

ABEYGUNAWARDENA
vs
PODI MAHATHMAA AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 350/2004(CG)
MAY 5, AND
JULY 6, 2005

Civil Procedure Code, sections 420, 422 and 422(1) — Refusal of court to issue a commission — Validity — Circumstances

The plaintiff-petitioner as well as the 1st defendant respondent both claimed that their predecessors in title was one 'A'. The plaintiff-petitioner filed action to have the deed whereby A has transferred the corpus to the 1st defendant-respondent set aside. The plaintiff petitioner with a supporting medical certifi-

cate moved court to issue a commission to record/examine the said A at the place he was residing as he had been medically advised not to travel due to his sickness.

This application was rejected by court. On leave being sought –

HELD:

- (i) If it is for a commission to examine a sick person within the jurisdiction of the court, section 420 would be applicable and a commission to examine in other cases the relevant section is section 422. In either case court is given a discretion to grant or withhold a commission.
- (ii) The power to issue commission is discretionary and for court to exercise its discretion adequate material must be placed before it. In an application under section 422 there must be material as to the residence of the person to be examined. In the circumstances, there is no material placed before Court to satisfy Court as to the residence of A.
- (iii) Where forgery is pleaded witness speaking to the fact must be present so as to be cross examined.
- (iv) The finding of the District Judge as to the evidentiary value of the medical certificate is correct, as the medical certificate only certifies that he is suffering from Parkinsons disease and at present not suitable for traveling.
- (v) Where the witness is ill, medical, evidence of such fact must be given, and when illness is alleged, mere certificate of a medical man is not admissible unless proved by the evidence of the person giving it.
- (vi) When a commission is asked for on the ground of illness the court is under obligation of coming to a definite conclusion and recording a finding as to whether the illness is serious enough to prevent the witness from attending court, before passing the order.

APPLICATION for leave to appeal, with leave being granted.

Cases referred to :

1. *Abner & Co. vs Ceylon Overseas Tea Trading Co.*, 47 NLR 9 at 11
2. *Sarala vs Surendra* 39 CWN 595
3. *Sirinivasa vs Ranga* – A 1927 M 524
4. *Panchkari vs Panchanam* – 39 CLJ 589
5. *R vs Ahiliya* – 47 B 74

Navin Rajapakse for plaintiff petitioner.

Chandana Prematilake with *S. Herath* for 1st and 2nd defendant respondents.

Cur.adv.vult.

October 07, 2005

ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking leave to appeal from the order of the learned District Judge of Gampaha dated 30.08.2004 refusing to issue a commission in terms of Section 422 of the Civil Procedure Code and if leave is granted to set aside the aforesaid order dated 30.08.2004 and to issue a commission under and in terms of Section 422(1) read with Section 420 of the Civil Procedure Code to examine and/or record the evidence of Sathasivam Achalingam and in the alternative for a direction to the District Court of Gampaha to issue a commission under and in terms of Section 422(1) read with Section 420 of the Civil Procedure Code to examine and/or record the evidence of the said Sathasivam Achalingam who is listed in the plaintiff-petitioner's list of witnesses.

As per minute dated 12.01.2005 leave has been granted to decide the substantial question as to the correctness of the learned District Judge's order dated 30.08.2004. On this question of law both parties have made oral submissions and have tendered written submissions as well.

the relevant facts are the plaintiff-petitioner as well as the 1st defendant-respondent both claimed that their predecessor in title was one Sathasivam Achalingam who according to the plaintiff-petitioner had made and signed or executed the deed of gift No. 27 in his favour while the 1st

defendant-respondent claimed that the said Sathasivam Achalingam had made and executed the deed of transfer No. 2199 in his favour. Thus in terms of the recitals of both deeds the predecessor in title was one and the same person named Sathasivam Achalingam. The plaintiff-petitioner filed the instant action in the District Court of Gampaha to have the said deed No. 2199 set aside and for a declaration of his title to the land in suit and ejection of the defendants-respondents therefrom.

On or about 14 November 2002 the plaintiff-petitioner made an application to the District Court of Gampaha to issue a commission on the Examiner of Questioned Documents (EQD) to compare and report on the authenticity of the signature of the said Sathasivam Achalingam claimed to be appearing on both the aforesaid deeds, deed No. 27 (plaintiff-petitioner) and deed No. 2199 (1st defendant-respondent). However the learned District Judge directed the plaintiff-petitioner to lead evidence for the purpose of issuing a commission to the Examiner of Questioned Documents.

In the meantime, the 2nd defendant-respondent was added as a party on the basis that the 1st defendant-respondent had by deed No. 1048 transferred his rights in the property to the 2nd defendant-respondent the son of the 1st defendant-respondent. Thereafter on or about 30.04.2003 the plaintiff-petitioner made an application to the District Court of Gampaha in terms of Section 178(1) of the Civil Procedure Code to record the evidence prior to trial which application was refused by the learned District Judge of Gampaha. It is to be noticed neither the application nor the order made has been made available to this Court.

It appears that another motion had been filed by the plaintiff-petitioner together with a copy of a medical certificate dated 16.08.2004 issued by a Neurologist indicating the present physical condition and/or health of Sathasivam Achalingam and moved Court to issue a commission to record evidence and/or examine the said Sathasivam Achalingam at the place he was residing as he has been medically advised not to travel due to his sickness. Though it is stated in the petition that a true copy of the said motion is tendered to Court marked P9 no such document marked P9 has been tendered to Court up to now. However a certified copy of the said

motion has been tendered by the defendants-respondents marked R1 to assist Court. The medical certificate has been produced marked P9A.

It is averred by the plaintiff-petitioner that as there was an error in the said written motion about the correct section of the Civil Procedure Code under which the said motion was made the plaintiff-petitioner's attorney-at-law made an oral motion and/or application to Court in terms of Section 422(1) of the Civil Procedure Code read with Section 420 of the Civil Procedure Code to which counsel for the defendant-respondent objected to. The learned District Judge having heard both counsel on this matter by her order dated 30.08.2004 rejected plaintiff-petitioner's aforesaid application.

Counsel for the plaintiff-petitioner has formulated two questions of law to be considered by this Court.

- (1) Whether there is a specific procedure for the issue or refusal of a commission under Chapter XXIX of the Civil Procedure Code ?
- (2) Whether the reasons for the order refusing the commission by the learned District Judge was reasonable in view of the material adduced before Court ?

On an examination of the order of the learned District Judge dated 30.08.2004 it is to be seen that the learned District Judge has not considered the procedural aspect of the matter either for the issue or refusal of a commission and in the circumstances I myself do not intend to consider this aspect of the matter at length. It suffices to say that the procedure is clearly stated in the relevant sections. If it is for a commission to examine a sick person within the jurisdiction of the Court, Section 420 would be applicable and a commission in other cases the relevant section would be Section 422. In either case the Court is given a discretion either to grant or withhold a commission and it only requires the Court to adhere to the principles governing the exercise of its discretion.

Sarkar's Code of *Civil Procedure Code* 10th Edition 2002 (vol. 2) page 1770 states as follows :

“The power to issue commission is discretionary. The recording of evidence by the Court has to be the normal rule or procedure. Examination of witnesses on a commission has to be an exception”.

Thus it is to be seen that for this Court to exercise its discretion adequate material must be placed before it. Therefore if the application is made in terms of Section 422 of the Civil Procedure Code there must be material before Court as to the residence of the person to be examined as at the relevant time to the satisfaction of Court. In the instant action the fact that the aforesaid Sathasivam Achalingam’s address as given in the two deeds is outside the jurisdiction of District Court of Gampaha will not be sufficient material to establish that at the time of the application the said Sathasivam Achalingam was residing outside the jurisdiction of the Court. Thus there was no material placed before Court to satisfy Court as to the residence of Sathasivam Achalingam.

K. D. P. Wickremasinghe in his Book *Civil Procedure in Ceylon* page 11 says :

“Where forgery is pleaded, witnesses speaking to that fact must be present so as to be cross-examined”.

This is exactly the situation in the present case where the plaintiff-petitioner alleges that the deed of transfer No. 2199 dated 18.09.1997 made in favour of the 1st respondent does not contain the signature of Sathasivam Achalingam and therefore is a forgery. Therefore the defendants-respondents must necessarily have the right and the opportunity to examine or cross-examine Sathasivam Achalingam under oath in Court to ascertain the truth and prove that the vendor’s signature in the said deed is in fact that of Sathasivam Achalingam.

Soerz ACJ and Rose, J in *Abner & Co., vs. Ceylon Overseas Tea Trading Co.*⁽¹⁾ where Their Lordships said :

“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 that discretion”.

The second question as to whether reasons for the order refusing the commission by the learned District Judge was reasonable in view of the material adduced before Court has been correctly considered and answered by the learned District Judge. It is to be seen that the only material adduced before Court was the copy of a medical certificate dated 16.08.2004 from a Neurologist indicating the present physical and/or health condition of the said Sathasivam Achalingam marked P9A which reads as follows :

“Mr. S. Achalingam

To whom it may concern

This patient is suffering from Parkinson’s disease and ... At present he is not suitable for traveling. To review in three months.”

It is interesting to note that under the heading Parkinson’s and Death in a medical definition of Parkinson’s disease found in Wikipedia, the free encyclopedia htm it is stated as follows.

Parkinson’s and Death :

While Parkinson’s does not by itself cause death, because the disease may affect the respiratory system, sufferers may eventually contract pneumonia and die. Swallowing difficulties may lead to aspiration where food goes down the windpipe. Immobility may increase susceptibility to infection. That being said, people have lived 20-30 years with the affliction.

I must concede that the finding of the learned District Judge as to the evidentiary value of the medical certificate marked P9A is correct and she cannot be faulted for not acting on it for the simple reason that the afore-

said medical certificate only certifies that Sathasivam Achalingam is suffering from Parkinson's disease and at present he is not suitable for travelling. Condition to be reviewed in three months. Certainly the medical certificate does not certify that Sathasivam Achalingam will never be able to travel or come to Court after three months or for a long period due to sickness. Sarkar's *Code of Civil Procedure* 10th Edition 2002 vol. 2 page 1770 states :

"When a commission is asked for on the ground of illness the court is under an obligation of coming to a definite conclusion and recording a finding as to whether the illness is serious enough to prevent the witness from attending the court, before passing the order".

Sarala vs Surendra⁽²⁾ goes on to say at page 1772 :

"Mere age is no sufficient ground (*Sirinivasa v. Ranga*⁽³⁾) If sickness and infirmity is alleged, its character and gravity have got to be assessed. At the same time the importance of having the witness before the court and the advantages that would follow from examination in court should not be altogether lost sight of. (*Panchkari v. Panchanam*⁽⁴⁾). When illness is alleged, mere certificate of a medical man is not admissible unless proved by the evidence of the person giving it. (*R v. Ahiliya*.⁽⁵⁾)"

Civil Procedure in Ceylon by K. D. P. Wickremasinghe at page 191 says"

"Where the witness is ill, medical evidence of such fact must be given".

It is to be seen that the so called medical certificate submitted by the plaintiff-petitioner falls far short of the above requirements and the District Judge is fully justified in refusing the commission. In the circumstances there is no basis to interfere with her finding.

However I must say that the aforesaid medical certificate is dated 16.08.2004 and the learned District Judge has made the order canvassed in this application on 30.08.2004 considering Sathasivam Achalingam's health condition as on or about August 2004. This does not mean that the District Court is prevented from entertaining another application for a commission if the plaintiff-petitioner is able to satisfy Court the necessity for the issue of a commission. This is what the learned District Judge herself has indicated in the last sentence of her order when she says :

“ඉල්ලීම මෙම අවස්ථාවේදී ප්‍රතික්ෂේප කරමි.”

I might also say that it has taken one year to decide this matter and if this application was not made to this Court in all probabilities the trial would have commenced and the evidence of Sathasivam Achalingam could have been lead.

In the circumstances, I would hold that the reasons given by the learned District Judge for refusing to issue a commission is reasonable. The application of the plaintiff-petitioner will stand dismissed with costs fixed at Rs. 10,000.

WIMALACHANDRA, J. — I agree.

Application dismissed.
