DALTON WIJEYERATNE
v.
HERMINE WIJEYERATNE

SUPREME COURT.
G. P. S. DE SILVA, C. J.,
KULATUNGA, J., AND
RAMANATHAN, J.
S.C. APPEAL NO. 47/92
C.A. APPEAL NO. 569/82 (F)
D.C. GAMPAHA NO. 16317/P
APRIL 4th, 1993.

Partition – Rights of plaintiff to call defendants as witness – Competent witness and compellable witness – Section 120 of the Evidence Ordinance – Sections 121 and 175 (1) of the Civil Procedure Code.

At the trial of the partition action the plaintiffs were absent but they were represented by Counsel. The only parties present were the 2nd and the 6th defendants who were also represented by Counsel. It was the position taken up by the defendants that the plaintiffs had no rights in the land sought to be partitioned and the 2nd defendant is its sole owner. On that basis they sought the dismissal of the action. Counsel for the plaintiffs sought the permission of the Court to call either the 2nd or the 6th respondent. This was opposed by Counsel for the 2nd and 6th respondents whereupon the Court refused the application and dismissed the action.

Held :

1. Section 120 (1) of the Evidence Ordinance read with the second proviso to Section 175 (1) of the Civil Procedure Code does not enable one party to compel the other party to give evidence ; and that Section 175 (1) of the Code does not go beyond conferring a discretion on the Court to permit a party to be called as a witness despite his name being not listed as required by Section 121 of the Code.

2. Although in a partition action all the parties have the double capacity of plaintiff and defendant, the general principle has its limitation and that in view of the position taken up by the defendants, the District Judge exercised his discretion rightly in refusing permission to the plaintiffs to call the defendants as witnesses.

Per Kulatunga J.

" ..... The learned District Judge cannot be faulted for exercising his discretion against the application to call one of the defendants as a witness for the plaintiff ;..... and that the dismissal of action for non-prosecution is justified by the provisions of s. 70 of the Partition Law"

Case referred to :

Gunatilake v. Ratnayake (1908) 2 Matara Reports 19.

APPEAL from a judgment of the Court of Appeal.

S. Sivarasa with *E. R. S. R. Coomaraswamy (Jr.)* and *Sampath Welgampola* for 2nd defendant – appellant.

N. R. M. Daluwatte, P.C. with *M. de Silva* for plaintiffs-respondents.

Cur. adv. vult.

April 02, 1993.

G. P. S. DE SILVA, C.J.

The plaintiffs filed these proceedings in February 1971 to partition the land called Urukanugahawatta alias Etaheraliyagahawatte. The case came up for trial on 26th November 1982. On that date the plaintiffs were absent but were represented by counsel. The only parties present in court were the 2nd and 6th defendants. At the commencement of the proceedings, counsel appearing for the plaintiffs sought the permission of court to call either the 2nd or the 6th defendant, as a witness. He stated that he was seeking to prove

the pedigree by calling the 2nd or the 6th defendant. Counsel appearing for the 2nd defendant and the counsel appearing for the 6th defendant opposed the application made by counsel for the plaintiffs. Counsel for the plaintiffs further stated to court that he was not moving for a postponement of the proceedings. The District Judge refused the application of counsel for the plaintiffs and dismissed the action. An appeal was preferred against the judgment of the District Court to the Court of Appeal. The Court of Appeal set aside the judgment of the District Judge dismissing the plaintiff's action, and sent the case back for trial *de novo*. The 2nd defendant has now appealed to this court against the judgment of the Court of Appeal.

In order to consider the correctness of the order made by the District Court, it is of the utmost importance to note that the 2nd to the 6th defendants filed a joint amended statement of claim wherein they prayed for a dismissal of the action and specifically denied that the plaintiffs have any rights in the corpus ; they further pleaded that the entirety of the corpus belonged to the 2nd defendant alone. It is therefore clear that this is not a partition action wherein the defendants have conceded rights in the corpus to the plaintiffs. The short point for decision is whether on the facts and circumstances of this case the District Judge correctly exercised his discretion in refusing the application made on behalf of the plaintiffs to call the 2nd or the 6th defendant as a witness.

Mr. Daluwatte for the plaintiffs-respondents submitted that section 120 (1) of the Evidence Ordinance read with the second proviso to section 175 (1) of the Civil Procedure Code enables a party to an action to be called as a witness " against his wishes ", the only restriction being that such witness cannot be treated as a " hostile witness ". Section 120 (1) of the Evidence Ordinance reads thus; " In all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses ". The point to be noted is that this section makes parties to the suit competent witnesses but it certainly does not expressly make them compellable witnesses. Further, section 120 of the Evidence Ordinance appears to imply that one party cannot compel the other party to give evidence in a civil suit. The second proviso to section 175 (1) of the Civil Procedure Code does not go beyond conferring a discretion on the court to permit a party to be called as a witness despite his name not being included in the list of witnesses required

to be filed in terms of section 121 of the Civil Procedure Code. I therefore cannot agree with the contention that section 120 (1) of the Evidence Ordinance read with the second proviso to section 175 (1) of the Civil Procedure Code enables one party to compel the other party to give evidence. It is right to add that counsel did not refer to any other provision of law which confers a power on the court to compel a party to give evidence on behalf of the opposing party.

The Court of Appeal set aside the judgment of the District Court on the ground that " the mere refusal on protest by the 6th defendant to testify on oath was not sufficient and his evidence on oath should have been recorded for what it is worth.....". The principle invoked was that in a partition action " all the parties have the double capacity of plaintiff and defendant. " But it seems to me that the application of this general principle has its limitations in a case where the contesting defendants have taken up the position (i) that the plaintiffs have no rights at all in the corpus, (ii) that the 2nd defendant is the sole owner of the entirety of the land sought to be partitioned ; (iii) the relief sought is the dismissal of the action. It is these crucial and relevant facts which have been stressed by the District Judge in his judgment refusing the application made on behalf of the plaintiffs to call the 2nd or the 6th defendant as a witness.

In my view, it cannot be said that the District Judge erred in the exercise of his discretion, having regard to the particular facts and circumstances of this case. I accordingly allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the District Court.

In all the circumstances, I make no order for costs of appeal.

RAMANATHAN, J. – I agree.

KULATUNGA, J.

I have perused, in draft, the judgment of my Lord The Chief Justice. I am also of the opinion that S. 120 (1) of the Evidence Ordinance read with S. 175 (1) of the Civil Procedure Code does not enable one party to compel the other party to give evidence in a civil suit ; and that S. 175 (1) of the C. P. C. does not go beyond a discretion in the Court to permit a party to be called as a witness

despite the failure to list him as required by S. 120 (2) of the Code. In *Gunatillake v. Ratnayake* [1] Wendt J. said :

> " Neither the law nor common sense sanctions your calling your opponent as your witness ..... "

The learned Counsel for the plaintiffs-respondents did not refer to any other provision of law which empowers the Court to compel a party to give evidence on behalf of his opponent presumably because as Mr. E. R. S. R. Coomaraswamy observes :

> " The question whether in civil cases, one party can compel the other party to give evidence on his own behalf is not specifically dealt with in any statute "
> Law of Evidence in Ceylon (1955) P 399.

The written submissions filed on behalf of the 2nd plaintiff-respondent seek to support the application made on the day of the trial to call, (on behalf of the plaintiff-respondents) one of the defendants, on the basis of sections 25 (1) and 70 of the Partition Law. S. 25 (1) provides, *inter alia*, that on the date of the trial " the Court shall examine the title of each party and shall hear and receive evidence ". S. 70 provides that " no partition action shall abate by reason of the non-prosecution thereof, but if a partition action is not prosecuted with reasonable diligence after the Court has endeavoured to compel the parties to bring the action to a termination, the Court may dismiss the action ". It is submitted that (by refusing to compel a defendant to give evidence) the learned District Judge has failed to make such endeavour.

I am of the view that in the circumstances of this case, where the 2nd respondent claimed to be the sole owner of the *corpus* sought to be partitioned and the relief sought by the defendants was the dismissal of the action on the basis of such sole ownership, the learned District Judge cannot be faulted for exercising his discretion against the application to call one of the defendants as a witness for the plaintiffs ; there was no further duty to be discharged by him in respect of the action and that the dismissal of the action for non-prosecution is justified by the provisions of S. 70 of the Partition Law.

For the foregoing reasons, I agree with the judgment of my Lord The Chief Justice to allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the District Court, but without costs of appeal.

Appeal allowed.