

ABREW

VS.

HOUSING DEVELOPMENT AND FINANCE CORPORATION AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 384/2004.
DC COLOMBO 5497/99/S/2L.
JANUARY 27, 2005.
SEPTEMBER 5, 2005.

Civil Procedure Code - sections 143, 145 - Strict compliance- Substantial portion of evidence led - Witness absent on day of re-examination-postponement asked - Refused- Next step?

The Plaintiff-petitioner instituted action against the 1st-3rd defendant-respondents seeking a declaration that the auction sale held on 15.11.99 with regard to a certain property is illegal and unjustifiable and for an order to invalidate the said sale. At the trial the plaintiff called the auctioneer who conducted the auction. He was examined in chief, cross examined and thereafter the plaintiff applied for a postponement to re-examine the witnesses. On the adjournment date the auctioneer was absent. On an application made by the plaintiff. Court granted permission to lead the evidence of other witnesses. On the next date, the final date to call this witness, the auctioneer was absent, the postponement required was refused. The plaintiff-petitioner contends that, the said order is bad in law.

HELD:

- (1) Under section 143 of the Code adjournment is entirely discretionary.
- (2) Under Section 145 of the Code, if a party to whom time has been granted fails to produce his evidence or to bring his witnesses or to do any other act necessary for the further progress of the case, for which time has been allowed, the Court has the power notwithstanding such default, to decide the action forthwith.
- (3) When the defendant repeatedly seeks adjournments on one ground or the other and fails to bring evidence, the Court should proceed to decide the suit by rejecting the adjournment application. It is appropriate for the Court to dispose of the suit on merits on the available evidence.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to :

1. *Abdul Hannan vs. Chandrasekera* - 1986 AIR Ori 236
2. *Rama Divakar Panikar vs. Bakari Hydrose Chennampillai* - 1990 AIR Ker 295 at 298.

Ranjan Suwandarathne with Mahinda Nanayakkara for petitioner.
Rohana Jayawardane for 2nd and 3rd defendants-respondents.

Cur.adv.vult.

February 10, 2006.

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the Additional District Judge of Colombo dated 21.09.2004. Briefly the facts relevant to this application are as follows:

The plaintiff-petitioner(plaintiff) instituted this action in the District Court of Colombo against the 1st to 3rd defendants-respondent (defendants) seeking *inter alia* for a declaration that the auction sale held on 19.11.1999 with regard to the premises No. 160-U-1/5, Anderson Flats at the instance of the 1st defendant is illegal and unjustifiable, for an order invalidating the said sale and for a declaration that the 2nd defendant is not entitled to claim any right, title or interest in relation to the said premises upon the auction sale and also for an order cancelling the Mortgage Bond No. 19 dated 19.05.1999 in respect of the said premises.

The defendant filed answer and the case proceeded to trial. At the trial the plaintiff called the auctioneer who conducted the auction. After the examination in chief the auctioneer was cross-examined by the defendants. Thereafter the counsel for the plaintiff applied for a postponement to re-examine the witness. The Court allowed the application for postponement. When the case was taken up for further trial the witness, the said auctioneer, was not present in Court and the learned Counsel for the plaintiff sought permission to lead the evidence of other witnesses, which the Court allowed. Thereafter the trial was postponed for 21.09.2004. On that day too the said witness, the auctioneer was absent. The counsel for the plaintiff moved for an adjournment to call the said auctioneer on a subsequent date. The learned Judge refused the application. It is against this order the plaintiff has filed this application for leave to appeal.

In making the said order the learned Judge had observed that the Court had granted adjournments on three occasions for the plaintiff to call this witness. Firstly on 31.10.2003, secondly on 23.02.2004 and finally on 02.07.2004. On the last occasion the Court had given a final date to call this witness upon an application made by the counsel for the plaintiff. In his order the learned Judge had made the following observations :

“සේනානායක නැමැති සාක්ෂිකරුවකුට නැවත ප්‍රශ්න සඳහා අවස්ථා දෙකකදීම පැමිණිල්ලෙන් අවසර ලබාගෙන ඇති මුල් වරට 2003.10.31 වන දින දිනයක් ලබා දී ඇත. ඉන්පසුව 2004.07.02 දින එම සාක්ෂිකරුගෙන් නැවත ප්‍රශ්න ඇසීම සඳහා අවසාන වශයෙන් දිනයක් ලබා දී ඇත.”

Section 143 of the Civil Procedure Code provides that when the hearing of evidence has once begun, the hearing shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment necessary for reasons to be recorded and signed by the Judge.

Section 145 of the Civil Procedure Code provides that if a party to whom time has been granted, fails to produce his evidence, or to bring his witnesses or to do any other act necessary for the further progress of the case, for which time has been allowed, the Court has the power notwithstanding such default, to decide the action forthwith.

It appears that where a party to the action has been granted time to produce certain evidence at the hearing, the Court must proceed to hear the other evidence as may be tendered on behalf of the party in default and decide the action forthwith.

Under section 143 of the Civil Procedure Code adjournment is entirely discretionary. In my view, in the instant case, the learned Judge had exercised the discretion in a judicial and reasonable manner when the learned counsel had sought adjournments on two occasions on the same ground.

Order 17 Rule 1 of the Indian Civil Procedure Code is identical to section 143 of our Civil Procedure Code. Similarly Order 17 Rule 3 is identical to section 145 of our Civil Procedure Code. Hence decisions of the Indian Courts on this subject can be of persuasive value in Sri Lanka and reference can be made to them with profit. It was held in an Indian case of **Abdul Hannan vs. Chandrasekhar**⁽¹⁾ that when the defendant repeatedly seeks adjournments on one ground or the other and fails to bring evidence, the Court could proceed to decide the suit by rejecting the adjournment application.

In the instant case the examination-in-chief and the cross-examination of the witness concerned, the auctioneer, had been already concluded and the learned counsel for the plaintiff moved for an adjournment on two occasions only to re-examine the said witness. Accordingly it appears that a substantial portion of his evidence had already been recorded leaving only the re-examination by the counsel for the plaintiff. In my view if that witness fails to appear in Court for the purpose of re-examination, even though three postponements had been given for the plaintiff to secure his attendance, it is appropriate for the Court to dispose of the suit on merits on the available evidence.

In the Indian case of *Rama Divakar Panikar vs. Bakari Hydrose Chennampillai* ⁽²⁾ at 298 it was held that the words “notwithstanding such default” in Order 17 Rule 3 (Section 145 of our Civil Procedure Code) clearly imply that the Court is to proceed with the disposal of the suit on merits, in spite of the default upon such materials as are before it.

It appears to me that the words “the Court may, notwithstanding such default, proceed to decide the action forthwith” must be construed strictly. The Court must proceed to decide the case on the merits on the very same date according to law, if the Court in its discretion thinks further postponements are unnecessary.

In the instant case the judge had exercised his discretion judicially and reasonably. The learned Judge had observed that the plaintiff had repeatedly sought adjournments to call this witness. In any event a substantial portion of evidence of this witness had already been given, in that, the examination in chief and cross-examination had been already concluded and only the re-examination remains. Moreover, when the learned Judge had given a final date to call this witness it was the duty of the plaintiff to get down this witness. It is to be noted that this action was instituted on 05.11.1997.

On a consideration of the matters set out above, I am satisfied that the learned Judge is correct and had exercised his discretion correctly. I therefore find that there is no merit in the submissions made on behalf of the plaintiff-petitioner. For these reasons I refuse to grant leave and the application for leave to appeal is dismissed with costs fixed at Rs. 7,500.

SOMAWANSA, J.(P/CA) — *I agree.*

Application dismissed.