IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Restitutio-in-Integrum and Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA/RII/18/2024

D.C. Nugegoda Case No:
D/1902/2013

1. Merregngnage Madhuri Priyanka Thushari Perera
   No.274/1/A, Weera Mawatha,
   Depanama, Pannipitiya.

Plaintiff

-Vs-

1. Amarasinghe Achchi Maddumage Don Pradeep Wasantha Kumara
   No.15, Rupasiri Mawatha,
   Mirihana, Nugegoda.

Defendant

And Now

1. Amarasinghe Achchi Maddumage Don Pradeep Wasantha Kumara
   No.15, Rupasiri Mawatha,
   Mirihana, Nugegoda.

Defendant-Petitioner

-Vs-

1. Merregngnage Madhuri Priyanka Thushari Perera
   No.274/1/A, Weera Mawatha,
   Depanama, Pannipitiya.

Plaintiff-Respondent

Before: Hon. D.N. Samarakoon, J.

Counsel: Varuna Nanayakkara for the Defendant-Petitioner.

The Plaintiff-Respondent absent and unrepresented despite the Fiscal's Report dated 25.04.2024 saying that notices were personally served on Maduri Priyanka Thushari Perera.

Argued on: The petitioner moved to dispose the case on written submissions which was permitted.

Written submission tendered on: 29.04.2024 by the Defendant- Petitioner.

Decided on: 10.05.2024

D. N. Samarakoon J.,

The defendant Petitioner's additional list was dated 19.10.2020.

The permission was sought to mark the documents on 30.04.2021, after 6 months.

Firstly the affidavit marked as X.4.

The plaintiff respondent objected.

It was under section 7 of Act No. 14 of 1995.

The basis was that computer evidence only with 45 days prior notice.

The defendant submitted to the District Court that the affidavit and photographs referred to in it were sought to be marked giving 6 months prior notice.

The District Court allowed the marking of the affidavit as D.08.

Then it was sought to mark photographs attached to the affidavit.

The plaintiff objected.

The objection was upheld on the following grounds,

(I) the photographs not referred to in the original list

(II) the inclusion of those in the additional list means that they have not been duly listed

(Iii) their relevance under section 175 of the Civil Procedure Code have not been shown

(iv) they seem to be photographs taken from a mobile telephone

(V) the affidavit D.08 already admitted do not confirm these photographs

(Vi) since the original list does not refer to these photographs they cannot be admitted

Prior to considering any section or a decided case which the petitioner now relies before this Court, it appears, that, there is a fundamental error in the

lopsided logic adopted by the learned District Judge of Nugegoda in her two orders dated 30.04.2021.

The affidavit that was allowed to be marked in evidence is at page 18 of the brief.

It says as follows [English rendering]

> "The photographs X.1 to X.8 which the defendant in this case proposes to mark in evidence were,
>
> (a) Captured on 28.04.2013 by me
> (b) By the mobile telephone Nokia (N.9) having telephone number 0786868640
> (c) Converted to photographs through my computer
> (d) In which process the telephone and the computer functioned properly
> (e) After that the photographs were not altered or edited
>
> I plead X.1 to X.8 may be accepted as part and parcel of this [affidavit]".

As already said the learned District Judge admitted the affidavit as D. 08.

She does so at page 05 of proceedings dated 30.04.2021.

The fascination of it, so to say, is that, having done so, at page 5, before the dust settles, she rejects the attached photographs, at page 7, to which the same considerations must apply on the basis that,

> (I) it is an unlisted document (despite having been listed and notified 6 months ago, just as the affidavit D. 08 she just admitted)
>
> (II) the photographs are not "taken responsibility of" by the affidavit (refer to the extract above from the affidavit) and
>
> (III) their necessity not being explained under section 175 of the Civil Procedure Code despite, as she says, "although however the affidavit D.08 is now admitted", "Kese wethath D.08 washayen idiripath kara ethi diwrum prakashaya denata lakunu kara ethath".

It appears that the basis to distinguish the two conclusions cannot be within the law.

D. 08 is an affidavit.

It was not listed in the original list.

It was listed in the subsequent list.

The latter was 6 months prior to trial date.

So, it was admitted.

Does a different regime apply to photographs attached to D.08?

D.08, among other things, says the following,

> (i) the 08 photographs were taken by the defendant petitioner on 28.04.2013
>
> (ii) They were taken by the mobile telephone Nokia N.9 having the number 0786868640
>
> (iii) they were converted to images by the computer of the petitioner.
>
> (iv) in doing so, that telephone and the computer functioned correctly
>
> (v) after the computer converted them to images, they were not changed or edited.
>
> (vi) those photographs are pleaded as part and parcel of the affidavit which was admitted in evidence as D.08

The above is computer evidence.

Section 05 of Evidence (Special Provisions) Act. No. 14 of 1995 applies.

It says

“

PART II

COMPUTER EVIDENCE

Computer Evidence

5.

(1) In any proceeding where direct oral evidence of fact would be admissible, any information contained in any statement produced by a computer and tending to establish that fact shall be admissible as evidence of that fact, if it is shown that-

(a) subject to subsection (2), the statement in the form that it was produced, or the form in which it is reproduced, is capable of being perceived by the senses;

(b) at all material times the computer producing the statement was operating properly or, if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the production of the statement or the accuracy of the information contained therein;

(c) The information supplied to the computer was accurate and the information contained in the statement reproduces or is derived from, the Information so supplied to the computer:

Provided that where information contained in the statement is shown to have been produced by the computer over a period during which the computer was used regularly to store or process information for the purpose of any activity carried on regularly over that period, it shall be sufficient to show that-

(a) during the said period there was regularly supplied to the computer, in the ordinary course of such activity, information of the

kind contained in the statement or of the kind from which the information as contained is derived; and

(b) the information contained in the statement reproduces, or is derived from, information regularly supplied to the computer in the ordinary course of such activity…."

The above section, or any other section of that particular Act does not say, that, either "computer evidence", which term represents the above photographs as per the contents of D.08; and or, the conventional photographs produced by an optical camera that works with light rays and celluloid[1] film, "developed" in a "dark room" ordinarily called "an studio", must be listed for the purpose of notification to the opposing party 45 days, or any other number of days, prior to the date the case is **first** fixed, either for "trial", "inquiry" or "pre trial".

That Act uses the word "photo" only once in the word "duplicate" under section 12, which is the interpretation section.

That Act does not use the word "first."

There was a recent case decided by another bench of the Court of Appeal, which purported to impose such a condition, that such evidence must be listed prior to the prescribed number of days of the date "first" fixed for trial, etc., which was distinguished and not followed by me in my order refusing to issue notice dated 10.11.2023 which was given with the concurrence of Iddawala J., in the following case.

That is **KAATSU HIGHLY ADVANCED MEDICAL TECHNOLOGY TRAINING CENTER RESPONDENT- PETITIONER-PETITIONER -Vs- A.G. SHENAL PIGERA APPLICANT-RESPONDENT RESPONDENT** and others C A PHC APN

[1] a transparent flammable plastic made in sheets from camphor and nitrocellulose, formerly used for cinematographic film.

No: CPA/117/2023, P H C Colombo Case No. HCRA 74/2023 L T Colombo Application No. 1/35/2021.

In that case, the item of special evidence had been listed 45 days prior to the actual date on which the inquiry before the Labour Tribunal commenced, but not before the first fixed date of inquiry.

The learned President of the Labour Tribunal and the learned High Court Judge in appeal held against the party who relied on the purported proposition that listing must be done 45 days prior to the date "first" fixed for inquiry.

The case **Professor Sarath Wijesuriya and another vs. Dr. Anuruddha Padeniya C.A./COC/5/2017 dated 23rd November 2021** decided in the Court of Appeal which expounded such a proposition had not been followed.

In refusing to follow that case in C A PHC APN No: CPA/117/2023 I said,

> "In the abovementioned case of **Professor Sarath Wijesuriya and another vs. Dr. Anuruddha Padeniya C.A./COC/5/2017,** the learned Judges of the Court of Appeal has said,
>
> > "I am in no position to agree with the contention of the Learned President's Counsel that the date fixed for inquiry or trial as mentioned in Section 07 of the Act means any date fixed for the trial or further trial for that matter. It is clear that the trial in this action has commended on 04-09-2019. Admittedly, by that time the complainants have failed to give the required notice under Section 07 of the Act".
>
> The relevant section says,
>
> > "(1) The following provisions shall apply where any party to a proceeding proposes to tender any evidence under section 4 or 5, in such proceeding-

(a) the party proposing to tender such evidence shall, **not later than forty-five days before the date fixed for inquiry or trial** file, or cause to be filed, in Court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence…"

It does not say, "not later than fourty five days before the date **"first"** fixed for inquiry or trial.

But the interpretation of that section by the Court of Appeal in the above case C. A./COC/5/2017 dated 23rd November 2021 requires the word "first" or any other word conveying that meaning to be inserted in the section.

In **Seaford Court Estates Ld. Vs. Asher [1949] K. B. 481,** Denning L. J., has said that,

> "**We do not sit here to pull the language of Parliament and Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."**

This was repeated in **Magor and St. Mellons Rural District Council vs. Newport Corporation, 1950 2 All E. R 1226.** Denning L. J., was in a minority in that case.

When the matter came to the House of Lords, in **Magor and St. Mellons Rural District Council vs. Newport Corporation, 1951 2 All E R 839 at 845,** the majority of the House of Lords, except Lord Radcliff, confirmed

the majority judgment of the Court of Appeal. Lord Simmonds made a speech only as a criticism of Denning L. J.'s dissenting judgment in the lower court.

Lord Simmonds said,

> ""My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Morton of Henryton, is about to deliver and I fully concur in his reasons and conclusion, as I do in those of Parker J. and the majority of the Court of Appeal. Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of Denning L. J., appears to invite some comment.
>
> My Lords, the criticism which I venture to make of the judgment of the learned lord justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions and I am content to say that I agree with my noble and learned friend. But it is on the approach of the lord justice to what is a question of construction and nothing else that I think is desirable to make some comment, for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned lord justice lays down for the guidance of himself and, presumably, of others…"

Furthermore, in instances where the legislature wanted to specify the date first fixed for trial, etc., it was expressly done.

For example, section 93(2) of the Civil Procedure Code, which was amended by section 08 of Act No. 08 of 2017 says,

"**On or after the day first fixed** for the Pre trial of the action and before the final judgment, no application for the amendment of any pleadings shall be allowed…"

Therefore, the learned President of the Labour Tribunal and the learned Judge of the High Court cannot be found fault with for deciding that the 45 day notice under the above section need not necessarily be before the first date fixed for trial or inquiry.

In the circumstances this Court is of the view that the petitioner has not established a prima facie case to issue notice and the application is therefore dismissed without costs."

Hence the second order of the learned district judge dated 30.04.2021 refusing to admit the photographs is wrong as wrong can be. The subsequent orders by her successor based on her second order are also wrong.

Hence orders X.10, X. 11 and the order at page 7 of X.06 are set aside.

The photographs X.5(i) and X.5(viii) are admitted in evidence.

There is no order on costs.

Judge of the Court of Appeal