

ROHANA WIJEWEERA
v.
CHANDRANANDA DE SILVA,
COMMISSIONER OF ELECTIONS

COURT OF APPEAL
B. E. DE SILVA, J., AND
T. D. G. DE ALWIS, J.
C.A. NO. 1/84
D.C. COLOMBO NO. 2275/SPL
DECEMBER 4, 1984

Civil Procedure Code – Interrogatories – Dismissal of action for failure to answer interrogatories – S. 109 of the Code – Failure to file the petition of appeal within the prescribed period – Sections 755 (3) and 759 (2) of the Code.

Where the District Court dismissed the plaintiff's action in terms of s. 109 of the Civil Procedure Code for failure to answer interrogatories.

Held:

1. There is a discretion in the District Judge to dismiss the action if there is a failure to answer interrogatories.
2. The plaintiff's appeal from the order of the District Judge had to be rejected as it was not filed within 60 days in contravention of S. 755 (3) of the Civil Procedure Code. In the absence of sufficient material, the court could not grant relief in terms of S. 759 (2) of the Code in respect of such delay.

Case referred to:

Vithana v. Weerasinghe and Others (1981) 1 Sri LR 52.

APPEAL from the judgment of the District Court.

Prins Gunasekera for the appellant.

K. M. M. B. Kulatunga P.C, Solicitor-General with *S. N. Silva*, Deputy Solicitor-General, *Ananda Kasturi Arachi*, State Counsel and *T. G. Gooneratne*, State Attorney for the state.

Cur. adv. vult.

December 4, 1984.

B. E. DE SILVA, J.

The plaintiff filed this action against the defendant praying inter alia that the referendum held and conducted by the defendant appointing 22nd of December, 1982, for the taking of the poll on the Proclamation dated 14th November, 1982, was not conducted in compliance with the provisions under the Referendum Act, No. 7 of 1981 and the principles laid down therein and asked for damages in a sum of Rs. 5,000.

The defendant filed answer resisting the plaintiff's claim and stated that for the reasons set out in the answer the plaintiff's action cannot be maintained. Thereafter on 24. 10. 83 the defendant made an application to court to serve certain interrogatories on the plaintiff through the plaintiff's Attorney. That application came up for inquiry on 8.11.83 and on 8.11.83 the court made order to serve the interrogatories on the plaintiff's Attorney to be answered within 10 days of service of interrogatories and to call the case on 29.11.83. Thereafter the Attorney for the defendant filed motion on 22.11.83 and brought to the notice of court that interrogatories have not been answered within 10 days as required by law and that the matter be considered on 29.11.83. On that date the Attorney for the plaintiff admitted the receipt of the interrogatories. He stated that he was unable to answer the interrogatories for the reasons set out by him and he asked for time to answer the interrogatories. The defendant opposed this application. After hearing parties, court made order granting time till 5.12.83 to answer interrogatories. When this matter come up for hearing on 5.12.83 the plaintiff moved for further time to answer the interrogatories stating that his client was under arrest and his party has been proscribed. He wanted indefinite time to answer interrogatories. This application was opposed by learned Solicitor-General for the defendant. The court has considered the submissions made by the parties and refused the application for granting of further time to the plaintiff to answer interrogatories. On the said date there was an application by learned Solicitor-General for the defendant that the plaintiff's action be dismissed. The learned District Judge has carefully considered this matter and he has dismissed the plaintiff's action as the plaintiff has failed to answer interrogatories. Section 109 of the Civil Procedure Code provides thus:

"If any party fails to comply with any order under this Chapter to answer the interrogatories, . . . which has been duly served, he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution."

Under this section there is a discretion on the District Judge to dismiss the action if there a failure to answer interrogatories. As the plaintiff has failed to answer the interrogatories the learned District Judge has correctly exercised this discretion in dismissing the plaintiff's action.

Learned Solicitor-General further brings to the notice of court that the appeal has been filed out of time. Judgment in this case had been delivered on 5.12.83. The petition of appeal has been filed 63 days after the judgment was delivered in contravention of section 755 (3) which provides that appeals must be filed within 60 days of the judgment. Under section 759 (2) it was competent for court to grant relief even where the appeal had been filed out of time provided sufficient material was placed before court: vide (1981) 1 SLR page 52. In the latter case there was an affidavit by the attorney-at-law for the appellant setting out sufficient material for this court to exercise its discretion under section 759 (2). There is no such material in this case for the court to exercise its discretion under section 759 (2). In the circumstances in any event the plaintiff's appeal has to be rejected. For the aforesaid reasons the appeal is dismissed. There will be no costs.

T. D. G. DE ALWIS, J. – I agree.

Appeal dismissed.