75(d) of the Civil Procedure Code. It is against this order that the petitioner has made this application for leave of appeal.

In terms of section 75(d), where a defendant does not deny an averment in the plaint he must be deemed to have admitted that averment.

Upon an examination of the answer of the respondent it appears that the respondent has answered all the averments in the paragraphs of the plaint. The respondent has admitted paragraph 1 of the plaint partly and denied that a cause of action has been 40 accrued to the petitioner. He has admitted paragraphs 2,3,5 and 6 of the plaint. He has answered paragraphs 4 and 7 of the plaint and denied the position taken by the petitioner. The respondent has denied the averments in paragraphs 9,11,12,13,14 and 19 of the plaint and set out the position taken by him. He has answered paragraphs 10 and 15 rejecting the position taken by the petitioner. He admits the averments in paragraphs 16 and 17, but states that even prior to the institution of case No. 1104/L he had acquired a servitude over the land depicted as lot E in plan No. 810. He has admitted the paragraph 18 of the plaint partly, but denied that he 50 obtained the leave and licence of the petitioner to use the right of way over the land referred to in the said paragraph. He had denied the averments in paragraphs 19,20 and 21 of the plaint and stated his position with regard to the said averments.

Each allegation of fact, which has not been admitted by the respondent, has been expressly and specifically dealt with by him. In my view it is only in instances where the facts alleged by the plaintiff are not specifically dealt with either by an express denial or by a specific statement of non admission that they will be taken as 60

admitted. The respondent has answered all the averments in the plaint.

Section 75(d) of the Civil Procedure Code requires a defendant to admit or deny the several averments in the plaint. This provision is similar to the order 18, rule 13 of the Rules of the Supreme Court of England relating to the rules of pleadings. It provides that facts averred in the plaint if not traversed is deemed to be admitted, and that traverse may be made either by denial or by a distinct statement of non admission.

A traverse is the express contradiction of an allegation of fact in an opponent's pleadings; it is generally a contradiction of the very terms of allegation. (vide - Odger's Principles of Pleadings and Practice 19th edition at page 128). 70

In *Fernando v Samarasekera*⁽¹⁾ our Supreme Court held that where a defendant does not deny an averment in the plaint, he must be deemed to have admitted that averment. However, the Supreme Court has not considered the position where an allegation of fact made by a party in his pleading is traversed by the opposite party by a distinct and specific statement of non-admission.

A general denial of an averment of the opponent or a general statement of non-admission of such allegation does not amount to a specific denial. But a distinct and specific statement of non admission of an averment of the opponent, in my view, amounts to a specific denial. There must be a specific denial or a definite refusal to admit. It must be unambiguous and not evasive. 80

In the instant case the respondent has answered all the averments in the plaint. The learned Counsel for the petitioner strenuously contended in his written submissions that the respondent has not specifically denied the paragraph 21 of the plaint; hence the petitioner is entitled to judgment in his favour. The respondent in replying to the averments in paragraph 21 of the plaint has stated in paragraph 17 of the answer as follows: 90

"21 වන ඡේදයේ සඳහන් අන්දමේ කිසිදු තවු තිමිත්තක් පැමිණිලිකරුගේ වාසියට උද්ගතව තැනි බව කියා සිටී."

The question is, does the aforesaid statement amount to a denial as contemplated by section 75(d) of the Civil Procedure Code? This matter has to be determined in the light of the above discussions. In my view the aforesaid statement in paragraph 17 of the answer is a specific and precise contradiction of a statement of facts in paragraph 21 of the plaint. It is also a distinct and definite non admission of averments in paragraph 21 of the plaint. In my opinion this amounts to a denial within the meaning of section 75(d) of the Civil Procedure Code. 100

In the circumstances it is my considered view that the learned District Judge has made the correct order that the respondent had complied with the provisions of section 75(d) of the Civil Procedure Code.

For these reasons this Court sees no cause to interfere with the order of the learned District Judge dated 24.3.2003. Accordingly, the application for leave to appeal is refused with costs fixed at Rs. 5,250/- 110

Application dismissed.