

1941

Present : Wijeyewardene and Nihill JJ

WIJESEKERE v. EASTERN BANK.

37—D. C. Colombo, 11,188.

Interrogatory—Legitimate use of interrogatories—Proof of facts relevant to a fact in issue—Not allowed to establish facts otherwise relevant.

The legitimate use of interrogatories is to obtain for the party interrogating admissions of fact relevant to a fact in issue or leading up to a matter in issue.

If the object of serving interrogatories is to obtain facts which it is not incumbent upon the party interrogating to prove in order to establish his case but which are otherwise relevant such interrogatories should not be allowed.

A PPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him. E. F. N. Gratiaen), for defendant, appellant.

N. Nadarajah, for plaintiff, respondent.

Cur. adv. vult.

November 14, 1941. NIHILL J.—

This is an interlocutory appeal from an order of the District Judge of Colombo dated February 17, 1941, which under section 100 of the Civil Procedure Code directed the Manager of the Eastern Bank in Colombo to answer certain interrogatories.

43/11

The matter arose in this way. The respondent to this appeal, a business man trading in Colombo, sued the appellant—the Eastern Bank—for damages, *inter alia*, by reason of an alleged defamatory letter written at Baghdad by the Manager of the Bank's Baghdad Branch to a merchant in that city. The Bank filed answer denying liability and the trial was fixed for February 11, 1941. On January 22, 1941, interrogatories were served on the Bank's Manager in Colombo. To three of these he objected and on February 1, 1941, he filed an affidavit containing his reasons.

The interrogatories to which he took objection were as follows:—

“(a) Did the Colombo Branch of the defendant Bank send to the Baghdad Branch on or about the 24th of July, 1939, the following message:—

EAST BANK. BAGHDAD.
TXDYE. YDUDU. UFSBA. AHXAP. BROAG. THUAA. TRIUO.
IPTOI

Signed illegibly.

(b) Was this message sent in Code?

(c) If so, state what code was used.

(d) State how the message would read in ordinary language when it is decoded.

“5 (a) Did the Baghdad Branch of the defendant Bank instruct or advise the Colombo Branch in or about July, 1939, to open a letter of credit to plaintiff?

(b) If so, what was the date on which the instructions or advice to open the said letter of credit was received in Colombo?

(c) Did the Colombo Branch fail to advise the plaintiff of this letter of credit?

(d) Did the Colombo Branch telegraph to the Baghdad Branch in reply?

(e) Was the reply to the effect that the plaintiff was worthless and that the Colombo Branch was not advising plaintiff of the letter of credit?

(f) If the answer to interrogatory No. 5 (e) is in the negative, state what the answer was.

6. (a) On whose behalf in Baghdad was the letter of credit referred to in the interrogatory No. 5 opened?

(b) Was your reply referred to in interrogatories No. 5 (c) and (d) and intended to be communicated to that person?

(c) Was the reply in fact so communicated?”

The learned District Judge in making his order directing the appellant to answer these interrogatories did so on the grounds that they were relevant as being links in the chain of the plaintiff's evidence which may help him to substantiate his case and he held that they had been put *bona fide* for the purposes of the action. These are good reasons in Law for the admission of the interrogatories provided the learned District Judge was justified in coming to the conclusion he did. What is really at issue between the parties to this appeal is whether the answers, if supplied, would provide in fact material which the plaintiff must have in order to prove his case. In order to consider this issue it will be best first to look at the plaint. The plaintiff has alleged three causes of

action but it is with the second only that we are concerned, for it is with regard to that cause of action that the interrogatories objected to were directed.

In paragraph 10 (a) of the plaint this cause of action was set out as follows:—

“10. (a) On or about the 25th or 26th of July, 1939, and again on a date between the 1st and 10th of August, 1939, the defendant's agent or servant acting in the course of his employment published or communicated by letter to the firm of 'G Y KHAZZAM and MEIR SHAOUL' Baghdad the following statement, namely, that the plaintiff's firm was not a *bona fide* one; and that the plaintiff was worthless.

(b) The said publication was made at Baghdad and by the Manager of the Baghdad Branch of the defendant's bank. Plaintiff is unable to ascertain the name of the said Manager but defendant is aware of the same”.

In the two following paragraphs of the plaint the plaintiff alleged that the said publication was false and malicious, and that what was meant by the words was that the plaintiff was not to be trusted in his business dealings and/or that the plaintiff's firm was not a reliable one.

Now it is clear that what the plaintiff has to prove is the publication of the statement in Baghdad. If he can do that and can defeat the plea that the communication was made on a privileged occasion by showing malice, he succeeds; if he fails to prove publication in Baghdad he must fail. That is all that is incumbent upon him. Can it be said that answers to the objected interrogatories are necessary to him to prove the publication in Baghdad? Supposing he obtains a decode of the cablegram set out in the fourth interrogatory and it is found to contain something defamatory of the plaintiff. This might give him another cause of action against the Bank but it will not help him to prove publication by the Bank's servant in Baghdad. How then can it be a necessary link in the chain of evidence which he has to prove? If he has proof of the publication in Baghdad he has his chain complete and evidence that some communication took place between the Bank's Manager in Colombo and their Manager in Baghdad will be an unnecessary elongation of it.

Smith L. J. in the case of *Kennedy v. Dodson*¹ put the matter thus:—

“The legitimate use and the only legitimate use of interrogatories is to obtain from the party interrogated admission of fact which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted”

Mr. Nadarajah has contended that as the defendant is a corporation it is incumbent on the plaintiff to prove that its Baghdad servant when he published the defamatory statement was acting in the course of his employment and that the answers to these interrogatories will help him to establish that part of his case.

¹ (1895) 1 *Chancery*, p. 341.

Now the defendant in paragraph 7 of his answer has indicated I think sufficiently that if a defamatory statement was published it was done on a privileged occasion. The plaintiff therefore need have no fear that if he proves the statement he will be met by a plea that the Baghdad Agent was not acting in the course of his employment. Indeed Mr. H. V. Perera in his appeal has conceded that if a defamatory statement was published by the Baghdad Manager it must have been an act done by that Manager in the course of his employment.

Mr. Nadarajah has also urged that we should be slow to interfere with the decision of the learned District Judge in a matter which is very much a matter of discretion. I agree with that principle but if, as I think, that, although the learned District Judge no doubt addressed his mind judicially to the problem, he reached a wrong conclusion as to the relevancy of these interrogatories, then it must be the duty of an Appeal Court to step in. It may be that the answers to these interrogatories might provide the plaintiff with evidence which would be relevant in the broad sense in which relevancy is defined in our Evidence Ordinance, but in judging an interrogatory a stricter test of relevancy is required. It must be relevant to a fact in issue or as leading up to a matter in issue in the action.

Where I think the learned District Judge has erred in this case is in assuming that details of what passed between the two Branches of the Bank would lead up to any fact which it will be incumbent upon the plaintiff to prove in order to maintain his action.

It is on this ground that I would disallow these interrogatories and having reached this conclusion it is not necessary for me to examine any other possible grounds of objection such as vexation or oppression or whether they were put merely with a view to further litigation. All such grounds, if established, would be grounds for disallowance but having found that they are objectionable on one ground it would be surplusage to consider whether they may be objectionable on another.

I think this appeal should be allowed with costs and the order set aside.
WIJEYWARDENE J.—I agree.

Appeal allowed.
