HILDON
v.
MUNAWEERA

COURT OF APPEAL.
HECTOR YAPA, J.
U. DE Z. GUNAWARDENA, J.
C.A. NO. 268/96.
REV D.C.KANDY 2175/RE.
OCTOBER 20, 1997

Civil Procedure Code – Section 150 – Calling evidence in Rebuttal

In an application to revise an Order allowing the plaintiff-respondent to call evidence in rebuttal.

Held:

As a rule the plaintiff in a case is entitled to lead evidence in rebuttal only to meet a situation that has arisen unexpectedly, an obvious instance would be where the plaintiff having closed his case is faced with evidence of a decisive nature arising ex improviso which reasonably could not have been foreseen.

***Per* Gunawardena, J.,**

"In practice such a situation, that is where either the plaintiff or the defendant would be permitted to lead evidence in rebuttal is rarely to be met with in a civil action, since a party to an action couldn't have led at the trial any evidence except to support the case enunciated in his pleadings and which his opponent was prepared to meet. In other words as stated in explanation 02 appended to Section 150 Civil Procedure Code, evidence must reasonably accord with party's pleadings and no party can set up at the trial a case which is materially different from that, which he has placed on record."

APPLICATION in Revision from the Order of the District Court of Kandy.

Case referred to:

1. *Jaganadan Pillai v. Perera* – 5 N.L.R. 95

Manohara R. de Silva for defendant-petitioner.
Upali Welaratne with *Anil Gunawardena* for plaintiff-respondent.

Cur. adv. vult.

October 20, 1997.

U. DE Z. GUNAWARDENA, J.

This is an application seeking to revise orders, dated 27.04.1995 and 25.03.1996 respectively, made by the learned Additional District Judge allowing the plaintiff-respondent to call evidence in rebuttal.

The learned Additional District Judge had on 27.04.1995 made order allowing evidence in rebuttal to be adduced without knowing or ascertaining in advance the nature of the evidence that was going to be led in rebuttal or the points or aspects in the defendant's evidence to which such evidence in rebuttal would pertain or even considering the question whether the circumstances of the case warranted an order permitting the plaintiff-respondent to lead evidence in rebuttal. The learned Additional District Judge seems to have been oblivious to the fact that the plaintiff in a case cannot lead evidence in rebuttal as a matter of right. Of course, the defendant-petitioner had originally acquiesced in or had not objected to the plaintiff-respondent's application to call evidence in rebuttal although he (the defendant-petitioner) had altered his stance and had objected, on a later date, to such evidence being led as was clear from the said order dated 25.03.1996 which order shows that the learned judge himself had, upon reconsideration of the matter, grown somewhat sceptical about the soundness of his previous order dated 27.04.1995 whereby he had originally allowed the application of the plaintiff-respondent to lead evidence in rebuttal but, perhaps, rightly, stopped short of setting aside his own earlier (wrong) order.

This action had been filed by the plaintiff-respondent who was the landlord seeking to eject the defendant-petitioner who was the tenant in respect of the premises described in the schedule to the plaint. One of the grounds, being also the main one, on which the action was rested was that the defendant-petitioner had caused damage to the premises in suit. At the trial, a suggestion had been made under cross-examination to a witness, viz. a grama-sevaka, who had been called as a witness for the plaintiff-respondent – the suggestion being that the damage to the premises in suit was caused by explosions that were caused by the authorities in connection with Mahapola

Celebrations in 1982. The material before us is not all that specific and is somewhat vague but it looks as if the plaintiff-respondent had sought to call evidence in rebuttal to erase the impression created by that suggestion made to the grama-sevaka – a suggestion, be it noted, that had been made before the close of the case of the plaintiff-respondent. It was admitted between the parties at the hearing before us that no evidence, whatsoever had been adduced at the trial, as part of the defendant's case, to the effect that any damage to the premises in question had been caused by Mahapola authorities.

At the argument before us the learned Counsel for the plaintiff-respondent submitted thus; "... object in seeking permission to lead evidence in rebuttal is to show that the damage to the house in question had been caused by the defendant herself and by nobody else".

That the defendant-petitioner caused damage to the building in question is the major, if not, virtually the sole ground, on which the plaintiff-respondent's action was initially based and as such no question of leading evidence in rebuttal to support that position can ever arise. The plaintiff-respondent, being the party beginning at the trial, had to lead all the available evidence, at the very outset, to establish the grounds stated in the plaint or the cause of action pleaded therein – if for no other reason than that the onus of proving the grounds relied upon by him (the plaintiff) was on him. The facts necessary to establish the cause of action set out in the plaint (unless admitted in the answer) have, of necessity, to be proved by the plaintiff-respondent as part of his case and not after the defendant had led his evidence and closed his (defendant's) case. As a rule the plaintiff in a case, is entitled to lead evidence in rebuttal only to meet a situation that has arisen unexpectedly, say, on the evidence led by the defendant, a position or a case which couldn't have been envisaged on the pleadings of the defendant. An obvious instance would be, where the plaintiff having closed his case is faced with evidence of a decisive nature arising ex improviso which reasonably could not have been foreseen. *Jaganadan Pillai v. Perera*[1] would be instructive in this regard – that being on action to recover the balance

of the price of a house which was sold by the plaintiff to the defendant. In that case the defendant (in the circumstances of that case being the party beginning) to support his plea of payment read in evidence the conveyance wherein the plaintiff had acknowledged the receipt of the full consideration and closed his case. Thereupon, plaintiff proved by witness and documents that the balance was not really paid. After the plaintiff's case was closed the defendant proposed to call evidence in rebuttal.

Held – that as the onus was on the defendant to prove payment, it was his duty to adduce all the evidence he had and that the District Judge having in the exercise of his discretion refused to allow the defendant to call evidence in rebuttal, there appeared no reason to interfere with it.

In the case in hand, too, as the onus was clearly on the plaintiff-respondent to prove the fact or facts constituting the cause of action viz., damage to the house in suit, he (the plaintiff-respondent) cannot be afforded a second spell or turn to which it will amount if the plaintiff-respondent is allowed an opportunity to lead evidence regarding a matter with respect to which the plaintiff, in fact, had already led evidence at the outset.

In practice, such a situation that is, where either the plaintiff or the defendant would be permitted to lead evidence in rebuttal, is rarely to be met with in a civil action, since a party to an action couldn't have led at the trial, any evidence except to support the case enunciated in his pleadings and which his opponent was prepared to meet. In other words, as stated in explanation 02 appended to section 150 of the Civil Procedure Code, Evidence must reasonably accord with party's pleadings and no party can set up at trial a case which is materially different from that which he has placed on record.

So far as I can see, in this case, inasmuch as the position that Mahapola authorities or any third party caused damage to the building is not pleaded in the answer, the learned District Judge could have allowed evidence in rebuttal to be led, perhaps, only in one of the two rare situations that is likely to arise and described

below: (a) if the defendant-petitioner had been permitted by the learned District Judge to lead evidence to show that damage, if any, to the building in question had been caused by Mahapola authorities (despite the fact that he had not pleaded so in his answer) or (b) if the defendant had after the close of the plaintiff-respondent's case, amended the answer to plead so, that is, that the damage was attributable to the acts of the authorities that held the Mahapola Celebrations or the festival.

It will be seen that neither of the above two situations had arisen in this case for it was admitted by both Counsel, at the hearing of this application, that the defendant-petitioner had not led any evidence to show that the damage, if any, was caused not by herself but by Mahapola authorities. In fact, it is to be observed that the position of the defendant-petitioner, stated in her answer, was that the building had not suffered any damage as was the position even according to the evidence led for the defence.

For the aforesaid reasons the said order of the learned Additional District Judge dated 27.04.1995 permitting the plaintiff-respondent to lead evidence in rebuttal is hereby set aside for the said order is wrong as wrong can be.

For the sake of completeness, the subsequent order dated 25.03.1996 which had been made by the learned Additional District Judge consistently with the previous order dated 27.04.1995 is also set aside.

YAPA, J. – I agree.

Application allowed.