

HATTON NATIONAL BANK LIMITED
v.
WARAWITAGE AND OTHERS

COURT OF APPEAL
WIJEYARATNE, J. AND
WEERASEKERA, J.
C.A. 404/83 (F)
D.C. COLOMBO CASE NO. 84576/M
2 NOVEMBER, 1992.

Civil Procedure – Can officer of a corporate legal person be called as a witness under section 175 (2) of the Civil Procedure Code where his name is not on the list of witnesses ?

Held:

The proviso to section 172(2) of the Civil Procedure Code which lays down that a party to an action may be called as a witness without his name being included in the list cannot be availed of when a party is a legal person (i.e., a limited liability company) to call any of its officers without his name or at least his designation being included in the list of witnesses.

APPEAL from judgment of the District Court of Colombo.

K. N. Choksy P.C. with Lakshman de Alwis for plaintiff-appellant.

Defendants-respondents absent and unrepresented.

Cur adv vult.

2nd November, 1992.

WIJEYARATNE, J.

The plaintiff-appellant, Hatton National Bank Limited filed this action on 2.12.83 to recover a sum of Rs. 36,563/75 and interest due on a loan granted to the 1st defendant-respondent, in respect of which the 2nd and 3rd defendants-respondents had signed as guarantors.

On 14.9.82 judgment was entered of consent against the 1st defendant-respondent, who was granted time to pay the amount due by monthly instalments of Rs. 2,000/- each.

When the case was taken up for trial on 1.3.83 issues were framed and thereafter learned counsel for the plaintiff-appellant moved to call Berty Alagakone, an officer of the Bank, as a witness for the plaintiff-appellant. Thereupon learned counsel for the 2nd and 3rd defendants-respondents objected to the calling of this witness as his name was not in the list of witnesses filed by the plaintiff-appellant as required by section 121(2)(a) of the Civil Procedure Code.

At this stage learned counsel for the plaintiff-appellant had taken up the position that as the plaintiff-appellant was a limited liability company it is not necessary to list this witness as he had come to give evidence on behalf of the plaintiff-appellant, and relied on the second proviso to section 173(1) of the Civil Procedure Code which lays down that a party to an action may be called as a witness without his name having been included in the list.

Learned counsel for the 2nd and 3rd defendants-respondents submitted that this witness could not be recognised as an agent of the plaintiff Bank because he had no authority to sign a proxy on behalf of the bank; also that a witness to represent a bank should be a Director or some one of similar standing who has signed a proxy for the plaintiff; also that he was not a "recognised agent" in law.

Learned counsel for the plaintiff-appellant contended that a Director of the bank may not be able to give evidence about the facts of this case, but this witness was conversant with the facts of this case and therefore moved to call him as a witness.

The learned Additional District Judge by his order made soon afterwards noted that the proxy for the plaintiff had been signed by a Director and the Secretary. He also noted that the second proviso to section 175(1) only enables a party to an action being called without his name being in the list, but not this witness, and upheld the objection.

Thereafter learned counsel for the plaintiff-appellant had moved for permission of court to call this witness in the interests of justice in the exercise of the discretion of court under the first proviso to section 175(1).

The learned Additional District Judge noted that there had been three trial dates earlier and held that there were no special circumstances and refused the application.

Thereupon learned counsel for the plaintiff-appellant had stated that since the court had refused the application of the plaintiff-appellant to call this witness, he was unable to proceed further with this case. (It would appear that no other witness had been listed on behalf of the plaintiff). Then counsel for the 2nd and 3rd defendants-respondents had moved that the action against the 2nd and 3rd defendants be dismissed with costs, and accordingly the learned Additional District Judge dismissed the action against them with costs.

From this judgment the plaintiff-appellant has filed this appeal.

The purpose of section 175(1) of the Civil Procedure Code regarding the listing of witnesses is to apprise the other parties of the witnesses who will testify so that they will be prepared to meet their evidence and to cross-examine them accordingly.

The second proviso to section 175(1) applies where the party to the action is a natural person (i.e., a human being). In this case the plaintiff was Hatton National Bank Limited, which is a corporate body and a legal person so that the plaintiff cannot be called as a witness but will have to give evidence through a natural person (i.e., a human being). It may be a Director, the Manager, the Accountant or the Secretary of the Bank. Therefore it was necessary for the plaintiff to have listed one or more witnesses, preferably by name and designation, or failing that by designation alone (such as Director, Manager, Accountant or Secretary). Therefore the learned Additional District Judge has rightly held that the name of this witness had not been included in the list and refused the application to call him.

However I am of the view that this is a fit case where the learned District Judge should have exercised his discretion in favour of the plaintiff, in the interests of justice, and permitted this witness to give evidence. Any hardship caused to the 2nd and 3rd defendants could have been alleviated by an appropriate order for costs and an

adjournment, if the 2nd and 3rd defendants-respondents were not ready to meet his evidence.

Therefore I set aside that part of the order of the learned Additional District Judge dated 1.3.83, where he refused permission to call this witness. I also set aside the order dismissing the plaintiff's action with costs and send this case back for trial according to law.

It will be open to parties to file fresh lists of witnesses and documents, with notice, at least 15 days before the next date of hearing.

Mr. Choksy informs court that as the 3rd defendant-respondent had died pending this appeal, the plaintiff-appellant has informed court by motion dated 6.10.92 that the plaintiff-appellant is not proceeding against the 3rd defendant-respondent.

Therefore the case will proceed only against the 2nd defendant-respondent. There will be no costs in appeal.

WEERASEKERA, J. – *I agree.*

Appeal allowed as stated in order.