SIVARATNAM AND OTHERS
v
DISSANAYAKE AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
CALA 103/2003
DC KANDY 17742/L
OCTOBER 21 AND 22, 2003

Civil Procedure Code, sections 72, 75, 75 (d), 94 and 101 – Evidence Ordinance, sections 21, 31 and 58 – Admission of facts in injunction inquiry – Could the admissions be recorded as admissions at the trial ? – Code of Criminal Procedure Act , No. 15 of 1979, section 183.

Held:

(i) An interim injunction inquiry is an incidental proceeding designed to provide provisional relief until the substantial relief a party is entitled to get is decided at a trial.

(ii) If material submitted to court by affidavit evidence in an injunction inquiry has some relevance to the issues to be decided at the main trial, such material can be taken into account according to law, but the court cannot record as an admission those facts on the basis of an affidavit filed for the purpose of the inquiry relating to the granting of an interim injunction.

(iii) Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels.

Per Amaratunga, J.

"An affidavit is written evidence, but such written evidence cannot be used to force an admission on the defendants when they in their answer have taken up a contrary position."

(iv) For the purpose of regulating the manner in which an admission may be proved, the law draws a distinction between formal and informal admissions.

APPLICATION for leave to appeal from the order of the District Court of Kandy.

Cases referred to:

1. *Uvais* v *Punyawathie* – 1993 2 SRI LR 46 (distinguished)

2. *Jayasinghe* v *Mercantile Credit* (1982) 2 SRI LR 495
3. *Fernando* v *Samarasekera* – 49 NLR 285
4. *Mariammai* v *Pethrupillai* – (1918) 21 NLR 200
5. *Muhammad Altof Ali Khan* v *Hamid ud-din* – 21 Indian Cases 81

Riza Muzni for plaintiff-petitioners

Rohan Sahabandu with *Athula Perera* for defendant-respondents.

Cur.adv.vult.

January 16, 2004

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the decision of the learned Additional District Judge of Kandy refusing to record a fact, contained in an affidavit filed relating to the same action, as an admission recorded at the commencement of the trial. The plaintiffs have filed action against the defendants for a declaration of their title to the property described in schedules A and B of the plaint and the other relief claimed by the plaint including an interim injunction. The defendants have filed their objections, supported by affidavit to the granting of an interim injunction. In their affidavit the defendants have stated that they admitted the facts set out in paragraphs 2-6 of the plaint.

When the trial was to be taken up the plaintiff's counsel has moved Court to record that the facts set out in paragraphs 2-6 of the plaint have been admitted. The learned counsel for the defendants has pointed out that the defendants in their answer have specifically stated that they were unaware of the facts set out in paragraphs 2 and 3 of the plaint and that the plaintiffs should specifically prove the truth of those facts. The learned counsel for the plaintiffs has submitted that the admission made in the affidavit could not be withdrawn and accordingly the admission contained in the affidavit must be recorded as an admission at the trial. He has relied on the decision in *Uvais* v *Punyawathie*(1).

The learned Judge in his order has stated that, that case related to the withdrawal of an admission already recorded at the trial. The

learned Judge has stated that in view of the specific position taken up in the answer that the defendants were not aware of the truth of the averments set out in paragraphs 2 and 3 of the plaint, it was not possible to record matters set out in the affidavit as admissions. The plaintiffs seek leave to appeal against that order.

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact which is made by a party to the action or by someone identified with such party in legal interest. In terms of section 21 of the Evidence Ordinance, admissions are relevant and may be proved as against the person who makes them or his representative in interest. According to section 31 of the Evidence Ordinance, admissions are not conclusive proof of the matters admitted, but they may operate as estoppels. For the purpose of regulating the manner in which an admission may be proved the law draws a distinction between formal admissions and informal admissions. A formal admission can be broadly defined as an admission made in Court, or formally made outside Court or deemed to be an admission by virtue of any rule of pleading.

A regular action begins with the plaint. If the defendant admits the claim of the plaintiff, the Court shall give judgment against the defendant according to the admission so made. Such admission shall be in writing, signed by the defendant and his signature attested by an attorney-at-law. (Section 72 Civil Procedure Code) This section refers to a formal admission made outside Court. A consent motion, consenting to the relief claimed by the plaintiff is an admission falling within this provision. See the judgment of Soza, J. in *Jayasinghe* v *Mercantile Credit* [2]. If a defendant wishes to resist the action filed by the plaintiff, the defendant has to file his answer, prepared in accordance with section 75 of the Civil Procedure Code. Section 75(d) enacts that the answer shall contain a statement admitting or denying the several averments in the plaint. This rule is imperative. A defendant's failure to deny an averment in accordance with the requirement in section 75(d) of the Code must be deemed to be an admission. *Fernando* v *Samarasekara* [3]. If interrogatories are served in terms of section 94 of the Code, the answers to such interrogatories may also contain admissions. An admission made in response to a notice to admit genuineness of documents given under section 101 of the Code is also a formal admission.

At anytime before the hearing of the action, the parties are at liberty to admit in writing any fact to be determined at the trial (section 58 Evidence Ordinance). Such admissions are also formal admissions made outside Court. At the commencement of the trial the parties may state to Court the facts they admit and then such admissions are recorded by Court. Even in the course of the trial such admissions, eg. genuineness of documents, may be made. All admissions described above are formal admissions. Section 58 of the Evidence Ordinance enacts that "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or, which before the hearing, they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings."

Other admissions which fall into the category of informal admissions must be proved by the manner of proving any other fact i.e. by oral or documentary evidence produced according to the provisions of the Evidence Ordinance.

In the instant case, the defendants in their answer have specifically denied the averments set out in paragraphs 2 and 3 of the plaint. In such circumstances, the facts stated in those paragraphs are in issue. Despite the protestations of the defendants, the Court cannot record an admission of those facts on the basis of an affidavit filed for the purpose of the inquiry relating to the granting of an interim injunction. An interim injunction inquiry is an incidental proceeding designed to provide provisional relief until the substantive relief a party is entitled to get is decided at a trial. If material submitted to Court in an injunction inquiry has some relevance to the issues to be decided at the main trial, such material can be taken into account according to law. In this case the plaintiffs contention was that averments in paragraphs 2 to 6 of the plaint have been admitted in the affidavit filed for the purpose of the interim injunction inquiry. An affidavit is written evidence. But such written evidence cannot be used to force an admission on the defendants when they, in their answer, have taken up a contrary position. The learned Judge was therefore correct in refusing to record that the averments in paragraphs 2 to 6 of the plaint as admissions.

It appears to me that this leave to appeal application has been made on the assumption that the learned Judge's ruling has the effect

of wiping out the evidentiary value of the admission made in the defendant's affidavit. But the learned Judge's ruling does not have such far reaching effects. The effect of the ruling is only confined to the refusal to take the admission into consideration for the purpose of recording admissions. The ruling does not debar the plaintiffs from using the contents of the affidavit according to the rules of evidence. They are entitled, if they are so advised, to formally mark the affidavit in evidence at the trial through the Justice of the Peace who attested it. They may also use the affidavit as a former statement to impeach the testimony of the defendants at the time they give evidence at the trial. Therefore if the affidavit is used at the trial in accordance with the law of evidence, the trial Judge will decide the weight to be attached to the admission in deciding the issues raised in the action, bearing in mind that "admissions are not conclusive proof of the matters admitted but they may operate as estoppels" (section 31 of the Evidence Ordinance) or that the affidavit contains material relevant to the weight to be attached to the evidence of the persons who have made those admissions.

The decision in *Uvais* v *Punyawathie* (*supra*) is authority for the proposition that a fact specifically admitted at the trial and relied on by the opposite party in deciding how he should present his case cannot be withdrawn or departed from at the stage of the appeal. See also *Mariammai* v *Pethurupillai* (4). Fernando, J.'s judgment in Uvais's case makes it very clear that what is not permitted is the withdrawal of an admission in circumstances where such withdrawal has the effect of subverting the fundamental principles of the Civil Procedure Code in regard to pleadings and issues.. That judgment is not authority for the broader proposition that an admission once made cannot be withdrawn at all. An admission made in a written statement may be subsequently withdrawn with the permission of the Judge. *Muhammad Altof Ali Khan* v *Hamid-ud-din.*(5) Section 183 proviso of the Code of Criminal Procedure Act, No. 15 of 1979 explicitly demonstrates that an admission can be withdrawn. Thus the law's refusal to allow the withdrawal of an admission is a matter depending on the circumstances of each case.

For all reasons I have stated above, the refusal of the learned Judge to record the admissions proposed by the plaintiffs was correct in law. Accordingly I uphold the ruling given by the learned Judge and

refuse leave to appeal. The application is dismissed with costs in a sum of Rs. 2500/-.

Application dismissed.