

ABDUL MUNAF
v.
MOHAMED YUSUF

COURT OF APPEAL.
ISMAIL, J.
C.A./L.A. 291/96.
D.C. KANDY 11820/P.
FEBRUARY 19, 1997.
MARCH 11,31, 1997.

Civil Procedure Code – List of witnesses not filed at least 15 days prior to trial date – Sections 175(1) and 121(2) of the Civil Procedure Code – Discretion of court.

The plaintiff respondent instituted Partition Action on 17.11.86, after several dates of postponement trial commenced on 17.1.96 which was the 4th date fixed for trial. The plaintiff respondent gave evidence and closed his case on this date. After several dates of postponement the trial was resumed on 27.8.96 when 'M' gave evidence on behalf of the defendant petitioner. Thereafter the trial was postponed for 5.11.96. On this date when witness 'S' was called the plaintiff respondent objected, as the list of witnesses has not been filed at least 15 days prior to the date fixed for the trial.

The District Judge upheld the objection.

On leave being sought –

Held:

(1) Section 121(2) requires the party to an action to file a list of witnesses/documents 15 days before the date fixed for trial after notice to the opposite party. The defendant petitioner has filed his list dated 10.1.96, on 29.1.96 after the plaintiff respondent had closed his case on the 4th date of Trial.

The trial Judge has found that the defendant petitioner has not sought to explain the delay in filing the list and that it would cause prejudice to the plaintiff respondent if a witness listed at this stage of the trial is permitted to be called after he has closed his case.

(2) The learned District Judge has in the circumstances of this case exercised his discretion properly in refusing to permit the evidence of witness 'S' to be led.

(3) The judgment and the observations of Gratiaen J., in Girantha v. Maria cannot help the defendant petitioner as the Court was there placing an interpretation on the repealed Section 121 which did not then specifically require the filing of a list of witnesses 15 days before the date of Trial.

APPLICATION for Leave to appeal.**Cases referred to:**

1. *Muttar v. Kathirasapillai* – 14 NLR 144.
2. *Girantha v. Maria* – 50 NLR 519 – distinguished.

Faiz Musthapa P.C., with *M. S. M. Suhaid* for defendant-petitioner.

Shibly Aziz, P.C., with *A. L. N. Mohamed* for plaintiff-respondent.

Cur. adv. vult.

May 05, 1997.

ISMAIL, J.

The plaintiff-respondent instituted an action bearing No. P11820 in the District Court of Kandy on 17.11.86 seeking to partition the land and premises bearing No. 45, King Street, Kandy. He set out the title in the plaint and stated that the defendant-petitioner and himself were the co-owners of the said land and premises in equal shares.

The defendant-petitioner filed a statement of claim and an amended statement of claim claiming prescriptive title to the entirety of the said land and premises. He stated as follows in his amended statement of claim;

- a. That the defendant-petitioner and the plaintiff-respondent had paper title to the said land and premises in equal shares by becoming the co-owners thereof on deed bearing No. 6610 dated 18.2.1973 attested by S. M. Musthapha, Notary Public.
- b. Shahul Hameed, the father of the defendant-petitioner, entered into an informal agreement to purchase the respondent's share for a sum of Rs. 100,000/-. The said Shahul Hameed and the plaintiff-respondent entered into the said non-notarial agreement on 2.7.1977.
- c. That on the said date, a sum of Rs. 50,000/- was paid to the plaintiff-respondent and it was agreed that the balance sum would be paid within 6 months. The receipt of the Rs. 50,000/- was acknowledged in the said agreement.

- d. That the balance consideration was paid as agreed and that the defendant-petitioner and the said Shahul Hameed continued to be in possession as owners thereof from the date of the said payment pending the execution of a formal deed and had acquired a prescriptive title to the entirety of the said land.

The said Shahul Hameed, the brother of the plaintiff-respondent, died on 26.2.90 and summons was served on the defendant-petitioner only on or about July '92.

On 6th October '94, the Court made order fixing the trial in the said case for 11.1.95, on which date the case was postponed to 29.3.95 on account of the illness of counsel. On 29.3.95 the case was postponed to 22.8.95 as the defendant-petitioner was absent. On 22.8.95 the case was postponed again for trial on 17.1.96 due to the illness of counsel for the defendant-petitioner.

The trial was taken up for 17.1.96 which was the fourth date fixed for trial. The admissions were recorded together with the points of contest and after the evidence of the plaintiff-respondent was recorded the case for plaintiff-respondent was closed leading in evidence documents marked P1 to P6. On the application of the defendant-petitioner the case was postponed to 16.02.96 as he had not brought certain documents to court.

A medical certificate on account of the illness of the defendant-petitioner was produced on 16.2.96 and the trial was postponed finally for 24.5.96. On this date the trial was again postponed finally to 14.6.96 on account of the illness of the defendant-petitioner subject to the payment of costs in a sum of Rs. 2,500/-.

On 14.6.96 the trial was postponed for 10.7.96 on an application made on the personal grounds of the Attorney-at-Law for the plaintiff respondent. The case was again refixed for 27.8.96 due to lack of time.

The trial was finally resumed on 27.8.96 when the defendant-petitioner called as his first witness S. L. Zain Manoon and after his

evidence was concluded further trial was postponed for 5.11.96 on the application of the defendant-petitioner as a material witness was ill.

On 5.11.96 when further trial resumed counsel for the plaintiff-respondent objected to the witness O. L. M. Siddeek being called as a witness by the defendant-petitioner as his list of witnesses had not been filed at least fifteen days prior to the date fixed for the trial.

The District Judge upheld the objection and refused to permit the defendant-petitioner to lead the evidence of O. L. M. Siddeek. The Judge has referred in his order marked P10A, to the fact that this action was instituted on 17.11.86 and that the first date of trial was 11.1.95 and that the trial commenced thereafter on 17.1.96 which was the fourth date fixed for trial. The defendant-petitioner was not ready to proceed with his case on that date after the plaintiff concluded his case as he had not brought certain documents to court. On another date he was not ready to continue with the trial after leading the evidence of a witness as another material witness was ill. On yet another occasion the trial was postponed on the application of the defendant-petitioner subject to the payment of costs. The trial judge found as a result that the defendant-petitioner has not acted with due diligence in the defence of this action.

The defendant-petitioner's list of witnesses and documents dated 10.1.96 (P4) was filed of record according to the journal entry No. 61 on 29.1.96 and it does not appear that summons have been taken out on the witnesses thereafter. It was contended that the plaintiff-respondent had ample notice of the witnesses intended to be called by the defendant-petitioner and that the evidence of O. L. M. Siddeek was intended to be led on 5.11.96 about 11 months after the list was filed. The witness Zain Manoon who was listed as the tenth witness in the list gave evidence previously on 27.8.96 without any objection being taken and it was suggested that this was an implied admission that the plaintiff-respondent had notice of the witnesses intended to be called. However, this witness admitted in cross-examination that he was summoned by the plaintiff-respondent to give evidence and not by the defendant-petitioner.

Learned Counsel for the defendant-petitioner submitted that the trial judge has failed to exercise his discretion in the interests of justice and that he has failed to take into account the proviso to section 175(1) of the Civil Procedure Code which empowers him to permit a witness to be called in the exercise of his discretion if a witness has not been included in the list. It is clear however that the trial judge has taken into consideration the provisions of section 121(2) of the Code which requires the party to an action to file a list of witnesses and documents 15 days before the date fixed for trial after notice to the opposite party. The defendant-petitioner has filed the list of witnesses and documents which is dated 10.1.96 on 29.1.96 after the plaintiff-respondent has closed his case on the fourth date of trial. The trial judge has found that the defendant-petitioner has not sought to explain the delay in filing the list and that it would cause prejudice to the plaintiff-respondent if a witness listed at this stage of the trial is permitted to be called after he has closed his case.

Learned Counsel for the plaintiff-respondent submitted quoting Lascelles CJ in *Muttar v. Kathirasapillai*⁽¹⁾, that the trial judge was right in considering the prejudice that would be caused to him after his case was concluded without the knowledge that an important witness was to be called "after the pinch of the case has been ascertained and the precise points located at which the effect of fresh evidence might be expected to be decisive". Learned Counsel submitted further that the defendant-petitioner has failed to conform to the mandatory requirement of filing a list before the date fixed for trial as provided in section 121(2) of the Code and that in any event the Court could exercise its discretion under section 175(1) of the Code only in circumstances where the name of a witness has not been included in the list filed as provided by section 121 of the Code.

The defendant-petitioner contended on the other hand that he has been prejudiced in presenting his case as the said witness O. L. M. Siddeek was due to be called to establish that the petitioner's father had paid in full the consideration for the purchase of the plaintiff-respondent's share as far back as 1977 and that therefore the petitioner and his father possessed the land adverse to the claim of the respondent.

Learned Counsel for the defendant-petitioner relied on the judgment in *Girantha v. Maria*⁽²⁾, and referred to the observations of Gratiaen, J. that "subject to the element of surprise being avoided it is clearly in the interests of justice that the Court, in adjudicating on the rights of the parties should hear the testimony of every witness who can give material evidence on the matters in dispute. In this case the defendant filed a list of witnesses before the trial commenced on 24.6.1947 on various issues, one of which raised the question of the prescriptive rights of the parties. The case for the plaintiff concluded on that date and further trial was not held until November 1947. In the meanwhile the defendant filed an additional list of witnesses which included the name of Inspector Sivasambo, with notice to and without objection from the plaintiff's proctor. The trial judge held in his order that Sivasambo's evidence and his official report which the defendant's sought to produce had a "direct bearing on the vital issue regarding prescriptive possession" but stated that to permit the Inspector to be called would be "putting the plaintiffs at a disadvantage". The appeal was against this order, Gratiaen, J. observed that this was no doubt correct in a sense, but the paramount consideration is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by reason of some technicality.

The judgment and the observations of Gratiaen, J. referred to above cannot help; the defendant-petitioner in this case as the Court was there placing an interpretation on the repealed section 121 of the Civil Procedure Code which did not then specifically require the filing of a list of witnesses fifteen days before the date fixed for trial. I am therefore unable to hold that the learned District Judge has not exercised his discretion properly considering the facts of this case in refusing to permit the evidence of the witness Siddeek to be led. For these reasons this application for Court Appeal is refused with costs.

Application refused.