

1950

Present : Basnayake J. and Gunasekara J.

NATIONAL BANK OF INDIA, LTD., Appellant, and
KALIAPPAPILLAI *et al.*, Respondents

S. C. 89—D. C. (Inty.) Colombo. 18,570M

*Commission to examine witnesses abroad—Stage at which Court will issue commission
—Civil Procedure Code (Cap. 86) s. 423.*

Under section 423 of the Civil Procedure Code, an application for the issue of a commission to examine a person outside Ceylon will be granted only at the stage when it appears that the evidence of such person is necessary.

A PPEAL from an order of the District Court, Colombo.

N. K. Choksy, K.C., with *Vernon Wijetunge*, for the defendant appellant.

H. V. Perera, K.C., with *R. Manikkavasagar*, for the plaintiffs respondents.

Cur. adv. vult.

¹ (1941) 42 N. L. R. 344.

November 2, 1950. BASNAYAKE J.—

The plaintiffs in this action are three persons carrying on business in partnership under the name, style, and firm of K. M. Kaliappapillai and Company in Colombo, and the defendant is the National Bank of India, Limited.

The plaintiffs seek to recover a sum of Rs. 65,285.32 from the defendant Bank being damages sustained by the plaintiffs in consequence of the defendant Bank acting contrary to the terms of the letter of credit granted by them.

The letter of credit is in the following terms:

“ CONFIRMED IRREVOCABLE AND WITHOUT RECOURSE

CREDIT

Bank No. 84/2,190

Amount £16,800 Stg.

To the Manager,
National Bank of India, Ltd.,
Colombo

5th December, 1946.

Dear Sir,

I/We shall feel obliged by your giving authority to your Agents in Lourenco Marques by cable to negotiate the drafts of Messrs. Dayal Khatau & Sons, Lourenco Marques on me/us to the extent of Pounds Sixteen Thousand Eight Hundred Sterling drawn at Sight against Shipping documents (consisting of on Board Bill of Lading, Invoice and Policy and/or Certificate of Insurance covering Marine and War Risk) representing Shipment or Shipments of Two Hundred Tons White Juwari and Two Hundred Tons Bajree. Import Licence EFS/EA/46/230. Part shipment allowed. All prices per ton of 2,240 lbs. C.I.F. Colombo.

It is understood that the Bank is not to be responsible for the genuineness or the accuracy of such shipping documents if apparently in order.

In consideration of such drafts or documents being purchased or negotiated by your Agents in Lourenco Marques I/we hereby agree duly to accept and pay the same at maturity, provided they shall not exceed in the whole the sum of Pounds Sixteen Thousand Eight Hundred Sterling as aforesaid and provided such draft or drafts be so negotiated 15-1-47. E2 Cr. 3729 of 4-12-46.

Yours faithfully,

K. M. KALIAPPAPILLAI & Co.

(Sgd.) _____

Manager.

This credit is confirmed by the National Bank of India, Ltd.

(Sgd.) E. MACONOCHE,
p. Manager.”

The plaintiffs contend that the defendant Bank contrary to the terms of the letter of credit paid money on three drafts which represented a shipment of 200 tons of millet.

The defendant denies that it acted outside its authority and asserts that the drafts were negotiated in conformity with the plaintiff's authority.

Before the trial and the settlement of the issues the Proctors for the defendant Bank filed an application under section 423 of the Civil Procedure Code praying that a Commission be issued to Capitaõ Antonio Dos Santos Figueiredo, the President of the Government Exchange Council and Director of Statistics of Lourenco Marques, to record the evidence of the following witnesses:—

- (1) Prahudas Bhimjee, Managing Partner of Messrs. Papatlal & Companhia of Lourenco Marques,
- (2) Ramji Meghji, Manager of Messrs. Damodar Mangalji & Co. of Lourenco Marques,
- (3) Damodar Bonavidas, President of the Indian Chamber of Commerce of Lourenco Marques.

The petition alleged that the witnesses are not in the employ of the petitioner and that the witnesses are unable to come to Colombo to give evidence and that it is necessary in the interests of justice that the evidence of the witnesses be recorded on commission. It is also alleged in the petition that the evidence of these witnesses is necessary in order to ascertain whether the term "Millet" and "Bajree" are recognised as applicable to the same commodity in Lourenco Marques, South Africa. It is contended for the petitioner that this investigation is necessary because the goods were described in the relative Bill of Lading as "Millet Seed" and in the invoice as "Millet (Bajree)".

Questions of law which affect the main issues which are likely to arise in the case were argued before us, but we wish to refrain from expressing any opinion on those questions as the trial of the case is yet to take place.

In regard to the question that arises for decision on this appeal, it is sufficient to say that a person making an application for the issue of a commission for the examination of a person residing at any place not within the Island must satisfy the Court that his evidence is necessary. In the instant case the proceedings have not reached the stage when it is possible for a Judge to state whether the evidence of the persons mentioned in the petition of the petitioner is necessary or not. We have construed the Judge's order as amounting to a finding that the evidence of those witnesses is not necessary, but it does not appear from the proceedings that the learned District Judge focussed his attention on the provisions of section 423 of the Civil Procedure Code. That section reads:

"When any court to which application is made for the issue of a commission for the examination of a person residing at any place not within the Island is satisfied that his evidence is necessary, the court may issue such commission."

We observe that in seeking the assistance of English decisions for determining the true scope of our enactment the language of the Code should not be overlooked, and it should be borne in mind that the English rule is not in exactly the same terms as our enactment. Another factor that should be taken into account in considering the older cases is the vast improvement in the speed of travel in modern times.

On the material before us we are of opinion that it is premature to state whether the evidence of the witnesses named by the petitioner is necessary or not. After the issues have been settled or even at a later stage it may appear that the evidence of any particular person or persons residing at any place outside the Island is necessary. Then it is open to the party relying on the evidence of such witnesses to make an application for the issue of a commission.

As we are not satisfied on the material before us at this stage that the evidence of the witnesses cited by the petitioner is necessary, we would dismiss the appeal with costs.

In order to remove doubts as to the right of the petitioner to make a fresh application under section 423 of the Civil Procedure Code, should it become necessary to do so in the course of the trial, we wish to record that the dismissal of this appeal will be no bar to such an application.

GUNASEKARA J.—I agree.

Appeal dismissed.
