

Tikiri Banda V. Loku Menika

342/1963

Present: Basnayake, C.J., and Abeyesundere, J.

**TIKIRI BANDA, Appellant, and LOKU MENIKA and others,
Respondents**

S. C. 190/61—D. C. Kandy, 7866/M

**Witness—Name not included in list of witnesses—
Admissibility of his evidence—Civil Procedure Code, ss. 121,
175.**

Judgment was given in favour of the plaintiff upon the evidence of a witness whose name was not included in the list of witnesses filed in accordance with section 121 of the Civil Procedure Code. The trial Judge was wrongly made to believe that the witness's name was in the prescribed list, and his permission was not obtained to admit the witness's evidence.

Held, that the evidence of the witness was illegally admitted, and his evidence could not form the basis of the judgment.

APPEAL from a judgment of the District Court, Kandy.

H. W. Jayewardene, Q.C., with D. R. P. Goonetilleke, for Defendant-Appellant.

N. E. Weerasooria, Q.C., with L. V. R. Fernando, for Plaintiffs-Respondents.

October 18, 1963. BASNAYAKE, C.J.—

In this action the plaintiffs Totagodawatte Mudiyansele, Pallehagedera Loku Menika, Totagodawatte Mudiyansele, Pallehagedera Bandara Menika and Totagodawatte Mudiyansele, Pallehagedera Leelawathie Menika sued the defendant Totagodawatte Mudiyansele, Pallehagedera Tikiri Banda and prayed

judgment in a sum of Rs. 12,762 being the mesne profits from the land described in the schedule to the plaint for a period of three years immediately preceding the date of action, namely, 27th October 1959. The learned Judge entered judgment for the plaintiffs in a sum of Rs. 3,314 and costs. This appeal is from that judgment.

The main submission of learned counsel for the appellant is that the evidence of Sakalasooriya Mudiyansele Tikiri Banda of Yatigammana was illegally admitted as he was not a witness whose name was included in the list of witnesses filed in accordance with section 121 of the Civil Procedure Code. The plaintiffs' Proctor filed a list of witnesses on 1st June 1960 before the date of trial and the name of Sakalasooriya Mudiyansele Tikiri Banda of Yatigammana does not appear therein. On 22nd June 1960 a list described as an additional list of witnesses was filed in which there occurs the name of Tikiri Banda Totagodawatte of Pottepitaya.

When the witness who described himself as Sakalasooriya Mudiyansele Tikiri Banda was called into the witness box, counsel for the defendant objected to his giving evidence on the ground that his name did not appear in the list of witnesses. Counsel for the plaintiffs referred the Court to the list filed on 22nd June 1960 in which there was the name of Tikiri Banda Totagodawatte of Pottepitaya, thereby making the Court to believe that witness Sakalasooriya Mudiyansele Tikiri Banda was the same person who was described as Tikiri Banda Totagodawatte. The learned District Judge asked the witness whether he was from Totagodawatte, and when he answered in the affirmative, he was allowed to give evidence. The learned Judge did so because he was made to believe that he was the witness who was described as Tikiri Banda Totagodawatte.

In the course of the plaintiffs' case, when counsel for the plaintiffs moved the Court to call Tikiri Banda Totagodawatte, counsel for the defendant objected stating that he had already been called, and referred to the proceedings of 20th February 1961. Counsel for the plaintiffs submitted that the person called on that date was Tikiri Banda Sakalasooriya of Totagodawatte and not Tikiri Banda

Totagodawatte, but did not press his application to call Tikiri Banda Totagodawatte and reserved for consideration later whether he should be called and finally learned counsel closed his case without calling Tikiri Banda Totagodawatte.

It is submitted that Sakalasooriya Mudiyansele Tikiri Banda is not a person whose name appears in the list of witnesses and that if his evidence goes out of the case, the plaintiffs' case must fail as there is no other evidence to establish it.

Section 175 of the Civil Procedure Code reads: "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."

Now section 121 provides— "(1) The parties may, after the summons has been delivered for service on the defendant, obtain, on application to the court or to such officer as the court appoints in that behalf, before the day fixed for the hearing, summonses to persons whose attendance is required either to give evidence or to produce documents. (2) 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."

In the instant case, Sakalasooriya Mudiyansele Tikiri Banda was permitted to give evidence in the mistaken belief that his name appeared in the list of witnesses filed in terms of the Code whereas, in fact, as it later turned out, his name was not in the prescribed list of witnesses, and the calling of such a witness is barred by section 175 except where the Court in its discretion permits it where special circumstances render such a course advisable in the interests of justice. The learned District Judge was not invited to consider whether he should permit the witness Sakalasooriya Mudiyansele

Tikiri Banda whose name was not on the list of witnesses to give evidence in the interests of justice because he was wrongly made to believe that the witness' name was in the prescribed list. The evidence of Sakalasooriya Mudiyanseelage Tikiri Banda has in the circumstances been illegally admitted, and his evidence cannot form the basis of the judgment in this case. It would appear from the judgment of the learned District Judge that he had reached almost all his conclusions on the evidence of that witness. The defendant is, therefore, entitled to succeed in his appeal.

We accordingly set aside the judgment and decree of the learned District Judge and order that the plaintiffs' action be dismissed. We award costs both here and below to the appellant.

ABEYESUNDERE, J.—I agree.

Appeal allowed.