

ASILIN NONA AND ANOTHER

v.

WILBERT SILVA

SUPREME COURT.

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

KULATUNGA, J. AND

RAMANATHAN, J.

S.C. APPEAL NO. 87/95

CALA NO. 48/95

D. C. KALUTARA NO. 4109/L

FEBRUARY 20, 1996.

Civil Procedure Code – Discretion of Court to call witnesses who are not listed – Sections 121 and 175 of the Code.

Although Section 121(2) of the Civil Procedure Code requires every party to file the list of witnesses "not less than 15 days before the date of trial", parties specifically agreed to file the same one week before the date of trial. However, the defendants filed their list only after the plaintiff closed his case. The District Judge upheld the plaintiff's objection to the defendants' application to call witnesses.

Held:

Section 175(1) of the Code imposes a bar against calling of witnesses who are not listed in terms of Section 121. The 1st proviso to Section 175(1) confers on the Court a discretion to permit a witness not so listed to be called "if special circumstances appear 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. There were no special circumstances as contemplated by the 1st proviso to Section 175(1).

Cases referred to:

1. *Girantha v. Maria* 50 N.L.R. 519, 520,522
2. *Hatton National Bank Ltd., v. Warawilage* 1992 1 Sri L.R. 358.

APPEAL from the judgment of the Court of Appeal.

Manohara R. de Silva for defendants-appellants.

N. R. M. Daluwatta, P.C., with Champaka Laduwahetty.

for plaintiff-respondent.

Cur. adv. vult.

February 26, 1996.

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

The plaintiff instituted these proceedings seeking a declaration of title to, and ejectment of the defendants from, the land described in the schedule to the plaint. The defendants resisted the plaintiff's claim on the plea of acquisition by title by prescription.

When the case was called on 27.9.93 the parties specifically agreed that they will file their list of witnesses one week before the date of trial. Although section 121(2) of the Civil Procedure Code required every party to an action to file the list of witnesses "not less than 15 days" before the date of trial, in the present case the agreement was that if a list is to be filed, it has to be done one week before the date fixed for trial. The case was fixed for trial on 9.12.93 and 13.12.93. The plaintiff closed his case on 13.12.93. The defendant filed his list of witnesses only on 17.12.93. On the next date of trial (31.1.94) the defendants' application to call the witnesses was objected to by counsel for the plaintiff. The District Judge upheld the objection. Against this order of the District Judge the defendants made an application for leave to appeal to the Court of Appeal. The Court of Appeal dismissed the application and the defendants have now preferred an appeal to this Court.

Relying strongly on the decisions in *Girantha v. Maria* ⁽¹⁾; and *Hatton National Bank Ltd., v. Warawitige* ⁽²⁾, Mr. Manohara de Silva for the defendants-appellants strenuously contended that the District Judge was in error when he refused the application made on behalf of the defendants to call the witnesses listed on 17.12.93. Mr. de Silva submitted (i) that there was a long period of time between 17.12.93 and the date when the application was made to call witnesses on behalf of the defendants; (ii) that the District Judge had wrongly exercise the discretion vested in him under the first proviso to section 175 of the Civil Procedure Code; (iii) that the refusal of the defendants' application resulted in a miscarriage of justice; (iv) that there was no element of "surprise" for the reason that the plaintiff had more than adequate notice of the witnesses that the defendants intended to call.

Section 175(1) of the Civil Procedure Code in its enacting part imposes a bar on a party calling witnesses unless such witnesses were included in the list previously filed as provided by section 121. The first proviso to section 175(1) confers on the court a discretion to permit a witness not so listed to be called **"if special circumstances appear to it to render such a course advisable in the interests of justice"**. The burden was on the defendants to satisfy the court in regard to the existence of such special circumstances. The finding of the District Judge, however, was that no explanation was given for the default of the defendants. This finding was not challenged before us. In my opinion, this clearly is an important circumstance which tells heavily against the defendants, particularly in view of the agreement between the parties that the list of witnesses will be filed one week before the date of trial. Admittedly, the defendants were in breach of the agreement. As rightly submitted by Mr. Daluwatte, Counsel for the plaintiff-respondent, it would certainly not be in the interests of justice to permit the defendants to act in breach of the agreement to which they were parties.

On the other hand, in the case of *Girantha v. Maria* (*Supra*) cited by Mr. Manohara de Silva there were special circumstances which required the court to permit the defendant to call the witness, Police Inspector Sivasambo, who was listed only after the plaintiff's case was closed. This too was a case where the plaintiffs sought a

declaration of title against the defendant and one of the issues was "the prescriptive rights of parties". This is a case that is often cited in the District Courts and it is best that the relevant facts are fully set out. Gratiaen, J. in the course of his judgment stated:—

"While the 1st plaintiff was giving evidence she was cross examined with regard to petition (marked D1) which she had submitted in 1940 to the Magistrate's Court of Dandegamuwa complaining that the defendants were forcibly resisting her claim to enter the land in dispute. It is common ground that this petition had been forwarded to Police Inspector Sivasambo for investigation, and that at the official inquiry held by that officer the 1st plaintiff had made a statement to him in connection with the dispute. The proctor for the defendants, who had been briefed with a certified copy of the Inspector's report to Court following the inquiry, **suggested to the 1st plaintiff that she had on that occasion told the Inspector "that she had not been in possession of this land for the last ten years."** The 1st plaintiff denied having made any such statement to Inspector Sivasambo. There can be no doubt that such an admission, if made in 1940, at an official investigation held by a Police Officer, would have very important bearing on the issue of prescription raised at the present trial. In view of the plaintiff's denial, however, the certified copy of this report could not be considered at the trial **unless Inspector Sivasambo was called as a witness**". (at P. 520) ... "In this case Inspector Sivasambo is admittedly a person whose evidence, if accepted by the trial Judge, would be of the greatest importance in deciding the issue of prescription. **The nature of the testimony which the defendants anticipate he would give was expressly put to the 1st plaintiff when she gave evidence.** The element of surprise does not arise because the plaintiffs had several months' notice of the defendants decision to call him on the adjourned date of hearing. In these circumstances it seems to me that the objection raised by the plaintiffs to Inspector Sivasambo being called as a witness as highly technical and without merit. It was 'in the interests of justice' that this material witness should have been examined. (at P. 522) (The emphasis is mine).

It is thus seen that the facts clearly establish that Inspector Sivasambo was a vital witness whose testimony had a **direct bearing**

on the issue of prescription. Therefore it was undoubtedly in the interests of justice to permit him to be called as a witness. This case is of hardly any assistance to the appellants in the appeal before us.

Hatton National Bank Ltd., v. Warawitage (Supra) is also a case of little assistance to the appellant in the present appeal. That was a case where the Bank instituted proceedings for the recovery of a loan granted to the 1st defendant; the 2nd and 3rd defendants had signed as guarantors. Judgment was entered of consent against the 1st defendant. At the trial against the 2nd and 3rd defendants, Counsel for the Bank moved to call an officer of the Bank "conversant with the facts". Counsel for the defendants objected on the ground the witness was not "listed". Wijeratne J., while taking the view that the "officer of the Bank" is not a "party" to the action within the meaning of the 2nd proviso to section 175(1) of the Civil Procedure Code, held that the District Judge should have exercised his discretion in terms of the 1st proviso to section 175(1) and permitted the witness to give evidence. On a consideration of the facts it is clear that the objection was of a technical nature and devoid of merit.

In the appeal before us, it is manifest that there are no "special circumstances" as contemplated by the 1st proviso to section 175(1) of the Civil Procedure Code. The "special circumstances" must be of such nature as to further the ends of justice. I therefore hold that the District Judge had fairly and properly exercised the discretion vested in him when he disallowed the application made on behalf of the defendants.

For these reasons the appeal fails and is dismissed with costs fixed at Rs. 500/-.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.