

**FAROSE AHMED  
VS  
MOHAMED AND ANOTHER**

COURT OF APPEAL.  
IMAM, J.,  
SRISKANDARAJAH, J.,  
CA 223/2002.  
DC MT LAVINIA 820/97/L.  
FEBRUARY 14, 2005.  
JANUARY 11, 2005, JUNE 5, 2006.

*Civil Procedure Code, section 51, section 54, section 121(2), section 125(2)-  
Document not listed - Can it be produced? - Discretion of Court-Public  
documents-Purpose of section 121(2) – Objective?*

**HELD:**

(1) The trial was fixed for 19.09.2001, the additional list of documents was filed on 14.02.2002 long before the next trial date viz. 30.05.2002. The petitioner's application was to mark a public document and there was no element of surprise caused as the document had already been gazetted.

*Per* Imam J.

"The objective of section 121(2) is to give notice of the witnesses and documents intended to be called or produced fifteen days before the date of trial".

**APPLICATION** for leave to appeal from an order of the District Court of Mt. Lavinia.

**Cases referred to :**

1. *Eheliyagoda Gama Alhiralage Karunawathie Menike vs. Bank of Ceylon* - CALA 164/99 - DC Balangoda - CAM 11.02.2000.
2. *Girantha vs. Maria* - 50 NLR 519
3. *Casie Chetty vs. Senanayake* - 1999 2 Sri LR 11

*C. E. de Silva* for plaintiff-petitioner.

*Malaka Herath* for defendant-respondent.

*Cur.adv.vult.*

May 5, 2006.

**IMAM, J.**

The Plaintiff - Petitioner (hereinafter referred to as the Petitioner) filed this application for leave to appeal against the order of the learned Additional District Judge of Mount Lavinia dated 30.05.2002 (X9), and inter alia make order permitting the "Petitioner" to mark at the trial of this case the Notification published in the Government Gazette bearing No. 839 dated 30.09.1994 (X10), amongst other reliefs sought for.

The facts of this case are briefly as follows : The Plaintiff-"Petitioner" instituted this action in the District Court of Mount Lavinia against the Defendant Respondent (hereinafter referred to as the "Respondent") seeking a Declaration to title to the allotment of land depicted as Lot 4043 A in Plan No. 474 dated 10.02.1999 made by H. Devasurendra Licensed Surveyor, described in the 2nd schedule to the amended plaint dated 12.02.1999, the ejectment of the "Respondent" from the said land, and recovery of damages at Rs.2000 per month from 12.02.1999 until the Petitioner is restored to vacant possession of the aforesaid premises.

The case of the Petitioner as pleaded in the amended plaint (X1) is Para (a) That by Notices published in the Government Gazette dated 12.11.1993 and bearing No. 793 (271) and by Government Gazette No. 839 dated 30.09.1994 (X10), the allotment of land and premises depicted as Lot 4043 in Plan No. 1250 dated 24.06.1994 made by T. S. Siriwardena Licensed Surveyor bearing Assessment No. 22/3, Mallika Lane, Wellawatta, Colombo 06 vested in the Commissioner of National Housing under section 17(1) of the Ceiling on Housing Property Law No. 01 of

1973. The said land and premises is described in the 1st Schedule to the amended plaint (X1).

(b) That the Commissioner of National Housing by deed of disposition bearing No. 16573 dated 14.10.1995 sold and conveyed the said land and premises described in the 1st schedule to the amended plaint (xi) to Tuan Kitchi Sahideen who by Deed No. 223 dated 31.03.1996 attested by Sarojini Sornabale NP gifted the said land and premises described in the 1st schedule to the amended plaint (X1) to his daughter the Petitioner in this case. It is averred by the Petitioner that the respondent having no manner of right, title or interest is in wrongful and unlawful occupation of a portion of the land and premises described in the 1st schedule to the amended plaint (X1), denying and disputing the title of the Petitioner.

The Respondent filed amended answer (X2) denying all the averments contained in paragraph 2 to 8 of the amended plaint (X1) and pleaded *inter alia* ;

- (a) That by the Notification published in the Government Gazette bearing No. 793 dated 12.11.1993 that only the house bearing assessment No.22/3 and the land covered by the said house vested in the Commissioner of National Housing.
- (b) That the Commissioner was not entitled to convey to the predecessor in title of the petitioner more land than what was vested in the Commissioner by the said Gazette Notification.
- (c) That the Respondent is the owner of the remaining land which is not covered by the house bearing assessment No.22/3 including the land situated on the eastern boundary of the respondents land.

The Respondent prayed for;

- (a) Dismissal of the action by the Petitioner ;
- (b) A declaration that the Petitioner is only entitled to the house bearing assessment No.22/3 and the land covered by the said house.

A true copy of the list of Witnesses and Documents filed by the Petitioner is filed marked "X3" and pleaded as part and parcel of the Petition.

The trial commenced on 19.09.2001, and the parties recorded their admissions and issues (X4). It was contended by the Respondent that the Document 'X10' was not listed in compliance with sections 51 and 54 of the Civil Procedure Code. The crux of the matter was whether the Petitioner had listed the document "X10" in accordance with section 121 of the Civil Procedure Code or not. Section 121(2) of the Civil Procedure Code states that "Every party to an action shall, not less than 15 days before the date

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fixed for the trial of an action, file or cause to be filed in Court after Notice to the opposite party—

- (a) A list of witnesses to be called by such party at the trial.
- (b) A list of the documents relied upon by such party and to be produced at the trial.”

The Respondent averred that (X10) was not listed in conformity with section 121 of the Civil Procedure Code, and thus should be rejected which objection counsel for the Respondent took up. On counsel for both sides making oral submissions, the learned Additional District judge of Mount Lavinia upheld the objections of the “Respondents” and made order on 30.05.2002 (X9). rejecting the application to mark (X10).

Leave to Appeal was granted on 23.01.2003 with regard to the question whether the trial judge had exercised her discretion properly and the case fixed for argument.

The contention of the Petitioner was that although trial was fixed for 19.09.2001 and ‘X10’ was not in the list of documents 15 days prior to 19.09.2001, on payment of Rs.5000 as costs, further trial was fixed for 30.05.2002. The Petitioner avers that he filed an additional list of witnesses and documents including ‘X10’ in the aforesaid list (X6) on 06.02.2002 with notice to the Respondent which was accepted on 14.02.2002. It is contended by the Petitioner that he gave further evidence on 30.05.2002, that grave prejudice would be caused to the Petitioner by not being permitted to mark the Gazette Publication No. 839 (X10) dated 30.09.1994 and that “X10” should therefore be permitted to be marked in evidence.

The Defendant - Respondent avers that there is no merit whatsoever in the application of the Petitioner, as the discretion to allow a document which is not listed in accordance with section 121 of the Civil Procedure Code is vested solely with the learned trial judge and that the Petition be dismissed with costs.

I have examined the appeal of the Petitioner and the objections of the Respondent. As per journal Entry (32(X7), Trial in this case was fixed for 19.09.2001 on which date the Plaintiff (Petitioner) and Defendant (Respondent) were present, represented by counsel and issues were raised by both sides, and further trial was fixed for 01.02.2002. The additional list of witnesses and documents dated 06.02.2002 was filed on 14.02.2002 (X7) by the Plaintiff (Petitioner) which was long before the next trial date namely 30.05.2002. The Plaintiff (Petitioner) sought to mark the Gazette

Publication 839 dated 30.09.1994 which was included in the aforesaid additional list of witnesses and documents. The Gazette Publication is a public document, and it is my view that there was no element of surprise caused to the Defendant (Respondent). The objective of section 121(2) of the Civil Procedure Code is to give Notice of the witnesses and documents intended to be produced fifteen days before the date of trial. So that a party would not be taken unaware. On the trial day prior to the 30.05.2002, namely on 01.02.2002 only the Examination in Chief of the Plaintiff (Petitioner) was led to a point. Especially as 'X 10' is a Public Document bearing No. 839 and was Gazetted on 30.09.1994. Hence irreparable prejudice would be caused to the Plaintiff (Petitioner) if 'X 10' is not permitted to be marked in evidence.

Section 175(1) of the Civil Procedure Code states that "No witness shall be called on behalf of any party unless such witness shall have been included in the List of witnesses previously filed in Court by such party as provided by section 121.

Provided however that the Court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of Justice, permit a witness to be examined, although such witness may not have been included in any such list."

(2) "A document which is required to be included in the list of Documents filed in Court by a party as provided by section 121 and which is not so included shall not, without the leave of the Court be received in evidence at the Trial of the action.

Provided that nothing in this sub-section shall apply to documents produced for Cross Examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory."

In *Eheliyagoda Gama Athiralage Karunawathie Menike Vs Bank of Ceylon*<sup>(1)</sup> it was held that the object of filing a list of witnesses is to prevent an element of surprise and thereby causing prejudice to the other party.

In *Girantha vs Maria*<sup>(2)</sup> it was held that in exercising the discretion of the judge, the paramount consideration for the judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by reason of some technicality."

In *Casie Chetty vs Senanayake*<sup>(3)</sup> it was held by Jayasinghe J that "In exercising discretion under section 175 of the Civil Procedure Code where

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it is sought to call a witness whose name was not in the list, the paramount consideration for the judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by some technicality.”

It is my view that justice would be meted out if the document “X10” is permitted to be led in evidence as it is a public document, and there could be no element of surprise to the Defendant (Respondent), as “X10” had already been gazetted.

For the aforesaid reasons I permit the appeal of the “Petitioner” and set aside the order of the Learned Additional District Judge, Mount Lavinia dated 30.05.2002 (X9). I further permit the “Petitioner” to mark the Document “X10” which is the Notification published in the Government Gazette bearing No. 839 dated 30.09.1994.

**SRISKANDARAJAH, J. - I agree.**

*Appeal allowed.*

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