

Before S. J. W. Ambeptiya Esqr. District Judge

(Recorded by Malani Rodrigo, Steno.)

District Court, Colombo

Case No. 19849/MR.

Date: 30. 07. 1998

Order

Vide Journal Entry No. (5), this Court has ordered the Defendant of this case to answer the Interrogatories tendered by the plaintiff on 23. 02. 1998 within ten days of service of such Interrogatories on him and the defendant refused to answer them. Thereafter the Court issued an order on the defendant under section 100 of the Civil Procedure Code, at the request of the plaintiff. Since the defendant did not answer the Interrogatories as required above, the plaintiff made a request to strike off the defendants' answer. Further vide J.E. No. (09), the plaintiff's Counsel moved for an Order of this Court to require the defendant to declare the documents in his possession. Accordingly the Court made an order under Section 102 of the Civil Procedure Code but the defendant did not comply with it and submitted only the objections. On this ground too, the Counsel for the plaintiff moved to strike off the defendants' answer. Both these matters were fixed for inquiry and permission was granted to both parties to make written submissions at the inquiry. Accordingly both parties made their respective written submissions, and this Order is a sequel to such submissions.

In these circumstances, it is pertinent that the plaintiff's request for striking off the defendant's answer on the ground of his failure to answer the Interrogatories issued on him under

Section 94 of the Civil Procedure Code should be considered first. One thing that is clear at the out set is that although the plaintiff made a request to reject the defendants' objections on the ground that the defendant failed to answer the Interrogatories by affidavit, the Court made an order on 16. 03. 1998 on the matter. Subsequent to that request the plaintiff moved for an order under Section 100 of the Civil Procedure Code and as such it was decided that the earlier request was withdrawn. Thereafter the Court made an Order under Section 100 of the Civil Procedure Code as moved by the plaintiff requiring the defendant to answer.

What is evident from the arguments put forward by the Counsel for the defendant in his written submissions is that the plaintiff's request to answer the Interrogatories has been maliciously made with a view to harrass the defendant and that this fact is proved by the Press Reports annexed to the Statement of Objections. The defendant further argues that the primary object of serving Interrogatories is to expedite the proceedings of an action but in this case what has actually happened by serving these Interrogatories is that the proceedings would be further delayed. In any event, as the plaintiffs' action is an ordinary defamatory case, it is not possible to require the defendant to answer 236 Interrogatories on this ground.

The main issue that has to be determined in this case is, whether any defamation or libel has been caused to the plaintiff from the matters enumerated in para 17 of the plaint.

The defendant contended that before making an order under Section 100 of the Civil Procedure Code, that no penalty can be imposed on the defendant for not answering the Interrogatories. That argument is true as, when default is made in respect of answering a series of Interrogatories issued under Section 94 and if that default does not fall into the ambit of Section 98, the Court should make an order under Section 100 requiring the defendant to answer them. The defendant argues that no order has been made by this Court under Section 100 requiring him to do so. This Court has made that order on the defendant under Section 100 on 06. 03. 1998. When going through the order made that day, it appears clearly that before taking action against the defendant under Section 109, as moved by the plaintiff, the Court, as a matter of being just and reasonable to the defendant, made that order under Section 100. The Court has further determined when an order has been made under Section 100, the main trial of the case cannot be conducted without concluding the inquiry pertaining to that order. The assertion that no order has been made on an application made under Section 100 is baseless in that event though the Court has not explained that order under Section 100 by word by word it has clearly made such order under Section 100 on that day. It is the opinion of this Court that the Counsel for the defendant and the defendant himself cannot state, according to their status, that they did not understand the order made under Section 100 by this Court. When that order under Section 100 was made, the Senior Counsel for the defendant was present in Court and if there had been any uncertainty in the said order he had the

opportunity to get the matters or doubts cleared at that stage. Therefore I reject the defendants' argument that no action can be taken under Section 109 as no order has been made under Section 100.

However, it appears that there is some grounds in the defendant's argument that he is not bound to answer the Interrogatories which are extensively lengthy and exhaustive as regards the matters of this case ~~are~~ concerned, for which he is expected to answer. As stated earlier, the plaintiff has instituted this action against the defendant as an ordinary case of defamation. This Court agrees with the argument raised by the defence that such a large number of Interrogatories numbering 236 which are required to be answered by the defendant are not directly relevant to or involved in the matters in this case. Because, most of the Interrogatories put into the defendant for answer are ex-facie not relevant to this case or the proceeding in this case would not be expedited by them. For example, the Interrogatory No. 2(a) is that "was not the defendant very closely associated with the former Government, how did he hold several appointments thereunder?" Interrogatory No. 2 (b) is that, "did not the defendant visit Rosmead Place residence or Mr. Anura Bandaranayaka, M.P. to advise and/or encourage him to cross-over to the "former government?" What is interrogated by Interrogatory No. 7 (1) is "does the defendant deny, that he had a strong personal relationship with Mr. K. N. Choksy, P.C., M.P.?" By Interrogatory 13(h) (ii) the plaintiff has questioned whether

the defendant does admit that he, having been learned in the law, and having obtained a Doctorate at the University of Oxford, and a Professor of Law, ought to have known the traditions and conventions that pertain to the concept of Parliamentary privilege?"

From these Interrogatories, it is clear that the defendant is unable to answer those Interrogatories as "yes" or "no" and these Interrogatories are not ex-facie relevant to the issues involved in this case. According to the established law, what is expected by tendering Interrogatories is only the admission by the second party of the facts and matters that the party tendering the Interrogatories wish to prove in the relevant case. As regards these Interrogatories this Courts' determination is that however, in a defamation action like the present one, the Interrogatories tendered have gone beyond that limit and that it has taken the form of cross-examination of the defendant. As such this Court accepts the contention of the defendant for not answering the Interrogatories put into him by the plaintiff and therefore, this Court determines that the defendant is not liable to answer the said Interrogatories. Therefore I reject the plaintiff's application to strike out the Answer of the defendant under Section 109 of the Civil Procedure Code on the ground of defendants' failure to answer them. Accordingly the costs of inquiry can be recovered by the defendant from the plaintiff.

The plaintiff further stated that by this Court's order dated 09. 03. 1998 the defendant was required to discover the documents but he has refused to declare them. When a request

is made under Section 102 for disclosing all necessary documents, the defendant is bound to declare them by an affidavit and he is entitled to refuse to do so only in an instance where an order has been made under Section 103 for the production of such documents. Therefore since the defendant has failed to declare those documents, the plaintiff moved that the Answer of the defendant be struck out under Section 109 of the Civil Procedure Code.

It appears that this Court on the application of the plaintiff on 9. 3. 1998 ordered the defendant to produce the documents on which he relies for his defence. The defendant having accepted that order without declaring what document he has in possession in that respect forwarded objections on 17.3.1998 and stated that the relevant documents are not in his possession in his personal capacity but that they are privileged documents and refused to declare those.

Accordingly the plaintiff's argument is that where a defendant has been ordered by Court to declare the documents a defendant cannot refuse to do so and what the defendant should do, is to declare the documents by an affidavit. But when an order is made to produce those under Section 103, the defendant may refuse to produce them.

The defendant has stated in his objections that the order made on him to declare documents is vague and that in any event the documents are not in his personal possession and that the documents he has are privileged documents.

It appears here that the defendant has stated that the order made under Section 102 (1) is not clear. In the order made on 9. 3. 1998 the Court has ordered that notice will be issued to produce the documents relevant to the plaintiff's case and relied upon by the defendant for his defence. The argument of the Attorney-at-Law for the defendant is that this is not an order made to declare documents. According to the Sinhala which this Court understands the conclusion of this Court is that the Court has made order on 9.3.1998 to declare the documents that are relevant to the plaintiff's case or the defendant's defence. The notice sent by this Court to the defendant in respect of this ^{order} ~~notice~~ is filed in the case record marked 'B' and even in those documents it is stated that the particulars of those documents should be declared by affidavit within seven (7) days of the service of the order. Accordingly it is the conclusion of this Court that the defendant's argument that the notice sent to the defendant to declare documents is vague, is baseless. Where an order has been made by a Court under Section 102 (1) of the Civil Procedure Code to declare documents the person who got that order has to declare the documents in his possession by an affidavit before the date specified in that notice. Accordingly it is clear that the only course of action that a person who received an order under Section 102 can take, is to declare what documents he has in his possession and while declaring so to forward objection with ^{as regard} reasons to the production of those. Accordingly it is the

conclusion of this Court that there is no right to forward objections while refusing to comply with an order made under Section 102 (1). On the other hand although the defendant says that the order issued to him under Section 102 (1) is vague, the defendant, within 8 days of its issue has forwarded an affidavit refusing to act on it.

One fact which appears from the objections of the defendant is that the defendant has stated in paragraph 02 of his objections that he has no documents in his possession. Again in the same objections in paragraph 04 he has stated that he does not have the documents relevant to the case in his possession in his personal capacity. According to paragraph 39 of the defendant's answer the defendant has admitted that he was the Deputy Minister of Finance during the relevant period. One fact which appears accordingly is that while the defendant on the one hand says that the documents relevant to the case are in his possession in the situation of his contesting the case, he states on the other hand that those are not in his personal possession. It is the conclusion of this Court that the defendant is not entitled to hold on to both these arguments at the same time.

An argument of the defendant is that these documents are not in his possession. It has been decided in the judgement 'Sundaram Vs Gonsalvez' reported in page 15 in 51 Law Reports that possession means sole legal right or the right to act in relation to those.

According to paragraph 39 of the defendant's answer he has admitted that he functioned as the Deputy Minister of Finance at all material times. If the situation is this, it appears that the documents which this plaintiff has sought to get declared are those in relation to which the defendant can act and according to the aforesaid judgement it has to be held that those documents are in his possession.

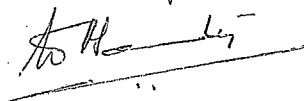
Another argument of the defendant is that these documents are privileged documents. In Section 103 A (1) of the Civil Procedure Code it has been stated that when the State is a party, order can be made against the State also in relation to the discovery or examination of documents. In Section 103 A(2) it has been stated that according to the opinion of the relevant Minister where the declaration of those documents can affect public interest the State can withhold those documents. One fact which appears in this case is that the State is not a party to this action and the defendant is not the Minister relevant to the documents ordered to be declared. Accordingly it is the conclusion of this Court that the defendant cannot claim these documents to be privileged documents.

The Counsel for the plaintiff has stated in his written submissions that a penalty cannot be imposed under Section 109 in relation to not acting under Section 102. However it has been clearly set out under Section 109 (1) that when an order made under the Chapter under which

is included,
Section 109/such^{as} an order to declare documents, is not complied with, if in the case of a plaintiff the action is liable to be dismissed and in the case of a defendant his defence is liable to be struck out when the other party has made an application. The plaintiff has clearly made an application to strick out the defendants' answer and the defendant in this case has not accepted the order made in relation to the declaration of documents.

According to the facts set out before, this Court has determined that the defendant has failed to comply with the order made by this Court for declaration of documents. Accordingly on the application of the plaintiff I, acting under Section 109 (1) strick out the defendants' answer and fix the case for ex-parte trial. The plaintiff can obtain costs of inquiry from the defendant.

Sgd.

Translation certified correct.


W. A. SAMARATUNGA
Sworn Translator of the Govt. of Sri Lanka
Legal Draftsman's Department
COLOMBO-I - SRILANKA.