1956 *Present:* K. D. de Silva, J., and H. N. G. Fernando, J.

M. B. NANDAWATHIE DE SILVA, Appellant, *and* M. B. YASAWATHIE DE SILVA *et al.*, Respondents

S. C. 51 (Inty.)—D. C. Galle, 5470/L

Discovery and Inspection of Documents—Scope and procedure—Objection to inspection on ground that documents do not support opponent's case—Form of affidavit—Civil Procedure Code, ss. 50, 51, 102, 103, 104, 105, 106, 109.

An order for discovery of documents need not be made as a matter of course, but is discretionary and may be resisted by a claim of privilege although no express provision in this behalf is to be found in section 102 of the Civil Procedure Code.

Although section 106 of the Civil Procedure Code does not on its face authorise the Court to refuse inspection of documents, the obligation to produce documents for inspection is much more restricted than the obligation to disclose their existence. One of the main grounds of protection is that the documents relate solely to the case of the party giving the discovery.

Where objection is taken to the inspection of any documents on the ground that they relate solely to the case of the party giving the discovery, the following is the proper procedure:—the party must declare by affidavit that the documents in question support or relate exclusively to his own case and that they contain nothing supporting or tending to support the adversary's case. An assertion in these terms is conclusive " unless the Court is reasonably satisfied or reasonably certain from particular sources that the nature of the document has been erroneously misconceived or that the documents are of such a character that the party cannot properly make such an assertion or the case has been misconceived ". In view of the conclusive effect which an affidavit made in the proper terms may have, a very serious responsibility is imposed on the legal advisers to peruse carefully all the documents and to refrain from advising their client to swear the affidavit unless the documents in questions do not even *tend to support* the opponent's case.

Where the party noticed fails to make the appropriate averments in the affidavit, the Court will usually not reject the affidavit without giving the party a further opportunity to make a further affidavit.

APPEAL from an order of the District Court, Galle.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff-appellant.

D. S. Jayawickreme, Q.C., with *C. D. S. Siriwardene*, for the defendants-respondents.

Cur. adv. vult.

February 28, 1956. H. N. G. FERNANDO, J.—

The plaintiff instituted this action for a declaration that three deeds executed by her deceased mother on 6th October, 1952, are null and void on the ground that their execution was secured by the defendants (brother

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and sisters of the plaintiff) by fraud and collusion. After filing answer denying the allegations in the plaint, the defendants moved for notice on the plaintiff to declare by affidavit the documents to be relied on by her at the trial. Notice having issued, the plaintiff filed the necessary list which referred to three classes of documents—certain deeds and copies thereof, prescriptions and certificates issued by doctors, and letters written to the plaintiff's husband by the 3rd defendant and by the broker who arranged the marriage between plaintiff and her husband. In the accompanying affidavit, the plaintiff objected to the production of the two latter classes of documents " on the ground that they relate solely to my own title and contain evidence by which I seek to prove my case ". The defendants thereafter applied for an order of inspection in relation to all the documents, and, in response to the notice to produce, the plaintiff has again objected to production in the same terms, subject to the alteration that " they relate solely to my title and case ".

At the inquiry into the application for inspection, the learned District Judge rejected the objections of the plaintiff for the reason that in his opinion the documents " do not relate to title whatsoever, but to other facts which are expected to help the plaintiff to prove her case ". He accordingly ordered the production for inspection of all the documents the production of which was pressed for at the inquiry.

It was agreed on both sides that in the Courts outside Colombo recourse is not often had to those provisions of the Civil Procedure Code relating to discovery and inspection of documents, and in view of the fairly full arguments which have been urged at the hearing of this appeal, we consider this a suitable opportunity to attempt some explanation of those provisions.

The Court has power under section 102 to order any party to declare by affidavit all the documents in his possession or power relating to any matter in question in an action, and in an affidavit under the section, the party is required to specify which of the listed documents he objects to produce and the grounds of his objection. Application for such an order may be made by a party at any time before the hearing.

Section 103 empowers the Court at any time during the pendency of an action to order the production of documents in the possession or power of a party and to deal with the documents when produced in such manner as appears just. This section does not confer any right on a party to ask for production, but appears rather to give the Court a discretion to order production in the interests of justice, without necessarily permitting inspection by the other party. As the section does not appear to confer rights on parties, no need arises for the consideration of this section in the present action.

Section 104 enables a party to obtain an order of Court for notice requiring any other party to produce for inspection (and for the taking of copies) any document referred to in the pleadings or affidavits of the party noticed. A notice under this section can issue either in relation to documents mentioned in the pleadings or else to documents declared

by affidavit in pursuance of an order under section 102. Sub-section (2) of this section provides that once a notice issues under section 104, the party noticed is bound to respond to the notice at the risk of being precluded from producing the particular document in the action, unless he is able to satisfy the Court when he seeks to produce it "that such document relates only to his own title or that he had some other or sufficient cause for not complying with such notice". Without comment at this stage on the words just cited from sub-section (2), I pass to the subsequent provisions of the Code.

The response to a notice under section 104 may be of two kinds. The party noticed would either comply with the notice within the time specified in section 105, or, if he objects to production of any documents, he will state through the Court the grounds of his objection to the production.

Section 106 deals with cases where either there is no response whatever to an order under section 104, or the party noticed objects to giving inspection. In each of these events application may be made to the Court for an order of inspection, which if made must be complied with at peril of his action being dismissed or his defence being struck out, as well as of punishment for contempt—(section 109).

It has not been disputed at the argument in appeal that the object of these provisions was to introduce the procedure and practice obtaining in England. But it was only after considerable discussion and examination of the authorities that Counsel and ourselves were able to acquire any adequate knowledge of what that practice and procedure actually is. In the first place, although section 102 of our Code is silent on the point, a party is not entitled *as of right* to require his opponent to make a declaration of documents. "Discovery is no longer granted as of right but as a matter of discretion based on the facts of the particular case under consideration". (Halsbury 3rd Edn. Vol. 12 p. 5). But quite apart from the discretionary power of the Court to refuse discovery, there are special grounds of privilege upon which discovery may be denied, including "the protection from disclosure of documents relating solely to the case of the party giving discovery" (idem p. 7). It will be seen therefore that except in regard to documents produced with the plaint or to be relied on as evidence (which must be produced or listed as required by sections 50 and 51 of the Code), a plaintiff would not necessarily be bound to make a full declaration under section 102 unless the Court in its discretion so orders. There is no express provision in the Code with regard to the production or listing of documents relied upon by a *defendant* and it is not necessary for the purposes of the present appeal to consider whether or not section 102 is the only provision under which a defendant can be required to make a disclosure of documents but clearly he too would be in the same position as a plaintiff if in fact an application is made to Court under section 102 for a declaration by affidavit. With regard to this section the point which does appear to need some emphasis is that an order for discovery need not be made as a matter of course, but is discretionary and may be resisted by a claim of privilege although no express provision in this behalf is to be found in section 102.

As to the procedure for inspection as opposed to discovery, it is clear from section 104 that the notice to produce may issue upon an *ex parte* motion. But where there is no response to such a notice the power of the Court to make an order of inspection is discretionary. (Halsbury p. 35). Order 31 Rule 18 of the Rules of the Supreme Court contains the proviso that the order (for inspection) " shall not be made when and so far as the Court or a Judge shall be of opinion that it is not necessary either for disposing fairly of the cause of matter or for saving costs ". Again, Halsbury at page 38 says " Many relevant documents, although their existence must be disclosed in the affidavit of documents, are, nevertheless, protected from production. The obligation to produce documents for inspection is much more restricted than the obligation to disclose their existence ". (cf. Halsbury, p. 38 for the 8 main heads of protection). One of the main grounds of protection " is that the documents relate solely to the case of the party giving the discovery ".

Although therefore section 106 does not on its face authorise the Court to refuse inspection, the English practice if followed would enable a party to resist inspection on any of the specified grounds of protection, including in particular the ground I have expressly cited.

I should now refer to the proper procedure which should be followed where objection is taken to the inspection of any document on this ground.

The Code nowhere sets out the various objections which may be taken or the form in which objection should be made. In England, it would appear that the Courts now recognise the following as the appropriate form of affidavit in a case such as the present one :—" The party must swear that (to the best of his belief, and after proper examination) they form or support or evidence or relate exclusively to his own case, that they contain nothing supporting or tending to support the adversary's case ". An assertion in these terms is in England accepted as conclusive " unless the Court is reasonably satisfied or reasonably certain from particular sources that the nature of the document has been erroneously misconceived or that the documents are of such a character that the party cannot properly make such an assertion or the case has been misconceived ". (p. 503 Annual Practice 1955 and the cases there cited).

I should like to emphasise, particularly in view of the conclusive effect which an affidavit made in the proper terms may have, that a very serious responsibility is imposed on the legal advisers of a party who has been noticed to produce documents for inspection. What is contemplated by the English procedure is that the advisers will carefully peruse all the documents with a view to forming an honest opinion as to their possible relevancy, both to their client's case as well as to that of his opponent, and that the client will not be advised to swear an affidavit in the terms stated unless the documents in question do not even *tend to support* the opponent's case. The adviser must bear in mind the fact that the Court will be bound by the assertions in the affidavit and will not reject them unless it is apparent from the description of the documents that the assertions are erroneous or misconceived.

Where there is an affidavit in the specific terms required by the English practice, the Court will usually not reject the affidavit without giving the party noticed a further opportunity to make a further affidavit. For instance in *O'Rourke v. Darbishire and others* [1] the party noticed to produce filed an affidavit, but the Judge held that it was insufficient and ordered a further and better affidavit. In this further affidavit objections to the production of certain documents was taken in the recognised terms and the objections were thereupon entertained. Indeed the rights of a party noticed appear to have been extended in the recent case of *Brooks and another v. Prescott and others* [2] where although a quite insufficient affidavit was furnished in the Court of trial, the Court of Appeal admitted and acted upon a sufficient affidavit which was sworn after the trial Judge had ordered inspection. The failure of the party noticed to make the appropriate averments in the original affidavit were not considered by the Court of Appeal to be a sufficient ground to draw an inference that the documents would have supported the opponent's case.

Involved in the ground of objection that a document relates solely to the case of the party noticed is the principle " that it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side-issues ; and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous ". (per Lindley L.J. in *Re Strachan* [3] ; see also Halsbury). While therefore the Court must consider the advantages to be gained in the matter of saving delay and costs, there must also be regard to the question whether an order to permit inspection would impose an unfair disadvantage on the party noticed.

While the terms of the affidavit and the statement of objections which have been filed in the present case do not correspond to those which are made essential by the English practice, the question still arises whether in the circumstances of the case the terms actually employed are insufficient. As stated already, objection was taken to the production of documents of three classes :—

(*a*) A register of prescriptions and two medical certificates presumably relating to drugs or treatment for the executant of the impugned deed. I think that with regard to these documents it is manifest from their description that in all probability they cannot be said to relate solely to the plaintiff's case. Undoubtedly such prescriptions must contain references to drugs or medicines, the nature of which may assist the plaintiff to establish (together with other evidence) the state of health of the executant ; but there is at least the same probability that they may help the defendants to establish that the state of health of the executant was not the same as that which the plaintiff may propose to establish. The defendants are therefore in my opinion entitled to an opportunity to inspect these documents with a view to preparation of their case.

[1] *(1920) A. C. 581.* [2] *(1948) 1 All. E. R. 907.*
[3] *(1895) 1 Ch. 439.*

The second class of documents consists of letters written by the 3rd defendant to the plaintiff's husband. In this connection Counsel for the respondent relied on the following observations of Odgers (Pleadings and Practice 13th Edn. p. 220) " Some letters have, as a rule, passed between the parties before the action was commenced, and these may contain important admissions, or be evidence of some material fact; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's; and in the absence of copies, neither set is properly intelligible without the other. It is most desirable that anyone who intends to give evidence should, if possible, read over his own letters before he enters the witness-box. For his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his account of it, given in a letter written at the time, which remains in black and white, as clear and intelligible now as it ever was. Moreover, there is no better material for cross-examining an opponent than his letters written before the dispute arose. Hence it is generally desirable for each party to see all material documents in the possession of his opponent, and to take copies of the more important ones ".

I think this statement must be read subject to the circumstances of the particular case. If, for example, some commercial agreement or business transaction is the subject of litigation, and the terms of the arrangement between the parties are to be found wholly or mainly in correspondence exchanged between them, it is in the interests of both parties that their memories be refreshed by inspection in order that they be made fully aware of the actual terms and conditions of the transaction. Such a course will clearly make for expeditious disposal of an action and may even enable a party to admit a claim of his opponent. But the position I think must necessarily be different if the documents in question do not in fact evidence the terms and conditions of a disputed transaction, but merely contain statements made by parties after a dispute has arisen, or, though made before the dispute, cannot reasonably be supposed to relate to the disputed transaction. In the present case the plaintiff's suit is for the annulment of deeds executed by her mother in October 1952. but most of the letters for which protection is sought were letters written by the 3rd defendant between December 1952 and September 1953. The plaint, be it noted, was filed in November 1953. The disputed question will apparently be whether the executant was of sound mind or subject to undue influence in October 1952, and it is impossible to say without actually perusing the letters which were written long after. whether they would in any way assist the defendants to establish the soundness of the mind or the freedom of the will of the executant in October 1952. The learned District Judge therefore, if he had properly addressed his mind to the question he had to decide, could not in my opinion possibly have concluded that the failure of the plaintiff to aver that the letters did not tend to support the defendants' case was in any way an indication that they would in fact tend to support that case.

The other letters of the 3rd defendant which were written in June, August and September, 1952 (before the execution of the deed) may on the other hand contain material relating to the circumstances in which

the impugned deed came to be executed, and in the absence of a positive averment that they do not tend to support the defendants' case, it cannot fairly be said that they are entitled to protection.

The third class of documents, namely letters alleged to have been written by a marriage broker to the plaintiff's husband before their marriage are also documents which from their description are not to be necessarily regarded as only tending to establish the case for the plaintiff. From their description they may well contain material concerning the arrangements or agreements made with regard to the marriage and to property proposed to be given to the plaintiff on her marriage. That being so, they may well contain material of assistance to the defendants.

I should add that I have thought fit to deal in appeal with matters which should more properly have been dealt with by the trial Judge, and which therefore might have been remitted to the trial Court to deal with at this stage. But having regard to the excusable ignorance of the terms in which the appropriate affidavit of objections should have been prepared, and also to the fact that there appears to have been no earlier decision of this Court emphasising the responsibility of the legal advisers of a party noticed, in the matter of the preparation of the affidavit, the case appears to be one which is best dealt with in appeal on its merits.

For the reasons set out above I would vary the order of the District Judge of 15th November, 1954 by the omission, from the direction to produce, of the documents specified in items numbered 6-12. The direction for production of the other documents itemized in the order will stand. The direction that the plaintiff pay Rs. 52·50 as costs of the inquiry is set aside. There will be no costs of this appeal.

K. D. DE SILVA, J.—I agree.

Order varied.