

Lebbaythamby V. Attorney General

502/1965

Present: T. S. Fernando, J., and Alles, J.

L. K. LEBBAYTHAMBY and others, Appellants, and THE ATTORNEY-GENERAL and another, Respondents

S. C. 24 (Inty.)—D. C. Colombo, 935/Z

Civil Procedure Code—Sections 423 and 434—Issue of commission to examine a person outside Ceylon—Power of Court to send out also a part of the subject-matter of the litigation.

When issuing a commission, in terms of section 423 of the Civil Procedure Code, to examine a person residing at a place outside Ceylon, the Court can also order a sample of the subject-matter of the litigation to be forwarded to the person who will execute the commission.

APPEAL from an order of the District Court, Colombo.

H. V. Perera, Q.C., with G. D. Welcome, for the plaintiffs-appellants.

J. G. T. Weeraratne, Crown Counsel, with S. Pasupati, Crown Counsel, for the defendants-respondents.

Cur. adv. vult.

July 23, 1965. **T. S. FERNANDO, J.—**

At the close of the evidence for the plaintiffs in this case which was filed to obtain (i) a declaration of Court that 132 bars of gold seized as forfeit under the Customs Ordinance were not liable to be so seized and that the forfeiture was illegal and (ii) a return to the plaintiffs of the said bars of gold, the defendants applied to court, in terms of section 423 of the Civil Procedure Code, for the issue of a Commission for the purpose of having the evidence of certain specified persons recorded in London. The court by its order of 4th

December 1963 granted the application as well as a motion of the defendants that samples of the gold bars be forwarded to the person who is to execute the Commission. The present appeal is one canvassing the correctness of the District Court's order of 4th December 1963.

Mr. Perera, for the appellants, does not now argue that the order appealed from in so far as it relates to the taking of the evidence of the specified persons is wrong, but he has submitted that the Court had no power to grant the further motion which related to the forwarding of samples of the gold bars. He argues that these gold bars are part of the very subject of the litigation, and there is no provision in the Civil Procedure Code or any other law permitting a court to send out of its custody and, as in this case, out of its jurisdiction the very subject of the litigation. He concedes, however, that there is no express provision of law which prevents the very subject of the litigation being so sent out of its custody.

Learned Crown Counsel has pointed to section 434 of the Code which authorises the Commissioner appointed under Chapter XXIX of the Code to call for and examine documents and other things relevant to the subject of the inquiry. That these gold bars or samples thereof are relevant cannot possibly be the subject of any dispute. It would therefore have been open to the Commissioner to call for the gold bars, the subject-matter of the litigation in this case. If that be so, I do not see why the Court in such an obvious case as this cannot send any of the gold bars without waiting for them to be sent for. The procedure followed has the additional merit of saving further time in reaching a final decision in the case.

Even if there had been no section like 434 enabling the Commissioner to call for and examine documents and other relevant things, I would have been prepared to say that a Court has power to do all things reasonably necessary to effectuate the purpose for which it has exercised its statutory power of issuing a commission. If the witness cannot give meaningful testimony without access to the document or other thing, surely there is an implied power to make that document or other thing available to the

witness. Arguments based on possible loss of or substitution in transit of some other thing for the thing sent are not entitled to much weight as it must be presumed that all reasonable steps will be taken for the safe despatch from and return of the thing to court. Further, although the document or thing may be temporarily out of the custody of the court, it is undeniable that it always remains within its control.

For these reasons we have dismissed the appeal with costs.

ALLES, J.—I agree.

Appeal dismissed.