SHEILA SENEVIRATNE
v.
SHEREEN DHARMARATNE
(Case No. 2)

COURT OF APPEAL
WIGNESWARAN, J.,
WEERASURIYA, J.
CALA NO. 231/97
DC MT. LAVINIA 2051/M
FEBRUARY 2, 1998.

Civil Procedure Code S. 104, 104 (2), 109, 109 (2) – Consequence of not complying with the provisions – wilful and contumacious conduct.

The District Court refused the request made by the plaintiff-petitioner under s. 109 of the Civil Procedue Code to have the defence of the defendant-respondent struck out. It was urged that provisions of s. 109 CPC were strict and have to be duly complied with and that the conduct of the defendant-respondent amounted to wilful and contumacious conduct.

Held:

1. The words "shall and be liable" in s. 109 CPC appear to reserve discretion to Court. If the legislature intended such strict compliance the section would have read "he shall if a plaintiff have his action dismissed or if a defendant have his defence struck out etc.,"

Per Wigneswaran, J.

"Where there are two possibilities one incriminating a person while the other gives a reasonable explanation for the same conduct of such person the advantage of the doubt arising due to uncertainty in culpability must be given to such person and the reasonably explanatory interpretation should be preferred to the incriminating interpretation."

2. Failure to allow inspection of certain documents by the plaintiff-petitioner did not amount to wilful and contumacious conduct on the part of the defendant-respondent.

APPLICATION for Leave to Appeal from an order of the District Court of Colombo.

Cases referred to:

1. *Namasivayam Chetty v. Ragsoobhoy* – 46 NLR 12.
2. *Karuppan Chetty v. Narayan Chetty* – 2 CLR 173.
3. *Amin Jrai and others v. Hadji Omar* – 71 NLR 115.

4. *M. Appu Singho v. Don Jussey Appuhamy* – 4 Leader Law Reports 81 5 Appeal Court Reports 135.
5. *Hyder Ali v. Rajadurai and others 1987* – 1 Sri LR 138.
6. *Nandawathie de Silva v. Yasawathie de Silva* – 58 NLR 97.

Ms. Maureen Seneviratne P.C. with *V. K. Choksy* for plaintiff-petitioner.

R. E. Thambiratnam with *Herman J. C. Perera* for defendant-respondent.

Cur. adv. vult.

February 09, 1998

WIGNESWARAN, J.

The matter in issue in this leave to appeal application is whether the order made by the Additional District Judge, Mt. Lavinia, dated 10.11.1997 refusing the request made by the plaintiff under section 109 of the Civil Procedure Code to have the defence of the defendant struck out, was proper.

Ms. Maureen Seneviratne, President's Counsel, argued that the provisions of section 109 of the Civil Procedure Code were strict and therefore have to be duly complied with. She said that the conduct of the defendant in this case amounted to wilful and contumacious conduct. She said that there were three stages with regard to inspection of documents. ***Firstly,*** under section 104 a party obtains an order of Court for ***notice*** to issue on the adverse party to produce documents for inspection. ***Secondly,*** if such party served with notice under section 104 omits to arrange for inspection, then under section 106 the first party could apply to Court for an ***order*** of inspection. ***Lastly,*** if despite an order of inspection the adverse party fails to comply with such order, the adverse party, if he is the defendant, would have his defence ***struck out*** and be placed in the same position as if he had not appeared and answered.

She pointed out that the first two stages had passed in the instant case and since the defendant did not comply with the court's order, steps under the third stage were taken. She argued that the court was duty bound to strike off the defence. She also referred to the provisions under section 109 (2) which gave her client the right to take steps for contempt of Court. She distinguished the cases reported

in *Namasivayam Chetty v. Ragsoobhoy*[1], *Karuppan Chetty v. Narayan Chetty*[2] *and Amin Jrai and others v. Hadji Omar*[3] referred to by the Additional District Judge, Mt. Lavinia and said the facts of the instant case were different. She alleged that the answer scripts of the plaintiff with regard to the first examination conducted were deliberately kept away from being perused by the plaintiff since if produced for inspection they would have exposed the defendant.

This was a case where the plaintiff alleged that the defendant, who ran an Institute for Training Montessori methods of Teaching, held an examination and made out that the plaintiff was entitled to a Diploma in Montessori methods of Teaching but handed over a blank certificate at the awarding ceremony and thereafter failed to give a diploma certificate saying that the plaintiff had failed her practical examination. The defendant alleged that the issue of Diploma Certificate at the Awarding Ceremony was a sham exercise undertaken for the benefit of the plaintiff who had failed her examination and others of similar predicament but that a second examination was held at which too the plaintiff had failed. The answer scripts relating to plaintiff's above-said two examinations are the documents in issue.

Mr. Thambiratnam on behalf of the defendant-respondent argued that discretion with regard to matters of this nature have always been reposited in the Court and that there was no question of strict compliance with regard to the provisions of section 109 of the Civil Procedure Code.

He stated that the perception of the defendant in this case was that the documents claimed by the plaintiff were not liable to be inspected by the plaintiff since they related only to the defendant's own title or defence in terms of section 104 (2) of the Civil Procedure Code. But when the Court thought otherwise and ordered inspection the defendant was prepared to allow inspection and did in fact allow inspection of most of the documents claimed but found the answer scripts of the first examination misplaced, with the registered attorney and the defendant believing the documents to be in each other's custody. He pointed out that nearly 17 years had passed between the preparation of the answer in the case and the order for inspection. He said a genuine misplacement of a document should not be made use of to strike off the defence of the defendant. He also pointed out that to the extent of the non-availability of the document in question the case of the defendant has been weakened.

He finally submitted that in terms of the decision in *M. Appu Singho v. G. Don Jussey Appuhamy*[4] order under section 109 can only be justified where there has been obstinacy or contumacy on the part of the person in default. In this case he said his client had allowed inspection of all documents except the ones which had been lost. Therefore, he said there was no obstinacy nor contumacy on the part of his client. He also referred to the Supreme Court decision in *Hyder Ali v. Rajadurai and others*[5] which held that an order made by District Court refusing to dismiss an action for failure to produce a document (sections 104 & 109 of the Civil Procedure Code) was not an order made in error. Drawing inspiration from *Nandawathie de Silva v. Yasawathi de Silva*[6] Mr. Thambiratnam said the Court in the present case had not given its reasons for disregarding the affidavit of the Attorney-at-Law wherein he stated that the relevant documents applied for, only supported the plaintiff's case.

Ms. Maureen Seneviratne in reply pointed out that the timing of the defence had to be considered. Even though the perception of the defendant was that the plaintiff was not entitled to inspect the documents in question the court thought otherwise and made order under section 106 for inspection. It was only after such an order was made that the defendant took up the position that the document was misplaced. This ruse was adopted by the defendant only to avoid showing the plaintiff's answer scripts at the first examination, fearing exposure. Such a deliberate conduct on the part of the defendant if condoned would give rise to parties slipping away from their obligations under an order made by Court in terms of section 106 of the Civil Procedure Code.

She further pointed out that even as late as on 1.9.97 when the registered Attorney-at-Law for the defendant filed his affidavit, he referred to the plaintiff's answer scripts at paragraphs 3 *(f)* & 3 *(g)*. At that stage he could have said that the documents were lost. Instead only after the order dated 8.10.97 made under section 109 of the Civil Procedure Code did the defendant come out with the excuse of the documents being lost. That is, when the fraud of the defendant was about to be exposed she had adopted this ruse as a defence. The position of the defendant in her affidavit dated 27.10.97 that she failed to trace the answer scripts was not consistent with the earlier conduct of the defendant and her registered Attorney-at-Law. Ms. Seneviratne further pointed out that this stratagem has been adopted

in order to harass the plaintiff during her cross-examination and to avoid the defendant having to be embarrassed.

She finally quoted Black's Law Dictionary which defined "wilful" as "without legal justification" and/or "indifference to the natural consequences". Quoting Oxford Dictionary she defined "contumacious" as "obstinately resisting authority" and/or "wilfully being disobedient to the order of Court".

All these submissions would now be examined.

Section 109 of the Civil Procedure Code states as follows :

"(1) If any party fails to comply with any order under this chapter to answer interrogatories, or for discovery, production, or inspection, which has been duly served, he ***shall*** *if a plaintiff,* ***be liable*** *to have his action dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered.*

And the party interrogating or seeking discovery, production, or inspection may apply to the court for an order to this effect, and the court may make such order accordingly.

(2) Any party failing to comply with any order under this chapter to answer interrogatories or for discovery, production, or inspection which has been served personally upon him, shall also be deemed guilty of the offence of contempt of court."

The words "shall" and "be liable" in the above-said section appear to reserve discretion in Court. It does not appear mandatory that the court should *per force* dismiss the plaintiff's action or strike a defendant's defence as soon as there is non-compliance with an order of Court under section 106. If the Legislature intended such strict compliance the section would have read, "he shall if a plaintiff have his action dismissed" or "if a defendant have his defence, if any, struck out, etc." The fact that the phrase "be liable" has been inserted shows that Court has been vested with discretion in such matters.

Justice Keuneman in *"Namasivayam Chetty v. Ragsoobhoy* (supra) said "I may add that the District Judge appears to have been under

the impression that he had no discretion to grant any indulgence, in a case under section 109 when objection was taken to such indulgence by the other side. This is certainly not the law. I would direct the attention of the Judge to *Karuppen Chetty v. Narayan Chetty* (supra) and *Appu Singho v. Jusey Appuhamy* (supra).

Thus it would be incorrect to argue that strict conformity with the penal provisions of section 109 of the Civil Procedure code was intended when an order made under section 106 was not complied with. In any event in this case there was part-compliance.

The next question that arises is whether the facts of this case show "wilful" and/or "contumacious" conduct on the part of the defendant.

The documents for which inspection was sought were:

(i) Application produced to the defendant on 5.10.1979 by the plaintiff.

(ii) The answer scripts of the plaintiff produced in November 1979 . . . (1st attempt).

(iii) Answer scripts . . . (2nd attempt).

(iv) Letter dated 22.10.79 sent to Padmini Wijewickrema. (Vide P10 dated 29.9.97).

The documents which were permitted inspection by the registered Attorney-at-Law for the defendant and of which photocopies were handed over to the registered Attorney-at-Law for the plaintiff were:

(1) Application tendered on 5.10.79 [(i) above]

(2) Letter dated 22.10.79 [(iv) above]

(3) Answer scripts (2nd attempt) [part of (iii) above]

(4) Copy of letter sent to L. M. Wijesekea on 6.2.80 (additional)

(5) Copy of letter sent to L. M. Wijesekera on 28.4.80 (additional)

First attempt answer scripts and balance 2nd attempt answer scripts were not made available.

Ms. Maureen Seneviratne, tried to persuade us to come to the conclusion that there was something sinister in the defendant not making available the answer scripts. Since the defendant had earlier made out that the answer scripts need not be made available to the plaintiff, when Court had granted an order for inspection under section 106, despite the defendant taking cover under section 104 (2), to avoid showing the answer scripts, Ms. Seneviratne said, a ruse had been resorted to by the defendant. Yet Mr. Thambiratnam pointed out that the defendant and her registered Attorney-at-Law could at worst be found fault with for negligence but not for wilful and/or contumacious conduct.

Where there are two possibilities, one incriminating a person while the other gives a reasonable explanation for the same conduct of such person, the advantage of the doubt arising due to uncertainty in culpability must be given to such person and the reasonably explanatory interpretation should be preferred to the incriminating interpretation. The purpose of benefit of the doubt being given to an accused in a criminal case is based on this principle.

When Ms. Seneviratne states that the registered Attorney-at-Law for the defendant in his affidavit prepared as late as 1.9.97, referred to the answer scripts at paragraphs 3 *(f)* & 3 *(g)*, it must be noted that the enumeration of the list in paragraphs 3 *(a)* to 3 *(h)* was only in relation to what had taken place on 23.10.1996. In any event to depose in his affidavit that he refused to produce documents 3 *(a)* to 3 *(h)*, the registered Attorney-at-Law may not have found it necessary to actually check whether the answer scripts were available or not. He may have in the alternative taken it for granted that the documents were with the defendant and since the defendant was away in England he may have prepared the affidavit without actually checking whether the answer scripts were with her.

The registered Attorney-at-Law and his client would no doubt have been aware that non-compliance with the order made under section 106 of the Civil Procedure Code would debar them from producing the said documents at the trial. In fact the learned Additional District

Judge had referred to it in her order thus: "තවද, විත්තිකාරිය දැනට තමා සතුව නැති බව කියන ලේඛනය ඔහුට නඩු විභාගයේ දී ඉදිරිපත් කිරීමට අයිතියක් නැත. ඒ අනුව එම ලේඛනය පෙන්වීම මත පැමිණිලිකාරියට අගතියක් වන බව කිව නොහැක."

Clearly the learned Additional District Judge was of the view that the documents not shown to the plaintiff would not be allowed by Court to be led in evidence by the defendant.

She was also of the view that even if the documents were to be produced later, probably on the basis that the lost documents had then been retrieved, the production of the document would not prejudice the plaintiff. But this may have only been an obiter observation. This Court is of opinion that the said document cannot hereafter be produced by the defendant in this case even if retrieved.

As for the fear that the plaintiff would be cross-examined unreasonably without her having recourse to the contents of the answer scripts in advance, it must be noted that since the answers given by her in cross-examination cannot be contradicted through the answer scripts, the fears expressed seem baseless. The plaintiff in this case probably has to experience a lot less of the travails which all plaintiffs have to undergo in Court in our adversarial system. We have no doubt that our original Court judges would under no circumstances allow witnesses to be intimidated in Court.

We are therefore of opinion that there is no need for us to interfere with the reasonable order made by the Additional District Judge, Mount Lavinia, dated 10.11.1997 and therefore refuse to grant leave to appeal. We reiterate that the answer scripts not made available to the plaintiff for examination under section 106 of the Civil Procedure Code would not be allowed to be produced at the trial by the defendant. We are not satisfied that the failure to allow inspection of certain documents by the plaintiff amounted to wilful and contumacious conduct on the part of the defendant.

Parties shall bear their own costs.

WEERASURIYA, J. – I agree.

Application dismissed.

Note by Editor.

The Supreme Court in SC SPLA No. 28/98 refused Special Leave on 31/3/1998.