JUDGMENTS

Criminal Law
Court of Appeal

CALA Application No. 19/05
H.C. Colombo No. 8830/97/04
Decided on 07.12.2009 by W.L. Silva J. & A.W.A. Salam J.

If a witness gives evidence and goes abroad without offering himself further cross examination can court allow the prosecution to adopt a deposition given in the magistrate's court by that witness under section 33 of the evidence ordinance.

Held
It would be highly prejudicial, highly unreasonable for the judge to adopt the deposition given in the Magistrate's Court by this particular witness, against the accused.

In such a situation the prosecution is absolutely prevented and should not be allowed to use a deposition made by a witness who had come to Court and who had given evidence, who was subjected to cross-examination and thereafter for reasons best known to her keeps away from Court without offering herself for further cross-examination.

It is quite obvious that the intention of the legislature was not to permit a deposition, made by a witness who opted and who gave evidence and who was subjected to some cross-examination though not concluded, to be used against the accused.

On the other hand in a prosecution, in a criminal case, the case has to be proved beyond reasonable doubt. Any reasonable doubt should be interpreted in favour of the accused and whether in the circumstances it would be reasonable or unreasonable to adopt as evidence a deposition made in the Magistrates Court is a matter for the learned High Court Judge to decide. If the objective test is applied it is obvious that it would be utterly unreasonable in view of the fact that certain material contradictions have been marked in the evidence of this particular witness.

the evidence of that witness can be allowed to be continued in the High Court, if this witness is available at any time before the conclusion of the case for the prosecution and not thereafter because, once again if that evidence is allowed, after the defence is closed that would cause prejudice to the defence. In a situation of this sort a Judge is not called upon to act like an automation granting a request of the police or the prosecution to adopt a deposition made by such a witness in a lower Court Ref.01.01.10

CIVIL LAW
PARTITION

COURT OF APPEAL
Adikari Mudiyanselage Wijesena Vs A.Solomon and others
CA. No: 918/2003
D.C. Kuliyapitiya Case No: 9917/P
Decided on 8th December 2008 by . W.L.R.Silva J. and
D.S.C. Lecamwasam, J.

Partition Law-Section 48(4) of the Partition Act-the failure in the part of the judge to make an order on the application of a party- should the party be allowed to suffer as a result.

The Petitioner filed the instant revision application against the order made by the learned District Judge marked "P12" wherein the learned District Judge dismissed the application made by the Petitioner seeking relief under Section 48(4) of the Partition Act. The learned District Judge based his decision mainly on the fact that the Petitioner was sufficiently represented by Counsel at the trial held on 06.06.2002. The reasoning behind his decision was that as there was no proper revocation of the proxy by Courts the proxy remained valid and that the particular lawyer on record appeared at the trial representing the Petitioner.

W.L.R.Silva J. held that

The journal entry No: 62 reveal that the 7th Defendant who is the Petitioner in this case has made an application to revoke the proxy on record. The learned District Judge addressed his mind to various other matters but failed to make any order with regard to the application. That application has not been rejected and one could safely assume that the application had been granted by the learned District Judge.

The act of the learned District Judge should not prejudice the 7th Defendant's rights. A lapse on the part of the judge to make a decision should not be interpreted against a party. Maxim 'actus curiae Neminem Gravabit' applies and the Court must consider that a proper application was made and that application was accepted by Court for all purposes. Ref.02.01.10

CIVIL PROCEDURE CODE

COURT OF APPEAL

S.Edurusuriya Vs M.Munindran
CALA 390/06
D.C.Colombo Case No.20578/L

Decided on 12th February 2009 by Eric Basnayake J. and K.T.Chitrasiri J.

Civil of Procedure Code-Section 121(2) and 175 of Civil Procedure Code-burden on satisfying the existence of special circumstances.

The Petitioner (the Plaintiff) filed the instant leave to appeal application inter alia to have the order of the learned Additional District Judge of Colombo dated 14.9.2006 set aside. By this order the learned Judge has refused the application of the Plaintiff to call Dr. G.A. Harischandra as a witness.
The list containing Dr. Harischandra's name was filed when the Plaintiffs case was almost concluded. When this case was taken up for trial on 11.7.2006, the Plaintiff called a witness (Dr. S. Thenbadu). After concluding with this witness the Plaintiff moved for summons on three other witnesses whose names already appeared in the list. The court also warned the Plaintiff to have all the other witnesses on the next date (and to conclude the Plaintiffs case) and the case was fixed for 14.11.2006.

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On 20.7.2006 the Plaintiff filed an additional list containing four witnesses including Dr. Harischandra.
On 14th November 2006, when the Plaintiff sought to call Dr.Harischandra, the Defendant objected and Learned Additional District Judge upheld the objection. The learned Judge by his Order has stated that the plaintiff had obtained a postponement to call three particular witnesses. Having obtained a date to call some witnesses that the defence would not object to, the Plaintiff filed another list to call some more witnesses. This is the reason why court held that the list dated 20.7.2006 is not proper. Hence the court held that such witness could be permitted only under special circumstances and the Plaintiff has failed to establish any special circumstances.
His Lordship Basnayake J. held that
In terms of section '175(1) of the C.P.C. a witness not listed in terms of section 121(2) cannot be call to give evidence. However, such witness will be allowed in the discretion of Court on the existence of special circumstances.

The burden of satisfying court as to the existence of special circumstances as required by section 175 (1) is on the party seeking to call such witness.

Though the Plaintiff contended that Dr.Mendis who was listed to give evidence has refused to give evidence, considering the contents of the motion filed by Dr.Mendis to the Court, the Learned District Judge has held that Dr. Mendis never refused to give evidence for the Plaintiff. Dr. Mendis only stated that because he never treated the deceased and examined the medical reports that he may not be able to give evidence on the mental condition of the deceased. Hence the learned Judge had refused to consider this as a special ground to allow Dr. Harischandra to be called under the proviso to section 175 of the C.P.C.

The Plaintiff has failed to discharge the burden with regard to the existence of special circumstances as required by section 175 of the C.P.C. and therefore, the Order of the Learned Trial Judge is correct. Ref.03.01.10

BANKING LAW
COURT OF APPEAL

M.P.D.Abeyagonewardena Vs Bank of Ceylon
CA(Writ) Case No.669/08
decided on 19th December 2008 by
Sathya Hettige P.C., J. (P, C/A) & Anil Gooneratne J.

Bank of Ceylon Ordinance-Certificate of Sale-Conclusive Proof-Leasio Enormis- upset price-contractual relationship and writs jurisdiction-delay

The Petitioner who was the Managing Director of one Dias Abeygonewardena Company Limited which is a duly incorporated company made the instant application inter alia, praying for Grant and issue an order in the nature of writ of certiorari quashing the certificate/s of sale issued in favour of the 1st Respondent Bank in respect of the properties described in the First and Second Schedules to the Petition.

The Petitioner has mortgaged property belonging to him as securities for facilities granted to the said Dias Abeygonewardena Company Limited and the 1st Respondent has sold the said property by public auction in terms of provisions of Bank of Ceylon Ordinance and a Certificate of Sale has been issued. The Petitioner sought to challenge the said Auction and Certificate of Sale inter alia, on the following basis,

[a] the auction of the Petitioner's properties for the recovery of sums due from the said M.P. Dias Abeygunawardena Ltd is illegal and therefore the Certificate of Sale transferring the properties to the 1st Respondent Bank is null and void.

[b] the said properties are situated in Colombo 07 and their market value is over 100 million and in the circumstances the purchase of the said properties on behalf of the Bank for a price of Rs.1,000/- is commercially unreasonable and is contrary to the principle of laesio enormis. Therefore, the Certificate of Sale transferring the said properties to the 1st Respondent Bank is null and void.

Gunarathne J. held that

[a] By the issue of the certificate of sale all the right, title and interest of the borrower and in the property are deemed to have been vested with the purchaser.

[b] A plain reading of Section 28 of Bank of Ceylon Ordinance specifically state that a borrower or any person claiming through or under the borrower would not be competent to move court to invalidate the certificate of sale.

[c] according to the Mortgage Bonds P4 - P6, the opening paragraphs of same would fortify the position that the Petitioner and the company are either both mortgagors and or beneficiaries to the loan transaction.

[d] since the Petitioner has benefited facilities granted to the said Company, the Petitioner cannot disclaim liability by seeking to take cover and equate himself with the dicta in Ramadhandran's case. Petitioner along with the Company is liable on the loan transaction. As such parate execution process cannot be invalidated by a Writ Application.

[e] Section 24 of the Ordinance enacts that the Board may fix the upset price and property cannot be sold below such upset price other than the Bank. Therefore the payment of a sum of Rs. 1,000/- for purchase of the property would not invalidate the sale, as the Bank does it not to appropriate the property to the Bank but to recover the dues from which the Bank expect a return by a resale or settlement of the amount due, at a future point of time.

[f] A number of statutes were passed in our country to facilitate debt recovery. Bank of Ceylon Ordinance is one such statute. The significant feature - It gives the power to non-judicial persons (Board of Directors) to take the decision to sell the mortgaged property in case of default. Most importantly the certificate of sale issued by the Board is deemed conclusive proof with respect to the sale of any property, that all the provisions of the statute relating to the sale of that property have been complied with. Ref.04.01.10