

SIRIWARDHANA
v
DISSANAYAKE AND OTHERS

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
CALA 93/2004.
D.C. ANURADHAPURA 14389/RE.
AUGUST 8, 2004

Civil Procedure Code, sections 121(2) and 175(1) – Document not listed – Applicability of section 175(1) – Whose burden to satisfy court of the existence of special circumstances?

Held:

- (1) In terms of section 121(2) a party is required to file a list of witnesses and documents fifteen days before the date fixed for trial.
- (2) The proviso to section 175(1) empowers court to use its discretion in special circumstances in the interest of justice to permit a document to be produced which is not listed.
- (3) In the case of a document not listed in terms of section 121 (2) the burden is on the party failing to list that document to satisfy court of the existence of special circumstances to permit a document not listed to be produced.

APPLICATION for leave to appeal from an order of the District Court of Anuradhapura.

Cases referred to:

1. *Girantha v Maria* – 50 NLR 519
 2. *Abdul Munaf v Mohamed Yusuf* 1997 1 - Sri LR 373 at 378
 3. *Asilin Nona v Wilbert Silva* 1997 1 - Sri LR 176
- C. *Ratnayake* for defendant-petitioner.
C.E.de *Silva* for substituted plaintiff-respondent.

October 22, 2004.

WIMALACHANDRA, J.

The defendant-petitioner filed this application for leave to appeal against the order dated 17.02.2004 made by the learned District Judge Anuradhapura, refusing to permit a document to be produced, as the particular document was not listed in terms of section 121(2) of the Civil Procedure Code.

The facts relevant to this application are, briefly, as follows:

The plaintiff instituted the action bearing No. 14389/RE in the District Court of Anuradhapura seeking to eject the defendant-petitioner from the premises No. 9/38 Kurunegala-Anuradhapura Road, Thalawa. The original plaintiff, Kapuru Banda Dissanayake, died on 28.06.1995. His widow and children were substituted as the substituted-plaintiffs. The trial commenced on 26.9.2002 by recording admissions and framing of issues by the parties. The substituted-plaintiffs' case commenced on 13.01.2003. The defendant-petitioner's case commenced on 27.10.2003. From the affidavit filed by the 2nd substituted-plaintiff, it appears that the substituted-plaintiff's case was closed on 18.7.2003. The defendant-petitioner failed to file the proceedings of 18.07.2003 and disclose to Court that the substituted-plaintiffs' case closed on 18.07.2003. On 17.02.2004 whilst giving evidence, the defendant-petitioner sought to produce a document by giving a marking "D4". The substituted-plaintiffs' counsel objected to the said document being produced on the ground that it was not listed in terms of the provisions of section 121(2) of the Civil Procedure Code and that the said document was listed after the case of the substituted-plaintiffs' was closed. The learned District Judge upheld the objection raised by the substituted-plaintiffs and did not allow the defendant to produce the said document by his order dated 17.12.2003. It is against this order the defendant has filed this application for leave to appeal.

In terms of section 121(2) of the Civil Procedure Code, a party to an action is required to file a list of witnesses and documents fifteen days before the date fixed for trial, after notice to the opposite party.

The defendant-petitioner's additional list of witnesses and documents, which includes the document sought to be produced, was dated 02.10.2003. Accordingly, the said document sought to be marked at the trial had been listed after the case of the substituted-plaintiffs' case had been closed. It is to be noted that the defendant-petitioner has failed to file the proceedings of 18.07.2003, may be deliberately, on which date the plaintiffs closed their case and also the defendant-petitioner not file the copies of the journal entries of the original case record of the District Court. 41

In terms of section 175(1) of the Civil Procedure Code, a party is not entitled to produce a document which has not been listed in terms of section 121(2) of the Civil Procedure Code. This provision requires the list of documents and list of witnesses to be filed not less than 15 days before the date fixed for trial. The proviso to section 175(1) empowers the Court to use its discretion in special circumstances where such course is rendered necessary, in the interest of justice, to permit a document to be produced which is not listed in compliance with section 121(2) of the Code. The defendant in this case did not list the document he sought to produce at the trial in terms of section 121(2) of the Code. Upon a perusal of the impugned order, it is to be observed that the defendant's counsel had not placed before the learned District Judge any special circumstances, to exercise his discretion in the interest of justice, to permit the said document, which had not been listed in compliance with section 121(2) of the Code to be produced. Moreover, no explanation had been given by the defendant for the delay in filing the list of witnesses and documents after the close of the plaintiffs' case. In these circumstances it would cause prejudice to the plaintiffs-respondents if the said document is permitted to be produced. 50 60

The defendant-petitioner cannot rely on the case of *Girantha v Maria*⁽¹⁾, as explained by Ismail, J., in the case of *Abdul Munaf v Mohamed Yusuf*². He said at 378;

"The judgment and the observations of Gratian, J. cannot help the defendant-petitioner in this case as the court was there placing an interpretation on the repealed section 121 of the Civil Procedure Code 70

which did not then specially require the filing of a list of witnesses and documents 15 days before the date fixed for trial”

In the case of *Asilin Nona v Wilbert Silva* ⁽⁹⁾ Chief Justice, G.P.S. de Silva made the following observation:

“The 1st proviso to section 175(1) confers on the Court a discretion to permit a witness not so listed in terms of section 121(2) to be called “if special circumstances appears to it to render such a course advisable in the interest of justice.” The burden of satisfying the court as to the existence of special circumstances is on the party seeking to call such witnesses”.

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Similarly, in the case of a document not listed in terms of section 121(2), the burden is on the party failing to list that document to satisfy court of the existence of special circumstances to permit a document not listed to be produced.

In the instant case before us, the counsel for the defendant has not established any special circumstances as contemplated by the 1st proviso to section 175(1) of the Civil Procedure Code.

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In this application, the defendant-petitioner has challenged the order made by the learned Judge on 17.02.2004. We are also of the view that we should not waste our time on submissions made by the counsel for the defendant-petitioner on extraneous matters not relevant to the subject matter of this application, which is the impugned order made by the learned Judge on 17.02.2004.

In these circumstances we see no reason to interfere with the said order made by the learned District Judge on 17.2.2004.

For these reasons, the leave to appeal application is dismissed with costs fixed at Rs. 10,000/-.

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AMARATUNGA, J. - I agree.

Application dismissed.