SUBRAMANIAM AND ANOTHER
v.
CEYLON PAPER SACKS LTD.

COURT OF APPEAL.
S. N. SILVA, J.
D. P. S. GOONESEKERA, J.
C.A.L.A. APPLICATION NO. 239/91
OCTOBER 15 & 30, 1992, MARCH 02, 1993.

Civil Procedure – Evidence in rebuttal – Listing of witnesses – Civil Procedure Code, sections 163, 121 (1) and 175 (1) – Reservation of right to lead rebuttal evidence.

This was an action for infringement of a patent. Plaint was filed on 01.07.1986. Issues were framed. In the issue the plaintiff assumed the burden of establishing the validity of the patent. The defendants' issues were in effect the converse of the plaintiffs' main issue. Plaintiffs' case was closed on 21.06.1988 without any reservation to lead evidence in rebuttal. The defendants' case was also closed. There had been 34 dates of trial upto 04.12.1991 which was the last date on which proceedings were had. The plaintiffs filed their 7th list of additional witnesses dated 02.12.1991 one day before the last date of trial listing as a witness "Mervan Peiris of Colombo" neither a description nor the address of the witness was stated. The defendant on whom the list of witnesses was served on the day before the trial was given no indication as to what this witness was intending to testify. On 04.12.1991 the District Judge refused the application of the Plaintiff to lead evidence in rebuttal by calling Mervan Peiris. Thereupon the Counsel for plaintiff closed his case. Plaintiffs then filed this application for leave to appeal, from the order refusing the application to lead evidence in rebuttal.

Held :

1. The question whether a party who begins a case should be permitted to call evidence in rebuttal has to be decided primarily in relation to the proceedings had in each case. There are two situations in which rebuttal evidence may be permitted. They are :

(i) Where there are several issues in the case and the burden of proving only some of them lie upon the party beginning and of the others on the opposing party. In such a situation section 163 of the Civil Procedure Code provides that the party beginning may at his option adduce evidence-in-chief on the issues where the burden lay on him and reserve his right to lead rebuttal evidence in respect of the issues where the burden lay on the opposing party.

(ii) Where the Court may in any event, in the interests of justice, permit the party beginning to lead evidence in rebuttal.

In situation (i) there is an element of a right in the party unlike situation (ii) which is entirely at the discretion of the Court. However, even in situation (i) the judge has a discretion in considering the particular issues raised by the respective parties and the evidence hitherto adduced by the party beginning, to decide whether that party has the right that is claimed under section 163.

Per S. N. SILVA, J.

" (Section 163) manifestly embraces a situation where the respective issues are distinct and are discernible as such. It does not readily apply in a situation where the respective issues overlap or where the issues raised by the opposing party are the counter or negative of the issues raised by the party beginning. In such situation the party beginning cannot split his case into two, present part in evidence-in-chief and seek to confirm that part by taking a second bite of the same cherry, under the cover of rebuttal."

2. In relation to section 163, the party beginning has to make an option and reserve his right to adduce evidence in rebuttal as to the issues where the onus lay on the opposing party. The reservation to lead evidence in rebuttal should be made before the party beginning adduces evidence or at the latest before such party closes his case. If the reservation is objected to, an order should be sought from court so that parties would know the precise nature of the proceedings that will be had in the case.

Per S. N. SILVA, J.

" Even assuming that the Plaintiffs were entitled to lead evidence in rebuttal, they should have been ready for this purpose by the 34th date of trial, when the case of the defendant was being closed. "

3. In terms of section 175 (1) of the Civil Procedure Code, a party is not entitled to call as a witness a person who has not been listed in terms of section 121 (1) of the Civil Procedure Code. This provision requires the list of witnesses to be filed not less than 15 days before the date fixed for trial. The proviso to section 175 (1) empowers the court to use its discretion in special circumstances where such a course is rendered necessary, in the interests of justice, to permit a witness to be called, whose name is not included in a list filed in compliance with section 121(2).

4. In the instant case the plaintiffs did not indicate to the District Court the material that they intended to adduce through the witness Mervan Peiris. No description or address has been disclosed of this witness as required by the Civil Procedure Code. The defendant had no notice whatever of the nature of the evidence intended to be adduced through this witness.

5. The discretion of court was rightly exercised in refusing to permit Mervan Peiris to be called.

Cases referred to :

1. *Alim Will* Case 20 NLR 481, 486.
2. *Penn v. Jack and Others* - The Law Reports Equity Cases (1866) 314.
3. *Green v. Sevin* - The Law Reports, Chancery Division, (1879) Vol. XIII P. 589, 597.
4. *Nanhey Raja v. Kadar Nath*, (1953) All India Reporter, Vol. 40 P. 953.

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

K. Kanag - Iswaran, P.C. with *Harsha Cabral* for plaintiff-petitioners.

Vernon Wijetunga, Q.C. with *S. G. Wijesekera* and *H. Anthony* for defendant-respondent.

Cur. adv. vult.

March 03rd, 1993.

S. N. SILVA, J.

The plaintiffs have filed this application for leave to appeal from the order dated 4.12.1991 of learned Additional District Judge. By that order learned Additional District Judge refused the application of the plaintiffs to lead evidence in rebuttal and in particular refused to allow the plaintiffs to call one Mervan Peiris as a witness in rebuttal. Upon that order being made learned President's Counsel for the plaintiffs closed the case of the plaintiffs, leading in evidence documents marked P1 to P13. The case of the plaintiff had been closed previously on 21.6.1988 at the conclusion of the evidence of the plaintiffs' witnesses, reading in evidence documents marked P1 to P7 (p 348). The case for the defendant has also been closed reading in evidence documents marked D1 to D 55. Learned Additional District Judge gave dates for written submissions of the parties. Written submissions of the defendant have been filed and the written submissions of the plaintiffs are due on 15.3.93. By this application the plaintiffs are seeking to set aside the aforesaid order of learned Additional District Judge and are also seeking permission for the plaintiffs to file additional lists of witnesses and documents and to lead evidence in rebuttal.

Trial in the case commenced on 24.4.1987. There have been 34 dates of trial up to 4.12.1991. The Additional District Judge before whom the trial commenced retired and the Additional District Judge who heard the evidence was subsequently appointed a Judge of the Provincial High Court. He is now hearing the case on a special

appointment made by the Judicial Service Commission. The only step to be taken in the trial is for the plaintiffs' Counsel to tender his reply (for which a date has been given as aforesaid) and for learned Judge to deliver judgment.

On 4.12.1991 being the last date on which proceedings were had in the District Court, the only witness the plaintiffs wanted to call in rebuttal was one " Mervan Peiris of Colombo " whose name was contained in the 7th additional list of witnesses of the plaintiffs dated 2.12.1991, filed one day before the 34th day of trial. Neither a description nor the address of this witness is contained in the list. The defendant on whom this list was served the day previous was given no indication as to what this witness was intending to testify. Similarly, in the petition filed in this Court, seeking leave to appeal, no particulars whatsoever are given of the witnesses whom the plaintiffs intend to call in rebuttal. Relief is sought simply to permit the plaintiffs to file " additional lists of witnesses and documents if any ". We have to note that the plaintiffs are by this relief attempting to resile from the position in the District Court where their case has been closed not once but twice by learned President's Counsel appearing for them. These matters weigh heavily against the plaintiffs' appeal and their application to suspend the proceedings in the District Court, at the eleventh hour.

The plaintiffs are owners of a patent for a " Multiwall Sack For Dry Tea " (Patent No. 9329) which was registered on 14.7.1983 in terms of the Code of Intellectual Property Act No. 52 of 1979. The action was filed on 01.07.1986 to restrain the defendant from infringing the patent and for damages. An interim injunction that had been issued was dissolved by the District Court after inquiry. It appears that a stay of that order was granted by this Court in an application by the plaintiffs.

The defendant in his answer stated that Multiwall Paper Sacks have been used as packaging material for over 100 years internationally and that the defendant has been producing these sacks from 1965 for packaging several products including tea. It was pleaded that the purported invention is not new, does not involve an inventive step and has been anticipated by prior art. These are the requirements of a patentable invention in terms of sections 60, 61 and 62 of the Act. On that basis the defendant prayed for a declaration that Patent No. 9329 is null and void.

Learned President's Counsel for the petitioner submitted that the plaintiffs have to prove only title to the patent and the alleged infringement and are entitled to lead evidence in rebuttal after the defendant has placed evidence for the declaration that the patent is invalid. Learned Queen's Counsel, on the other hand submitted that the plaintiffs raised a specific issue in the District Court that the patent was valid and subsisting and as such evidence as to validity should have been adduced in evidence-in-chief of the plaintiffs. It was also submitted with reference to the evidence of the 1st plaintiff that evidence as to validity was in fact adduced and as such evidence on the same matter cannot be adduced in rebuttal which will in effect confirm the evidence-in-chief.

Learned President's Counsel for the plaintiffs urged that leave to appeal should be granted because the matter at issue relates to an important question as to the nature of the proceedings in an alleged infringement of a patent and the extent to which the burden lies on each party. We are of the view that it is unnecessary for the purposes of this appeal to go into the question addressed by learned President's Counsel in abstract, in relation to proceedings that may generally be taken for an alleged infringement of a patent. It is clear from the issues raised by learned President's Counsel for the plaintiffs at the trial that the plaintiffs assumed a burden to establish the validity of the patent. Issues were suggested earlier on the basis of only infringement and relief (vide proceedings of 24.4.1987), since registration of the patent was admitted. On objection raised by learned Queen's Counsel for the defendant, Counsel for the plaintiffs re-framed the issue (1) as follows :

"1 (*a*) Is the said patent 9329 valid and subsisting?

(*b*) Is the defendant acting in violation of the plaintiffs' rights under the said patent 9329 as pleaded in paragraph 6 (*a*) of the plaint?"

In the circumstances we are of the view that learned Additional District Judge was not in error when he observed that the plaintiffs led evidence and were obliged to prove that the patent is valid and subsisting. Learned Queen Counsel, quite correctly, drew our attention to the several passages of the plaintiff's evidence in support of his claim of a patentable invention.

The issues of the defendant are based *inter alia* on the requirements of a patentable invention as noted above. Therefore, these issues are in effect the converse or the negative of issue 1 (*a*) framed by the plaintiffs. It is in this context that learned Additional District Judge observed that the plaintiff in this case is not entitled to lead evidence in rebuttal.

Learned President's Counsel relied heavily on the *Alim Will Case* [1] *20 N.L.R. P481* and the case of *Penn Vs Jack and Others* [2] *The Law Reports Equity Cases (1866) page 314* in support of his submission that the aforesaid observation is erroneous. In the *Alim Will case,* a Last Will that was propounded was challenged on the basis that the signature was obtained by a fraudulent substitution. The Petitioner rested his case by adducing evidence only of execution. Respondents adduced evidence of fraud and an application of the Petitioner to rebut that evidence of fraud, was refused. The Supreme Court held that although, as of right, the Petitioner could not call evidence at that stage, the judge should have allowed the application in exercising his discretion in the interests of justice. Bertram CJ commented (at page 487) that where evidence of fraud has been adduced " it is repugnant to one's idea of justice " that the persons against whom the charge is made " should be denied an opportunity of giving their version of the circumstances, when they were anxious to do so. " In this case we are not confronted with a parallel situation.

In the case of *Penn vs Jack (supra)* it was held that in a suit for an infringement of a patent the plaintiff was entitled to call evidence in reply for the purpose of rebutting a case of prior user, set up by the defendant. Although the decision appears to support the submission of learned President's Counsel, it is not clear as to whether an issue of validity of the patent was raised by the plaintiff in that case. The issue appears to be as to the grant of the patent. The decision has been made in the course of a proceeding. It commences with the sentence, " I think the plaintiff

is entitled to adduce evidence in reply for the purpose of rebutting the case set up by the defendant....". Further an observation is made that " the witnesses are at hand and ready and the sensible and obvious course is to examine them now ". We are inclined to agree with the submission of learned Queen's Counsel that it is highly misleading to apply this decision to the case before us, without knowing the issues raised by each party in the case.

The question whether a party who begins a case should be permitted to call evidence in rebuttal has to be decided primarily in relation to the proceedings had in each case. There are two situations in which rebuttal evidence may be permitted. They are :

(i) Where there are several issues in the case and the burden of proving only some of them lie upon the party beginning and of the others on the opposing party. In such a situation, section 163 of the Civil Procedure Code provides that the party beginning may at his option adduce evidence-in-chief on the issues where the burden lay on him and reserve his right to lead rebuttal evidence in respect of the issues where the burden lay on the opposing party.

(ii) Where the Court may in any event, in the interests of justice, permit the party beginning to lead evidence in rebuttal.

Learned President's Counsel relied on situation (i) covered by section 163 and submitted that in this situation the party beginning has a right to lead evidence in rebuttal and cannot be denied the exercise of that right at the discretion of court as has happened in this case.

We are inclined to agree that in situation (i) there is an element of a right in the party unlike situation (ii) which is entirely at the discretion of court. However, even in situation (i), the judge has a discretion in considering the particular issues raised by the respective parties and the evidence hitherto adduced by the party beginning, to decide whether that party has the right that is claimed under section 163. That is what happened in this case. The relevant portion of section 163 reads as follows :

" But where there are several issues, the burden of proving some of which lies on the other party or parties, the party beginning may at his option either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the opposing party or parties ; and in the latter case the party beginning may produce evidence on those issues after the other party or parties has or have produced all his or their evidence. "

This provision manifestly embraces a situation where the respective issues are distinct and are discernible as such. It does not readily apply in a situation where the respective issues overlap or where the issues raised by the opposing party are the counter or negative of the issues raised by the party beginning. In such situation the party beginning cannot split his case into two, present part in evidence-in-chief and seek to confirm that part by taking a second bite of the same cherry, under the cover of rebuttal. In Halsbury's Laws of England (4th Edition Page 15) this basic principle is stated thus :

" When the onus of proof on all issues is on one party, that party must ordinarily, when presenting his case, adduce all his evidence, and may not, after the close of his opponent's case, seek to adduce additional evidence to strengthen his own case. In theory, when the onus is partly upon the plaintiff and partly upon the defendant, the plaintiff may in the first instance limit his evidence to proving those issues in respect of which the onus is upon him, and then, after the close of the defendant's case, adduce evidence in rebuttal upon those issues where the burden was upon the defendant. Such evidence in rebuttal must be confined solely to rebuttal and not merely be evidence in confirmation of evidence-in-chief. "

To permit the party beginning an opportunity to lead evidence in confirmation of his evidence-in-chief, after the opposing party has closed the case will give him an undue advantage and strike at the very root of fairness of proceedings.

The case of *Green Vs. Sevin* [3] presents a situation where the issues of fact in relation to the plaintiff's claim and the defendant's counter-claim were indentical. Fry J held as follows, (at page 597).

" In the present case it appears to me that I ought not to admit fresh evidence at this stage of the proceedings. All the issues of fact on the claim and on the counter–claim are the same ; I am not able to find one which is different. The evidence on the claim has been closed, and I think I should be doing wrong if I were now to allow fresh evidence to be adduced. It is said that there are facts which are material on the question of delay, but, if so, they would have been material with reference to the plaintiff's notice to rescind. I should be creating a very inconvenient precedent if I were to admit new evidence now, when the whole case has been gone into in the plaintiff's opening. Without saying anything about cases in which the issues on the counter-claim are different from those on the claim, I refuse to allow fresh evidence on the ground which I have already mentioned, that in the present case the issues on the claim and on the counter–claim are identical. "

A further aspect of significance in relation to section 163 is that the party beginning has to make an option and reserve his right to adduce evidence in rebuttal as to the issues where the onus lay on the opposing party. The section does not specify the stage at which such reservation should be made. In the *Alim Will case* (supra at page 486) some observations were made that such a reservation need not be expressly made. However, it is to be noted that it was a case where there was a single issue and evidence of fraudulent substitution arose only in the evidence adduced by the Respondents. The petitioner had no opportunity whatever to explain the circumstances relevant to the allegation. In any event their Lordships held that the application to lead evidence in rebuttal should have been allowed in the interests of justice, thereby alluding to situation (ii) stated above and not to an application of the provisions of section 163.

The reference in section 163 to a reservation being made by the party beginning, clearly implies that it should be done at the stage that party is leading evidence and certainly before the opposing party commences adducing evidence. A useful observation in this regard is found in the judgment of Krishnan JC in the case of *Nanhey Raja Vs. Kadar Nath,* [4]. It was observed as follows :

" The law does not prescribe a situation at which a party should apprise the Court of its exercising the option under O 18, R3, but, it is only reasonable that this should be done if possible, before it begins; and in any case before the other party begins its evidence so that it might clearly note that the first party has not really finished. In certain circumstances it might become necessary to scrutinize the option to see if it is not a device to shift the burden of proof on the other party ; or to bring in separate evidence, as it were, by the back door. "

In this case learned President's Counsel for the plaintiffs submitted at the commencement of proceedings on 30.4.1987 that the plaintiffs are reserving their right to lead evidence in rebuttal. This was objected to by learned Queen's Counsel for the defendant. Thereupon, the matter was not pursued further by learned President's Counsel and no ruling was sought from court. Later, on 21.6.1988, more than one year later counsel for the plaintiffs closed the case of the plaintiffs without making any reservation to lead evidence in rebuttal. The question of leading evidence in rebuttal featured next 3 1/2 years later on 4.12.91. In these circumstances we are of the view that there is merit in the submission of learned Queen's Counsel for the defendant that no reservation has been made by the plaintiffs to lead evidence in rebuttal as required by section 163 of the Civil Procedure Code and that the application made for this purpose is much belated and causes prejudice to the defendant. We are of the view that a reservation to lead evidence in rebuttal should be made before the party beginning adduces evidence or at the latest before such party closes his case. If the reservation is objected to an order should be sought from court so that the parties would know the precise nature of the proceedings that will be had in the case.

As regards situation (ii) above we wish to refer to the following statement in Halsbury's Laws of England (supra p15) :

" There is a judicial discretion to allow further evidence to be called even when it should have been adduced in the first place, where the judge considers it necessary in the interests of justice. Such evidence in rebuttal will generally be allowed when the party wishing to adduce it has been taken by suprise and for that reason did not call the evidence earlier. "

The judgment of the Supreme Court in the *Alim Will case* is referable to this situation. In the case before us, the defendant had raised the matters on which he was relying upon to establish the invalidity of the patent at a very early stage, viz, in the objections to the interim injunction. Therefore it could not be said that the plaintiffs were taken by suprise by the evidence of the defendant. For the reasons stated above we are of the view that the application of the plaintiffs to lead evidence in rebuttal does not fall within either situation referred above. We are therefore of the view that learned Additional District Judge was not in error when he observed that the plaintiffs were not entitled to lead evidence in rebuttal.

In any event we are of the view that the real decision in this case falls into a narrower conspectus than the general observation of learned Additional District Judge that the plaintiffs are not entitled to lead evidence in rebuttal. Even assuming that the plaintiffs were entitled to lead evidence in rebuttal, they should have been ready for this purpose by the 34th date of trial, when the case of the defendant was being closed. On this day the only witness the plaintiffs sought to call in rebuttal was the witness described as " Mervan Peiris of Colombo ". Clearly, there was no other witness of the plaintiff to be called on that day. The previous list of witnesses of the plaintiff (the 6th additional list) was filed on 21.9.87, well before the case of the plaintiffs was closed. When the application to call Mervan Peiris was refused by learned Additional District Judge, learned President's Counsel did not inform Court that there were other witnesses to be called nor did he make an application for that purpose. Instead, he closed the case of the plaintiffs for the second time, as noted above.

Considering whether learned Additional District Judge was correct in refusing the application to call this witness, we have to be guided by the provisions of section 175 (1) of the Civil Procedure Code. In terms of this section a party is not entitled to call as a witness a person who has not been listed in terms of section 121(1) of the Civil Procedure Code. This provision requires the list of witnesses to be filed not less than 15 days before the date fixed for trial. As noted above, the 7th additional list was filed only one day before the date of trial. The proviso to section 175 (1) empowers the court to use its discretion in special circumstances where such a course

is rendered necessary, in the interests of justice, to permit a witness to be called, whose name is not included in a list filed in compliance with section 121(2). In this instance the plaintiffs have not indicated to the District Court the material that they intended to adduce through the witness referred to. Indeed, no description or address has been disclosed of this witness as required by the Civil Procedure Code. The defendant had no notice whatever of the nature of the evidence intended to be adduced through this witness. In the circumstances we are of the view that learned Additional District Judge was not in error when he refused to exercise the discretion of court in allowing that witness to be called.

For the several reasons stated above we hold that the plaintiffs have not raised an arguable case in support of this application. We accordingly refuse this application for leave to appeal. The defendant would be entitled to costs of this application.

D. P. S. GUNASEKERA, J. – I agree.

Application referred.