GAMINI LAKSHMAN PEIRIS
v.
NIHAL SRI AMERASEKERA

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. REV. APPLN. NO. 775/98
D.C. COLOMBO CASE NO. 19849/MR
NOVEMBER 04 & 20, 1998.

Civil Procedure Code – Notice to disclose documents under S. 102 CPC – Objection to discovery under S. 108 CPC – Striking out the answer under S. 109.

The procedure relating to discovery of documents is different from procedure to secure interrogatories, admit genuineness of document and inspection of documents.

The procedure provided for, an application for interrogatories under section 94, for notice to admit genuineness of documents under section 101 and for inspection of documents under section 104 is to move court by way of a motion *ex parte*. However, in terms of section 102 (1) there is no provision for a party to have recourse to discovery of documents by resorting to an application by way of a motion *ex parte*.

Therefore, a party is entitled to make his objection to an order for discovery and the court has a duty to inquire into such objection and make an order. The granting of an order for discovery is entirely within the discretion of court.

Section 109 CPC undoubtedly contains stringent provisions and is punitive in character. It provides for the defence of a defendant to be struck out and places him in the same position as if he had not appeared and answered. Further, such a party is deemed to be guilty of contempt of court.

Where it was difficult to foresee what matters were contemplated by the plaintiff-respondent by way of discovery, in the absence of any ascertainment of the specific matter or matters that were in question (under S. 108 CPC) the defendant would have to speculate on what matters discovery was sought. The defendant objected on the ground that the order of court had been made per incuriam and also pleaded privilege. Hence the essential requirement of contumacy before an order under section 109 could be made was lacking.

Further the order of court lacked the following basic features it ought to have contained:

(*a*) Declaration to be by affidavit.

(*b*) Declaration of the documents relating to matters in question in the action.

Cases referred to:

1. *Nandawathie de Silva v. Yasawathie de Silva* – 58 NLR 97.
2. *Weerasuriya v. Croos* 22 NLR 87.
3. *R. H. M. Foods Ltd. v. Bovril Ltd.* (1982) 1 WLR 661, (1982) 1 All ER 673.
4. *Appu Singho v. Jusey Appuhamy* 5 Appeal Court Rep. 135.
5. *Amin Jrai v. Hadji Omar & Co., Ltd.* – 71 NLR 115.
6. *Namasivayam Chetty v. Ragsoobhoy* – 46 NLR 12.

APPLICATION in Revision in respect of the order of the District Court of Colombo.

H. L. de Silva PC with *Faiz Musthapa* PC, *Romesh de Silva* PC and *Harsha Amersekera* for defendant-petitioner.

K. Kanag-Iswaran PC with *Harsha Cabral, M. A. Sumanthiran* and *Nigel Barthòlomeusz* for plaintiff-respondent.

Cur. adv. vult.

January 11, 1999.

WEERASURIYA, J.

The plaintiff-respondent by his plaint dated 21. 07. 97, instituted action against the defendant-petitioner, seeking a judgment in a sum of Rs. 300,000,000 as damages, allegedly for defamation based on a statement made by the defendant-petitioner over suspension of a settlement agreement pertaining to Hilton Project. The defendant-petitioner filed answer denying liability and prayed for dismissal of the action and the case was fixed for trial on 16. 03. 98. In the meantime, pursuant to an application *ex parte* by way of a motion by the plaintiff-respondent, court made order to issue notice purportedly in terms of

section 102 of the Civil Procedure Code, requiring the defendant-petitioner to disclose by affidavit all the documents in files maintained at the Ministry of Finance, which are or have been in possession or power of the defendant-petitioner relating to all matters in question in the action. On 17. 03. 98, defendant-petitioner filed a statement of objections together with an affidavit that the order had been made *per incuriam,* and documents referred to are not in his possession in his personal capacity and that they are privileged. On 07. 05. 98, the plaintiff-respondent made an application in terms of section 109 (1) of the Civil Procedure Code, to strike out the defence of the defendant-petitioner on the basis that he had failed to comply with the order made under section 102 of the Civil Procedure Code and District judge by his order dated 30.07.98, struck out the answer of the defendant-petitioner and fixed the case for *ex parte* trial. It is from the aforesaid order of the District Judge that this application for revision has been filed.

At the hearing of this application, the case of the defendant-petitioner was presented basically on the following two matters:

(1) that the District Judge had misdirected himself on the scope and content of section 102 of the Civil Procedure Code; and

(2) that the District Judge had misdirected himself on the purpose and scope of section 109 of the Civil Procedure Code.

The contention of learned President's Counsel for the defendant-petitioner that the District Judge had misdirected himself on the scope and content of section 102 of the Civil Procedure Code was based on the following grounds:

(*a*) that the District Judge failed to consider that the motion of the plaintiff-respondent was vague and nebulous; and

(*b*) that the District Judge made the order of discovery as a matter of course on a motion *ex parte.*

Learned President's Counsel for the plaintiff-respondent submitted that the answer of the defendant-petitioner was properly struck out, as he had failed to comply with the order under section 102 of the Civil Procedure Code served on him and that the court has no discretion in the matter.

Section 102 (1) of the Civil Procedure Code which provides for discovery of documents is in the following terms :

> *"102 (1) – The court may, at any time during the pendency therein of any action, order any party to the action to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the action, and any party to the action may, at any time before the hearing, apply to the court for a like order."*

The contention of learned President's Counsel for the plaintiff-respondent is that the discretion to move for an order for discovery under the second limb of section 102 (1) is the discretion vested in the plaintiff-respondent and that court has no discretion in the matter.

In the case of *Nandawathie de Silva v. Yasawathie de Silva*[1] it was held that an order for discovery of documents need not be made as a matter of course but is discretionary and may be resisted by a claim of privilege although no express provision in this behalf is to be found in section 102 of the Civil Procedure Code.

It was held in *Weerasuriya v. Croos*[2] that the court has a discretion to refuse discovery of documents where it can see that no good is reasonably to be expected from ordering it.

The contention of learned President's Counsel for the plaintiff-respondent that court has no discretion in the matter of discovery of documents was based mainly if not solely on the English practice,

where discovery of documents between parties to an action with pleadings is automatic without court order upon the close of pleadings except in running down actions in terms of Rule 1 of Order 24 of the Rules of Supreme Court. (The Supreme Court Practice (1995) vol. (1) page 431).

It is significant to note that English practice is for the parties to exchange lists of documents between them after the pleadings are closed. (Order 24 Rule 2 – The Supreme Court Practice (1995) vol. (1) page 434).

However, Rule 4 (1) of Order 24 (The Supreme Court Practice (1995) vol. (1) page 441) provides that where on an application for an order under rule 2 or 3 it appears to the court that any issue or question in the cause or matter should be determined before any discovery of documents is made by the parties, the court may order that, that issue or question be determined first.

Further, the English practice of deciding the stage at which discovery may be ordered is reflected in the case of *R. H. M. Foods Ltd. v. Bovril Ltd*[3] where it was held that court has a wide discretion when to order discovery in the interest of justice. But, it is generally inexpedient and unnecessary to do so until the issues have been defined by the pleadings. (The Supreme Court Practice (1995) vol. (1) page 440).

It is to be observed that rules in English practice in respect of discovery of documents vary in accordance with the manner in which action is instituted. Thus, in an action begun by writ, the requirement that the parties make discovery is obligatory by virtue of the Rules of the Supreme Court without the necessity for a prior order of the court and may thus be regarded as a matter of right on the part of the opposite party and moreover such requirement is mutual, that is the parties must make discovery to each other simultaneously by exchanging lists of documents. The requirement for the mutual discovery of documents without order does not apply to actions which

are begun by originating summons nor to third party proceedings and some others (Halsbury's Laws of England vol. 13, – 4th edition, pages 9 and 10). Whether discovery is to be made without an order of the court in an action begun by writ or by order of court, in determining whether a document should be disclosed by a party, two tests should be applied (1) whether it is relevant and (2) whether it is or was in the possession, custody or power of the party of his agent (idem page 33).

At page 34, it states as follows:

. . . Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars. Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to "fish" for witnesses or for a new case that is to enable him to frame a new case . . ."

It will be seen therefore, that according to the practice obtaining in England discovery is no longer granted as of right but as a matter of discretion based on the facts of the particular case under consideration.

Section 108 of our Civil Procedure Code which makes provision to reserve questions as to discovery is as follows:

"108 – If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the court is satisfied that the right of such discovery or inspection depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the court may order that

the issue or question be determined first, and reserve the question as to the discovery or inspection."

Learned President's Counsel for the plaintiff-respondent sought to argue that only upon compliance by a party of an order under section 102 (1) to declare by affidavit, could such party take up objection to discovery under section 108. This contention of learned President's Counsel for the plaintiff-respondent is untenable for the reason that the section itself makes no restriction in respect of the stage at which objection could be raised. To read into this section such a restriction when all other circumstances point to a contrary view would do violence to the language of the section and to the orderly conduct of the pre-trial proceedings.

Chapter XVI of the Civil Procedure Code relates to pre-trial proceedings encompassing provisions for interrogatories, discovery of documents, notice to admit genuineness of documents and inspection of documents. However, the procedure relating to discovery is different from procedure to secure interrogatories, admit genuineness of documents and inspection of documents.

The procedure provided for an application for interrogatories under section 94, for notice to admit genuineness of documents under section 101, and for inspection of documents under section 104 is to move court by way of a motion *ex parte*. However, in terms of section 102 (1) there is no provision for a party to have recourse to discovery of documents by resorting to an application by way of a motion *ex parte*.

Therefore, it is manifestly clear that a party is entitled to make his objection to an order for discovery, and the court has a duty to inquire into such objection and make an order. The granting of an order for discovery is entirely within the discretion of court.

Learned President's Counsel for defendant-petitioner submitted that District Judge had misdirected himself on the purpose and scope of section 109 of the Civil Procedure Code.

Section 109 of the Civil Procedure Code undoubtedly contain stringent provisions and it is punitive in character. It provides for the defence of a defendant to be struck out and to place himself in the same position as if he had not appeared and answered and also such party is deemed to be guilty of the offence of contempt of court.

It was held in *Appu Singho v. Jusey Appuhamy*[4] that power conferred by section 109 should be exercised only in cases where there has been obstinacy or contumacy in the conduct of the party in default. In *Amin Jrai v. Hadji Omar & Co., Ltd.*[5] it was held that penalty under section 109 of the Civil Procedure Code, can only be imposed on a party who is guilty of wilful or contumacious refusal.

In *Namasivayam Chetty v. Ragsoobhoy*[6] it was laid down that order under section 109 of the Civil Procedure Code is discretionary.

Therefore, it would be apparent that this provision could be resorted to where non-compliance is not a case of failure to comply with an order for discovery *per se* but has aggravating features which makes it a contumacious or obstinate refusal to obey such order.

In the instant case, the defendant-petitioner adduced reasons for his inability to comply with the order for discovery made by court. the plaintiff-respondent's case was founded allegedly on a defamatory nature of a statement of the defendant-petitioner. Therefore, the relevant issues must relate to matters in so far as publication of the statement complained of, defamatory nature of the statement, that it refers to the plaintiff or was understood to refer to the plaintiff, the *animus injuriandi*, damages and defences pleaded. The paragraphs and sub-paragraphs in the plaint aggregate over one hundred and cover 10 pages. Further, plaintiff-respondent claimed in his plaint that discussions and negotiations pertaining to the Hilton Hotel settlement were essentially handled by him and were achieved by his sole and sustained efforts over a period of six years. In the circumstances, it was an arduous task for one to foresee what were the matters, that were contemplated by the plaintiff-respondent by way of discovery.

It is justifiable for one to assume that in the absence of any ascertainment of any specific matter or matters in question, it was left to the defendant-petitioner to speculate on what matters discovery is sought.

This situation seemed to have confused the District Judge too, in making an order purportedly in terms of section 102 (1) wherein he had directed notice on the registered Attorney-at-law for the defendant-petitioner to produce documents relevant to the case of the plaintiff-respondent and documents which the defendant-petitioner rely on for his defence. However, the order issued by court under the hand of the Registrar, directed the defendant-petitioner to declare by affidavit within 7 days' of service of the notice, all the documents in files maintained by and kept at the Ministry of Finance under the supervision, control or authority as the Deputy Minister of Finance which are in his possession or power relating to all matters in question in the action.

It must be noted that the order made by the District Judge purportedly under section 102 (1) of the Civil Procedure Code lacked the following basic features it ought to contain namely –

(*a*) to declare by affidavit; and
(*b*) to declare documents relating to matters in question in the action.

Learned counsel for the plaintiff-respondent sought to explain this variance between the order made by the District Judge and the notice issued on the defendant-petitioner as having caused by a mere error, either in use, stenography or transcription which was however not an explanation relating to the inadequacy of the order of discovery lacking in essential prerequisites referred to above.

The District Judge having realised the obvious inadequacy of the order for discovery had also attempted to explain that he made order on 09. 03. 98 to declare the documents. However, in this explanation

too, there does not seem to have any material for his lapse, to direct the defendant-petitioner to declare by affidavit all documents relating to matters in question in the action.

Learned President's Counsel for the defendant-petitioner contended that a condition precedent to the making of an order under section 109 is the existence of a valid order of discovery under section 102 (1). Learned President's Counsel for the plaintiff-respondent, however, contended that this instance was not a case of invocation of wrong provision of law nor a case of assumption of jurisdiction under a wrong provision of law, nor the exercise of a non-existent power, all of which may affect jurisdiction. The District Judge purportedly acted under section 102, with no specific reference to that in the order proper, though there is prior mention of it, as being the application of counsel. But if the order which entail far-reaching consequences for non-compliance lacked the essential and necessary prerequisites it could be challenged as having been made without proper inquiry.

The other question which would arise in this context would be whether or not a party could be held as having failed to comply with such order with contumacy or wilful obstinacy, on whom notice is served, objects on the ground that the order had been made *per incuriam.* Having regard to all the circumstances, it would appear that such an inference is not justifiable.

For the foregoing reasons, it seems to me that the District Judge was manifestly in error when he made order to strike out the answer of the defendant-petitioner and to have the trial *ex parte.* This order has occasioned a miscarriage of justice which demands intervention by this court. In the circumstances, I set aside the order of the District Judge dated 30. 07. 98. This application is allowed with costs.

DE SILVA, J. – I agree.

Application allowed.