

BIBILE
v
BADUGE

COURT OF APPEAL
WIMALACHANDRA, J.
ERIC BASNAYAKE, J.
CALA 496/2005
DC NEGOMBO 4973/L.
JULY 2, 2007

Civil Procedure Code – Section 121 (2) – Section 175 – List of witness' documents – Plaintiffs – Special circumstances referred to in Section 175 – Witness in defendants' list ?

The instant action was filed on 13.12.1994. On 4.12.1996 and 16.7.2001 two lists of witnesses were filed on behalf of the plaintiff. The plaintiff moved for a Commission on 11.3.2001. The trial was on 1.8.2001. Commission was received by Court on 1.4.2003. Trial was taken up on 11.9.2003. After the evidence of the plaintiff was concluded a list containing the name of the Commissioner was filed on 1.02.2005. When the witness was called to give evidence objection was taken that his name was in the list filed long after commencement of the trial. The District Court upheld the objection.

On leave being sought,

Held:

The witness to be called is the Surveyor who made the plan on a Commission issued by Court. The name of the witness and the plans prepared by him were listed in the list of witnesses as well as in the list of documents filed by the defendant.

These are special circumstances referred to in Section 175 (1).

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

D.M.G. Dissanayake for plaintiff.

Defendant-respondent is absent and unrepresented.

Cur.adv.vult.

February 11, 2008

ERIC BASNAYAKE, J.

The plaintiff petitioner (plaintiff) is seeking to have the order of the learned Additional District Judge of Negombo dated 1.12.2005 set aside. By this order the learned District Judge had disallowed the plaintiff to call Lakshman Gunasekera Licensed Surveyor as a witness.

On 20.8.2002 the Court issued a commission at the instance of the plaintiff on Lakshman Gunasekera Licensed Surveyor. This commission was returned on 1.4.2003. The trial commenced on 11.9.2003 on which date the plaintiff began his evidence. Her evidence was concluded on 30.9.2004. A list containing the name of this witness was filed in Court on 1.2.2005 this witness was called to give evidence to which the learned Counsel appearing for the defendant objected. The learned Judge upheld the objection and refused to allow this witness to give evidence. One reason for disallowing this witness was that the list containing the name of this witness was filed long after the commencement of the trial in this case. The list was filed after the conclusion of the plaintiff's evidence. Thus depriving the defendant from asking questions based on this plan from the plaintiff.

This action was filed on 13.12.1994. Thereafter on 4.12.1996 and 16.7.2001 two lists of witnesses and documents were filed on behalf of the plaintiff. The plaintiff moved for a Commission on 11.3.2001. This case was taken up for trial on 1.8.2001. The Commission was received by Court on 1.4.2003. Thereafter the case was taken up for trial on 11.9.2003. By this time the name of this witness was not included in to the list. However the defendant named this witness in a list filed by him together with the plan No. 2088 of 23.3.2003.

Section 121 is as follows: (1) *Not reproduced.*

(2) *Every party to an action shall not less than fifteen days before the date fixed for the trial of an action, file or caused 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, and (b) Not reproduced.*

Section 175 is as follows: (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 interest of justice, permit a witness to be examined, although such witness may 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.

The witness to be called is a Licensed Surveyor who made a plan on a commission issued by Court. The name of this witness and the plan prepared by him were listed in the list of witnesses as well as in the list of documents filed by the defendant. These could be considered as special circumstances referred to by the aforesaid section.

Considering the above facts I am of the view that the learned Judge had erred in disallowing this witness. Further I cannot understand why the learned Counsel appearing for the defendant objected to this witness being called after having named him in their own list. The order of the learned District Judge is therefore set aside with costs. This application is allowed.

WIMALACHANDRA, J. - I agree.

Application allowed.