

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

Nalani Lokubandara,
No. 24/14B, Purana Vihara
Road, Balapokuna,
Colombo 06.

**1st Defendant-Complaint-
Petitioner**

CA. Case No. CA/COC/0004/19

D.C. Colombo Case No. DLM 138/14

Vs

Hiniduma Liyanage Induni
Lokubandara,
No. 24/14B, Purana Vihara
Road, Balapokuna,
Colombo 06.

Presently at

No. 260/G, Galauda Road,
Kathalawala,
Kaduwela.

**Plaintiff-Accused-
Respondent**

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

Hon. Sasi Mahendran, J.

Counsel: Mr. Anuja Premaratne PC., with Ms. Nawushalya Rajapakshe and Mr. Ramith Dunusinghe for the 1st Defendant-Complaint-Petitioner.

Mr. Harindra Dhammage with Mr. Sudath Madanayake for the Plaintiff-Accused-Respondent.

Written submission Tendered on: 27.01.2022 by the Petitioner.

27.01.2022 by the Respondent.

Argued On: 19.01.2022

Decided On: 15.02.2022

D.N. Samarakoon, J.

Order

When this matter instituted under a charge of contempt of court was taken for inquiry on 25th November 2021, it was informed that in view of an order made by a division of this court on 23rd November 2021 in case No. CA/COC/0005/2017 the defendant complainant petitioner has to give fourteen

days' notice prior to leading of audio visual evidence contained in a compact disc. The inquiry had not begun then. It was refixed to enable the petitioner giving notice. Such notice was thereafter given.

When this matter was taken for inquiry on its second day, on 19th January 2022, when the petitioner in giving her evidence in chief sought to refer to the said audio visual evidence, the plaintiff accused respondent objected on the basis that the connection between the evidence to be adduced and the alleged source has not been established.

It was submitted for the petitioner that the respondent who did not, within the period of fourteen days seek information as per Evidence (Special Provisions) Act No. 14 of 1995 cannot now raise such an objection. The parties have then filed written submissions and this is the order pertaining to the said matter.

The examination of the aforementioned order in case No. CA/COC/0005/2017¹ and the order dated 14th January 2020 in case No. CA (PHC) APN:35/2018² as well as sections 04,05,07,08 and 09 of Evidence (Special Provisions) Act No. 14 of 1995 shows that it is not a fourteen day notice, but a forty five day notice which is mandatory under the Act. Such notice has not been given in this case. Hence the question whether the respondent has sought information within the time provided does not arise.

Section 07(1) of the Act says,

The provisions mentioned below "shall apply where any party to a proceeding proposes to tender any evidence under section 04 or 05, in such proceeding-

¹ Professor Sarath Wijesuriya and another vs. Dr. Anurudda Padeniya

² Tiran P. C. Alles vs. Hon Attorney General

Section 07(1)(a) requires such party to give forty five days notice by filing a list of such evidence with a copy of such evidence or such particulars.

Under section 07(1)(b) a party to such notice was given may within fifteen days apply to the party giving notice to permit access to (i) the evidence sought to produce (ii) the machine, device or computer used to produce such evidence (iii) any records relating to the production of evidence or the system used in such production.

Then under section 07(1)(c) the party proposing to tender such evidence shall within a reasonable time and not later than fifteen days after the receipt of such application, comply with the request and provide reasonable opportunity to the party applying to have access and inspect such evidence, machine, etc.

Section 07(1)(d) provides that where the party proposing to tender evidence is unable to comply, or does not comply with the said application or where parties are unable to agree on any matter relating to the notice or application or the manner and extent of the inspection the court may on application made by either party make such order or give such direction, as the interests of justice may require.

Section 07(2) states that save as provided in section 08 and 09, where a party proposing to tender evidence fails to give notice, or upon application for access, etc., made fails to provide reasonable opportunity, or fails to comply with any order or direction given by court under paragraph (a) shall not be permitted to tender such evidence in respect of which the failure was occasioned.

The position is that the petitioner has failed to give notice as required by section 07(1)(a) of the Act. But this was occasioned due to inadvertence in informing court on 25th November 2021, that "Counsel are ready for the inquiry. However they bring to the notice of the court a judgment delivered on 23rd of this month C. A. COC 05/2017 where it

has been held by court No. 301 that before leading computer evidence fourteen days notice should be given prior to the commencement of trial". It is true that in that case which was referred to above the court said notice should be given prior to the commencement of trial. But under the said Act the notice required is not fourteen days but forty five days. The inquiry in this matter has now commenced.

But this court notes the provisions of section 07(1)(d) which is as reproduced below,

“(d) Where the party proposing to tender such evidence is unable to comply, or does not comply with, the application for access and inspection, **or where the parties are unable to agree on any matter relating to the notice** or the application for access and inspection or the manner and extent of the inspection, **the court may on application made by either party, make such order or give such direction, as the interest of justice may require”.**

This is a case where the parties were under a mistaken belief as to the notice that was required to be given for which the court has not given its mind. Hence it can be considered as **where parties were unable to agree on any matter relating to notice**. There is now the application made by the respondent to prohibit the petitioner from leading said evidence under sections 04 and 05 and another application by the petitioner on the basis that the respondent having not applied for inspection now cannot object. **Hence there are applications made by parties. The court has to then make an order or give such direction, as the interest of justice may require.**

This court also notes that in C.A. (PHC) APN:35/2018, the Court of Appeal has said among other things, that,

“Hence it is evident that the intention of legislature is to provide the judge with a discretionary power in the interest of justice by adopting a more liberal view to accomplish the objectives of the said Act....Therefore the legislature is very clear...the judge has a discretion to permit the appellant to lead such evidence as the interest of justice may require. In this present case it is very clear that it was a mistake”.

Hence this court in the interest of justice give direction that the petitioner shall give notice required under section 07(1)(a) forthwith to the respondent, until the completion of which further inquiry will be adjourned. It would not cause any prejudice since no item of evidence under sections 04 or 05 have been adduced up to now.

D.N. Samarakoon,
Judge of the Court of Appeal.

I agree.

Sasi Mahendran,
Judge of the Court of Appeal.