

1946

Present : Soerisz S.P.J and Cannon J.

S. UMMA, Appellant, and MOHAMED, Respondent.

108—D.C. Galle, 1312.

Summary procedure—Oral evidence given by petitioner—Right of respondent to give oral evidence—Civil Procedure Code, s. 384.

Where, in an application of summary procedure, the Court permits the petitioner, under section 384 of the Civil Procedure Code, to give oral evidence it cannot properly refuse the respondent the same privilege or the right, for the purpose of supplementing his evidence, to cross-examine the petitioner.

A PPEAL from a judgment of the District Judge of Galle.

N. K. Choksy (with him *Izadeen Ismail*), for the respondent, appellant.

N. Nadarajah, K.C. (with him *H. W. Jayawardene*), for the petitioner, respondent.

Cur. adv. vult.

February 13, 1946. CANNON J.—

The petitioner applied to be appointed curator of the estate of his minor brothers and sisters, the first four respondents; and for the fifth respondent, their sister, to be appointed guardian of the minors. The sixth respondent, who is the widowed mother of them all, opposed the application, alleging that the petitioner was not a suitable person to be appointed curator. Affidavit evidence was tendered by both sides, and the petitioner gave oral evidence. In granting the petitioner's application the acting District Judge said:

“The sixth respondent opposes this application but all the others are in favour of the petitioner being appointed curator. The sixth

respondent appeared to me to be a very domineering sort of lady, devoid of all tactfulness and far from conciliatory in her manner towards the children."

The sixth respondent, however, was not permitted by the acting District Judge to cross-examine the petitioner about certain documents relevant to the petitioner's eligibility. The reason for this ruling by the acting District Judge is not clear; it was not suggested that the documents were irrelevant. The acting District Judge, commenting on this part of the proceedings, says,

"At this stage (during the cross-examination of the petitioner by the sixth respondent's Counsel) I have heard from Counsel on both sides a good many of the things that have got to be urged in favour of each party and there are also the affidavits before me. I will therefore make my order with regard to the appointment of a curator and of the guardian of these minors.

Mr. Abeywardena states that the cross-examination of this witness is not yet finished and that he has a number of other documents to be put forward to the petitioner to show that he is not a fit and proper person to be appointed curator.

Mr. Abeywardena wants to call the sixth respondent in support of the case. The Court does not think it necessary that she should be called.

All the minor respondents are present in Court and all express their willingness to live with the eldest brother the petitioner on being questioned by Court."

The departure from the rules of procedure forms the basis of an appeal by the sixth respondent. The Judge has an undoubted right and duty to stop cross-examination which is prolix or unduly prolonged or unfair or irrelevant. It does not, however, appear from the record that the acting District Judge stopped the cross-examination by the sixth respondent's Counsel for these or any other sufficient reason. Section 384 of the Civil Procedure Code, which is referred to in *Dassanaike v. Dassanaike*¹ does not avail the respondents to this appeal, because the acting District Judge, having allowed the petitioner to give oral evidence "in order that I may know something more of their difficulties and to ascertain the kind of person he is", could not properly refuse the sixth respondent the same privilege. This failure to exercise his discretion judicially becomes more evident when one reads that without hearing the sixth respondent in the witness-box the acting District Judge formed a personal opinion adverse to her. It cannot be said that the sixth respondent has had a fair opportunity of putting her case.

I would therefore allow the appeal and direct that the matter be reheard before another Judge, the costs of all the proceedings to be costs in the cause.

SOERTSZ S.P.J.—I agree.

Appeal allowed.