

1965 *Present* : T. S. Fernando, J., and Alles, J.

M. M. MUTTUWAPPA and others, Appellants, and THE EASTERN SHIPPING CORPORATION LTD., Respondent

S. C. 147 (Inty.) of 1964—D. C. Colombo, 51911/M

Civil Procedure Code—Section 423—Commission to examine a witness outside Ceylon—Scope of Court's discretionary power to refuse it.

Where the evidence of a witness residing outside Ceylon is admittedly vital for the decision of an action, section 423 of the Civil Procedure Code does not give any discretionary power to the Court to refuse the issue of a commission on the ground of the absence of a reason for the witness's inability to come to Ceylon.

APPEAL from an order of the District Court, Colombo.

C. Ranganathan, Q.C., with *K. Thevarajah*, for the plaintiffs-appellants.

J. W. Subasinghe, for the defendant-respondent.

Cur. adv. vult.

September 15, 1965. T. S. FERNANDO, J.—

This is an appeal from an order refusing an application for the issue by the District Court of Colombo of a commission for the evidence of a witness for the plaintiffs to be recorded in Australia.

The action has been instituted by the plaintiffs, the consignees of a shipment of 200 cases of apples shipped in a vessel owned by the defendant for carriage from Fremantle to Colombo. The plaintiffs allege that, in breach of the agreement between them and the defendant, the vessel, instead of sailing direct from Fremantle to Colombo, was diverted by its master to the port of Trincomalee resulting in a delay which rendered the apples unfit for human consumption and which caused the plaintiffs to suffer loss in a sum of Rs. 10,973·53 which they sought in this action to recover from the defendant.

At the stage of framing the issues to be tried in the action, the trial judge accepted an issue in the following form :—

Issue 2 (b)—Did the defendant represent to the said shippers and/or plaintiffs that the said ship would sail direct from Fremantle to Colombo for discharge of the said apples ?

The trial was then refixed for the 19th August, 1963. On the 28th June, 1963, the plaintiffs moved that a commission be issued for the recording in Australia of the evidence of one W. G. Adamson whom they alleged was the person who made all the shipping arrangements in Australia in connection with the shipment. They attached to their motion a copy of their letter to Adamson in which they had informed him his evidence was important and vital and inquired from him what his fees would be for coming over to Ceylon for the taking of his evidence at the trial. Adamson replied to this letter to say that it will not be possible for him to travel to Ceylon, but that he would be prepared to attend in Perth, Australia, if arrangements could be made for his evidence to be recorded there.

Before the learned District Judge and before us counsel for both sides admitted that Adamson's evidence was vital for the decision of this action. It should not be overlooked that there is no procedure available for compelling Adamson to come to Ceylon to testify in a civil action. Section 423 of the Civil Procedure Code vests a discretion in a court to issue, on application thereto, a commission for the examination of a person resident outside Ceylon when the court is satisfied that his evidence is necessary. The learned District Judge declined to issue the commission substantially on the ground that no reason has been given for the inability of the witness to come to Ceylon. It is correct to say that Adamson's reason for his inability to come to Ceylon is not expressly disclosed in the correspondence between him and the plaintiffs. Even if that reason cannot be so inferred (and I am far from saying that it cannot be), it is plain that the witness is not willing to come and there is no law to be invoked which can compel him to come here. I am in agreement with the argument of counsel for the appellants that, where section 423 vests a discretion in the court to issue a commission even where the evidence of a witness merely is necessary, it is impossible to sustain the contention that that discretion should be exercised so as to refuse the issue of a commission where it is conceded that the evidence is not merely necessary, but indeed vital. It must also be mentioned that the present case is not one where it is plain that it is essential for the witness to be cross-examined before the trial judge. The party needing the evidence of the witness, of course, takes the risk of the weight that might otherwise attach to the evidence being affected by the absence of the witness in the proceedings taken in the presence of the trial judge.

In my opinion it is necessary for the purposes of justice being done between the parties to secure the evidence admitted in this case to be vital. The refusal to issue the commission appears to have been

exercised on a wrong principle, *viz.* on the ground of the absence of a reason for the witness's inability to come to Ceylon, and is therefore reviewable by this Court.

I would set aside the order appealed from and remit the case back to the District Court with a direction that a commission do issue at the expense of the plaintiffs to such a court or person as the trial judge may deem fit for the evidence of the witness concerned to be taken. The plaintiffs will be entitled to the costs of this appeal and of the argument on the point in the District Court.

ALLES, J.—I agree.

Order set aside.

