

ARPICO FINANCE CO. LTD.
v
PERERA AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 230/2005
DC MT. LAVINIA 2457/99M
SEPTEMBER 27, 2006

Civil Procedure Code – Sections 121(2), 175, 175(2) – Document in additional list filed after the case was first fixed for trial – Exceptional circumstances to exercise discretion – Interest of justice – Paramount consideration.

The plaintiff-petitioner pleaded that, the 1st defendant-respondent entered into a lease agreement with the plaintiff-petitioner in respect of a Toyota bus. Though the defendant-respondent agreed to pay the lease rentals he defaulted. At the trial, the plaintiff-petitioner sought to produce another lease agreement, this was objected to, on the basis that the document had been listed in the additional list but which was filed after the first date fixed for the trial. The District Court held with the defendant-respondent.

Held:

- (1) Provisions of section 121 (2) empowers the Court to require the list of documents to be filed not less than 15 days before the date fixed for trial.
- (2) Section 175 (2) empowers Court to use its discretion and grant leave to produce a document which is not listed in terms of section 121(2).

- (3) Whether leave should be granted or not is a matter eminently within the direction of the trial Judge.
- (4) The defendant had notice of this document when the plaintiff raised Issue No. 12, and further the lease agreement has been pleaded in the replication.
- (5) The principle of filing a list of witnesses is to prevent an element of surprise and thereby not cause any prejudice to the other party.
- (6) The 1st defendant cannot be heard to say that she was taken by surprise.

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

Cases referred to:

- (1) *Kandiah v Wiswanathan and another* – 1991 – 1 Sri LR 269.
- (2) *Girantha v Maria* – 50 NLR 519 at 522.
- (3) *Casiechetty v Senanayake* – 1999 – 3 Sri LR 11 at 14 and 15.

Palitha Kumarasinghe PC with *M.I.U. Idroos* for plaintiff-petitioner.

S. Gunawardane with *J. Hissella* and *S. Athuladewa* for 1st and 4th defendant-respondents.

May 04, 2007

WIMALACHANDRA, J.

This is an application for leave to appeal filed by the plaintiff-petitioner (plaintiff) from an order of the learned Additional District Judge of Mount Lavinia dated 2.6.2005. 01

The plaintiff instituted the above action against the defendant-respondents (defendants) jointly and severally for a judgment in a sum of Rs. 2,442,385/62 and the legal interest at the rate of 4% per month from 7.10.1999 till the date of the decree. The plaintiff has pleaded in the plaint that the 1st defendant entered into a lease agreement bearing No. LF/1208/25/98 dated 27.11.1988 with the plaintiff in respect of a Toyota-Coaster bus described in the schedule to the plaint. The 1st defendant had agreed to repay the total sum in the lease in 48 monthly instalments. In the event of a default, the parties had agreed that the plaintiff is entitled to 10

terminate the lease agreement and charge default interest and to recover statutory and other charges arising out of the agreement. The 2nd, 3rd, and 4th defendants were the guarantors of the lease agreement. When the plaintiff instituted this action in the District Court of Mount Lavinia, the 1st, 2nd and 3rd defendants expressed their willingness to settle the action and a consent motion was filed.

However, the 1st, 2nd and 3rd defendants failed to comply with the terms of the settlement and hence the plaintiff made an application for writ of execution. Thereafter on an application made by the defendants the District Court set aside the settlement and fixed the matter for trial. 20

When the case came up for trial on 30.06.2004, the plaintiff called an executive officer attached to the plaintiff-company. The examination in chief could not be concluded on that day and the matter was re-fixed for further hearing on 7.10.2004. On 7.10.2004 the trial was re-fixed for 26.5.2005. When the trial was resumed, the plaintiff continued to lead the evidence of the earlier witness and he told Court that the 3rd defendant entered into another lease agreement bearing No. LF/1207/25/98 on 27.11.1998. The plaintiff then sought to produce the said agreement marked 'P19'. At that stage the Counsel for the 1st defendant objected to the said document being produced on the ground that the said document had been listed in the additional list which was filed on 14.6.2004, which was after the first date fixed for the trial to this action. This objection was upheld by the learned Additional District Judge by order dated 2.6.2005. 30

When this matter was taken up for inquiry into the granting of leave, by consent of the parties, leave to appeal was granted on the question whether the lease agreement bearing No. LF/1207/25/98 referred to in the proceedings dated 2.6.2005 should be allowed in evidence. Thereafter, the parties agreed to dispose of this matter by way of written submissions. 40

When the trial resumed on 2.6.2005 the Counsel for the plaintiff moved to produce and mark the said lease agreement bearing No. LF/1207/25/98, and the Counsel for the defendants objected to producing the said document on the basis that the said document was listed in the additional list filed on 14.6.2004, which 50

was after the case was first fixed for trial. The learned District Judge upheld the objection and rejected the said document.

In this order the learned Judge held that there are no exceptional circumstances to exercise his discretion under the proviso to section 175(2) of the Civil Procedure Code to allow the said document. The question that arises in this appeal is whether the discretion of Court in terms of section 175(2) has been correctly applied.

Section 175(2) reads thus:

"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."

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The provisions of section 121(2) of the Civil Procedure Code require the list of documents to be filed not less than 15 days before the date fixed for trial. Section 175(2) empowers the Court use its discretion and grant leave to produce a document which is not listed in terms of section 121(2) of the Civil Procedure Code.

The purpose of listing of witnesses and documents is to prevent an element of surprise and thereby not cause any prejudice to the opposite party. It also prevents false documents from being introduced after the institution of the action.

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It was held in the case of *Kandiah v Wisvanathan and another*⁽¹⁾ that when an unlisted document is sought to be produced by a party in a District Court trial, the question as to whether leave of Court should be granted under section 175(2) of the Civil Procedure Code is a matter eminently within the discretion of the trial Judge. The precedence indicates that leave may be granted:

- (1) where it is in the interest of justice to do so.
- (2) where it is necessary for the ascertainment of the truth.
- (3) where there is no doubt about the authenticity of the documents (as for instance a certified copy of a public document or records of judicial proceedings).
- (4) where sufficient reasons are adduced for the failure to list the document (as for instance where the party was ignorant of its existence at the trial)

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Where the Court admits such a document, an appropriate order for costs will generally alleviate any hardship caused to the said party.

The learned Counsel for the plaintiff submitted that the lease agreement LF/1207/25/98 has been referred to in paragraph 10 of the replication filed by the plaintiff. Therefore, the 1st defendant had notice of the said lease agreement. 90:

Now I shall proceed to consider whether leave of Court should be granted under section 175(2) of the Civil Procedure Code to allow the said document to be included in the list of documents.

As pointed by Gratiaen, J. in *Girantha v Maria*⁽²⁾ at 522, the purpose of the requirement of section 175 that each party should know before the trial the names of the witnesses whom the other side intends to call is to prevent surprise. The proviso to section 175 of the Civil Procedure Code authorizes the Court to permit a witness to be called although his name does not appear on the list of witnesses filed before the commencement of trial is such course is "advisable in the interest of justice". 100:

Jayasuriya, J. in *Casie Chetty v Senanayake* at 14 and 15 quoted with approval the opinion expressed by Gratian, J. in *Girantha v Maria* (*supra*) and held:

"In exercising under section 175 of the Civil Procedure Code where it is sought to call a witness whose name was not in the list, the paramount consideration of the Judge is the ascertainment of truth and not the desire of a litigant to be placed at an advantage by some technicality." 110

The same principle applies to the listing of documents.

In *Kandiah v Wisvanathan and another* (*supra*) at 275, 276, Wijeyaratne, J. too held that among other grounds upon which the Court should consider granting leave of Court to receive an unlisted document, are where it is necessary for the ascertainment of the truth and it is in the interest of justice to admit such a document.

The learned Counsel for the plaintiff submitted that the plaintiff by its replication dated 13.6.2003 marked 'J', in paragraph 10, denied the 1st defendant's position taken up by her in paragraph 8 of her answer 120

and in reply the plaintiff by its replication marked 'J' annexed to the petition has stated in paragraph 10 that the mortgage bond No. 5443 attested by D.L. Liyanage, N.P. was executed as security against the lease agreements No. LF/1207/25/98 and No. LF/1208/25/98 and the said mortgage has been released and sold and the proceeds were credited to both lease agreements. Furthermore the 1st defendant has put this matter in issue No. 12 and the plaintiff has raised a consequential issue No. 27.

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The issue 27 reads as follows:

"27(අ)3 වන විත්තිකරු විසින් අත්සන් කරන ලද උකස් ඔප්පුව පැමිණිකරුගේ ප්‍රති උත්තරයේ 10 වන ඡේදයේ සඳහන් පරිදි ගිවිසුම් දෙකක් සම්බන්ධයෙන් වලංගු කිබුණේ ද?

(ආ) එකී උගස්කරවලින් ලැබෙන මුදල් එකී ගිවිසුම් දෙකෙහිම ගිණුම් සඳහා බැරකර ඇත්තේ ද?"

In the circumstances, it appears that the 1st defendant was aware of this document, the lease agreement bearing No. LF/1207/25/98. Therefore it cannot be said that the 1st defendant was taken by surprise when the said document was listed in the additional list of documents. The 1st defendant had notice of this document when the plaintiff raised the issue No. 12. The principle of filing a list of witnesses is to prevent an element of surprise and thereby not cause any prejudice to the other party.

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In the circumstances, to ascertain the truth which should be the paramount consideration, and in the interest of justice the lease agreement LF/1207/25/98 listed in the additional list should be allowed as the said document is necessary to decide the aforesaid issues Nos. 12 and 27. Furthermore if this document is not allowed grave injustice would be caused to the plaintiff as the plaintiff will be unable to explain the facts relevant to the execution of the mortgage bond No. 5443 attested by D.L. Liyanage, N.P. In any event no prejudice would be caused to the 1st defendant as she had notice of this document. Moreover, the 1st defendant cannot be heard to say that she was taken by surprise as this document, the lease agreement LF/1207/25/98, has been pleaded by the plaintiff in paragraph 10 of the replication and it was out in issue by raising the issue No. 27.

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In the circumstances the learned Additional District Judge was in error when he refused to exercise the discretion of Court and refused leave to produce this document.

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For these reasons stated above I set aside the order of the learned Additional District Judge dated 2.6.2005. Accordingly, the appeal is allowed with costs.

Appeal allowed.