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

In the matter of an application for leave to appeal in terms of Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

SC APPEAL 163/2011
SC HC LA No. 75/2011
HC (CHC) Case No. 227/2002 (1)

PLAINTIFF-APPELLANT

-Vs-

01. Minal Chandra Jayasinghe,
No. 49/15, Fife Road,
Colombo 05.

02. Suresh Harkishim Mirchandani,
No. 7, Sulaiman Terrace,
Colombo 05.

03. Amith Mahinder Mirchandani,
No. 7, Sulaiman Terrace,
Colombo 05.

DEFENDANT-RESPONDENTS

BEFORE	:	Hon. S. Marsoof, P.C., J, Hon. K. Sripavan, J, and Hon. P. Dep, P.C., J.
COUNSEL	:	Kushan de Alwis P.C with C. Wickramanayake and Ms. Ruwanthi Amarasinghe for the Plaintiff-Appellant. M.U.M. Ali Sabry P.C with Shamith Fernando for the 2nd Defendant-Respondent. 1st and 3rd Defendant-Respondents absent and unrepresented.
ARGUED ON	:	08.08.2012
WRITTEN SUBMISSIONS ON	:	28.11.2012 (Plaintiff-Appellant) 13.02.2013 (Defendant-Respondent)
DECIDED ON	:	15.12.2014

SALEEM MARSOOF, P.C., J,

The main issue in this appeal is whether the Plaintiff-Appellant Bank (hereinafter referred to as "the Appellant ") should have been allowed to call an unlisted witness to prove the service to the 2nd Defendant-Respondent (hereinafter referred to as "the Respondent") of a letter demand for the purpose of establishing the liability of the said Respondent under a Guarantee Bond put in suit. This Court has granted leave to appeal in this case against the order of the learned Judge of the Commercial High Court dated 8th July 2011, on the questions set out in paragraph 20 of the petition of appeal dated 26th July 2011 which sets out the following substantial questions of law for determination by this Court :-

(a) Did the learned Judge of the Commercial High Court err in interpreting the provisions of Section 175 (1) of the Civil Procedure Code, in disallowing the Appellant's application to call the witness from the Central Mail Exchange?

(b) In any event, did the learned Judge of the Commercial High Court misdirected himself in law in failing to appreciate that the said officer from the Central Mail Exchange has been listed as a witness in the Additional List of Witnesses and Documents dated 30.06.2009 to :- "චිත්තිකරුවන් වෙත යවන ලද එන්තරවාසි ලිපි වලට අදාළ ලියාපදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය හා අදාළ පොත්පත් ඉදිරිපත් කිරීමට සහ හෝ ඉදිරිපත් කර සාක්ෂි දීමට?"

(c) Do the matters set out in paragraphs 18 to 23 of the Written Submissions of the Appellant marked X9 above constitute special circumstances in terms of the first proviso to Section 175(1) of the Civil Procedure Code?

Before considering the above questions, it will be useful to outline the facts material to the determination of this appeal.

The Material Facts

On or about 27th September 2002, the Appellant Bank instituted action in the Commercial High Court, seeking *inter alia*, judgement and decree against the 1st, 2nd and 3rd Defendant-Respondents in a sum of US $ 440,350 together with interest allegedly due in terms of a Guarantee Bond executed by the said Defendant-Respondents in their capacity as Directors of the Rican Lanka (Pvt) Limited as security for the three loan facilities granted by the Appellant Bank to the said company.

By clause 2 of the said Guarantee Bond, the Respondents had agreed as follows:-

> "IN CONSIDERATION of the Bank at my / our request agreeing not to require immediate payment of such of the moneys herein mentioned as may be now due and / or in consideration of any moneys herein mentioned which the Bank may hereafter advance or pay or which may hereafter become due, I / we the undersigned.
>
> (a) Minal Chandra Jayasinghe
> of 49/15, Fife Road, Colombo 5.
>
> (b) Suresh Harkishim Mirachandani
> of 7, Sulaiman Terrace, Colombo 5.

(c) Amith Mahinder Mirchandani
of 7, Sulaiman Terrace, Colombo 5.

hereby agree to pay to the Bank, the moneys herein mentioned *ten days after demand* (PROVIDED ALWAYS that the total liability including all interest from the date of demand, and such further sums by way of Banker's charges, Legal costs and expenses in accordance with Bank's usual course of business shall not exceed the sum of US dollars Seven Hundred and Fifty Thousand (USD 750,000) only.)"

Party (b) to the aforesaid Guarantee Bond was Suresh Harkishim Mirachandani, who was the 2nd Defendant-Respondent to this appeal. It is obvious that in order to succeed in the action against the said Respondent, the Appellant had to establish that *the amount claimed by the Appellant was demanded* from the said Respondent, since in terms of the Guarantee Bond the cause of action would arise only "*ten days after demand*".

It is relevant to note that the since the 1st and 3rd Defendant-Respondents had failed to file answer on the due date, the action was fixed for *ex-parte* trial against these Respondents, and the only contesting party at the trial *inter-partes* was the 2nd Defendant-Respondent, who filed his answer on 28th May 2003. It is significant to note that in paragraph 9 of the plaint filed by the Appellant dated 27th September 2002, it was specifically averred that the sum of US $ 440,350 together with interest allegedly due in terms of a Guarantee Bond *was demanded* from the 1st , 2nd and 3rd Defendants by letters demand dated 15th July 2002, which averment was denied in paragraph 4 of the Answer of the Respondent dated 28th May 2003 by a general denial of paragraphs 4, 5, 7, 8, 9, 10, 11 and 12 of the plaint. However, in paragraphs 3 and 12(ii) of the said answer the Respondent has specifically averred that no cause of action has arisen or disclosed in the plaint for the Appellant to sue the Respondent.

The Trial before the Commercial High Court

It appears from the journal entries of the Commercial High Court marked X12 that the case was initially fixed for trial *inter-partes* against the Respondent on 29th May 2003, on which day two dates were fixed, viz 6th August 2003 for tendering of issues and 26th August 2003 for trial. Due to various reasons that are not very material to this appeal, the trial from which this appeal arises commenced only on 20th February 2009. Prior to this date the Appellant had filed two lists of witnesses and documents, and the first of these was filed on 3rd July 2003 prior to the original trial date of 26th August 2003. In the said list of witnesses and documents, the letter demand dated 15th July 2002 alleged to have been sent by the Appellant to the Respondent was listed as document No. 4, and the postal article receipt relating to the alleged posting of the said letter demand to the Respondent was listed as document No. 5. The said list of witnesses and documents also contained a notice in terms of Section 66 of the Evidence Ordinance addressed to the Respondent requiring him to produce the original of the said letter demand at the trial failing which, it was also intimated that secondary evidence would be led to prove the same. After the said first trial date of 26th August 2003, an additional list of documents dated 28th July 2004 and an additional list of witnesses and documents dated 30th June 2009 were filed by the Appellant, and the latter list of witnesses and documents included as witness No. 3, the Officer in charge of the Central Mail Exchange or his representative, to produce the postal article receipt relating to the letters demand allegedly sent to the Defendants-Respondents in the case including the Respondent. When the trial commenced on 20th February 2009, the learned Judge of the

Commercial High Court noting that while the case was for trial *inter-partes* against the Respondent, it was also fixed for trial *ex-parte* against the 1st and 3rd Defendant-Respondents, who had defaulted in appearance, indicated that *ex-parte* judgment against the said Respondents will be pronounced simultaneously with judgment in the *inter-partes* trial.

The Appellant's main witness, Mohamed Thambi Fazal Mohamed, who had affirmed to the affidavit dated 12th February 2009, was called to give evidence on 20th February 2009, and the Court allowed the adoption of the contents of the said affidavit as the examination-in-chief of the said witness, subject to him being subjected to cross-examination by the learned Counsel for the Respondent. It is noteworthy that the learned Judge specifically recorded the fact that learned Counsel for the Respondent had objected to the reception in evidence of the documents the said witness had tendered with the his aforesaid affidavit marked පැ.5-අ to පැ.5-ඈ, being respectively the postal article receipts bearing Nos. 1290, 1291 and 1292 relating to the letter-demand dated 15th July 2002 marked පැ6 allegedly despatched to the 1st Defendant-Respondent Minal Chandra Jayasinghe, the Respondent Suresh Harkishim Mirachandani and the 3rd Defendant-Respondent Amith Mahinder Mirchandani, and the learned Judge of the Commercial High Court ordered that they be accepted subject to proof. It is significant that witness Fazal Mohomed clarified in the course of his testimony that the original of the postal article receipt bearing No. 1291, relating to the letter-demand dated 15th July 2002 marked පැ6 alleged to have been despatched to the Respondent by registered post, had got misplaced and could not be traced in the relevant file. During the cross-examination and re-examination of the witness Mohamed Thambi Fazal Mohamed, he was questioned at length about the despatch of the letters-demand, and he clarified that letters-demand in question had been despatched by an officer by the name of Visaka Kumari Gunapala, who is still in service in the Appellant Bank.

After the conclusion of the testimony of the said witness on 23rd February 2010, the next witness to be called to the witness box was E.M. Gamini Karunaratne, who was at the relevant time a Senior Manager in the International Division of the Appellant Bank, and was listed by name and designation as witness No. 2 in the additional list of witnesses and documents dated 30th June 2009. He testified mainly in regard to the liability of the principal debtor, Rican Lanka (Pvt) Limited. Thereafter, witness Visaka Kumari Gunapala, Attorney at law and the Legal Officer for the Western Zone 11 of the Peoples Bank, who was listed as witness No. 1 in the additional list dated 30th June 2009 was called to give evidence, and she testified that she prepared and despatched the letter demand dated 15th July 2002 marked as පැ6, under her hand to the Respondent under registered cover, and stated as follows in her examination in chief:

"ප්‍ර. මේ අනුව 02 වෙනි විත්තිකරුට පැ.6 දරණ එන්තරවාසියේ මුල් පිටපත යැව්වා කියා ගරු අධිකරණයට සහතික කර කියන්න පුලුවන්ද?

උ. ඔව්. යැව්වා. නැවත ආපසු මා වෙත ලැබුණේ නැහැ.

ප්‍ර. ඒ යැව්වේ පැ.6-අ ලෙස ලකුණු කර තිබෙන ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය අනුව ලියා පදිංචි කරලාද?

උ. ඔව්.

ප්‍ර. මහත්මය කලින් ගරු අධිකරණයට කිව්ව ආකාරයට පැ.6-අ කියන අංක 1291 ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සියේ මුල් පිටපත අස්ථාන ගතවී තිබෙන්නේ?

ළ. ඔව්.

ප්‍ර. මහත්මයගේ මතකයේ හැටියට 02 වෙනි විත්තිකරු විසින් පැ.6 දරණ එන්තරවාසියේ කරුණු ප්‍රතික්ෂේප කර ලිපියක් මහත්මය වෙත යොමු කළාද?

ළ. නැහැ.

අධිකරණයෙන් :-

ප්‍ර. පැ.6-අ කුවිතාන්සියේ තිබෙන ලිපිනය තමන්ලාට දුන්න ලිපිනයද?

ළ. එහෙමයි. එම ඇප බැඳුම්කරයේ සඳහන් වෙන ලිපිනය."

The witness was cross-examined at length in regard to the despatch of the aforesaid letter-demand, and she was firm in her testimony that she was quite certain that the said letter-demand was in fact posted under registered cover to the Respondent and it did not get returned in post. She also stated that the original of the postal article receipt had got misplaced from the relevant file, after the affidavit necessary for the *ex-parte* inquiry against the 1st and 3rd Defendants had been prepared. She answered questions in cross-examination as follows:-

"ප්‍ර. 02 වන විත්තිකරු වෙනුවෙන් යෝජනා කර සිටිනවා තමන්ට, මෙම පැ.6-අ දරණ තැපැල් භාණ්ඩ කුවිතාන්සිය මගින් තමා විත්තිකරු වෙත මේ ලිපිය යැව්වා කියා ප්‍රකාශ කළත් සත්‍ය වශයෙන්ම ඒ විදිහේ ලියා පදිංචි තැපැල් මගින් යැවීමක් සිදුකර නැහැ කියලා?

ළ. මම ඒක ප්‍රතික්ෂේප කර සිටිනවා.

ප්‍ර. ඒ වගේම යෝජනා කරනවා, ඒ ආකාරයට යැව්වා නම් සහ විශේෂයෙන්ම අනෙකුත් ලේඛණ පවා, මහත්මයගේ සන්තකයේ තිබියදි මෙම ලේඛණ විතරක් නොමැති වන්න කිසිදු සාධාරණ හේතුවක් නැහැ, මේ ලේඛණයක් පමණක් නැති වුනා කියන්නේ මේ නඩුවේ විත්තිකරුට යවා නොමැති ලේඛණයක් යැව්වා කියන පදනම සනාථ කරන්න කියන අසත්‍ය සාක්ෂියක් කියා මම යෝජනා කරනවා?

ළ. මම ඒක ප්‍රතික්ෂේප කරනවා. තව දුරටත් කියා සිටින්නේ, මෙම සියලු ලේඛණ එකට අප ලග තිබුණා ලිපි ගොණුවක. මේ 02 වෙනි විත්තිකරුට එරෙහිව පමණයි විභාගයට නියම වුනේ. එවිට ඒක පාක්ෂික විභාගයට ඉතිරි ලේඛණ ගොනු කිරීමෙන් අනතුරුව තමයි ඉතිරි වුනේ. 02 වෙනි විත්තිකරුගේ එන්තරවාසි ලිපිය හා අදාළ තැපැල් භාණ්ඩ කුවිතාන්සියේ මුල් පිටපත. එම ලේඛණ දෙක පමණක් වීම සහ කුඩා ලිපි ගොනුවක් බවට පරිවර්තනය වුනා. ඉන් අනතුරුව තමයි මෙහෙම අස්ථාන ගත වෙලා තිබෙන්නේ. සියලු ලේඛණ ඒක පාක්ෂික විභාගයේ දිවුරුම් ප්‍රකාශය සමග ගොනු කිරීමෙන් අනතුරුව.

At the conclusion of the evidence of this witness, the case was adjourned for further trial on 13th December 2010. On that date, witness No. 3 in the Additional list of witnesses and documents dated 30th June 2009, namely the Officer in Charge of the Central Mail Exchange or his representative was called to give evidence by the Appellant with the view of producing the postal article receipts and other relevant books relating to the issue of letters-demand on the three Defendants Respondents. Upon objection being taken by learned Counsel for the Respondent, learned Counsel were granted time to file written submissions on the question whether the Court should exercise its discretion in favour of the Appellant and allow the witness to be called or should uphold the objection taken up by learned Counsel for the Respondent. After the learned Counsel

for the Appellant and the Respondent filed their written submissions, the learned Judge of the Commercial High Court made his impugned order dated 8th July 2011.

The Order of the Commercial High Court

By the impugned order of the learned Judge of the Commercial High Court dated 8th July 2011, the application of the Appellant Bank to call the Officer in Charge of the Central Mail Exchange or his representative to give evidence in the case and produce the relevant documents relating to the dispatch issue of the letters-demand in question was disallowed. In the course of his order, the learned Judge considered Sections 121(2) and 175 of the Civil Procedure Code No. 2 of 1889, as subsequently amended, and stated that he cannot agree with the submission of the learned Counsel for the Appellant that the words "fifteen days before the date fixed for the trial of an action" as used in Section 121(2) should be interpreted to mean fifteen days before any date to which the trial has been adjourned. The learned Judge of the Commercial High Court observed at pages 4 to 5 of his impugned order that:-

> "මේ අනුව 121(2) වගන්තියේ විභාගයට දින 15 කට පෙරාතුව සාක්ෂි ලැයිස්තුව ගොනු කළ යුතුය යන්න නඩු විභාගය කල් තබන ඕනෑම දිනයකට දින 15 ට පෙරාතුව ලෙස අර්ථ නිරූපනය කළහොත් එය ප්‍රායෝගික අන්තරකාරී ප්‍රතිඵල ගෙන දිය හැකිය.

At pages 6 to 7 of the impugned order, the learned Judge expressed the view that it was the duty of the Plaintiff and his lawyers in any case to ensure that all witnesses and documents are properly listed as contemplated by Section 121(2) of the Civil Procedure Code. He further observed that in the circumstances of the case it is necessary to consider whether the Court can exercise the discretion vested in it by the first proviso to Section 175 of the Civil Procedure Code to permit the testimony of the witness from the Central Mail Exchange, and correctly observed that for this purpose the Appellant has to satisfy Court that there were exceptional circumstances to permit such a course of action. The learned Judge reasoned as follows at pages 6 and 7 of the impugned order:-

> "ඒ අනුව මෙම සාක්ෂිකරුට ඉඩ දිය හැක්කේ සිවිල් නඩු විධාන සංග්‍රහයේ 175(1) අතුරු විධි විධාන අනුව විශේෂ අවස්ථානුගත කරුණු පෙනී යෑම මත යුක්තිය ඉටු කිරීම සඳහා අවශ්‍ය වීටෙය. 1997(1) SLR 176 හි සඳහන් ඇසිලින් නෝනා එදිරිව විල්බට් සිල්වා නඩු තීරණය අනුව මෙම විශේෂ අවස්ථානුගත කරුණු පෙන්වා සිටීම එසේ මෙම සාක්ෂිකරු මෙහෙයවීමට ඉල්ලා සිටින පාර්ශවයන්ගේ වගකීම වේ. මේ බව ආබෑ එදිරිව සේකරම් 2003(1) SLR 373, 1999(1) SLR 76 නඩු තීන්දු අනුව පෙනී යයි. ඒ අනුව මෙම සාක්ෂියට ඉඩ දීමට නම් මෙම සාක්ෂිකරු කැඳවීම සඳහා විශේෂ අවස්ථානුගත හේතු ඇති බව මෙම සාක්ෂි මෙහෙයවීමට ඉල්ලා සිටින පාර්ශවය පෙන්වා සිටිය යුතුය. එමෙන්ම පාර්ශවයන්ගේ නොසැළකිල්ල නිදාගිලි බව පියවීමට සිවිල් නඩු විධාන සංග්‍රහයේ 175(1) වගන්තිය යටතේ ඇති අභිමතය භාවිතා කිරීම සුදුසු නැත. මෙම නඩුවේ පැමිණිල්ල අනුව 2 විත්තියට එන්තරවාසි යවන ලද බවට එහි 9 වන ඡේදයේදී කියා ඇතත්, විත්තියේ උත්තරයේ 4 වන ඡේදයේදී පැමිණිල්ලේ 9 වන ඡේදය ප්‍රතික්ෂේප කර ඇත. ඇපකරයක් මත බැඳීම් ඉටු කිරීමට ඉල්ලා සිටින බැවින් දැනට ලකුණු කර ඇති ඇපකරය අනුව නඩු නිමිත්ත පැන නැගීමට විධාන කොට ඉල්ලීමක් ඔප්පු කිරීමක් අවශ්‍ය විය හැක."

The learned Judge concluded that in all the circumstances of the case, the Appellant has failed to satisfy Court that there were exceptional circumstances to justify the exercise of the discretion of the Court in favour of the Appellant. In particular, the learned Judge observed as follows at pages 11 and 12 of his order:-

"ඊළඟට සැළකිය යුතු වන්නේ, පැමිණිල්ලේ ලිඛිත දේශන වල 22, 23 ඡේදවල දක්වන කාරණය විශේෂ හේතුවක් ලෙස සැළකිය යුතුද යන්නයි. එහි දක්වන්නේ අදාළ ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය නිකුත් කළ S.S. Corner Sub – Post Office යන තැපැල් කාර්යාලය වසා දැමීම නිසා මධ්‍යම තැපැල් හුවමාරු තැපැල් කාර්යාලයෙන් සාක්ෂි කැඳවීම හැර වෙනත් අවස්ථාවක් හිමි නොවුනු බවයි. මෙම හේතුව විශේෂ හේතුවක් ලෙස සළකා මධ්‍යම හුවමාරු තැපැල් කාර්යාලයේ සාක්ෂිකරු කැඳවීමට ඉඩ දීමට S.S. Corner Sub – Post Office මුල් සාක්ෂි ලැයිස්තුවෙහි ලැයිස්තු ගත කර තිබිය යුතුය. එසේ වී නම් එය වසා දැමීම නිසා අලුත් තත්ත්වයක් උදා වීමෙන් විශේෂ අවස්ථානුගත කරුණක් පැන නැගීමට තිබුණි. නමුත් S.S. Corner Sub – Post Office පවා නිසි කලට නිවැරදි සාක්ෂි ලැයිස්තුවේ ලැයිස්තු ගත කර නැත. එය පවා ලැයිස්තු ගත කර ඇත්තේ විවාදිත සාක්ෂිකරු ලැයිස්තු ගත කරන ලැයිස්තුවෙන්මය. ඒ අනුව එම කරුණ විශේෂ අවස්ථානුගත කරුණක් හැටියට මා හට සැළකීමට නොහැක. අනික් අතට එකී ලිඛිත දේශනයේ 23 වන ඡේදයෙන් දක්වන්නේ S.S. Corner Sub – Post Office දැන් පැවැත්මක් නැති බව සනාථ කිරීමට මෙම සාක්ෂිකරු කැඳවීම අවශ්‍ය බව වුවත්, අතිරේක සාක්ෂි ලැයිස්තුවෙන් දක්වා ඇත්තේ තැපැල් භාණ්ඩ කුවිතාන්සිය හා අදාළ පොත් පත් ඉදිරිපත් කිරීමට කැඳවන බවද නිරීක්ෂණය කරමි.

මේ අනුව ඉහත දැක්වූ පැමිණිල්ලේ ඉදිරිපත් කරන විශේෂ අවස්ථානුගත කරුණු අනුව මා හට සැහිමකට පත් විය නොහැක. ඒ අනුව සාක්ෂිකරු කැඳවීමට ඉඩ දීම ප්‍රතික්ෂේප කරමි."

Submissions of Counsel on appeal

At the hearing of this appeal, the submissions of learned Counsel were confined to the question whether the Commercial High Court had erred in exercising the discretion vested in it under Section 175 of the Civil Procedure Code against the Appellant, but in this context they also adverted to Section 121(2) of the Code which is expressly referred to in Section 175.

Learned President's Counsel for the Appellant has contended that the learned Judge of the Commercial High Court had erred in rejecting his submission that in terms of Section 121(2) of the Civil Procedure Code, additional lists of witnesses or documents may be filed fifteen days before any subsequent date of trial, and that any witness listed in such a list may be called to give evidence. He further submitted that the learned Judge of the Commercial High Court had misdirected himself in the interpretation of Section 175 of the Code, and had also failed to appreciate the fact that the Appellant had been compelled to call the Officer in Charge of the Central Mail Exchange, who had been listed as a witness in the Additional List of Witnesses and Documents filed by the Appellant dated 30th June 2009, only when the Appellant had come to know that the ''SS Corner Sub-Post Office" from which the letter-demand dated 15th July 2002 marked පැ6 was allegedly sent to the Respondent by registered post, had been closed down. He emphasised that the said witness was called to testify only on 13th December 2010, more than a year and six months after the listing of the witness. He further submitted that in those circumstances, it cannot be contended that the Respondent was taken by surprise. In support of his submission that the learned Judge of the Commercial High Court had misdirected himself in the interpretation of the first proviso to Section 175 of the Civil Procedure Code, leaned President's Counsel for the Appellant invited attention of the Court to the decision of this Court in *Girantha v Maria* 50 NLR 5199 (SC). He also submitted that the learned Judge of the High Court erred applying the *ratio decidendi* of the decision in *Silva v Silva* (2006) 2 SLR 80 (CA) to the circumstances of this case. He argued that the objection of the Respondent was purely technical, and submitted relying on the decisions in *Casie Chetty v Senanayake* (1999) 3 SLR 11 (CA) and *Colgan and Others*

v Udeshi and Other (1996) 2 SLR 220 (SC) that upholding the said objection will not further the interests of justice.

It was the contention of the learned President's Counsel for the Appellant that the matters set out in paragraphs 18 to 23 of the Written Submissions of the Appellant filed in the Commercial High Court dated 13th January 2011 and marked as "X9", constitute special circumstances in terms of the first proviso to Section 175(1) of the Civil Procedure Code. In the aforesaid paragraphs It was submitted on behalf of the Appellant that at the time of posting the Letters-demand to the 1st, 2nd and 3rd Defendant-Respondents, the registered postal article receipt Nos. 1290, 1291 and 1292 were issued by the S.S Corner Sub-Post Office; that the registered postal article receipt Nos. 1290 and 1292 had been tendered to court with the affidavit filed by the Appellant at the *ex-parte* trial against the 1st and 3rd Defendant-Respondents; that the relevant postal article receipt bearing No. 1291 marked එ6-(අ) and received in evidence subject to proof related to the issue of the letter-demand to the Respondent; that witness Visaka Kumari Gunapala has in her evidence testified that the letters-demand were sent to the 1st, 2nd and 3rd Defendant-Respondents at the same time and the said registered postal article receipts were issued at the same time by S.S. Corner Sub-Post Office, which upon inquiry the Appellant has become aware, has been since closed down and it is not possible to call a witness from the said sub-Post Office in order to produce the second copy (pink copy) of the said registered postal article receipt; and in those circumstances, the Appellant had no option but to call the said witness from the Central Mail Exchange in order to prove the non-existence of the said sub Post Office, and to produce any records, books and counterfoils that may exist in regard to the said registered postal article receipt bearing No. 1291. The learned President's Counsel for the Appellant has stressed that the learned Judge of the Commercial High Court had erred in concluding that the special circumstances set out in paragraphs 18 to 23 of the Written Submissions of the Appellant did not constitute exceptional circumstances to justify the exercise in favour of the Appellant the discretion alleged to be vested in Court by the first proviso to Section 175 of the Civil Procedure Code. He submitted that the calling of the witness from the Central Mail Exchange was necessary to ascertain the truth in regard to the despatch of the letter-demand which was vital to prove that a cause of action has arisen to sue the Respondent on the Guarnatee Bond. He submitted that the appeal should be allowed in the interests of justice to enable the trial to go on for the truth to be ascertained.

Learned President's Counsel for the Respondent submitted that the lists referred to in Section 121(2) should have been filed before fifteen days before the first date of trial, and that any witness listed in any additional list filed thereafter may be called to give evidence only with the leave upon being satisfied that special circumstances exist which render such a course advisable in the interests of justice. He invited the attention of Court to the language of Section 121(2) and the first proviso to Section 175 of the Civil Procedure Code and referred to the decision in *Asilin Nona and Another v Wilbert Silva* 1997(1) SLR 176 (SC) in which this Court had observed that Section 175(1) of the Code imposes a bar against calling of witnesses who are not listed in terms of section 121. He submitted that the granting of permission for calling unlisted witnesses is a matter eminently within the discretion of the trial judge, and cited the decisions of the Court of Appeal in *J.A. Chandramali v M.M. Rivaldeen and Another* reported in [2010] BLR 205 (CA) and *Kandiah v Wiswanathan and Another,* 1991(1) Sri L.R.269 (CA) for the proposition that an exception can be made only if "special circumstances appear to it to render such a cause advisable 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 witness.

It was the contention of the learned President's Counsel for the Respondent that in the circumstances of this case, the Appellant had failed to discharge the burden placed on it by law to establish that exceptional circumstances exist to justify the granting of leave to call a witness from the Central Mail Exchange. He emphasised that the averment in the plaint that the sum of US $ 440,350 together with interest allegedly due in terms of a Guarantee Bond *was demanded* from the from the Respondent by the letter demand dated 15th July 2002 was denied in the paragraph 4 of the Answer of the Respondent, who had specifically taken up the position in the answer that no cause of action has arisen or disclosed in the plaint for the Appellant to sue the Respondent. He pointed out that the Respondent had not objected to witnesses Gamini Karunaratne and V.K. Gunapala testifying in the case in view of the fact that even though these names were included for the first time in the Additional List of Witnesses and Documents field on 30th June 2009, they could have been called in terms of the original List of Witnesses and Documents filed by the Appellant as they had been listed by their designations, and stressed that none of the two lists of witnesses filed prior to 30th June 2009 included any officer from the ''SS Corner Sub-Post Office", and therefore there was no justification for calling a witness from the Central Mail Exchange on the basis that the sub-post office in question had been closed down. Referring to the decision of the Court of Appeal in *Wijesekara v Wijesekara* 2005(1) SLR 58 (CA), he submitted that it is to the best interest of the administration of justice that a Judge should not ignore or deviate from the procedural law and decide matters on equity and justice, and in all the circumstances of this case, the appeal should be dismissed with costs.

The Relevant Statutory Provisions and their interpretation

As already noted, the three substantive questions on which this Court has granted leave to appeal in this case, focus on Section 175 of the Civil Procedure Code No. 2 of 1889, as amended by Section 29 of the Civil Procedure Code (Amendment) Law No. 20 of 1977, appearing on Chapter XIX of the Code headed "Of the Trial", which provides 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 interests of justice*, permit a witness to be examined, although such witness may not 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.
>
> (2) 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:

Provided that nothing in this 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." (*Emphasis added*)

The gist of the matter in issue is whether the learned Judge of the Commercial High Court properly exercised the discretion vested in him by the first proviso to Section 175 of the Civil Procedure Code in refusing to allow the witness from the Central Mail Exchange to testify at the trial.

Learned President's Counsel for the Appellant and the Respondent have, at the hearing of this appeal, invited our attention to Section 121 of the Civil Procedure Code, particularly since that section is expressly mentioned in Section 175 of the Code in its reference to "the list of witnesses previously filed in court by such party *as provided by section 121*". Section 121 appears in Chapter XVII of the Civil Procedure Code entitled "Witnesses and Documents", and Section 121(1) of the Code, enacts that the parties may, after the summons has been delivered for service on the defendant, obtain from Court "before *the day fixed for the hearing*" summonses to persons whose attendance is required either to give evidence or to produce documents. Section 121(2) of the Code as amended by Section 29 of the Civil Procedure Code (Amendment) Law No. 20 of 1977, goes on to provide that-

"(2) Every party to an action shall, not less than fifteen days before *the date fixed for the trial* of an action, tile 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."

It was contended by the learned Counsel for the Respondent that that the lists referred to in Section 121(2) should have been filed before fifteen days before the first date of trial, and that any witness listed in any additional list filed thereafter may be called to give evidence or any document listed in any additional list can be produced in evidence only with the leave of court upon being satisfied that *special circumstances* exist which *render such a course advisable in the interests of justice.* Learned Counsel for the Appellant argued the contrary and submitted that additional lists of witnesses or documents may be filed fifteen days before any *subsequent date of trial*.

It is noteworthy that both Section 121 and Section 175 of the Civil Procedure Code underwent substantive amendment in 1977, and while Section 121(2) which was quoted above is what now stands as the current law, prior to the Civil Procedure Code (Amendment) Law No. 20 of 1977 this provision was differently worded, and provided that "a list of witnesses shall be filed in court by the party applying for such summonses, after notice to the other side, and *within such time before the trial as the Judge shall consider reasonable*, *or at any time before the trial with the consent of the other side appearing on the face of such list*." Similarly, when the Civil Procedure Code was enacted, Section 175 was not divided into two sub-sections, and Section 175(2) was also introduced into the Code by Section 31 of the Civil Procedure Code (Amendment) Law of 1977.

The changes brought about into the Code in 1977 obviously reflect a change of policy of speeding up the disposal of cases through clearer procedural rules with time limits while further reducing the surprise element in litigation. It is interesting to note that this policy was carried further when Section 93 of the Code dealing with amendment of pleadings was amended twice, first by Section 9 of the Civil Procedure Code (Amendment) Act No. 79 of 1988, which provision was then repealed and replaced by Section 3 of the Amending Act No. 9 of 1991. The law in this regard as it now stands is found in Section 93 of the Code as amended by Act 9 of 1991, which for the first time draws a distinction between situations when an amendment in the pleadings is sought by application made "before *the day first fixed for trial* of the action" which is now regulated by Section 93(1) which confers on the court "full power of amending in its discretion, all pleadings in the action", and Section 93(2) which confers power on the Court to permit an amendment of pleadings where the application for the same is made after the "*day first fixed for trial*" only where the court is satisfied, for reasons to be recorded, "that grave and irremediable injustice will be caused if such amendment is not allowed".

In my view, while it is likely that the words "*the day fixed for the hearing*" used in the first sub-section of Section 121 of the Civil Procedure Code was intended to mean the same day as "*the date fixed for the hearing*" as used in the second sub-section of that Section, there being no material difference between "day" and "date" and "hearing" and "trial" in the context of an action, the use in Section 93 of the Civil Procedure Code of the words "*the day first fixed for trial"* may be contrasted with the words "*the date fixed for the trial"* as used in Section 121(2) of the Code. In my opinion, the difference in language between Section 93 and 121(2) may be significant in deciding whether the fifteen day limit fixed in Section 121(2) was intended by the legislature to be confined in its application to the day first fixed for trial of any action or whether it was intended to be applied also to a further date to which the trial may have been postponed.

However, since the three questions on which leave to appeal has been granted in this case are based on the first proviso to Section 175 of the Civil Procedure Code, it is not necessary for me to go deep into the question whether the additional list of documents dated 28th July 2004 and additional list of witnesses and documents dated 30th June 2009 have been field fifteen days before "the date fixed for trial" within the meaning of Section 121(2) of the Civil Procedure Code. In my view, in determining whether the discretion vested in the Commercial High Court by the first proviso to Section 175 of the Civil Procedure Code has been properly exercised, it would be material for this Court to take into consideration the fact that the Appellant moved to call witness No. 3 the Officer in Charge of the Central Mail Exchange or his representative, listed in the additional list of witnesses and documents dated 30th June 2009, only on the adjourned trial date of 13th December 2010 more than 17 months after the said listing, which I wish to stress at the outset, altogether takes away the element of surprise, which in my view, is all what Section 175 is about.

Learned President's Counsel for both parties have invited the attention of this Court to several decisions of this Court and the Court of Appeal that have sought to interpret Section 175 of the Civil Procedure Code. Of particular importance are the decisions of this Court in *Girantha v Maria* 50 NLR 519 (SC) and *Asilin Nona and Another v Wilbert Silva* 1997 (1) SLR 176 (SC). If I may refer first to the second of these cases, *Asilin Nona and Another v Wilbert Silva, supra*, which was a case involving conflicting claims of prescriptive title to land, in which the parties had agreed that either party would file a list of witnesses one week before the date of trial. The learned District Judge had upheld an objection taken on behalf of the plaintiff when the

defendants sought to call a witness listed in an additional list of witnesses filed by them after the plaintiff had closed his case. The defendants made an application for leave to appeal against the decision of the Court of Appeal, which was refused by the Court of Appeal, and the defendants preferred an appeal to this Court. This Court affirmed the decision of the Court of Appeal and dismissed the appeal. In the course of his judgement, His Lordship G.P.S de Silva CJ observed at page 178 that:-

> "Section 175(1) of the Civil Procedure Code in its enacting part imposes a bar on a party calling witnesses unless such witnesses were included in the list previously filed as provided by section 121. The first proviso to section 175(1) confers on the court the discretion to permit a witness not so listed to be called **"**if *special circumstance**s*** appear to it to render such a course advisable *in the interests of justice***".** The burden was on the defendants to satisfy the court in regard to the existence of such special circumstances. The finding of the District Judge, however, was that *no explanation was given for the default of the defendants.* This finding was not challenged before us. In my opinion, this clearly is an important circumstance which tells heavily against the defendants....."(*Emphasis added*)

In the course of his judgment, His Lordship G.P.S de Silva CJ distinguished the earlier decision of this Court in *Girantha v Maria, supra,* cited by learned Counsel for the defendants on the basis that that was a case in which there were special circumstances which required the court to permit the defendants to call a police inspector who was listed only after the plaintiffs' case was closed. That too was a case that involved prescriptive claims of the parties, and the defendants' proctor moved to call Police Inspector Sivasambo, whose evidence was vital to clinch the issue of prescriptive possession. The plaintiffs' proctor objected on the ground that the Inspector's name was not in the Defendants' list of witnesses filed before the original trial date and had been included in an additional list of witnesses filed by the defendant after the plaintiffs had closed their case. The District Judge upheld the objection, but on appeal, the Supreme Court reversed the decision. In the course of his judgment, His Lordship Gratiaen J. observed at page 522 that:-

> "The proviso to Section 175 of the Civil Procedure Code authorises the Court to permit a witness to be called although his name does not appear on the list of witnesses filed before the commencement of the *trial if such a course is "advisable in the interest of justice"*. The purpose of the requirement of Section 175 that each party should know before the trial the names of witnesses whom the other side intends to call is to prevent surprise. 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 matters in dispute*. In this case Inspector Sivasambo is admittedly a person whose evidence, if accepted by the trial Judge, would be of the greatest importance in deciding the issue of prescription.....The element of surprise does not arise because the plaintiffs had several months' notice of the defendant's decision to call him on the adjourned date of trial. In these circumstances, it seems to me that the objection raised by the plaintiffs to Inspector Sivasambo being called as a witness was highly technical and without merit. It was "in the interests of justice" that this material witness should be examined. The learned District Judge refused the application because the plaintiffs would be "placed at a disadvantage" if Inspector Sivasambo's evidence was allowed to be called. This is no doubt correct in a sense, but *the paramount consideration is the ascertainment of the truth and not the readily understandable desire of a litigant to be placed at a tactical advantage by reason of some technicality*".(*Emphasis added*)

In my view, the decision in *Girantha v Maria, supra,* is on all fours with the circumstances of the instant case, where too the proof of dispatch of the letter-demand alleged to have be sent to the Respondent is of vital importance to the parties, particularly in the context that the Appellant has not specifically denied in his answer the receipt of the said letter demand, and had also admitted at the trial the contents thereof. It is noteworthy that the learned Judge of the Commercial High Court has arrived at the conclusion that the Appellant has failed to discharge the burden placed on it by the first proviso to Section 175 of the Civil Procedure Code of satisfying court as to the existence of special circumstances to justify the calling of the Officer in Charge of the Central Mail Exchange mainly on the basis that since the Respondent has denied in his answer the averment in the plaint that the letter-demand in question was despatched to the Respondent, a witness from the S.S Corner Sub-Post Office should have been duly listed by the Appellant in its list of witnesses and documents dated 3rd July 2003, which the Appellant has failed to do. In this context, the question arises as to whether the Appellant could be blamed for this omission in the state of the pleadings in the case.

It is significant to note that paragraph 4 of the Answer of the Respondent dated 28th May 2003 by which the averment in paragraph 9 of the plaint to the effect that by letter-demand dated 15th July 2002, the principal sum sued for in this action was demanded from the Respondent, was in fact a general denial of paragraphs 4, 5, 7, 8, 9, 10, 11 and 12 of the plaint, and there was no specific denial in the answer of the receipt of the said letter-demand. It is expressly provided in Section 75(d) of the Civil Procedure Code that every answer should contain a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence. Even the averments in paragraphs 3 and 12(ii) of the said answer by which the Respondent has specifically averred that no cause of action has arisen or was disclosed in the plaint for the Appellant to sue the Respondent, did not disclose the position later taken up by the Respondent at the trial that he did not receive the letter-demand in question. In fact, as already noted, notice had been given by the Appellant to the Respondent through its list of witnesses and documents dated 3rd July 2003 requiring him to produce the original of the said letter demand at the trial, failing which, it was also intimated that secondary evidence would be led to prove the same in terms of Section 66 of the Evidence Ordinance. In those circumstances, I am of the opinion that *while the Respondent cannot claim to have been taken by surprise by the application of the Appellant to call a witness from the Central Mail Exchange* to prove the despatch of the letter-demand, *the Appellant had most likely been taken by surprise* by the Respondent due to the vague nature of his denials in the answer and his failure to expressly disclose his defence that no cause of action has arisen or is disclosed in the plaint due to the Respondent not receiving the letter-demand alleged to have been sent to him in paragraph 9 of the plaint.

In my opinion, the Respondent knew very well that the Appellant had to prove the despatch of the letter-demand and showed his intent to lead secondary evidence through his Section 66 notice referred to above. A true copy of the letter-demand dated 15th July 2002 marked අ6, had been attached to the plaint and the affidavit of Mohamed Thambi Fazal Mohamed, along with a true copy of the relevant postal article receipt bearing No. 1291 allegedly issued by the S.S. Corner Sub-Post Office marked අ6-අ, and the Legal Officer of the relevant Branch of the Appellant Bank, Visaka Kumari Gunapala has testified at the trial that she despatched the three letters-demand addressed to the 1st, 2nd and 3rd Defendant-Respondents by Registered

Post from the S.S. Corner Sub-Post Office, which issued postal article receipts bearing Nos. 1290, 1291 and 1292 respectively, of which the postal article receipt bearing No. 1291 marked පැ6-අ related to the letter-demand sent to the Respondent. She has also testified that postal article receipts bearing Nos. 1290 and 1292 true copies of which were attached to the affidavit filed on behalf of the Bank with respect to the *ex-parte* trial against the 1st and 3rd Defendant-Respondents were photocopied along with postal article receipt bearing No. 1291 which had to be attached to the affidavit of Mohamed Thambi Fazal Mohamed filed in these proceedings, but thereafter the original postal article receipt bearing No. 1291 had got misplaced. Learned President's Counsel for the Appellant has explained that it was in these circumstances that it became necessary to call the witness from the Central Mail Exchange.

It is also relevant to note that the said documents marked පැ6 and පැ6-අ have been received in evidence subject to proof, and that prior to witness Visaka Kumari Gunapala commencing her testimony on 31st August 2010, Court had the following submissions of Counsel recorded:-

> "මෙම නඩුවේ අද දින පැමිණිල්ලේ ඉතිරි සාක්ෂි කැඳවීමට නියමිතය. මෙම නඩුවේ එන්තරවාසිය සහ එන්තරවාසිය යවන ලද රිසිට් පත වන පැ.6 සහ පැ.6-අ ඉදිරිපත් කර ඇත්තේ ඔප්පු කිරීමට යටත්ව බවද දන්වා සිටියි. ඒ අනුව අද දින සාක්ෂි කැඳවීමට ඇති බව දන්වා සිටියි.
>
> කෙසේ වෙතත් විත්තිය වෙනුවෙන් දන්වා සිටින්නේ එන්තරවාසිය සහ එහි අන්තර්ගතය ඔප්පු කිරීමේ අවශ්‍යතාවය ඉවත් කර ගන්නා බවයි. ඒ අනුව ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය සම්බන්ධයෙන් පමණක් එකී ඔප්පු කිරීමට යටත් විරෝධය පවත්වාගෙන යන බව දන්වා සිටියි.
>
> එය සනාථ කිරීමට සාක්ෂි කැඳවේ."

The concession made by learned Counsel for the Respondent in the Commercial High Court on 31st August 2010 is indeed significant in that the letter-demand and its contents have been admitted by the Respondent subject to the proof of only the relevant postal article receipt. This makes it necessary in the interests of justice to call the witness from the Central Mail Exchange in regard to the alleged despatch of the relevant letter-demand and to prove all relevant records, books and copies of the postal article receipt bearing Nos. 1290, 1291 and 1292.

I am firmly of the opinion that-

(a) the learned Judge of the Commercial High Court erred in interpreting the provisions of Section 175 (1) of the Civil Procedure Code, and disallowing the Appellant's application to call the witness from the Central Mail Exchange;

(b) the learned Judge of the Commercial High Court misdirected himself in law in failing to appreciate that the said officer from the Central Mail Exchange has been listed as a witness in the Additional List of Witnesses and Documents dated 30.06.2009, and no prejudice would be caused to the Respondent since the Appellant sought to call him to give evidence more than seventeen months after the filing of the said list of Witnesses and Documents; and

(c) the matters set out in paragraphs 18 to 23 of the Written Submissions of the Appellant marked X9 constitute special circumstances sufficient to persuade a court to allow the calling of a witness from the Central Mail Exchange in all the circumstances of this case in terms of the first proviso to Section 175(1) of the Civil Procedure Code.

Conclusions

For these reasons, I answer all the substantive questions on which leave to appeal was granted in this case in the affirmative and in favour of the Appellant.

Accordingly, I allow the appeal and set aside the impugned order of the Commercial High Court dated 8th July 2011. I also make order directing the Commercial High Court to forthwith fix the case for further hearing and allow witness No. 3 of the Additional List of Witnesses dated 30th June 2009 to give evidence.

I award the Appellant costs of this Appeal in a sum of Rs. 75,000.00 payable by the 2nd Defendant-Respondent.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

P. Dep, P.C. J.

I agree.

JUDGE OF THE SUPREME COURT