

ARYARATNE
v
LAKSIRI FERNANDO

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
CALA 391/2001
D.C. COLOMBO 25099/MR
MAY 11, 2004

Civil Procedure Code, sections 428 and 839 – Does section 428 permit court to issue a commission to E.Q.D.? – Local investigation – Inherent powers – Evidence Ordinance, section 45 – Partition Act, section 26 – Cursus curiae .

The petitioner's application for a commission on the Examination of Questioned Documents (E.Q.D.) was refused on the ground that section 428 of the Civil Procedure Code does not permit court to issue a commission to the E.Q.D. and that there is no other provision in the Civil Procedure Code to issue a commission of this nature to the E.Q.D.

HELD:

Per Wimalachandra, J.

"In my view "local investigation" (S.428) is not confined to an investigation with regard to a place or premises. Section 428 speaks of a situation where the court thinks it fit to issue a commission for a local investigation for the purpose of elucidating any matter in dispute. It does not necessarily mean an investigation with regard to a place or premises."

Per Wimalachandra, J.

"Everyday practice in the courts shows that Judges often order the issue of commissions to the E.Q.D. Even if there is no specific provision in the C.P.C. for that purpose, the Court can exercise its inherent powers under S. 839 C.P.C. to make an order to issue a commission to the E.Q.D."

APPLICATION for leave to appeal from the order of the District Court of Colombo with leave being granted.

Cases referred to :

1. *CALA 247/2001 D.C. Morawaka* – M 25/T – CAM 3.9.2001
2. *Hewavitharana v Themis Silva* – 63 NLR 68
3. *Narasinghedas v Mangel Dubey* – (1883)5 Allahabad 163 at 175
4. *Podihamy v Simon Appu* – 47 NLR 503 at 504.
5. *Wickrematilake v Marikkar et al* – 2 NLR 9
6. *Re.Chelwell* 8 Ch. D. 506

Manohara. R. de Silva for petitioner.

V. Kulatunga for respondent.

Cur.adv .vult.

June 3, 2004

WIMALACHANDRA, J.

The plaintiff-petitioner (hereinafter referred to as the petitioner) instituted this action against the defendant-respondent (hereinafter referred to as the respondent) claiming damages in a sum of Rupees One Million from the respondent for the injury caused to the petitioner by a defamatory statement made by the respondent. 01

When the matter came up for trial the petitioner moved for a Commission to be issued to the Examiner of Questioned Documents (EQD) to examine the said defamatory statement marked "P1". It was opposed by the defendant. The court directed the parties to tender written submission on the aforesaid application made by the petitioner. Thereafter the learned Additional District Judge made order dated 16.10.2001 refusing the petitioner's application for a commission to be issued to the Examiner of Questioned Documents. 10

It is against this order that the petitioner has sought relief by way of leave to appeal. The court granted leave to appeal and the matter was argued after filing written submissions by both parties.

The learned Additional District Judge in his order for the rejection of the petitioner's application has taken the view that section 428 of the Civil Procedure Code does not permit the court to issue a commission to the Examiner of Questioned Documents and that 20

there is no other provision in the Civil Procedure Code to issue commissions of this nature to the Examiner of Questioned Documents. The learned Judge in his order has stated as follows: (thus)

“එකී 428 වගන්තිය අදාළ වන්නේ අධිකරණයට ස්ථානික විමර්ශන කිරීමට අවශ්‍ය වන අවස්ථාවක දී පමණි. සැකකටපුතු ලේඛනයක් සම්බන්ධයෙන් අත් අකුරු පරීක්ෂක වෙත කොමිසමක් නිකුත් කිරීමට එම වගන්තිය යටතේ ප්‍රතිපාදන සපයා නැත. එමෙන්ම ශ්‍රීවිල් නඩු විධාන සංග්‍රහයේ වෙනත් වගන්ති යටතේ ද එවැනි ප්‍රතිපාදන නැති බව පැහැදිලි වේ.”

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Section 428 of the Civil Procedure Code reads as follows:

“In any action or proceeding in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, and the same cannot be conveniently conducted by the judge in person, the Court may issue a Commission to such person as it thinks fit, directing him to make such investigation and to report to Court.”

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The learned Additional District Judge has given a narrow interpretation to the words “Local Investigation” in section 428 of the Civil Procedure Code.

In my view, “Local Investigation” is not confined to an investigation with regard to a place or premises as stated by the learned Judge. It is to be noted that the first limb of section 428 speaks of a situation where the court thinks it fit to issue a commission for a local investigation for the purpose of elucidating any matter in dispute. It does not necessarily mean an investigation with regard to a place or premises.

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Every day practice in these Courts shows that judges often order the issue of Commissions to the Examiner of the Questioned Documents. In an unreported case⁽¹⁾, the Court of Appeal directed the District Judge to issue a commission to the Examiner of Questioned Documents.

In any event the court has inherent power to issue commissions to ascertain the authenticity of a document. The court has often in

the course of a trial or an inquiry resorted to expert evidence which involves the knowledge of a special, technical or scientific nature. Section 45 of the Evidence Ordinance makes expert evidence relevant in certain situations. 60

Even if there is no specific provision in the Civil Procedure Code for that purpose, the Court can exercise its inherent powers under section 839 of the Civil Procedure Code to make an order to issue a commission to the Examiner of Questioned Documents.

Sarkar in his Code of Civil Procedure volume 1 at page 842, states;

“Where a contingency happens which has not been anticipated by the framer of the Civil Procedure Code, and therefore no express provision has been made on that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation.” 70

In the case of *Hevavitharana v Themis Silva*⁽²⁾, Thambiah, J., held that section 26 of the *Partition Act*⁽³⁾ does not exhaust all the orders which a Court could make and the Court has the inherent power under Section 839 of the Civil Procedure Code, to make an order excluding a lot which has been wrongly included in the corpus. In support of his view Thambiah, J. cited the following observation made by Mahmood, J. in *Narasingh Das v Mangal Dubey*⁽³⁾ 80
175.

“Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed.”

In the instant case, the learned Judge has refused the plaintiff-petitioner's application for a commission to be issued to the Examiner of Questioned Documents to examine the document 'P1' annexed to the plaint solely on the basis that there is no provision in the Civil Procedure Code to issue of such a commission. 90

It is my view that the learned Judge has erred when he had come to the conclusion that there are no provisions in law to issue a commission to the Examiner of Questioned Documents. In any event the learned Judge could have used the inherent powers of Court in terms of section 839 of the Code following the *Cursus curiae* of the original Courts, as sanctioned by the Superior Courts.

By way of a final comment on this matter it would be appropriate to refer to the following observation made by Dias, J. in *Podihamy v Simon Appu*⁽⁴⁾ at 504.

“.....It is well to remember that a Court should not be fettered by technical objections on matter of procedure”.

It has to be noted that even as far back as 1895 the thinking of the Supreme Court was that the Court should not be trammelled by technical objections on procedural matters. In the case of *Wickramatilake v Marikkar*⁽⁵⁾ at page 12 Withers, J. commenting on the technical objections observed:-

“.....I think the District Judge should not have given effect to the technical objection which was raised. I commend to his attention, as to that of all other Judges of first instance, the observations of Jessel, M.R., in *re Chenwell*,⁽⁶⁾

It is not the duty of a Judge to throw technical difficulties in the way of the administration of Justice, but when he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise.”

For the foregoing reasons, I allow the appeal and set aside the order of the Additional District Judge dated 16.10.2001 and the learned Additional District Judge is directed to issue the said Commission to the Examiner of Questioned Documents and call for the report. In all the circumstances I make no order as to costs of appeal.

AMARATUNGA, J. – I agree.

Appeal allowed.