

1946

Present : Cannon and Canekeratne JJ.

SADIRISA, Appellant, and ABEYESINGHE, Respondent.

351—D. C. Colombo, 2,075.

Evidence—Discovery of new evidence after hearing of case—Re-opening of case.

Where the plaintiff denied possession of certain documents which the defendant (appellant) alleged were relevant to his case and, after the hearing of the case, new evidence was discovered which indicated that the documents were in fact in the possession of the plaintiff—

Held, that, as the failure to produce the new evidence earlier was not due to the defendant's negligence or default, the case should be re-opened so that the trial Judge might consider the new evidence and decide on its effect and, if necessary, vary his order.

A PPEAL from a judgment of the District Court of Colombo.

G. E. Chitty (with him *M. D. H. Jayewardene*), for the 2nd defendant, appellant.

E. B. Wikramanayake, for the plaintiff, respondent.

March 8, 1946. CANNON J.—

It was alleged by the 2nd defendant, who is the appellant, that two plans, Nos. 169 and 170, referred to his case, but he said that he could not produce them because they were in the possession of the plaintiff, to whom they were handed some years ago when there was an amicable arrangement between the parties. The plaintiff denied possession of these plans. One Mr. Wijegoonewardana, who is a son-in-law of the plaintiff's vendor, admitted at one stage of his evidence that the plans were in the plaintiff's possession, but later said he was not certain about it. The clerk of one Mr. Jayasekera, a proctor, who was not representing either of the parties, was called on this point by the appellant, but the

District Judge was not satisfied with his evidence. In his judgment the District Judge remarks:—"P. D. H. Wijegoonewardana, whose mother-in-law is the plaintiff's predecessor-in-title, said in examination-in-chief that there were plans attached to the deeds and that when the deed in plaintiff's favour was executed, those plans were handed to him. He later corrected himself and stated that he could not say whether there were any old plans. Having considered the matter carefully, I have come to the conclusion that his first answer was a *bona fide* mistake". Affidavits are filed in this appeal by the proctor for the 2nd defendant and Mr. Jayasekere, from which it appears that, since the hearing of this case, Mr. Jayasekere has discovered in his receipt books an entry, signed by Mr. Wijegoonewardana above mentioned acknowledging receipt of the relevant plans from Mr. Jayasekere's office before action was brought, and we are asked to direct the District Judge to re-open the case. Mr. Wikramanayake objects to this course because the action was first brought as long ago as 1941, and he submits that the entry in the proctor's office should have been discovered before the hearing. It is to be noted that Mr. Jayasekere was not the proctor of either of the contending parties, and the 2nd defendant did in fact call as a witness a clerk from his office. We do not think that any negligence or default can be attributed to the appellant. Therefore the case should be re-opened, and the order of the Court is that the District Judge be asked to consider this new evidence and decide on its effect and, if necessary, vary his order.

The judgment is *pro forma* set aside for this purpose. Costs will be costs in the cause.

As so much time has elapsed since the case was instituted, we would request the District Judge to decide the matter at the earliest opportunity.

CANEKERATNE J.—I agree.

Judgment pro forma set aside.
