

**SILVA  
VS.  
SILVA**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA).  
WIMALACHANDRA, J.  
CALA 75/2005 (LG).  
DC NEGOMBO 5484/L.  
MAY 25, 2005.  
SEPTEMBER 21, 2005.

*Civil Procedure Code, sections 121(1), 121(2), 175(1), - List of witnesses filed after fifteen days –Leading the evidence of a witness in the list - Is it permissible?- Does section 175 (1) apply as the party has filed a list?–Discretion granted to court under section 175(1) - Existence of special circumstances - Burden of proof on whom?*

The District judge refused to permit the defendant to lead the evidence of a witness whose name appeared in the list filed not within 14 days as stipulated under section 121(1).

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**HELD:**

- (1) In terms of section 175(1) of the Civil Procedure Code a party is not entitled to call as a witness a person who has not been listed in terms of section 121(2). The Proviso to section 175(1) empowers the Court to use its discretion in special circumstances where such a course is rendered necessary in the interest of justice. The burden of satisfying court as to the existence of special circumstances is on the party seeking to call such witnesses.
- (2) The defendant's list was filed on 26.02.1999. The plaintiff's objection was on 21.02.2005. It is to be observed that sufficient notice had been given to the plaintiff before calling the witness since there was a long period of time between 26.02.1999 and 21.02.2005. Therefore no prejudice would be caused to the plaintiff as the plaintiff had more than 5 years notice of the witness that the defendant intended to call.
- (3) Section 175(1) imposes a bar against the calling of witnesses who are not listed in terms of section 121(2). In the instant case, the witness was included with list but the list was not filed within the time provided by section 121(2). Section 175(1) becomes applicable.

*Per* Wimalachandra, J.

"In exercising the discretion in terms of the proviso to section 175(1) the Court is entitled to look into whether the conduct of the party is grossly negligent and whether there are serious laches on the party."

**APPLICATION** for leave to appeal from an order of the District Court of Negombo with leave being granted.

**Cases referred to :**

1. *Girantha vs. Maria* 50 NLR 519 at 522
2. *Kandiah vs. Wiswanathan* 1991 1 Sri LR 269
3. *Asilin Nona and Another vs. Wilbert Silva* 1997 1 Sri LR 176
4. *Casiechetty vs. Senanayake* 1999 3 Sri LR 11

*Hiran M. C. de Alwis* for defendant-petitioner.  
*Sunil Cooray* for plaintiff-respondent.

March 3, 2006.

**WIMALACHANDRA. J.**

This is an application for leave to appeal filed by the defendant-petitioner (defendant) from the order of the learned District Judge of Negombo dated 21.02.2005. By that order the learned District Judge refused to permit the defendant to lead the evidence of a witness as his name had not been filed at least fifteen days prior to the date fixed for the trial.

Briefly, the facts are as follows:

The plaintiff instituted this action in the District Court of Negombo *inter alia* – for a declaration of title to the property described in the schedule to the plaint, for the ejectment of the defendant and for damages. The defendant filed answer and prayed for the dismissal of the plaintiff's action and in the alternative for a declaration that the plaintiff is holding the land in dispute as a constructive trust in favour of the defendant. The case was fixed for trial on 09.03.99 and both parties filed their respective list of witnesses and documents. Admittedly, the trial started on 09.03.1999. Issues were raised and the plaintiff gave evidence. Thereafter additional lists were tendered by the plaintiff on 02.06.1999 (*Vide* - J. E. No. 7 dated 02.06.1999) and the defendant too filed an additional list of witnesses and documents on 15.03.2002 (*vide* J. E. No. 15/A dated 15.03.2002). The trial was resumed on 15.03.2002 before another judge after the proceedings were adopted before him. After the conclusion of the plaintiff's case the defendant started his case on 07.05.2004. On 21.02.2005 the defendant moved to call witness No. 3 in the original list filed on 26.02.1999. The plaintiff objected to the calling of the witness on the basis that the particular list dated 26.02.1999 had not been filed fourteen days before the first date of trial. After hearing the submissions made by both parties, the learned District Judge by his order dated 21.02.2005 upheld the objection and refused to allow that witness being called. It is against this order, the application for leave to appeal has been filed.

When the matter was taken up for inquiry by this Court on 03.05.2005 both counsel agreed to file written submissions and if the Court granted leave they further agreed that the appeal also be decided on the same submissions.

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The case had been first fixed for trial on 09.03.1999. The defendant had filed the original list of witnesses, in which the witness concerned was listed as No. 3, on 26.02.1999. It appears that the list had been filed ten days before the case was first fixed for trial.

The learned judge in his order has held that the section 175 (1) of the Civil Procedure Code will apply only where a party has not filed a list at all, and he has held that in this case it will not apply because even though the list had been filed it had not been filed within fifteen days as contemplated by section 121 (2) of the Civil Procedure Code.

In terms of section 175 (1) of the Civil Procedure Code, a party is not entitled to call as a witness a person who has not been listed in terms of section 121 (1) of the Civil Procedure Code. This provision requires the list of witnesses to be filed not less than fifteen days before the date fixed for trial. The proviso to section 175 (1) empowers the Court to use its discretion in special circumstances where such a course is rendered necessary in the interests of justice to permit a witness to be called, whose name is not included in a list filed in compliance with section 121 (2) of the Code.

In the instant case, the position is that the witness that the counsel for the defendant wanted to call was included in the list of witnesses but the list had not been filed within fifteen days before the date fixed for trial in terms of section 121 (1) of the Civil Procedure Code. The reasoning of the District Judge was that he cannot exercise the discretion in terms of the proviso to section 175 (1) of the Civil Procedure Code because the Court can permit a witness to be examined only in cases where that witness is not included at all in such list. In the instant case the witness was included but the list was not filed within the time provided by section 121 (2) of the Code.

Section 175 (1) of the Code imposes a bar against the calling of witnesses who are not listed in terms of section 121 (2) of the Code. However, the first proviso to section 175 (1) empowers the Court to use its discretion in special circumstances where such a course is rendered necessary, to permit a witness despite his name not being listed as required by section 121 of the Code. In the instant case too the witness concerned was not listed in terms of section 121 (2) of the Civil Procedure Code. Accordingly, the first proviso to section 175 (1) of

the Code vests discretion in the trial judge to permit the witness to be called if special circumstances appear to him to render such a course advisable in the interests of justice.

It is to be observed that the trial, first commenced on 09.03.1999. On that day issues were raised and the plaintiff gave evidence. Thereafter the trial commenced on 15.03.2002 after adopting the proceedings of 09.03.1999. It is also to be noted that the plaintiff too filed an additional list of witnesses after the commencement of the trial and on 19.02.2003 the plaintiff led the evidence of her husband who was a witness listed in the additional list filed by her. The defendant started his case on 07.05.2004 and on 21.02.2005 the counsel for the defendant moved to call the witness No.3 in the original list dated 26.02.1999. Accordingly, it appears that the plaintiff had sufficient notice as to the original list of witnesses filed by the defendant which was available to the plaintiff for well over 5 years prior to the defendant commencing the leading of the evidence of that particular witness. The defendant's list was filed on 26.02.1999. The plaintiff's objections were on 21.02.2005.

In the circumstances, it appears that the plaintiff was not placed at a disadvantage as he was aware of the defendant's list of witnesses. The defendant had filed the list of witnesses with notice to the plaintiff. As Justice Gratiaen pointed out in the case of *Girantha vs. Maria*<sup>(1)</sup> at 522 "the purpose of the requirement of section 175 that each party should know before the trial the names of the witnesses whom the other side intends to call to prevent surprise". In the circumstances it appears that the sole object of filing a list of witnesses is to prevent an element of surprise and thereby cause prejudice on the other party. Accordingly, a judge may exercise his discretion and allow to call a witness not listed according to section 121(2) in the interests of justice provided it avoids an element of surprise.

The judgment of Gratiaen, J. referred to above, interpreted the repealed section 121 of the Civil Procedure Code which did not specifically require the filing of a list of witnesses fifteen days before the date fixed for trial. However in my view, the above mentioned observation made by Gratiaen J. is relevant for the purpose of exercising the Court's discretion in terms of the proviso to section 175 (1) of the Civil Procedure Code, in special circumstances where such a course is necessary, in the interests of justice to permit a witness to be called who is not listed in terms of section 121(2) of the Civil Procedure Code.

I am also of the view that in exercising the discretion in terms of the proviso to section 175(1), the court is entitled to look into whether the conduct of the party is grossly negligent and whether there are serious laches on his part. In the instant case I cannot see any serious laches or gross negligence on the part of the defendant as he had listed this witness (ten days) before the date fixed for trial and five years before the commencement of the defendant's case.

In *Girantha vs. Maria (supra)* Gratiaen, J. at 522, observed that, "subject to the element of surprise being avoided, it is clearly in the interest 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 matter of dispute" In the case of *Kandiah vs. Wiswanthan and Another*<sup>(2)</sup> Wijayaratne, J. adopted a similar view. His Lordship observed that "when an unlisted document is sought to be produced by a party in a District Court trial, the question as to whether leave of Court should be granted under section 175(2) of the Civil Procedure Code is a matter eminently within the discretion of the trial judge that leave may be granted where it is in the interest of justice to do so" (emphasis is mine).

The learned counsel for the plaintiff relied on the Supreme Court case of *Asilin Nona and Another vs. Wilbert Silva* <sup>(3)</sup>. In this case the Supreme Court held that section 175(1) of the Code imposes a bar against calling 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 a such 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. The Supreme Court observed in this case that since no explanation was given for the default, the defendant had failed to satisfy the Court in regard to the existence of special circumstances contemplated by section 175(1) of the Code, particularly in view of the agreement between the Parties that the list of witnesses will be filed one week before the date of trial and admittedly, the defendants were in breach of the agreement.

In the instant case the facts are different from the facts in the aforesaid Supreme Court case of *Asilin Nona and Another vs. Wilbert Silva (supra)* In the instant case the list of witnesses had been filed before the

commencement of the trial but only ten days, and not fifteen days before the date fixed for the trial which was 09.03.1999. The application was made on behalf of the defendant to call the witness on 21.02.2005. It is to be observed that sufficient notice had been given to the plaintiff before calling the witness since there was a long period of time between 26.02.1999, date on which the defendant's list of witnesses was filed, and 21.02.2005 the date when the application was made to call the witness on behalf of the defendant. Therefore, no prejudice would be caused to the plaintiff as the plaintiff had more than five years notice of the witnesses that the defendant intended to call.

In the case of *Casie Chetty vs. Senanayake J. Jayasinghe*,<sup>(4)</sup> observed-

**"In exercising discretion under section 175 of the Civil Procedure Code where it is sought to call a witness whose name was not in the list. The paramount consideration for the judge is the ascertainment of truth and not the desire of a litigant to be placed at an advantage by some technicality."**

In the instant case the learned District judge in exercising the discretion vested in him under the first proviso to section 175 of the Civil Procedure Code had failed to consider -

- (i) that the defendant has filed a list of witnesses which included the name of the witness that the defendant intended to call, and even though the list was filed only ten days before the date fixed for trial, the plaintiff got the opportunity of knowing who the witnesses are ;
- (ii) that there was a long interval of time (five years) between the date on which the list was filed and the date on which the application was made to call that witness on behalf of the defendant ;
- (iii) that there was no element of surprise as the plaintiff had more than adequate notice of the witnesses that the defendant intended to call ;
- (iv) that the purpose of filing a list of witnesses is to prevent an element of surprise and thereby cause prejudice to the other

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party, which in my view, does not arise as there was a long interval of time between the date on which the list of witnesses was filed and the date on which the application was made to call that witness ;

- (v) that the conduct of the defendant is not grossly negligent and there are no serious laches on his part.

In my view, the aforesaid matters are eminently within the discretion of the trial judge and the learned judge had failed to exercise that discretion conferred on him by the proviso to section 175(1) of the Civil Procedure Code according to the rules of reason and justice. In the circumstances the trial judge has been in error in refusing to exercise his discretion in favour of the defendant.

For these reasons leave to appeal is granted, and the appeal is allowed. The order of the learned District Judge dated 21.02.2005 is set aside and the defendant should be permitted to call the witness No. 3 listed in the list of witnesses. The defendant is entitled to the costs of this appeal.

**ANDREW SOMAWANSA, J. (P/CA), - I agree.**

*Application allowed.*

*Defendant entitled to call the witness.*

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