COLGATE PALMOLIVE COMPANY
vs
HEMAS (DRUGS) LIMITED AND ANOTHER

SUPREME COURT,
S. N. SILVA, CJ,
WEERASURIYA, J AND
UDALAGAMA, J,
S. C (CHC) APPEAL No. 6/98
(H. C. CIVIL) CASE NO. 21/96(3),
D. C. COLOMBO CASE NO. 4569/SPL
25TH OCTOBER, 2004

Civil Procedure - Refusal of postponement of trial - Code of Intellectual Property Act - Action for nullity of registration of trade mark - Circumstances justifying postponement of trial.

In the above action which was filed by the plaintiff-appellant on 29.09.1997, the trial was fixed for 10th, 11th and 12th of December, 1997 before the High Court in terms of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

On 5th December 1997 a motion was filed applying for a postponement of the trial due to concerns expressed by 5th witness, a foreigner that he was unable to attend court due to the security situation in the country in view of a bomb blast which had occurred on 15.10.1997. The 5th witness has so informed the registered attorney-at-law. There was no affidavit filed in the matter. In all there were 20 witnesses. The High Court Judge refused the postponement with liberty to the plaintiff to call the other witnesses.

Later on in an affifavit dated 29.01.98, the 5th witness stated that he had no invitation to attend the trial on the date fixed or at any other time. It was not claimed that the witness was ill.

Held:

1. There was no defect of law or fact in the order of the High Court Judge. The judge has exercised his discretion according to law and justice of the case.

2. The plaintiff's appeal was without merit.

Cases referred to :

1. *Meiyappan Thevar* v *Arumugam Chettiar and Others* 57 CLW 69
2. *Weerakoon* v *Hewa Mallika* (1978-79) 2 Sri LR 97
3. *Gardner* v *Jay 29 Chancery Division* 50
4. *Maxwell* v. *Kenn* (1928) 1KB 645, at 653
5. *Dick* v *Pillar* (1934) (1) AER 627

K. Kang Iswaran, P . C. with *N. Bartholameus* for plaintiff-appellant

Romesh de Silva, P. C. with *N. R. Sivendran* for defendant-respondents

Cur.adv. vult

February 09, 2005

UDALAGAMA, J.

This appeal arises from the impugned order of the learned High Court Judge of Colombo in H. C. case No. 21/96(3) which case had been filed by the plaintiff-appellant under the provisions of section 130 of the Code of Intellectual Property Act, No. 52 of 1979 seeking *inter alia* a declaration that the purported registration in the name of the respondent of certain trade marks morefully described in the plaint are null and void. The plaintiff-appellant having filed the action originally in the District Court, the action stood transferred to the High Court (Civil) Colombo by virtue of the provisions of section 2 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Admittedly on the 29th of July 1997 the action was specially fixed for trial for 3 consecutive dates, namely the 10th, 11th and 12th of December, 1997 probably to accommodate the 20 witnesses listed by the plaintiff-appellant including the alleged foreign witness to testify on behalf of the plaintiff-appellant. However, by a motion dated 5th December just 5 days before the scheduled 1st date of trial the attorney-at-law appearing for the plaintiff-appellant moved for a postponement which motion appears to have been supported on the aforesaid 1st trial date which had been as stated above, fixed as far back as 29th of July 1997. The basis of the application appears to be the concern expressed by the alleged principal foreign witness, (No. 5 on the list filed on 15.07.1997) for his personal safety in Colombo following a bomb blast admittedly which had occurred on 15th of October, 1997. The learned High Court Judge, however, does not appear

to have been satisfied with the reasons for an adjournment and by his impugned order had subsequent to offering an opportunity to the counsel for the plaintiff-appellant to lead the evidence of any other witness in the absence of the purported principal witness and the offer not been heeded to, proceeded *inter alia* to refuse an adjournment.

Significantly when the issues were settled and the case specially fixed for trial, it is observed that in addition to the list of witnesses filed on 15.07.1997, listing therein 13 witnesses of which the purported principal witness was the 5th witness, a second list appears to have been filed on 10.02.1997 listing therein 4 witnesses altogether totalling 20 witnesses.

It is also observed *vide* paragraph 12 of the written submissions of the plaintiff-appellant that on or about 02.12.1997 the purported principal witness informed the registered attorney-at-law by telephone that the former would not be attending the trial of the action set for either 10th, 11th and 12th of December in view of the unsatisfactory security situation prevalent in Colombo subsequent to a bomb blast which admittedly happened as stated above on or about 15.10.1997. There appears to be no intimation to court until less than a week before the trial date that the said witness was unable to attend court due to the aforesaid reason nor had he given any reason as to why he was unable to intimate to court well in time of his inability to attend court on the date the case was specially fixed for trial. There is also no evidence forthcoming even by way of an affidavit of the fact that the witness was forewarned not to attend court in order to justify and support his apprehension not to attend court on the dates fixed for trial. There is no evidence of any incident of a security lapse after the 15th of October up to the trial date.

Apart from the fact that the application for a postponement on the basis of the absence of one witness was belated considering in addition the failure on the part of the plaintiff-appellant to be ready for trial and considering also the failure on the part of the counsel for the plaintiff-appellant to call even some of the other remaining 19 witnesses as required by the learned High Court Judge, I am inclined to hold that in all the aforesaid facts and circumstances of the application, the trial judge exercised his discretion judicially and properly and refused a postponement.

I would also agree with the learned High Court Judge as adverted to by him in his impugned order that calling of witnesses is entirely a matter for

the plaintiff or his counsel conducting the case. I would also hold that by the failure to lead any other witness out of the list of 20 witnesses so listed to testify on behalf of the plaintiff-appellant, that the trial judge having considered all the attendant circumstances correctly exercised his discretion to disallow an application for a postponement of the trial.

Importantly this court needs also to consider the averments in paragraph 4 of the affidavit filed by the absent witness dated 29.01.1998 subsequent to the impugned order which adverts to the fact that the witness never had an intention to testify in this action on the 10th, 11th and 12th of December 1997 **or any other time**. (emphasis mine)

The submission made on behalf of the appellant that the aforesaid words "or any other time" was a typographical error was not established even by a subsequent affidavit. In the respondent's written submissions *vide* paragraph 39, the latter specifically refuses to admit that the said words could have been typographical error.

The assertion of the learned President's Counsel for the plaintiff-appellant *vide* his written submission that the counsel for the defendant did not at the trial court object to a postponement is also resisted and in fact vehemently denied by the President's Counsel for the respondent as per paragraph 13 of the respondent's written submission filed on 17.04.1998. In any event the granting of postponements is within the discretion of the trial court judge and considering the facts and circumstances of the application I would reiterate that the learned High Court Judge exercised his discretion within reason and according to law.

The learned President's Counsel for the appellant has referred this court to the case of *Meiyappan Thevar vs. Arunasalam Chettiar and Others* [1] wherein Basnayaka, C. J. had stated, that

> "this court does not interfere in appeal in a case where a court of first instance had exercised its discretion unless it is shown that some error had been made in exercising the discretion. A person invoking the appellate jurisdiction must satisfy that the court of first instance had committed an error in fact or law."

Although in that case the judge of the court of first instance was held to have been mistaken in thinking that he was bound to refuse an application for adjournment when opposed and resisted, in the instant case the learned

High Court Judge does not even refer to any objection to the application for a postponement but in fact proceeded to dismiss the application *inter alia* on the basis that the application for a postponement was not to suit the convenience of a party but a mere witness. The learned High Court Judge further reasoned out the insufficient cause shown to consider the application on behalf of a witness said to be resident in India.

The learned President's Counsel for the plaintiff-appellant has also referred to this court the case of *Weerakoon vs. Hewa Mallika*, [2] wherein the learned Counsel submitted that Soza, J. in that case following *Gardner vs. Jay* [3] and *Maxwel vs. Kenn* [4] held that the exercise of discretion by a trial judge must be on relevant considerations and according to law and justice of the case. It is my considered view that the learned High Court Judge in the instant application did in fact consider relevant facts according to law and justice of the case. An order fixing the date of trial or refusing a grant of an adjournment is a typical exercise of purely a discretionary power and would be interfered with by a court sitting in appeal only in exceptional circumstances and I see no exceptional circumstances to interfere with the order of the learned High Court Judge.

Judicial discretion is the exercise of judgment by a judge of a case based on what is fair under the circumstances and guided by the rules of principles of law.

In another English case of *Dick vs. Pillar*, [5] also cited by the learned President's Counsel for the plaintiff-appellant, Scott L. J. did pose the question that "if an important witness - ***a fortiori* if he is a party** (emphasis mine) is prevented by illness from attending the court for an adjourned hearing at which his evidence is directly and seriously material what is the legal duty of the judge when an adjournment is asked for ?

Scott L. J. proceeded to answer the question as follows

> " In my view if the judge is satisfied of the medical fact and that the evidence is relevant and important it is his duty to give and adjournment — it may be on terms but he ought to give it unless on the other hand he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs."

The facts in that case show the refusal to grant an adjournment being due *inter alia* to the absence of an affidavit to establish the inability of the party to attend court due to illness. However the facts in the instant case before this court significantly differ in as much as the postponement was sought on the basis of the non presence of a witness and not a party which fact the learned High Court Judge also reiterates in his impugned order. Besides the belatedness of the application without even an explanation and importantly the additional evidence before this court by way of the averments in paragraph 4 of the affidavit of the absent witness dated 29.01.1998 where in no uncertain terms the witness had stated that he had "no intention to come and give evidence on the 10th, 11th or 12th December 1997 or any other time" which averment by itself would render the submission on behalf of the appellant, that the refusal for an adjournment and the subsequent dismissal of the action resulted in injustice, to be clearly untenable.

Then again it is apparent that the learned High Court Judge was not satisfied with the excuse put forward by the aforesaid witness, to support the latter's absence, was a true one leading to the conclusion that this court ought not to interfere with the decision of the learned High Court Judge which was undoubtedly one based purely on facts and it cannot be an authority for the proposition that an appeal will lie from the decision of a court of first instance on a question of fact and would not justify this court in ignoring a statutory limitation upon its powers which it is an elementary duty to observe.

For the aforesaid reasons I am of the view that the only order which this court in the circumstances could pronounce is that the appeal should be dismissed.

The appeal is dismissed with costs fixed at Rs. 5,000.

S. N. SILVA, C. J. - I agree

WEERASURIYA, J. - I agree

Appeal dismissed.