Sri Chandrasekera V. Salgado

405/1964

Present:Sri Skanda Rajah, J., and Alles, J.

K. P. M. SRI CHANDRASEKERA, Appellant, and M. R. SALGADO and others, Respondents

S. C. 66/1964 Inty.— D. C. Panadura, 862/T

Evidence de bene esse—Procedure for recording it—Requirement of opportunity for cross-examination—Civil Procedure Code, s. 178.

The Court should not record evidence *de bene esse* under section 178 of the Civil Procedure Code without notice to the parties and without giving them an opportunity to cross-examine the witnesses in question.

APPEAL from an order of the District Court, Panadura.

C. Thiagalingam, Q.C., with *G. Navaratnarajah,* for the 3rd respondent-appellant.

H. V. Perera, Q.C., with *G. R. D. Fernando* and *R. Ilayperuma,* for the petitioners-respondents.

Cur. adv. vult.

September 21, 1964. SRI SKANDA RAJAH, J.—

At the conclusion of the argument we allowed the appeal with costs, ordered a trial *de novo* before another judge and stated that we would give our reasons on another date. We now set down the reasons.

The petitioners, who are respondents to this appeal, applied for probate of what purports to be a will made by the late Jayarajah Hemaratna Sri Chandrasekera in the presence of five witnesses,

one of whom is Mihiri Virani de Fonseka, whose evidence was recorded *de bene esse*. The third respondent (appellant), widow of the deceased, filed objection disputing its validity and due execution. Her complaint in this appeal is regarding the evidence recorded *de bene esse*.

The following are the facts relevant to this appeal:

On 19.3.64 issues were settled and the inquiry was adjourned for 22.5.64 and four other dates. On 17.4.64 proctor for the petitioners filed a motion bringing " to the notice of court that Miss Mihiri de Fonseka who is one of the witnesses to the disputed will... has to go to England " and moved " under section 178 of the Civil Procedure Code that her evidence be taken immediately or as early a date as is possible." He also moved that the case be called on 21.4.64 in order to support the motion. The third respondent's proctor received notice of this application. Therefore, he was present in court the whole of 21.4.64 expecting the case to be called for this motion to be supported. The petitioners' proctor did not request the court to call the case. The case was not called. At the end of the day the third respondent's proctor found from the record that in spite of the request in the motion to call the case on 21.4.64 the judge had made order on 17.4.64, " Evidence *de bene esse* 22/4 ", as evidenced by the journal entry of 17.4.64.

It is pertinent to reproduce the order made by the learned Judge on 22.4.64:

" On 17.4.64 a motion was filed in Court applying for the evidence of Miss Mihiri de Fonseka to be taken in an earlier date than the inquiry date as she was about to leave the jurisdiction of this Court. The motion also asked that the case be called on the Bench on 21.4.64. I fixed the evidence to be taken on 22.4.64 so as to enable this case to be called on 21.4 and parties informed. For some reason or other the case was not called on 21.4 and in such an event it is usual for proctors to bring to my notice that a particular case has not been called and I sent for the record. Mr. Leo Perera, according to the affidavit of the 3rd respondent, was present in court on the whole of the 21st of April waiting for this case to be

called. He does not seem to have followed the usual practice, namely, to bring it to my notice that the case had not been called to enable me to send for the record. He has by filed the affidavit which I am considering but he has not had the courtesy to be present in court to support his affidavit, nor is the 3rd respondent present in Court. In these circumstances I am not in a position to consider what is stated in the affidavit."

I find it difficult to understand that part of the order which I have underlined. If the learned judge wanted the parties informed of his order that evidence *de bene esse* would be taken on 22.4.64 he should have made an order to that effect. In fact, he should have acceded to the petitioner's request to call the case on 21.4.64 and, after hearing the third respondent's proctor, fixed a convenient date for recording the evidence of the witness. But, he preferred to make an *ex parte* order fixing 22.4.64 as the date for recording the evidence of the witness. Once this order was made, the office would have thought that it was quite unnecessary to send the case up on 21.4.64 to be called in court. That being so, one cannot appreciate the judge's observation: " For some reason or other the case was not called on 21.4 .... " The reason for the omission is obvious. If there was any duty cast upon anyone to have the case called on 21.4.64, it was on the petitioner's proctor, who wanted it called on 21.4.64. The learned judge did not stop to consider this aspect. Instead he proceeded to blame the third respondent's proctor, on whom there was no duty to mention the case to the judge.

It is observed that the learned judge did not give the third respondent an opportunity to ask for a date convenient to her counsel. Mr. Thiagalingam had reason to complain that the *audi alteram partem*—hear the other side—principle was not observed in fixing the date for the examination of the witness *de bene esse*.

Section 178 of the Civil Procedure Code which provides for the *de bene esse* examination of witnesses about to leave the jurisdiction of the court runs thus:—

" 178 (1) if a witness is about to leave the jurisdiction of the court, or if other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may upon the application of either party or of the witness, at any time after the institution of the action and before trial, take the evidence of such witness in manner herein before provided.

(2) Where such evidence is not taken forthwith, and in the presence of the parties, such notice as the court thinks sufficient of the day fixed for the examination shall be given to the parties.

(3) The evidence so taken may be read at any hearing of the action, provided that the witness cannot then be produced."

The corresponding provision in the Indian Civil Procedure Code is Order XVIII Rule 16. It was the subject of interpretation in *Peary Lal Das v. Peary Lal Dawn et al*. [¹A. I. R. 1914 Calcutta S7S at.]. There it was pointed out that the court should not examine such witnesses without notice to the parties or their pleaders and without giving them an opportunity to cross-examine them. This appeals to me as the correct view to take in the matter of recording evidence *de bene esse* under section 178 of our Civil Procedure Code.

Even on 22.4.64 it was still open to the learned judge, if he was so minded, to fix another date, before 2.5.64, on which date the witness was leaving the Island, for taking her evidence *de bene esse* thereby affording the third respondent an opportunity to cross-examine her. But, on the other hand, he proceeded to record her evidence *ex parte*. From this order this appeal was taken. An application for Revision was also filed in order to stay further proceedings until this appeal was disposed of. On 21.5.64 this Court made order refusing to stay further proceedings but directed that the District Judge should not deliver the order till he received the order of this Court in regard to this appeal. In consequence the inquiry has been concluded, but the learned judge has not yet delivered his order.

Mr. H. V. Perera submitted that the evidence in question has not been put in by the petitioners in support of their case. The answer to

it is that the learned judge who recorded it will find it difficult to completely erase it from his mind when he prepares his order.

For these reasons, the interests of justice will be best served by the order we have made.

ALLES, J.— I agree.

Appeal allowed.