SAMARASINGHE
V.
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COURT OF APPEAL
PALAKIDNAR, J. &
SENANAYAKE J.
C.A. APPLICATION NO. 522/90
D.C. COLOMBO NO. 12599/D
13 JULY 1990 and 02 AUGUST 1990

Natural Justice - Bias - Tests to be applied - Discretion

Held:

Orders made for costs, orders made against the defendant, refusal to allow a *de novo* trial, refusal to permit written submissions in preference to oral submissions except where the discretion of the court is exercised with capricious perversions and unreasonableness and again exercise of discretion of the Court against issue of attachment of a witness for default of appearence do not amount to bias.

There was no real likelihood of bias in the rulings given by the Judge. This is the test to be applied.

Per Palakidnar, J:

"Counsel's role in the administration of justice in a trial is invaluable. Within reasonable bounds, courts should accommodate counsel on the basis of reciprocity and a full awareness that the client should be able to avail himself of fair and expeditious justice with the services of counsel of his choice. Such an approach would remove rancour and a sense of misgiving in contentious litigation".

Cases referred to:

1. *Cottle* v. *Cottle* (1939) 2 All ER 41
2. *Queen* v. *Huggins* (1895) 1 QBD 553
3. *Re Ratnagopal* 70 NLR 409
4. *R* v. *Camborne Justices, ex parte Pearce* (1954)2 All ER 850
5. *Kumaran* v.*Data Processing Systems* (1989) 2 Sri LR 192
6. *Metropolitan Properties Co.* v. *Lannon* (1968)3 All ER 304
7. *Simon* v. *Commissioner of National Housing* 73 NLR 471

APPLICATION in revision of the orders of the District Court of Colombo.

Maureen Seneviratne, P.C. with *G.L. Geethananda* for defendant - petitioner.

Romesh de Silva, P.C. *with* Palitha Kumarasinghe *for plaintiff - respondant.*

Cur. adv. vult.

29 August, 1990

PALAKIDNAR, J:

The Plaintiff brought an action against the Defendant for judicial separation on 31-10-1984. It was amended to an action for divorce on 26.02.1985. After several stages borne out by the journal entries this matter became ripe for trial on 20.06.1990. On that date Counsel for the Defendant was ill. This fact was known to the Plaintiff's Counsel and he did not raise any objections to the case being called on 25.06.1990 to fix a date for trial. The learned trial judge kept the case on the trial roll but kept the case down till 12 noon on that day. At 12 noon the Court was informed that a transfer application had been made in the Court of Appeal under section 46 of the Judicature Act in respect of this case. The learned trial Judge fixed the case for trial for the next day 26.06.1990 and proceeded to take the matter of trial. The Judge observed that no order to stay proceedings had issued from the Court of Appeal and he continued with the trial on 26.06.90.

On 06.07.90 the case was postponed on the application of the Counsel for the Defendant. On 16.07.90 the Defendant was not well. The Court on the application of Plaintiff's Counsel ordered incurred costs payable by the Defendant in a sum of Rs. 10,050/-. The Counsel for the Defendant has consented to the amount fixed. The matter was later fixed for trial on 01.08.90.

Prior to these developments the case was postponed on several occasions for reasons for which neither the Plaintiff nor the Defendant were responsible. The situation arose out of working arrangements in the District Court and allocation of different types of work to different Judges. Considering the aspect of laws delays it is not a commendable feature to find that a Plaintiff seeking relief in the year 1984 had to wait till 1990 to get his case heard before the trial court. The delay among other factors would be attributable to incidental orders being agitated in appeal with leave. It was inevitable that matters had to await the decisions of the higher Court and the progress towards a speedy disposal of the trial had to delayed. Learned Counsel for Petitioner at the outset submitted that a series of orders made against the Defendants could give the impression to the Defendant and indeed to any reasonable person that the Court was acting in a biased manner. We have examined the refusals complained against and do not see any reason to uphold the

contention of a biased attitude on the part of the Judge. The refusals to allow a de novo trial or the refusal to admit written submissions in preference to oral submissions are matters well with the jurisdiction of the learned trial Judge. His discretion cannot be readily interfered with unless it was exercised with capricious perversion and unreasonableness. The Defendant sought a ruling on the interrogatories to be raised. The complaint is that no order was made on this matter. Counsel for the Respondent drew the attention of Court to the fact that it was not pursued in the course of the trial by the Defendant. The refusal of the trial Judge to issue attachment on a witness cannot be urged as one with biased motivation. Attachment with the inconveniences it entails is not resorted to readily in civil proceedings. The discretion of the Judge plays a large part in the issuance of an attachment for default of appearance. The Judge should be convinced that such default was malicious and intended to delay proceedings.

It was the contention of respondent's Counsel that even if all the orders were wrong orders yet to impute bias purely on that basis cannot be supported as the correct approach is to decide this question within the scope of the provisions in the Judicature Act.

After the matter was fixed for trial Counsel's illness and Defendant's illness have occasioned delay. But a study of the rulings that were given by court on these occasions in our mind is what every trial judge would have done to cope with the application made having regard to the long time that has passed between the date of the plaint and date of trial. It was urged that the trial Judge was a supernumerary Judge and did not follow the norms of court implying thereby that a permanent Judge would have ruled differently in the circumstances. It is not unoften that a supernumerary Judge with a sense of dedication and purposiveness would decide to dispose of a trial during his supernumerary tenure. He may seek to achieve this objective by fixing matters day to day for hearing. He would be guided by drawing a mean between expeditious disposal and convenience of Counsel. On an examination of the Judge's decisions on this matter we cannot find anything exceptionable in the step taken towards disposal of the trial in this case so far.

In the sum total we are left with the evaluation of matters that have been raised before us on the basis of the affidavit of the Defendant to decide whether there was a real likelihood of bias in the rulings given by the learned trial Judge.

Counsel for the petitioner cited several judgments which have considered the question of bias in judicial approach. The tests and guidelines have been laid down in these decisions.

Boyd Merriman J in *Cottle* vs. *Cottle* (1) said that the necessity is not to prove actual bias but to prove that the position is such that the other party cannot reasonably form the impression that this case may not be given an unbiased hearing.

In *Queen* vs. *Huggins* (2) Willis, J. observed that it is impossible to overrate the importance of keeping the administration of justice by Magistrates clear from all suspicion of unfairness.

Justice T.S. Fernando in *Re Ratnagopal* (3) held that the subjective tests in exercise of these matters would be wrong. Quoting the dictum expressed in *R.* v. *Camborne Justice ex parte Pearce* (4) he held that the objective test of the real likelihood of operative prejudice would be the correct approach to assess the question.

In *Kumaran* vs. *Data Processing Systems* (5) Goonewardena, J citing Denning, J's view in *Metropolitan Properties Co.* v. *Larron* (6) took the view that there must be real likelihood of bias and not mere surmise or conjecture. It is an impression formed in the minds of reasonable people. Wimalaratne, J in *Simon* vs. *Commissioner of National Housing* (7) did not approve of reasonable suspicion as a guideline. He preferred the test of a real likelihood of bias.

Applying this test to the facts of this case we do not think that the Petitioner has shown sufficient reasons for us to conclude that there is a real likelihood of bias in this case.

Counsel's role in the administration of justice in a trial is invaluable. Within reasonable bounds courts should accommodate counsel on the basis of reciprocity and a full awarness that the client should be able to avail himself of fair and expeditious justice, with the services of Counsel of his choice. Such an approach would remove rancour and a sense of misgiving in contentious litigation.

We therefore dismiss this application on the ground that no real likelihood of bias exists on the matters urged before us. The Respondent is entitled to costs in a sum of Rs. 525/-

SENANAYAKE, J - I agree