

SISILINONA
v.
BALASURIYA

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA NO. 601/93 (F)
DC KURUNEGALA NO. 2668/L
OCTOBER 23, 2001

Civil Procedure Code, sections 84, 164 and 165 – Ex parte order – Power vested with a judge to examine a witness – Demeanour of a witness varies when being questioned by court.

The District Court refused to vacate the *ex parte* Order.

Held:

- (1) Section 164 of the Civil Procedure Code provides that the court may question a witness at any time and by section 165 a Judge is vested with a power to put questions to a witness in order to discover or to obtain proper proof of relevant facts.
- (2) The court must not question the witness in the spirit of beating him down or encouraging him to give an answer.

Per Somawansa, J.

"One must not forget the fact that even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of the opposing Counsel are in view of the deference with which they treat the Court inclined to treat with greatest regard suggestions when they come from court and are couched in compelling language and it is a rare witness who will steadily maintain his version in the face of such questioning by Court."

- (3) A Judge who observes the demeanour of the witness while they are examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination.

- (4) The line of questioning by the Judge had been in the spirit of beating the witness down or encouraging the witness to give answers accepting the position put to the witness – it appears that the intention of the trial Judge had been not to ascertain the truth of the matter but to obtain contradictions which he did. In the circumstances the conclusions arrived at by the trial Judge are untenable.

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to :

1. *Grand Central Rubber Estates Ltd. v. Rompi Singho* – 48 NLR 525.
2. *Yuill v. Yuill* – 1944 – 29 CLW 102.

P. P. Gunasena for defendant-appellant.

Jacob Joseph for plaintiff-respondent.

Cur. adv. vult.

November 28, 2001

SOMAWANSA, J.

This is an appeal preferred against the order made by the District Judge of Kurunegala dated 31. 03. 1993 in case No. 2668/L refusing to vacate an *ex parte* order entered in the case. ¹

On an examination of the case record it appears that in view of an application by the defendant-appellant to have the *ex parte* decree set aside on the basis that she was ill and was not in a position to be present in court on the trial date, an inquiry was held and at the inquiry the defendant-appellant as well as the Homeopathic Doctor who treated her had given evidence. The evidence reveals that before the trial date the defendant-appellant took treatment for Rheumatic Arthritis, a medical certificate and prescription issued by the Homeopathic Doctor was produced marked P1 and P2. These documents have not been challenged at all by the plaintiff-respondent ¹⁰

at the inquiry. However, after the re-examination of the defendant-appellant was concluded the learned District Judge on his own has questioned the defendant-respondent at length and has come to the conclusion that the defendant-appellant contradicted herself and therefore the doubt that had arisen with regard to the credibility of the evidence given by the Homeopathic Doctor was confirmed by the defendant-appellant's contradictory evidence. The procedure adopted ²⁰ by the learned District Judge is certainly not in keeping with the principles laid down in decided cases.

A Judge is certainly vested with wide powers to question a witness.

Section 164 of the Civil Procedure Code provide that the court may question a witness at any time as it may consider conducive to the attainment of truth and justice and again by section 165 of the Evidence Ordinance a Judge is vested with power to put questions to a witness in order to discover or to obtain proper proof of relevant facts. While the widest powers in regard to examination of witness are undoubtedly conferred on the court by section 165 of the Evidence ³⁰ Ordinance and section 164 of the Civil Procedure Code, these powers are not without certain limitations. Discussing the aspect of power vested with a Judge to examine a witness, Monir in his book on *Evidence*, 4th edition vol. II, p. 949 says : One of the well-recognised limitations of the powers of the court under section 165 of the Evidence Ordinance is that the court must not question the witness in the spirit of beating him down or encouraging him to give an answer. One must also not forget the fact that even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of opposing counsel are in view of the deference with which they treat ⁴⁰ the court inclined to treat with greatest regard suggestions when they come from court and are couched in compelling language and it is a rare witness who will steadily maintain his version in the face of such questioning by court. In the case of *Grand Central Rubber Estates Ltd. v. Rompi Singho*⁽¹⁾ :

Where a trial Judge himself examined witnesses at some length after re-examination and then rejected their evidence on the ground of contradictions.

It was held, that in the circumstances it was possible to attach weight to the views of the Judge as to their credibility.

In *Yuill v. Yuill*⁽²⁾ it was observed that "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked as everyone who had experience of these matters knows that the demeanour of witness is apt to vary when he is being questioned by the Judge particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue".

On an examination of the line of questions put to the defendant-appellant by the learned District Judge it appears that his intention had been not to ascertain the truth of the matter but to obtain contradictions which he did. It would be improper and unfair for a witness who is 65 years of age and is unable to give specific dates as to her date of birth, date of trial and the date on which she obtained the medical certificate, etc., both on her examination in chief as well as in cross-examination to be subjected to further examination by the learned District Judge on the same matters after the re-examination of the witness was concluded. The line of questioning adopted by the learned District Judge clearly shows that the court was suggesting to the defendant-appellant that as she failed to appear in court on the trial date she subsequently obtained a medical certificate to show that she was ill on the trial date and the learned District Judge was

certainly successful as she ultimately accepted this position. It is clear that this line of questioning had been in the spirit of beating her down or encouraging her to give answers accepting the position put to her. One should also not forget the fact Homeopathic Doctors do exist and though some may be bogus practitioners with no registrations, patients do go to them for treatment. 80

In the light of the above reasoning and in view of the principle laid down in the case of *Grand Central Rubber Estates Ltd. v. Rompi singho* referred to above, I am of the view that the conclusion arrived at by the learned District Judge is untenable.

Order of the learned District Judge dated 31. 03. 1993 refusing to vacate the *ex parte* order is set aside and the learned District Judge is directed to hear and determine the case in accordance with the provisions of the Civil Procedure Code. 90

Appeal is allowed with costs.

N. E. DISSANAYAKE, J. – I agree.

Appeal allowed.