

SAHUL HAMEED ABDUL MUNAF
v.
MOHAMED LEBBE MOHAMED YUSUF ALIAS AHAMED
MOHAMED YUSUF

SUPREME COURT
G. P. S. DE SILVA, CJ.,
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
S.C. APPEAL NO. 168/97
C.A. (LA) NO. 291/96
D.C. KANDY NO. 11820/P
NOVEMBER 19 AND 20, 1998

Civil Procedure Code – Failure to file list of witnesses in time – Section 121 (2) and the first proviso and section 175 (1) of the Code.

Where the District Court upheld an objection taken by the plaintiff to the defendant calling a material witness on the ground that the defendant had failed to file his list of witnesses 15 days before the date fixed for trial as required by section 121 (2) of the Civil Procedure Code –

Held:

The first proviso to section 175 (1) of the Civil Procedure Code vests the discretion in the trial judge to permit the witness to be called "if special circumstances appear to it to render such a course advisable in the interests of justice". There was a total lack of "special circumstances" postulated in the proviso to section 175 (1) of the Civil Procedure Code. The trial judge was right in refusing to exercise his discretion in favour of the defendant.

Cases referred to:

1. *Girantha v. Maria* 50 NLR 519 distinguished.
2. *Kandiah v. Wiswanathan* (1991) 1 SLR, 269 at 278.

APPEAL from the judgment of the Court of Appeal.

Faiz Musthapha, PC with *Amarasiri Panditharatne* and *Ms. Faiza Musthapha-Markar* for the defendant-appellant.

Shibly Aziz, PC with *A. L. M. Mohamed*, *Farook Thahir* and *Nazli Buhari* for the plaintiff-respondent.

November 26, 1998.

G. P. S. DE SILVA, C.J.

This is a partition action. The plaintiff sought to partition the land and premises bearing No. 45, King Street, Kandy. In his plaint he averred that he and the defendant were co-owners, each entitled to a half-share of the corpus. The defendant, however, in his statement of claim, pleaded prescriptive title to the entirety of the corpus.

The trial commenced on 17. 1. 96. Admissions and points of contest were recorded. After the evidence of the plaintiff was led, the case for the plaintiff was closed, reading in evidence P1 to P6. On the application of the defendant, the case was postponed for 16. 02. 96, the reason being that the defendant had failed to bring to court certain documents. At this point it is relevant to note that the case had been fixed for trial on three occasions prior to 17. 1. 96. The trial could not be resumed on 16. 2. 96 owing to the illness of the defendant. The trial was ultimately resumed on 27. 8. 96 when the defendant called his first witness, Manoon. After the evidence of Manoon was concluded further trial was postponed for 5th November, 1996, once again on the application of the defendant.

When the trial was resumed on 5th November, 1996, the defendant moved to call witness Siddeek but the plaintiff objected to this witness being called on the ground that the defendant's list of witnesses had not been filed at least 15 days before the date fixed for trial. (section 121 (2) of the Civil Procedure Code). The objection taken before the District Court was on the basis that the defendant's list of witnesses was filed only on 10. 1. 96, the trial having commenced on 17. 1. 96. The submission before the District Court was that the defendant's list of witnesses was filed only 7 days before the date of trial and this was clearly contrary to the provisions of section 121 (2) of the Civil Procedure Code. This objection was upheld in the District Court. The defendant's application to the Court of Appeal for "leave to appeal" against the order of the District Court was refused. Hence the present appeal by the defendant to this court.

The principal submission of Mr. Musthapha for the defendant appellants was that the trial judge has failed to address his mind to the first proviso to section 175 (1) of the Civil Procedure Code. Section 175 (1) reads thus:

"175 (1) – 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 such list aforesaid;

Provided also that any party to an action may be called as a witness without his name having been included in any such list."

Relying on the judgment of Gratiaen J. in *Girantha v. Maria*,⁽¹⁾ Mr. Musthapha strongly urged before us that the sole object of filing a list of witnesses is to avoid "the element of surprise" and that the court should have permitted witness Siddeek to be called in the interests of justice. It was counsel's submission before us that Siddeek was a very material witness to establish the defendant's plea of prescriptive possession. It was also pointed out to us that it was almost eleven months after the plaintiff had notice of the defendant's list of witnesses, that the application was made to call witness Siddeek.

The first proviso to section 175 (1) vests the discretion in the trial judge to permit the witness to be called "if special circumstances appear to it to render such a course advisable in the interests of justice". As submitted by Mr. Shibly Aziz for the plaintiff-respondent, the finding of the trial judge was that the counsel for the defendant was unable to give any "acceptable" or "reasonable" explanation for the admitted delay in filing the list of witnesses. Upon a scrutiny of the proceedings of 5th November, 1996, it is manifest that this finding

of the trial judge is correct. What is more, there was no indication whatever of the nature, content, and relevance of the evidence sought to be led through witness Siddeek. This is a very significant fact which clearly distinguishes the present case from *Girantha v. Maria (supra)*. Literally there was nothing on record to show that Siddeek's evidence was vital to the case for the defendant. There was a total lack of material to suggest any "special circumstances" postulated in the proviso to section 175 (1) of the Civil Procedure Code. I accordingly hold that in the facts and circumstances of this case the trial judge was plainly right in refusing to exercise his discretion in favour of the defendant.

For these reasons the appeal fails and is dismissed with costs fixed at Rs. 1,000.

Before I part with this judgment I would commend the observations made by Wijeyaratne J. in *Kandiah v. Wiswanathan*⁽²⁾ : "It happens frequently in District Court trials that material witnesses and documents have not been listed as required by law. The failure to do so entails considerable hardship, delay and expense to parties and contributes to laws delays. It should be stressed that a special responsibility is cast on attorneys-at-law, who should endeavour to obtain full instructions, from parties in time to enable them to list all material witnesses and documents as required by law".

WADUGODAPITIYA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal dismissed.