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

Niyakulage Dilruk Sanjeewa Fernando,
No. 137, Nisalagiri Uyana,
Boraegoda, Poruwadanda,
Horana.
Plaintiff-Petitioner-Appellant

SC/APPEAL/1/2025
SC/HCCA/LA 227/23
WP/HCCA/KAL/57/21/LA
DC PANADURA 2564/L

Vs.

1. Diyagama Vidanelage Somawathie Perera,
No. 412, Ratiyagoda,
Kuda Aruggoda, Aruggoda.

1A. Meddakandage Anilka Rohini Perera,
(Substituted 1st Defendant)
No. 412, Ratiyagoda,
Kuda Aruggoda, Aruggoda.

2. Meddakandage Anilka Rohini Perera,
No. 412, Ratiyagoda,
Kuda Aruggoda, Aruggoda.
Defendant-Respondents-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Neomal Senathilleke with Vinura Jayawardena for the Plaintiff-Petitioner-Appellant.
Yuwin Matugama with Gihini Yapa for the Defendant-Respondent-Respondents.

Argued on: 09.12.2024

Written submissions:
By the Appellant on 17.12.2024
By the Respondents on 20.12.2024

Decided on: 10.02.2025

Samayawardhena, J.

This appeal arises from the order of the District Court of Panadura dated 29.11.2021, wherein the Court upheld the objection raised by the defendant's counsel to the marking of a document through the plaintiff and, further, rejected the entire list of witnesses and documents filed by the plaintiff including the said document, on the ground that the list had been filed out of time. On appeal, the High Court of Civil Appeal of Kalutara, by its judgment dated 28.04.2023, affirmed this finding.

I must make it clear that this judgment primarily focuses on the legal position as it stood prior to the significant changes made by the Civil Procedure Code (Amendment) Act, No. 29 of 2023 on this subject under consideration. However, this analysis is not a futile exercise as there are a large number of cases pending in District Courts and Appellate Courts that remain governed by the previous provisions in view of the transitional provisions embodied in section 21 of Act No. 29 of 2023. In addition, the principles enunciated herein may also serve as a guide for interpreting the current provisions where appropriate.

Pre-trial proceedings were introduced to the District Court for the first time by the Civil Procedure Code (Amendment) Act, No. 8 of 2017. Although it is widely regarded that filing the list of witnesses and documents constitutes a pre-trial step, this Act did not consider it to be so. Sections 121 and 175 of the Civil Procedure Code, which governed the filing of the list of witnesses and documents, were not amended by this Act to facilitate an effective pre-trial hearing. Therefore, it was permissible to file lists of witnesses and documents even after the pre-trial hearing. As the filing of the list of witnesses and documents was not considered a pre-trial step, section 80A, introduced by this Act, which debars pre-trial steps after the date fixed for the trial (unless grave and irremediable injustice would result from not permitting such steps and subject to costs), does not apply to the filing of lists of witnesses and documents. While this may have been an oversight on the part of the draftsman, at the time relevant to this appeal, sections 121 and 175 remained in force. Hence, the Court is bound to take cognizance of these provisions and cannot disregard them or introduce new words to give a different interpretation to those provisions.

Section 121(2) of the Civil Procedure Code, No. 2 of 1889, addressed only the filing of the list of witnesses. It provided that a list of witnesses shall be filed "*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*". The filing of the list of documents, however, was primarily governed by sections 50-54. Section 50 required that if the plaintiff sues upon a document in his possession, it must be produced along with the plaint. Section 51 stipulated that if the plaintiff relies on any other documents, he must file a list of such documents with the plaint. Section 54 further stated that documents not listed as specified above could only be marked at the trial with the leave of the Court. At that time, there was no

provision which required a defendant to file a list of documents in the District Court. (*Subramanium v. Thilliampalam* (1956) 54 CLW 12)

Section 121(2) was repealed and replaced with a new subsection under the Civil Procedure Code (Amendment) Act, No. 20 of 1977. This amended provision was in force at the time material to this appeal.

> *121(2). 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.*

I must pause to observe that, although Act No. 20 of 1977 introduced timelines for filing lists of documents and amended section 175, the original sections 50 to 54 of the Civil Procedure Code remain intact, except for the repeal of section 54(2). In my view, this renders these provisions largely redundant. It is also evident that these provisions are not being adhered to by legal practitioners.

In this case, after the pre-trial hearing, the case was first fixed for trial on 09.06.2021. The defendant filed her first list of witnesses and documents as well as an additional list of witnesses and documents on 18.12.2020 and 11.01.2021 respectively, which is more than four months before the first date of trial. In contrast, the plaintiff did not file any list of witnesses or documents before the case was first fixed for trial. On 09.06.2021 the case was not called in open Court due to the COVID-19 pandemic and was subsequently refixed for trial on 28.10.2021. This is the second date of trial. The plaintiff filed his list of witnesses and documents for the first time on 14.10.2021, only 14 days before the second date of trial whereas section 121(2) enacted that every party to

the action shall file the list of witnesses and documents not less than fifteen days before the date fixed for the trial of an action.

The phrase "fifteen days before the date fixed for the trial" has been correctly interpreted in a number of cases to mean fifteen days before the date first fixed for the trial and not fifteen days before the date the case is actually taken up for the trial.

This interpretation is consistent with the other provisions of the law. According to section 80 of the Civil Procedure Code as it stood prior to the Civil Procedure Code (Amendment) Act, No. 8 of 2017, on the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, "the court shall appoint a date for the trial of the action". After section 80 was replaced with a new section by Act No. 8 of 2017, section 80 stated that on the date the case is called to fix the date of trial, "the court shall appoint a date for the trial of the action". Section 80 was repealed and replaced by a new section under Act No. 29 of 2023. Section 82 addresses postponements of the trial. According to section 80 read with section 82, the Court can fix a date for the trial of the action only once. Thereafter, the trial can be postponed if it cannot be taken up or concluded on the scheduled date.

In *Rogers Agencies (Pvt) Ltd v. People's Merchant Bank Ltd* [2005] 3 Sri LR 210 at 213, in reference to section 121 of the Civil Procedure Code, Justice Somawansa stated that "*the meaning assigned to the words 'before the day fixed for the hearing' is the first date on which the trial is fixed for hearing. The meaning of the aforesaid words is clear and no other meaning could be assigned to the aforesaid words*." Accordingly, it was held that the additional list filed subsequent to the date the case was first fixed for trial was clearly not in compliance with the requirements of section 121(2) of the Civil Procedure Code.

In *Salih v. Hemawathie* [2004] 3 Sri LR 91 at 93, in reference to section 121(2) of the Civil Procedure Code, Justice Amaratunga stated that "*this section requires the parties to file their list of witnesses and documents before the first date fixed for trial and if we are to interpret the words date fixed for trial to mean the date on which the trial is first taken up, we have to read into the section words which are not there and this is something we are not prepared to do*."

The same view was taken by Justice Amaratunga in *Martin v. Indrani Samarasinghe* (CALA/536/2002, CA Minutes of 14.11.2003).

In *Rajah Sinnathuray v. Malathi Perera* (CALA/445/2005, CA Minutes of 12.02.2010), while drawing attention to sections 80, 82 and 121 of the Civil Procedure Code, Justice Basnayake held:

> *These provisions make it clear that the court would fix a date of trial only once and thereafter postpone the hearing. On appointing a date of trial, the court shall notify such date to all parties. Whenever the case is postponed for another date, there is no such requirement. The requirement to file the list 15 days before the date fixed for the trial as per section 121(2) means 15 days before the first date fixed for the trial (Salih v. Hemawathie [2004] 2 Sri LR 96). Thus the submission of the learned President's Counsel that a trial date is any date the trial commences is untenable.*

If the phrase "the date fixed for the trial of an action" is interpreted as the date on which the trial is actually taken up in open Court, for instance, any party who later realizes his failure to file the list of witnesses and documents in compliance with section 121(2) could circumvent this requirement by seeking a postponement on the first date of trial on a pretext unrelated to the real reason and then file the list to fall within the provision.

Learned counsel for the plaintiff states that as the case was not called in open Court on 09.06.2021 due to the COVID-19 pandemic, the date fixed for the trial should be considered as 28.10.2021. However, as the District Judge pointed out in his order, while open Court proceedings were disrupted by the pandemic, the office remained operational. The defendant filed her list of witnesses and documents well within the stipulated time. Even for the sake of argument, 28.10.2021 is considered the first date of trial, the list was still filed out of time as the plaintiff filed the list not less than fifteen days before the trial but fourteen days before the trial.

Be that as it may, at the trial, the plaintiff marked deed No. 10421 dated 03.11.1986 as P1 in his evidence. Counsel for the defendant objected to it on the ground that the deed had been listed out of time. The District Judge upheld the objection and rejected the entire list of witnesses and documents, allowing only the plaintiff to give evidence. The procedure adopted by the District Judge was contrary to established practice and the law.

If the Court upholds the objection to the marking of a document on the ground that it was not properly listed, there is no need to reject the entire list on that basis. Objections to each witness and each document must be considered separately. There is no prohibition against a party filing a list or an additional list out of time, but such a list will not be considered as one filed in compliance with section 121(2) of the Civil Procedure Code. For example, in *Silva v. Silva* [2006] 2 Sri LR 80, the defendant filed his list of witnesses with a copy to the plaintiff out of time but ten days before the case was first fixed for trial. After the close of the plaintiff's case, when the defendant sought to call a witness from that list, the plaintiff objected to it on the ground that the list had been filed out of time. The District Judge upheld the objection. However, on appeal, Justice Wimalachandra

set aside the order stating that the plaintiff had been given sufficient notice of the defendant's original list of witnesses, which had been available to the plaintiff for over five years prior to the defendant calling the particular witness. Similarly, as observed by Justice Somawansa in *Rogers Agencies (Pvt) Ltd v. People's Merchant Bank Ltd (supra)* at 216, the Court cannot permit the entire list, if an objection is overruled with respect to a single document included in that list.

It may be relevant to note that although section 121(2) enacts that every party to an action "shall" file a list of witnesses and documents fifteen days before the date fixed for the trial, it is not mandatory for each party to an action to file such a list. A party may successfully conduct a trial even without filing a list at all. As Bindra in *Interpretation of Statutes* (13th Edition 2023) at page 449 states "*The word 'shall' is not always decisive. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory*." In *Ramalingam v. Thangarajah* [1982] 2 Sri LR 693 at 702, Justice Sharvananda (as His Lordship then was) stated: "*Prima facie the word 'shall' suggests that it is mandatory, but that word has often been rightly construed as directory. Everything turns on the context in which it is used; and the purpose and effect of the section in which it appears.*"

I must also add that, even if the rejection of the entire list is permissible, such rejection does not preclude the party from calling witnesses or marking documents included in the rejected list under section 175 of the Civil Procedure Code. Even in cases where witnesses and documents have not been listed at all, as opposed to filing the list belatedly, the Court retains the discretion to permit witnesses to be called and documents to be marked under section 175 of the Code. Section 175 was amended by

the Civil Procedure Code (Amendment) Law, No. 20 of 1977. As of the time relevant to this appeal, section 175 read as follows:

> *175(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 subsection 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.*

According to the second proviso to section 175(1), a party to the action can be called as a witness whether or not his name is included in the list. The Court could also allow an unlisted witness to be called "if special circumstances appear to it to render such a course advisable in the interests of justice". It may be noted that section 175(2) adopts a more flexible approach regarding unlisted documents, allowing such documents to be marked with the "leave of the court", without the need to establish "special circumstances" as required for unlisted witnesses. However, in both instances, the Court must exercise its discretion

judicially, not arbitrarily, in accordance with sound principles of law and judicial precedent.

According to the proviso to section 175(2), unlisted documents can be marked during the cross-examination of witnesses. However, this should not be considered as a licence to mark any document through cross-examination. Documents can only be marked during the cross-examination to contradict the testimony of the witness. A document can be marked if the witness is the author, recipient or has knowledge of the document. If the witness is able to identify his handwriting or signature, or any handwriting or signature of another person on the document, or otherwise acknowledges the document, it can be marked.

If the witness acknowledges receipt of the document but disputes its contents, it can be marked "subject to proof" of its contents. There may be instances where a witness has previously seen the document or has knowledge of it but does not accept its genuineness or authenticity. In such cases, the document may be marked "subject to proof" allowing the witness to explain his position regarding the document. As a general rule, where the witness denies the document, it cannot be marked through that witness. (*Gabo Singho v. Karunawathie* [2012] BLR 72) However, this is not an absolute rule. If it is evident that the denial is intended to conceal the truth and not *bona fide*, the Judge may allow the document to be marked "subject to proof". The decision of the Judge in such circumstances is more a matter of prudence than of science. According to the last part of the Explanation to section 154(1) of the Civil Procedure Code, "*Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it.*" However, section 114(1) of the Civil Procedure Code states "*No document shall be placed on the record unless it has been*

proved or admitted in accordance with the law of evidence for the time being in force." It is important to understand that allowing a document to be marked does not amount to admitting it in evidence. Marking a document and admitting it in evidence are two distinct processes. The Judge has the power to reject any document marked during the trial, whether or not marked subject to proof, in the final evaluation of the evidence in the judgment. Similarly, documents marked "subject to proof" but not technically proved should not be automatically rejected. For instance, when a document is marked by the author himself, and the opposite party moves to have it marked subject to proof, the document need not be rejected on the basis that it was not proved by calling witnesses. The determination of whether a document has been proved, its admissibility in evidence, and the extent of its admissibility should be made at the conclusion of the trial, based on the unique facts and circumstances of each case.

The first part of the Explanation to section 154(3) of the Civil Procedure Code states that if the opposing party does not object to the marking of a document, the Court may allow it to be marked and admitted in evidence, provided it is not a document prohibited by law from being received in evidence. In *Seyed Mohomed v. Perera* (1956) 58 NLR 246 at 254, Justice Sinnetamby explained that "*What is meant, by the expression 'forbidden by law' as considered in the case of Siyadoris v. Danoris (1941) 42 NLR 311 and construed to mean absolute prohibition and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled—an instance of absolute prohibition which immediately comes to mind is income tax returns made by a person to the Income Tax Department*." If the opposing party objects to the marking of the document, such objection must be raised at the time the document is marked and not at a later stage of the trial or on appeal. This rule also applies to notarially executed documents including deeds. (*Silva v.*

Kindersly (1914) 18 NLR 85, *Siyadoris v. Danoris* (1841) 42 NLR 311, *Seyed Mohomed v. Perera* (1956) 58 NLR 246, *Cinemas Ltd v. Sounderarajan* [1998] 2 Sri LR 16) If an objection is raised to the marking of a document at the appropriate time, the Court must first decide on the authenticity of the document, and then decide whether it constitutes legally admissible evidence.

A document marked subject to proof, but not subsequently proved, may still constitute valid evidence if the party objecting fails to raise that matter when closing the case reading in evidence the marked documents, as such failure is deemed a waiver of the objection previously raised. This has been the *cursus curiae* of the original civil Courts (*Sri Lanka Ports Authority v. Jugolinija Boat East* [1981] 1 Sri LR 18, *Balapitiya Gunananda Thero v. Talalle Methananda Thero* [1997] 2 Sri LR 101), and was subsequently given statutory recognition through the introduction of section 154A to the Civil Procedure Code by Act No. 17 of 2022.

According to section 155 of the Civil Procedure Code, before a witness is allowed to identify a document, he should generally be asked to state the grounds of his knowledge of the document. Section 156 provides that, "*the opposing party, if he desires to do so, should be allowed to interpose with cross-examination on this point before the document is shown to the witness.*" Judges must not allow section 156 to be misused to delay or hinder the steady progress of the trial, as the same questions can be asked during cross-examination.

A document which is thirty years old can be marked under section 90 of the Evidence Ordinance if it is produced from proper custody. This section provides that any document, thirty years old produced from any custody which the Court in the particular case considers proper, may be presumed to be genuine both regarding to its contents and its due execution. The explanation to that section states that "*Documents are*

said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or in the circumstances of the particular case are such as to render such an origin possible." Section 161 of the Civil Procedure Code is to a similar effect but does not specify a time period, as section 90 of the Evidence Ordinance does. Section 161 reads as follows: "*When the document purports on the face of it to be so old that proof of the actual execution is not required by law, it is not proved until sufficient evidence has been given to prove both that it comes into court from the proper custody, and that it has continued to be in proper custody throughout the period during which it can be reasonably accounted for*." It must be stressed that the word "document" in these sections refers to the original document itself. However, in reference to section 90 of the Evidence Ordinance, Justice K.D. De Silva with the agreement of Chief Justice Basnayake in *Davoodbhoy v. Farook* (1956) 58 NLR 126, held that the *duplicate* of a last will over thirty years old produced in that case was admissible under section 90 of the Evidence Ordinance as it was produced from proper custody. His Lordship at page 132 stated "*The reason why section 90 insists on proper custody is to ensure the authenticity of the documents admitted under that section. Whether or not a particular custody is proper is a question of fact to be determined in the circumstances of each case. Proper custody does not necessarily mean the best or the strictly legal custody. It is sufficient if the circumstances render it probable that the origin was legitimate*." The decision of the Court on the question of proper custody will depend on the unique facts and circumstances of each case. It is significant to note that when a thirty-year-old document is marked from proper custody, the Court may, not shall, accept the contents of the document. In *Dingiri Appu v. Mohottihamy* (1963) 68 NLR 40 at 43, Chief Justice Basnayake stated that "*Kiri Menika v. Duraya (supra) should not*

be regarded as holding that the court is bound in every case to presume any or all of the matters referred to in section 90 on the production of the duplicate. It is open to the court, as in the case of the original itself, to refrain from presuming any of the matters stated therein."

Sections 145(1) and 155(c) of the Evidence Ordinance are also relevant in this regard. According to section 145(1), "*A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*" In terms of section 155(c), the credibility of a witness may be impeached by the adverse party or, with the consent of the Court, by the party who calls him by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

However, previous statements cannot just be marked to contradict a witness without following the procedure laid down in section 145(1) of the Evidence Ordinance. In *Tennekoon v. Tennekoon* 78 NLR 13 at 16, Justice Malcolm Perera explained the procedure as follows:

> *Section 145 requires that if it is intended to put such writing to contradict a witness, his attention must be called to those parts of the statement which are to be used for contradicting him. The witness must be afforded every opportunity to address his mind to the relevant portion of the statement and every occasion given to him to explain or reconcile his statements. If such an opportunity is not given to the witness, the contradictory writing cannot properly be admitted in evidence. The witness must be treated with fairness and should be afforded every opportunity of explaining the contradictions after his attention has been drawn with clarity and in a reasonable*

manner. It is a question of fact in each case whether there has been a substantial compliance with the requirements of section 145.

On the question of filing the list of witnesses and documents, let me emphasize a very important point. As repeatedly highlighted by the superior Courts, the underlying principle behind the requirement of filing the list of witnesses and documents fifteen days before the trial is to ensure that each party is fully aware of the witnesses and documents the opposing party intends to rely upon in establishing his case at the trial, thereby preventing any party from being taken by surprise and eliminating the prejudice caused thereby.

A party cannot present a case at the trial that differs from what has been pleaded and put in issue. Although our legal system operates within an adversarial framework, litigation is not intended to be a mere contest of strategy. It is not a game of hide and seek. It is a solemn process aimed at uncovering the truth and ensuring justice by remedying injustice. Technicalities that obstruct the pursuit of justice must be removed, and cases should, as far as possible, be resolved on their merits, unless such a course of action causes grave prejudice to the opposing party. Chief Justice Bonser more than one and a quarter centuries ago, in the year 1895, in *Read v. Samsudin* 1 NLR 292 at 294, cited with approval the following dicta of Sir George Jessel, Master of the Rolls, from the case of *Jones v. Chennell*, 8 Ch. D 506: "*It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but where 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.*" His Lordship concluded, "*Those observations of the late Master of the Rolls ought to be borne in mind by every Judge in this Colony.*"

In describing the scope of section 175(1), Justice Gratiaen in the oft-quoted case of *Girantha v. Maria* (1948) 50 NLR 519 at 522 stated as follows:

> *It remains to be considered whether the learned Judge was justified in refusing to allow Inspector Sivasambo to be called as a witness for the defence. 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 interests of justice". 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 is to prevent surprise. 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 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 nature of the testimony which the defendants anticipate he would give was expressly put to the 1st plaintiff when she gave evidence. The element of surprise does not arise because the plaintiffs had several months' notice of the defendants' decision to call him on the adjourned date of hearing. 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 have been examined. The learned Judge refused the application because the plaintiffs "would be placed at a disadvantage" if Inspector Sivasambo's evidence were 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. In my opinion the learned Judge has not properly exercised the discretion vested in him by section 175, and this Court is entitled to reverse his decision.*

When exercising discretion under section 175, the Court should allow documents pleaded in the plaint, answer, replication, statement of claim, statement of objections, etc., which the opposing party had prior notice of, to be marked, regardless of whether they are listed, as there is no element of surprise in permitting them to be marked.

In the Supreme Court case of *Walker & Sons Co. Ltd. v. Masood* [2004] 3 Sri LR 195, the document in question was allowed to be marked despite not being included in the list filed under section 121(2), as it had been referred to in the plaint and had been listed 13 days prior to the trial. The Court held that there was no element of surprise in such circumstances. Justice Weerasekera emphasized that section 175 of the Civil Procedure Code permits the Court to allow unlisted documents to be marked in appropriate circumstances. The Court rejected the contention that listing documents under section 121(2) is mandatory.

In *Arpico Finance Co. Ltd v. Perera* [2007] 1 Sri LR 208, the document in question, though listed in an additional list filed after the commencement of the trial, had been referred to in the replication, and an issue had also been raised based on it. On appeal, the District Court was directed to allow the document to be marked. The Court held that the principle underlying the requirement to file a list of witnesses and documents is to prevent an element of surprise and to avoid causing prejudice to the opposing party.

In *Bibile v. Baduge* [2008] 1 Sri LR 374, after the conclusion of the plaintiff's evidence, the Court disallowed the plaintiff from calling the surveyor who had prepared a plan pursuant to a commission issued by the Court, citing non-compliance with section 121(2) of the Civil Procedure Code. On appeal, this order was set aside, with the appellate Court holding that the surveyor should have been permitted to testify under section 175 of the Civil Procedure Code. The Court observed that the surveyor prepared the plan on a commission issued by Court, and the surveyor and the plan had also been included in the defendant's list, eliminating any element of surprise.

In *Farose Ahmed v. Mohomed* [2006] 2 Sri LR 66, the Court permitted the marking of a document despite it not being listed fifteen days before the first date of trial. The rationale was that the document in question was a public document, specifically a Gazette Notification, and thus its inclusion did not cause prejudice or surprise to the opposing party.

The foregoing discussion should not be construed as diminishing the significance or legal force of section 121 of the Civil Procedure Code.

As Chief Justice G.P.S. De Silva emphasized in *Asilin Nona v. Wilbert Silva* [1997] 1 Sri LR 176 and *Abdul Munaf v. Mohamed Yusuf* [1999] 2 Sri LR 76, where a witness or document has not been listed in compliance with the law, the burden lies on the party failing to list to demonstrate the existence of special circumstances that warrant the Court's indulgence in granting such an application under section 175 of the Civil Procedure Code. This was further illustrated by Justice Wimalachandra in *Siriwardena v. Dissanayake* [2004] 3 Sri LR 137.

In this regard, sheer negligence, as opposed to an innocent mistake, does not constitute "special circumstances".

Although "interest of justice" and "ascertainment of truth" are primary considerations, as Justice Amarasekara stated in *Matilda Herathge v. Dayananda* (SC/APPEAL/97/2011, SC Minutes of 19.10.2023), "*For the interest of justice and ascertainment of truth, it is necessary for each party to know the scope of and nature of evidence of each other's case. If one acts in a prejudicial manner affecting the opposite party's rights or entitlements by not listing an important document, he or she cannot be allowed to ask permission to produce the same for interest of justice*." As Justice Amarasekara further pointed out, another advantage of filing lists of documents as required by law is that the opposite party can make use of "*the provisions in the Civil Procedure Code under chapter XVI including interrogatories and inspection and production of documents for the benefit of his case*."

Procedural law should not be given a secondary position. Both substantive law and procedural law are equally important for the proper administration of justice. This principle was emphasized by Justice Amarasinghe in *Fernando v. Sybil Fernando and Others* [1997] 3 Sri LR 1. Without procedural law, the administration of justice would descend into confusion and uncertainty. Justice Bandaranayake (as Her Ladyship then was) eloquently expressed this in *Sudath Rohana v. Mohomed Zeena* [2011] 2 Sri LR 134 at 145: "*When it is stated that the substantive law and procedural law are complementary, it signifies the importance of procedural law in a legal system. Whilst the substantive law lays down the rights, duties, powers, and liberties, the procedural law refers to the enforcement of such rights and duties. In other words, the procedural law breathes life into substantive law, sets it in motion, and functions side by side with substantive law*." Similarly, in *Bhagwan Swaroop v. Mool Chand* AIR 1983 SC 355, Justice Sen observed: "*Excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object*

of doing substantial justice to the parties may in many cases lead to miscarriage of justice."

There can be no rigid or universally applicable rule governing the circumstances under which a trial Judge should permit unlisted witnesses to be called or unlisted documents to be marked. Each decision must be made based on the unique facts and circumstances of the case, carefully weighing the competing interests at stake. The Judge must balance the potential irreparable loss that may be caused to the party seeking such permission if it is refused, against the substantial prejudice that may be caused to the opposing party if it is granted. Ultimately, the decision should be guided by the interests of justice, prioritizing the ascertainment of the truth over rigid adherence to procedural technicalities.

The case of *Mashreq Bank v. Arunaselam* [2007] BLR 20 serves as an instructive example of how trial Judges should exercise their discretion under section 175 of the Civil Procedure Code. In this case, the plaintiff bank had originally listed its credit officer as a witness, but before his evidence could be recorded, he left the bank. During the trial, the bank filed an additional list naming the new credit officer as a witness. Although this was clearly contrary to section 121 of the Civil Procedure Code, the trial Judge overruled the objection to calling the new officer, exercising discretion under section 175. On appeal, this decision was upheld on the basis that no prejudice was caused to the defendant by calling the succeeding officer as both were intended to present official documents. Justice Wimalachandra endorsed the view expressed by the trial Judge in the impugned order that when official documents are produced, it is the documents which are material and not the person who produces them.

On the facts and circumstances of the instant case, the ruling against marking deed No. 10421 through the testimony of the plaintiff cannot be justified. This deed was clearly pleaded the plaintiff in paragraph 2 of the plaint as the title deed of the plaintiff's predecessor in title. The District Judge should have allowed the document to be marked under section 175(2) of the Civil Procedure Code as there is no element of surprise in allowing that deed to be marked. It is well-established that when an objection is raised against a single document in a list, there is no justification to reject the entire list that contains the contested document. The District Judge is obliged to assess each witness and document in the list separately on the merits.

For the sake of completeness, it is necessary to briefly state the law as it stands today regarding the list of witnesses and documents. With the enactment of the Civil Procedure Code (Amendment) Act, No. 29 of 2023, section 79A now requires the Court to appoint a date for the pre-trial conference not less than three months and not exceeding five months from the date of filing the answer or, where applicable, from the date given for filing the replication, regardless of whether the replication was filed.

It is important to note that, with this amendment, section 121(2) has been repealed. Instead, in accordance with section 79B, parties are now required to tender lists of witnesses and documents, along with copies of the said documents in their possession and control, to the registry of the Court not less than thirty days before the date first fixed for the pre-trial conference. Simultaneously, the party must serve copies of the list and documents on all other parties and provide proof of service thereof.

Notwithstanding anything to the contrary contained in the Evidence (Special Provisions) Act, No. 14 of 1995, the Electronic Transactions Act, No. 19 of 2006, or any other written law, where any party proposes to

tender a document in electronic form, the provisions of section 79C shall apply to the tendering of such documents. A party proposing to tender documents in electronic form shall, not less than thirty days before the date first fixed for the pre-trial conference, file in Court, with copies served on the opposing party or parties, a list of such documents in electronic form, along with an index and copies of the documents sufficient to enable the opposing party or parties to understand the nature of the evidence. The steps the parties must take thereafter are set out in the section.

In terms of section 142A of the Civil Procedure Code, the main purpose of a pre-trial conference is to facilitate a settlement between the parties. The pre-trial conference is not another procedural step in a civil case such as filing the answer or calling the case in open Court to fix a date for trial. It is also a mistake to assume that the purpose of a pre-trial conference is to lay a solid foundation for a full-blown trial. In terms of section 142A(2), it is the peremptory duty of each District Judge conducting the pre-trial conference to make every effort to persuade the parties to reach a settlement of the dispute. A Judge conducting a pre-trial conference must actively take part in the process, rather than being a passive observer or umpire. Settlement is the norm and fixing the case for trial is the exception. The Judge shall fix the case for trial, if, and only if, all settlement efforts fail. In the event the case is fixed for trial, the Judge must limit the trial to the real issue or issues between the parties, as identified by the Judge himself. In accordance with section 142F, the Judge shall determine the issue or issues by considering the pleadings, proposed admissions and issues of the parties, interrogatories, documents, agreements of the parties, and reports, if any, submitted to the Court during the pre-trial conference. Although the Judge may, of course, seek the assistance of lawyers, the Judge cannot delegate this judicial function to them.

There is no need to call all the witnesses or mark all the documents listed in the list of witnesses and documents at the trial. In terms of section 142A and 142B, the Judge shall at the pre-trial conference identify the necessary witnesses to be called and necessary documents to be marked at the trial and make appropriate orders accordingly before the trial proper takes place. If the pre-trial conference is conducted effectively, only a limited number of witnesses would be called, and only the relevant documents would be marked at the trial to resolve the specific issues on which the parties could not reach agreement. This approach will eliminate objections to witnesses and documents during the trial and avoid the leading of unnecessary evidence, thereby promoting efficient trial management and the speedy disposal of cases.

Although section 79B requires the list of witnesses and documents to be filed not less than thirty days before the date first fixed for the pre-trial conference, section 142D provides a party with another opportunity to seek permission to call any additional witnesses and produce any additional documents not listed thirty days before the pre-trial conference, but identified or discovered at the pre-trial conference. This section can be invoked to call additional witnesses and mark additional documents. A party who did not file the list as required by section 79B cannot invoke this provision unless the other party consents to it at the pre-trial conference. Section 142D reads as follows:

> *142D(1). The court shall, at the pre-trial conference, on application of any party, grant permission to such party, to call any witness or produce any document at the trial, if such witness or document is identified at such conference to be relevant to the matters in dispute, notwithstanding such witness or document not being included in the list of witnesses or documents filed under paragraph (b) of section 79B:*

Provided that, the pre-trial Judge may award costs against the party seeking to tender documents or summon witnesses which had not been included in the list filed under paragraph (b) of section 79B unless such party can adduce sufficient reasons for the failure to include such documents or witnesses in the said list.

(2) The court may, at its discretion, grant permission at the pre-trial conference, to any party to produce any document at the trial and call any witness in proof thereof, if such document is discovered under Chapter XVI relevant to the matters in dispute.

(3) Where the court grants permission to call any additional witness or document under subsection (1) or (2), the court shall, at the pre-trial conference, record the fact that such party is entitled to call such witness or produce such document at the trial and no further list of witnesses or documents is required to be filed thereafter.

Notwithstanding the detailed provisions introduced by Act No. 29 of 2023 requiring the parties to provide details of witnesses to be called and documents to be marked at various stages prior to the trial, the legislature, with wisdom, chose not to repeal section 175 of the Civil Procedure Code but instead amended it to align with the pre-trial steps. Section 175 now provides the final opportunity for a party to call and mark unlisted or not properly listed witnesses and documents at the trial. A party who could not invoke the provisions of section 142D may also invoke this provision depending on the facts and circumstances of the case. Section 175, as presently stands, reads as follows:

175(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 subparagraph (i) of

paragraph (b) of section 79B or permitted by court under section 142D:

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 subparagraph (ii) of paragraph (b) of section 79B and which is not so included or not permitted by court under section 142D shall not, without the leave of the court, be received in evidence at the trial of the action:

Provided that nothing in this subsection 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.

(3) Where an order is made under this section, the court shall take into consideration any order made under section 142B.

The question of law on which leave to appeal was granted, i.e. whether both the High Court of Civil Appeal and the District Court erred in law by upholding the objection to the marking of deed No. 10421 as P1 and rejecting the entire list of witnesses and documents, is answered in the affirmative. Consequently, the order of the District Court dated 29.11.2021 and the judgment of the High Court dated 28.04.2023 are set aside and the appeal is allowed but without costs. The District Judge will now permit the deed to be marked in evidence and proceed with the trial in accordance with the law.

Let me conclude this judgment with the insightful words of Justice Wijeratne in *Kandiah v. Wiswanathan* [1991] 1 Sri LR 269 at 278, which remain profoundly relevant and instructive to this day and beyond:

> *It happens 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.*

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court