CONSTRUCTION AND DEVELOPMENT COMPANY LTD. AND ANOTHER VS GUNASEKERA

COURT OF APPEAL.
WIJEYARATNE, J.
C. A. 350/2001 (LG).
DC COLOMBO 17090/L.
SEPTEMBER 23, 2002.
OCTOBER 1, 2002.

Civil Procedure Code, sections 75, 146 and 146(2) - No express denial in answer - Can they be regarded as admissions ?-Deemed to have been admitted - Is it in fact admitted ?-Evidence Ordinance, sections 58, 101 and 102.

The plaintiff-respondent instituted action seeking a declaration of title to the premises in suit. The defendant-appellants filed answer wherein paragraphs 3, 4, 6 and 7 were not specifically denied or admitted; paragraph 1 of the amended answer and certain parts of some paragraphs were admitted and put the plaintiff to the proof of other averments in those paragraphs but did not expressly deny any averment therein.

On an application made by the plaintiff the trial judge made order to record them as admissions.

HELD:

(1) There is no justification or rational basis to record as an admission a fact which is not expressly admitted on the basis that what is not expressly denied is deemed to be an admission. What is deemed to have been admitted is not in fact admitted.

(2) Per Wijeyaratne, J.
"Answer clearly indicates that the 1st and 2nd defendant-appellants having admitted part of the averments contained in the relevant paragraphs has put the plaintiff-respondent to the proof of the other averments. This means that the defendants did not admit and it is because that they did not admit what is averred they expected the plaintiff who asserted them to prove same."-sections 101, 102 of the Evidence Ordinance.

(3) The Order to record as admissions what is not expressly admitted and matters where parties are at variance is neither lawful nor justifiable.

APPLICATION for leave to appeal from an order of the District Court of Colombo with leave being granted.

Cases referred to :

1. *Fernando* Vs. *Samarasekara* 49 NLR 285.
2. *Mallawaaratchi* vs. *Central Investments Finance* -CA 433/79(F).

Wijeyadasa Rajapakse, PC with *Asoka Kalugampitiya* for 1st and 2nd petitioners.

Ikram Mohamed, PC with *Thisath Wijesiriwardane* for plaintiff-respondent.

Cur. adv. vult.

January 10, 2006.

WIJEYARATNE, J.

The Plaintiff-respondent instituted action against the 1st and 2nd defendant-appellants and the 3rd defendant-respondent seeking declaration of title to the premises in suit and injunctive relief as prayed for in the plaint. The 1st and 2nd defendant-appellants filed answer and amended answer dated 17.01.1995 wherein paragraphs 3,4,6, & 7 were not specifically denied or admitted. However paragraph 1 of the amended answer admitted certain parts of such paragraphs of the plaint and put the plaintiff to the proof of other averments in those paragraphs but did not expressly deny any averment therein.

At the commencement of the trial counsel for the Plaintiff-respondent moved to record that the 1st and 2nd defendants have admitted paragraphs 3,4,6 and 7 of the plaint in the absence of any express denial of the same, which, the counsel urged, be treated as being deemed to have been admitted. The learned trial Judge having heard the submissions made by counsel made order to record them as admissions. The 1st and 2nd respondents made application for leave to appeal from such orders which are recorded as four separate orders. This Court by its minute dated 26.03.2002 granted leave and the appeal when taken up for hearing the parties opted to file written submissions and invited Court to deliver judgment on the strength of such submissions.

The counsel for the plaintiff-respondent supporting the orders relied on the decision of *Fernando Vs Samarasekera*[1] where it was held that the failure to deny the averments of the plaint in accordance with the requirements of the statute (section 75 of the Civil Procedure Code) must be deemed to be an admission by the defendants of the averment. He further referred this Court to the judgment in *Mallawaratchi vs Central Investments Finance Ltd.*[2] which followed the judgment above referred to.

The recording of the same as an admission is not in accordance with any provision of the Civil Procedure Code. Nor does the counsel refer this Court to any such provisions requiring or empowering the trial Court to record such admissions. However the recording of admissions has become a long established practice in civil trials. Yet there is no justification or rational basis to record as an admission a fact which is not expressly admitted on the basis that what is not expressly denied is deemed to be an admission. What is deemed to have been admitted is not in fact admitted.

Section 146 of the Civil Procedure Code requires".....questions of fact or law to be decided between parties as issues. The duty of the trial Court in terms of the provisions of sub section (2) of section 146 is to ".....ascertain upon what material propositions of fact or law the parties are at variance and shall there upon proceed to record the issues on which the right decision of the case appears to the Court to depend."

Perusal of the amended answer clearly indicates that the 1st and 2nd defendants-appellants having admitted part of the averments contained in the relevant paragraphs has put the plaintiff-respondent to the proof of the other averments. This means that the 1st and 2nd defendants did not admit and it is because they did not admit what is averrred only they expected the plaintiff who asserted them to prove the same. In terms of the provisions of sections 101 and 102 of the Evidence Ordinance the burden of proving a particular fact is on the party who asserts the same and expect judgment to be given on such facts. The exception is found in the provisions of section 58 of the Evidence Ordinance which states what is admitted need not be proved. This means that what is admitted by the adverse party need not be proved though admissions does not amount to proof.

Applying these provisions to the matter in issue, it is the burden of the plaintiff - respondent to prove what he asserts in the plaint excepting what is admitted. To record as an admission what the defendant did not admit, but did not deny either, purely on the basis of a deeming aspect of it would

mean the plaintiff-respondent would be absolved of his burden to prove facts needed to be proved as assertions relied on for the purpose of obtaining a decision in his favour. This is in complete contrast to the scheme of the Civil Procedure Code and the legal system of adversaries ; specially in the absence of any provisions enabling or empowering Court to resort to such a cause through recording of admissions. It would if permitted, result in a total twist of the process of law and subvert justice.

The order to record as admissions what is not expressly admitted and matters where parties are at variance is neither lawful nor justifiable.

Such orders are set aside and vacated and the appeal is allowed with costs.

The learned trial judge is directed to proceed with the trial from the commencement according to law.

Appeal allowed.