

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST**  
**REPUBLIC OF SRI LANKA**

**S.C. Appeal No: 106/2007**

**S.C.H.C.C.A.L.A. No: 19/2007**

**Civil Appeal High Court No:**

**WP/HC/CA/Co/30/2007 (LA)**

**District Court No:**

**7749/CD (Homagama)**

In the matter of an application for  
Special Leave to Appeal under  
Article 128 (2) of the Constitution.

Gabo Singho Wijendra alias Wijendra  
Acharige Gabo Singho,  
No. 75, Old Road,  
Pannipitiya.

Plaintiff

Vs.

Malagodagamage Karunawathie,  
No. 1212/3/F, Hokandara Road,  
Pannipitiya.

Defendant

And Between

Malagodagamage Karunawathie,  
No. 1212/3/F, Hokandara Road,  
Pannipitiya.

Defendant-Petitioner

Vs.

Gabo Singho Wijendra alias Wijendra  
Acharige Gabo Singho, No. 75, Old Road,  
Pannipitiya.

Plaintiff-Respondent

**And now Between**

Malagodagamage Karunawathie,

No. 1212/3/F, Hokandara Road,  
Pannipitiya.

Defendant-Petitioner-Appellant

Vs.

Gabo Singho Wijendra alias Wijendra  
Acharige Gabo Singho,

No. 75, Old Road, Pannipitiya.

Plaintiff-Respondent-Respondent

**Before : Shiranee Tilakawardane.J**  
**P.A. Ratnayake.PC, J**  
**S.I. Imam.J**

Counsel : Kamal Dissanayake for the Defendant-Petitioner-  
Appellant.  
Anil Silva for the Plaintiff-Respondent-Respondent.

Written Submissions: Counsel for both sides tendered their Written  
Submissions on 19.11.2009.

Decided on : 24.11.11

## **S.I. IMAM.J**

The Defendant-Petitioner-Appellant (henceforth sometimes referred to as the “Appellant”) has tendered this Special Leave to Appeal Application seeking inter alia to set aside the Order of the Provincial High Court of Civil Appeal of the Western Province of Colombo dated 16.7.2007 (P10) amongst other reliefs prayed for.

This Court having heard submissions of both Counsel for the Petitioner and the Respondent on 4.12.2007 decided to grant Special Leave to Appeal to the Petitioner in terms of the questions set out in paragraph 18 (b), (c) and (d) of the Petitioner’s Petition dated 24.8.2007, which stated as follows, namely, whether the High Court of Civil Appeals

- (b) has not addressed its mind to the question of the refusal of a Commission sought by the Defendant at the trial,
- (c) has misdirected itself to make its conclusion with regard to the marking of documents but not in respect of issuing a Commission,
- (d) has failed to consider the proviso to Section 175 (2) and its effects in tendering Documents at the trial.

A question to be considered by the High Court of Civil Appeal was whether the refusal by the learned District Judge by his order dated 16.3.2007 marked as “P7” to issue a Commission to the EQD (Examiner of Questioned Documents) as sought by the Defendant-Petitioner-Appellant was correct or not. The Order marked “P10” dated 16.7.2007 made by the High Court of Civil Appeal was emphatic about the marking of unlisted Documents in a Trial. By the order given by the learned District Judge of Homagama dated 16.3.2007 marked as P7 the application made by the Counsel for the Defendant-Petitioner to issue a Commission to the EQD (Examiner of Questioned Documents) was refused on the basis that the document of which the signature was in dispute had not been listed in a list of documents prior to the commencement of the Trial. Hence in accordance with the Order marked P7- it was

held by the learned Judges of the Provincial High Court of Civil Appeal of the Western Province that as the Defendant-Petitioner sought to mark such a Document, from which a Commission and a report could have been anticipated, that the Document should have been listed.

The facts of the case are briefly as follows. The Plaintiff-Respondent-Respondent (henceforth sometimes referred to as the “Respondent”) instituted this action in the District Court of Homagama seeking

- (a) An Order setting aside the Agreement to Sell No. 1610 dated 12.9.1998 and
- (b) Ejectment of the Defendant-Petitioner-Appellant from the premises in dispute.

On 13.10.2006 consequent to the case being taken up for Trial, Admissions and Issues were recorded by both parties. On 2.02.2007 the evidence of the Plaintiff-Respondent was led, with Documents P1 to P8 being produced in the Examination in Chief. On 16.3.2007 when the Plaintiff-Respondent was cross-examined by the Counsel for the Defendant-Appellant he sought to mark an un-listed Document alleging that it was prepared by the Plaintiff-Respondent. This allegation was denied by the Plaintiff-Respondent, who refused to accept the signature of the Document in question as his. Subsequently Counsel for the Defendant-Appellant sought permission of Court to send the Document to the Examiner of Questioned Documents (henceforth referred to as the EQD) without marking the aforesaid Document. Counsel for the Plaintiff-Appellant objected to the aforesaid application. Consequent to both Counsel having made submissions, the aforesaid application made on behalf of the Defendant-Petitioner-Appellant was refused by the learned District Judge of Homagama by Order dated 16.3.2007 marked as “P7”. On being discontent by the said Order (P7), the Defendant-Petitioner-Appellant preferred a Leave to Appeal application to the High Court of Civil Appeal of the Western Province held in Colombo, which application was refused with costs by order dated 16.7.2007 marked as “P10”. It is against the aforesaid order “P10” dated 16.7.2007 that the Defendant-

Appellant has preferred this Special Leave to Appeal application. It was contended on behalf of the Defendant-Petitioner-Appellant that the refusal by the Plaintiff-Respondent to admit a letter said to have been written by him deprived the Defendant-Appellant from marking the Document, and that the only option available was to move for a Commission to identify the signature placed on it. The Appellant adverted to ***Section 428 of the Civil Procedure Code*** which reads as follows. “In any action or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits and the same cannot be conveniently conducted by the Judge in person, the Court may issue a Commission to such person as it thinks fit directing him to make such investigation and to report to the Court”.

The Appellant contended that the Trial Judge had to cautiously exercise his discretion when the issuance of a commission is appropriate for the necessity of deciding a matter in dispute when it would not be practical for the Judge to personally partake thereof.

The Proviso to Section 175 (2) of the Civil Procedure Code was referred to by the Appellant, which reads as follows.

*“Provided that nothing in this sub-section shall apply to documents produced for Cross Examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory”.* The Appellant contended that the marking of an unlisted document through the opposite party witness at the cross examination is not a bar in a civil suit in terms of the Civil Procedure Code. It was conceded by the Appellant that the denial of the witness namely the Plaintiff-Respondent to accept his signature placed on the document sought to be adduced in evidence barred the marking of the aforesaid document before Court, and that such a situation postulated that expert opinion should be utilized for the determination of the truth. The

Appellant averred that he could not have foreseen such a situation, and that the Application to move for a Commission could have been made at any time to elucidate a matter in dispute. The Appellant contended that in this case as the learned District Judge could not determine whether the signature was in fact placed by the Plaintiff-Appellant or not, that the service of a competent professional such as the EQD was necessary to resolve the matter in dispute.

The Appellant referred to the case of *Ariyaratne Vs Laksiri Fernando (2004) 1 SLR p. 184* where the issue of a Commission on an EQD was very clearly discussed in a broader sense and quoting Withers.J in the case of *Wickramathilake vs. Marikkar* stated that “It is not the duty of a Judge to throw technical difficulties in the way of the Administration of Justice, but when he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise”.

It was urged on behalf of the Appellant that a Commission can be issued at any stage when the Court is of the view that a local investigation is proper for the purpose of resolving a matter in dispute as was held in *Canapathipillai Vs Adannappa Chetty (21 NLR p. 217)*, where it was held that Court has the Jurisdiction to issue a Commission even after Conclusion of the Trial.

The Appellant averred that the High Court of Civil Appeal had wrongly concluded with regard to the marking of Unlisted documents through the opposite party witness at the Cross Examination, and had also failed to address its mind with regard to the issuance of a Commission to the EQD to identify the signature in dispute. Hence the Appellant contended that the aforesaid Order of the High Court Judges dated 16.7.2007 and marked as P10 be set aside. It was also urged by the Appellant that the District Judge of Homagama issue a Commission to the EQD to determine the questioned signature of the Plaintiff- Appellant which appears in the said Document

which was sought to be led in evidence at the Cross-Examination as prayed for in paragraph (V) of the prayer to the Petition dated 24.8.2007.

The Plaintiff-Respondent urged that the Defendant- Appellant had not acted in conformity with the requirements set out in Section 175 (2) of the Civil Procedure Code and hence could not seek relief under the proviso to Section 175 (2) of the Civil Procedure Code. Section 175(2) of the Civil Procedure Code states as follows. “A document which is required to be included in the list of documents filed in Court by a party as provided by Section 121 and which is not so included shall not, without the leave of the Court be received in evidence at the trial of the action”. The proviso states as follows,-

“Provided that nothing in this sub-section shall apply to Documents produced for Cross-Examination of the Witnesses of the opposite party or handed over to a Witness merely to refresh his memory. The Plaintiff-Respondent referred to Section 121 (2) of the Civil Procedure Code which states as follows. “Every party to an action shall, not less than fifteen days before the date fixed for the trial of an action, file or cause 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) a list of the Documents relied upon by such party and to be produced at the trial”.

The Plaintiff-Respondent averred that the particular Document which was sought to be marked was in the possession of the “Defendant-Petitioner” and that she had knowledge that the same would be produced at the trial, but failed to comply with the Mandatory requirement of Section 121(2) of the Civil Procedure Code. The Plaintiff-Respondent alleged that the Appellant was negligent in this regard, and had not taken appropriate steps to verify the signature and authentication with regard to the Document sought to be marked in evidence, which Application was refused by the learned District Judge by Order dated 16.3.2007 marked as “P7”. The Respondent conceded that although Sri Lankan Courts do permit Commissions taking into

consideration the instances where such a procedure is required to mete out the ends of justice, in the instant case the Appellant is not justified to move for a Commission to camouflage his negligence and mark the Document.

I have examined the Application of the Defendant-Appellant to mark the said Document or issue a Commission to the EQD to determine the signature of the Document. This Special Leave to Appeal Application, the Documents tendered in evidence, the Written and Oral Submissions tendered by both parties, and the Legal Authorities referred to by both sides have been considered by me. The Plaintiff-Respondent referred to various aspects of the law and fact as to why the Orders P7 and P10 should not be quashed or set aside, but be upheld.

I have analyzed the sequences that led to the quest for a Commission by the Defendant-Appellant.

On 24.1.2006 the Attorney-at-Law for the Plaintiff by way of a Motion tendered his list of Witnesses and Documents to the District Court of Homagama as set out in the Journal Entry No. 8 of the Document marked “X”, and hence complied with Section 121 (2) of the Civil Procedure Code as the case was fixed for Trial for 17.5.2006. The aforesaid List of Witnesses and Documents were hence filed well within the stipulated period of fifteen days of the date fixed for Trial. The Defendant-Appellant however did not comply with Section 121 (2) of the Civil Procedure Code and did not file a list of Witnesses and Documents at all in the District Court of Homagama before the date of trial. On 17.05.2006 both parties were present in Court and represented by Counsel. As there was a possibility of a settlement between the parties, Trial was re-fixed for 13.10.2006 or for terms of settlement. On 13.10.2006 Counsel for both sides recorded Admissions, raised Issues and the case was re-fixed for Trial or settlement for 2.2.2007 as set out in Journal Entry No. 10 in proceedings marked “X”. The Plaintiff-Respondent gave evidence on 2.2.2007 on which day his Evidence in Chief was concluded, and further Trial was re-fixed for 16.3.2007, on which day the

Plaintiff-Respondent was cross-examined by Counsel for the Defendant- Appellant and a ***Document sought to be marked***, which application was refused by the learned District Judge (P7). The Attorney-at-Law for the Defendant- Appellant did not tender a list of Witnesses and Documents as stipulated by Section 121 (2) of the Civil Procedure Code, although there was ample time namely almost a year to do so. The Proviso to Section 175 (2) reads thus: *“Provided that nothing in this Sub-section shall apply to Documents produced for Cross-Examination of the Witnesses of the opposite party or handed over to a witness merely to refresh his memory”*. It is my view that although the Proviso to Section 175 (2) of the Civil Procedure Code allows parties to tender unlisted Documents to Witnesses of the opposite side during Cross-Examination those Documents cannot be marked in evidence unless the witnesses in question admit those Documents. In this case too although the Attorney-at-Law for the Defendant- Appellant attempted to mark a Document using the Proviso of Section 175 (2) of the Civil Procedure Code the Plaintiff-Respondent who was in the Witness Box did not admit the aforesaid Document, and hence the Defendant-Petitioner was not permitted by the learned District Judge of Homagama to mark the Document using the aforesaid Proviso. The Attorney-at-Law for the Defendant- Appellant in his submissions before the District Court submitted that to prove the Document in question he had to send the said Document to the Examiner of Questioned Documents to verify the Plaintiff-Respondent’s signature. However a Commission could be issued to the EQD only in instances where the Documents in question had been listed or marked in evidence. In this case the Defendant- Appellant had not filed a list of Witnesses and Documents in the District Court and the Counsel for the Defendant- Appellant failed to mark in evidence the Document in question using the Proviso of Section 175 (2).

The granting of permission to issue a commission for the Examination of a Questioned Document is entirely within the Discretion of Court. In exercising that Discretion the Court would take into consideration the following matters.

- (i) Whether Justice would be meted out by the issuance of such a Commission.
- (ii) Could the District Court issue a Commission at the Trial stage when there is apparent negligence on the part of the Appellant.
- (iii) Whether the Defendant- Appellant has any legal right to move for a Commission seeking Local Investigation for a Document without listing it or without marking the said Document.

It is my view that a Commission could be issued to the EQD in instances where the Document has been listed or has been marked in evidence or when the Court deems a Commission proper for the purpose of elucidating any matter in dispute which is entirely within the discretion of Court. In this case the Defendant- Appellant has not even filed a List of “Witnesses” and “Documents” in the District Court, and the learned Counsel for the Defendant- Appellant failed to mark in evidence the Document in question using the Proviso of Section 175 (2) of the Civil Procedure Code. The learned District Judge refused the application of the Defendant- Appellant to issue a Commission to the EQD to determine the signature on the Document by Order dated 16.3.2007 marked as P7.

The main objective of filing a List of Witnesses and Documents in accordance with Section 121(2) of the Civil Procedure Code - is to prevent an element of surprise and thereby causing prejudice to the other side by non-compliance of the aforesaid Section.

In concluding whether there was negligence on the part of the Defendant- Appellant is not including the Document in the List of Witnesses and Documents innumerable other remedies too have been disregarded by the Defendant- Appellant. Certain pre-Trial Remedies as envisaged in the Civil Procedure Code which have been overlooked by the Defendant- Appellant include Sections 101 and 94 of the Civil Procedure Code which could have been utilized by the Defendant- Appellant, but were not. Section 101 of the Civil Procedure Code states that “(1) either party may

*by a notice issued by order of Court, to be obtained on motion ex-parte within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such Documents in evidence) the genuineness of any Document material to the action”*. If the Defendant- Appellant sought the relief under this Section before trial, the present situation where seeking a commission for local investigation at the trial stage would not have arisen. This could have been easily done by the Appellant by filing a motion in Court.

Under Section 94 (1) of the Civil Procedure Code the Defendant- Appellant could have examined the other party by way of Interrogatories. Section 94 (1) of the Civil Procedure Code states that *“Any party may at any time before hearing by leave of the Court to be obtained on motion ex parte deliver through the Court Interrogatories in writing for the examination of the opposite party, or, where there are more opposite parties than one, any one or more of such parties with a note at the foot thereof stating which of such Interrogatories each person is required to answer”*. The Defendant- Appellant failed and neglected to file any Interrogatories relating to the genuineness of the Document in question. If the Appellant examined the Respondent through Interrogatories about the genuineness of the said Document the Respondent was bound to answer by Affidavit denying or accepting the same in accordance with Section 99 of the Civil Procedure Code, thus giving a clear indication to the Appellant about the genuineness of the Document. If the Respondent refused to accept the Interrogatories in accordance with Section 98 and 100 of the Civil Procedure Code at the pre trial stage then the Appellant could have moved for a Commission at that stage, which was not sought for by the **Defendant-Appellant**.

Although it was submitted on behalf of the Defendant- Appellant that the Document in question is a very important vital document in this case, she has failed and neglected to include it in the List of Witnesses and Documents under Section 121 (2) of the Civil Procedure Code. The Defendant- Appellant has also not availed herself of the pre-trial remedies available under Sections 94 and 101 of the Civil Procedure

Code. The Commissions for Local investigations under Section 428 of the Civil Procedure Code is a Discretionary Relief granted to a party, which the Defendant-Appellant did not resort to earlier at the pre-trial stages. When Section 175 (2) of the Civil Procedure Code is examined there is a Mandatory requirement upon parties to an action to list the Documents under Section 121 (2) of the Civil Procedure Code. Section 175 (2) of the Civil Procedure Code very clearly states that a Document which is required to be included in the list, but not so included, shall not without the leave of the Court be received in evidence at the trial of the action. Hence it is a mandatory requirement to first obtain the leave of the Court to mark an unlisted Document under Section 175 (2) of the Civil Procedure Code. However in this case the leave of Court was not obtained for the aforesaid purpose. I have herewith cited the following relevant cases for consideration.

- (1) In *ABNAR and Co. (Appellant) Vs. Ceylon Overseas Tea Trading Co. Ltd. (Respondent)* 47 NLR P:9 it was held that “it is evident that the Defendant-Appellant was dependant on the Document which was shown to the Plaintiff-Respondent in Cross-Examination, which the Plaintiff-Respondent failed to recognize. If the Defendant-Appellant was dependant on the impugned document she should have resorted to the Pre-Trial Remedies which she did not. The Defendant-Appellant however seeks to obtain a commission now, which in my view would delay the case further. Hence I disallow the application of the Defendant-Appellant for a Commission to the Examiner of Questioned Documents (EQD) to elucidate the questioned signature of the Plaintiff in the impugned Document, as sought for in paragraph (V) of the prayer to the Petition dated 24.8.2007. The answers to the question of Law for which Leave was granted on 4.12.2007 as set out in paragraph 18, subparagraphs (b), (c) and (d) of the Petition dated 24.8.2007 are all answered in the NEGATIVE. Where the Plaintiff, a merchant residing in Cairo, Egypt was desirous of having his evidence and that of certain of his witnesses taken on Commission, but the Court which comprised Their Lordships Soertsz ACJ and

Rose J refused his application principally on the ground that the Plaintiff had shown want of due diligence in making his Application, it was held that “although the granting or withholding of a Commission is a matter within the discretion of the Court, it is the duty of the Court to examine the principles which should govern the exercise of discretion in cases where it is alleged that a Plaintiff has failed to show due diligence in making his application.

- (2) “In the case of *Kandiah vs. Wiswanathan and another (1991) (1) SLR p. 269*) His Lordship Wijeyaratne.J held that “It appears frequently in District Court Trials that material witnesses and documents have not been listed as required by law. The failure to do so entails considerable hardship, delay and expense to parties and contributes to laws delays. It should be stressed that a special responsibility is cast on Attorneys-at-Law, who should endeavour to obtain full instructions from parties in time to enable them to list all material witnesses and documents as required by law”.
- (3) In *Casie Chetty vs. Senanayake (1999 (3) SLR p. 11)* His Lordship Jayasinghe.J held as follows. “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 the truth and not the desire of a litigant to be placed at an advantage by some technicality”. “There have been instances in the past where Courts have relied on the evidence of Attorneys-at-Law to support the claim that documents were in fact dispatched”.
- (4) In *Girantha vs. Maria (50 NLR p. 519)* it was held that “In exercising his discretion under Section 175 of the Civil Procedure Code where it is sought to call a witness whose name was not in the list filed before the trial, the paramount consideration for the Judge is the ascertainment of the truth, and not the desire of a litigant to be placed at an advantage by reason of some

technicality”.

- (5) In *Asilin Nona vs. Wilbert Silva 1997 (1) SLR p. 176*, it was held as follows: “Section 175 (1) of the Code imposes a bar against calling of witnesses who are not listed in terms of Section 121. The 1<sup>st</sup> proviso Section 175 (1) confers on the Court 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.
- (6) In *Abdul Munaf vs Mohamed Yusuf (1997 (1) SLR p. 373)* it was held that the Judgment and the observations of Gratien J in *Girantha vs 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 the trial.

Having considered all matters placed before this Court with regard to this Special Leave to Appeal Application, I am of the opinion that the learned District Judge of Homagama by Order dated 16.3.2007 marked as P7 made a correct Order, and that the Order of the Honourable Judges of the Civil Appeal High Court of the Western Province holden in Colombo on 16.7.2007 marked as P10 is correct. Hence I dismiss the Special Leave to Appeal application tendered by the Defendant-Petitioner-Appellant without costs. The questions of law set out in paragraph 18 sub- paragraphs (b), (c) and (d) of the Petition dated 24.8.2007 are all answered in the negative.

**JUDGE OF THE SUPREME COURT**

**Shiranee Tilakawardane.J**

I agree.

**JUDGE OF THE SUPREME COURT**

**P.A. Ratnayake.J**

I agree.

**JUDGE OF THE SUPREME COURT**