

PAR MARKETERS (PVT.) LTD
v
HATTON NATIONAL BANK LTD

COURT OF APPEAL
WIJERATNE, J. (P/CA)
CALA 318/2000 (LG)
DC COLOMBO 18225/MR
NOVEMBER 15, 2004

Civil Procedure Code – Sections 91, 99 and 100 – Interrogatories – Court fixing matter for trial without making an order on the application under section 100 or without giving reasons for not considering application – Validity? – Application under section 100 is it on a motion? – Affidavit not valid – Belated objection?

The plaintiff-respondent instituted action for the recovery of certain sums pleaded as due on account of an overdraft. The defendant-petitioner filed answer and thereafter tendered interrogatories. Oral application was made by the defendant-petitioner to make order under section 99 and section 100 of the Code. Order was reserved. The plaintiff thereafter tendered written submissions and moved Court to accept the statement of objections and fix the matter for trial. The Court after noting that the defendant has refused to answer the interrogatories, fixed the case for trial, and stated that if the objections of the defendant are not accepted the plaintiff is informed to take relevant steps.

The defendant sought leave and leave was granted on two questions:

- (1) Whether the order fixing the case for trial without making an order on the application under section 100 or without giving reasons is valid.
- (2) Whether it is necessary to make an application under section 100 upon a motion in terms of section 91.

Held:

- (1) The application to make order under section 100 was as a sequel to objections being accepted. The tenor of the objection is a refusal to answer, and upon such refusal when the party interrogating makes application, the Court is bound to make an order whether in its opinion interrogatories need not have been answered or otherwise requiring the party interrogating to answer either by affidavit or by viva voce examination as the Court may direct.
- (2) Section 98 permits a refusal to answer on grounds justifying such refusal only. Either section 98 or any other provisions of Cap XVI does not provide for objection to interrogatories, it only provides for refusal to answer interrogatories, on justifiable grounds.

Per Wijeyaratne, J. (P/CA)

“The failure of the learned District Judge to make necessary order under section 100 is not a sequel to the objection to the form of the application, but it appears that he has failed to appreciate the scheme of the procedure set down in Cap XVI”.

- (3) The application to make an order under section 100 is not an incidental step because the Court is bound to make an order either to answer, further answer or in the alternative the interrogatories need not be answered. Therefore the application under section 100 is a step in the regular procedure which need not be made in terms of section 91. A step required to be take by a Court by the provisions of the Code is not an incidental step in the course of the proceedings.

Per Wijeyaratne, J. (P/CA)

“The validity of the application for leave to appeal in as much as the affidavit of the petitioner affirmed to before a Justice of Peace of Homagama Judicial District and hence not legally valid, cannot now be challenged as the application for leave to appeal is since accepted and acted upon by this Court”.

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

Cases referred to:

1. *Ceylon Workers Congress v Sathasivan* – CALA 86/2002
2. *D. A. Senanayake v Gamage* – 64 NLR 517

Manohara de Silva for the petitioner.

Romesh de Silva P.C. with *Palitha Kumarasinghe* for the respondent.

Cur.adv.vult.

November 15, 2004

WIJAYARATNE, J.

The plaintiff-respondent (RESPONDENT) instituted action against the defendant-petitioner (PETITIONER) for the recovery of certain sums pleaded as due on account of overdraft. The petitioner filed answer and the case was fixed for trial. After the third postponement of the trial, the petitioner tendered interrogatories which were served on the respondent who having obtained extension of time to answer, objected to the interrogatories on 20.09.2000. The counsel for the petitioner made application orally to Court to make order under section 99 and 100 of the Civil Procedure Code. Counsel for both parties made submissions and the Court reserved the order to be delivered 03.10.2000. In the meantime the respondent on 23.09.2000 tendered written submissions with notice to the petitioner given under registered cover and moved Court to accept the statement of objections and fix the matter for trial. On 03.10.2000 the Court made order journalized as 'case fixed for trial. If the objections of the defendant are not accepted, the plaintiff is informed to take relevant steps. The defendant has refused to answer the interrogatories.'

Being aggrieved by the said order, (which is *per se* erroneous for the reason that it is the defendant-petitioner who served interrogatories and it is the plaintiff-respondent which filed statement of objections) the petitioner made application for leave to appeal by his petition dated 20.10.2000 supported by affidavit dated 19.10.2000.

When the matter of leave being granted was taken up on 03.06.2004, in the presence of parties represented by lawyers, Court granted leave on two questions:

- 1) Whether the learned District Judge's order fixing the case for trial without making an order on the application under section 100 of the Civil Procedure Code or without giving reasons for not considering that application, is correct in law.
- 2) Whether it is necessary to make an application under section 100 upon a motion in terms of section 91 of the Civil Procedure Code."

Upon such grant of leave, the argument of the appeal was fixed and the Registrar of the Court was directed to communicate the order to the Registrar of the District Court. When the matter was taken up for argument counsel for both parties invited Court to dispose of the matter by way of written submissions to be tendered.

The respondent in its submissions has referred to the matter of the validity of the application for leave to appeal in as much as the affidavit of the petitioners was affirmed to before a Justice of the Peace of Homagama Judicial District and hence it is not legally valid. Reference is made to the decision of *Ceylon Workers Congress v Sathasivan*⁽¹⁾. However the application for leave to appeal is since accepted and acted upon by this Court when it granted leave to appeal on 03.06.2004 without any objection from the respondent represented by Lawyers. In my view the validity of the application for leave to appeal cannot now be challenged and the matter does not require any determination.

With regard to the two questions framed for determination by the order granting leave, the first question has two limbs, proceedings dated 20.09.2000, motion minuted at journal entry no. 20 dated 23/26.09.2000 and minute dated 27/26.09.2000 clearly indicate the position that the petitioner who served interrogatories on the respondent, has made oral application to court to make an order under section 100 of the Civil Procedure Code. Both parties concede that the petitioner made such application. The contentious issue is whether such application should be by way of motion or would an oral application suffice.

The order impugned in this appeal and dated 03.10.2000 does not make any order with regard to the application of the petitioner. Instead the Court has informed the petitioner that if he does not accept the objections he should take steps. But the matter that required determination is the oral application of the petitioner which was not determined by Court – whether the application made orally is accepted or that the petitioner should make application by way of motion in writing or court refuse to make order on the basis that the oral application is not in terms of the relevant law. The learned District Judge has left the matter of objection being accepted to the decision of the petitioner, when in fact there was no question of

objections being accepted or not by the petitioner. The application to make order under section 100 of the Civil Procedure Code was as a sequel to objections being accepted. The tenor of the objection is a refusal to answer; and upon such refusal when the party interrogating makes application the Court is bound to make an order whether in its opinion interrogatories need not have been answered or otherwise requiring the party interrogated to answer, either by affidavit or by viva voce examination as the court may direct.

In the order impugned the Court has failed and neglected to make any such order in terms of section 100 and the Court that failed to make order has necessarily failed to give reasons.

The second question whether it is necessary to make an application under section 100 upon a motion in terms of section 91 of the Civil Procedure Code needs examination of relevant provisions and the nature of such motion envisaged under the law. The respondent argues that application envisaged under section 100 should be either by 'motion and a memorandum in writing of such motion' in terms of section 91 of the Code. Reference is made to the case of *D. A. Senanayake v Gamage*⁽²⁾ where it was held "The contention of the respondents counsel that the word 'motion' is used in section 91 of the Civil Procedure Code, means written motion, also fails. "It was so held on the basis that 'section 91 of the Civil Procedure Code becomes relevant only in application made to the Court in the course of an action incidental thereto, and not a step in the regular procedure. A Court is bound to take certain steps in a regular procedure such as "A step required to be taken by a Court by the provisions of the Civil Procedure Code is not an incidental step in the course of the proceedings."

According to this rule, the application to make an order under section 100 of the Code is not an incidental step, because the Court is bound to make an order either to answer, further answer or in the alternative the interrogatories need not be answered. Therefore the application under section 100 is a step in the regular procedure which need not be made in terms of section 91 of the Code.

It is expedient to note that the contentious issue requiring the order is on the so-called statement of objection to the

interrogatories filed by the respondent which takes high grounds based on terminology used in the relevant sections. However the respondent arguing that the term 'application' should be by motion has failed to comply with the requirement of law in refusing to answer interrogatives in terms of section 98 of the Code.

Section 98 of the Code states:

“any party called upon to answer interrogatories, may refuse to answer any interrogatory on the ground....”

What the section permits is a refusal to answer on grounds justifying such refusal only. Either section 98 or any other provisions of Chap XVI of the Code does not provide for any objection to interrogatories. What the respondent has consequent to the serving of interrogatories presented to Court is not a refusal to answer interrogatories as envisaged by section 98 but objection to interrogatories only. The Civil Procedure Code does not provide for objection to interrogatories; it only provides for refusal to answer interrogatories, when served on justifiable grounds. However in my view this type of argument is not in accord with the spirit of the law. The form of the application or the refusal is immaterial so long as it serves the purpose of the procedural step envisaged specially under Chapter XVI of the Code.

The failure of the learned District Judge to make necessary order under section 100 is not as a sequel to the objection to the form of the application; but it appears that he has failed to appreciate the scheme of the procedure set down in Chapter XVI. Thus the need arises for intervention by this Court to remedy the situation created by the impugned order dated 03.10.2000. Accordingly the order dated 03.10.2000 reflected in the journal of the case is set aside and vacated. The learned District Judge is directed to make order on the application made under section 100 of the Code on the premise that there is a refusal to answer interrogatories in terms of section 98 of the Code. The appeal is allowed with costs fixed at Rs.10,000/-.

Appeal allowed.

District Judge directed to make order under section 100 on the premise that there is a refusal to answer interrogatories.