
**NANDAWATHIE
VS.
JINASOMA**

COURT OF APPEAL.
WIJEYARATNE., J.
CALA 301/2002 (LG)
DC GAMPAHA 35471/L.
NOVEMBER 29, 2004.

Civil Procedure Code, sections 121, 175, 175(2) – Refusing to allow document not in the list – Discretion of Court ? – Failure to list or delay of producing documents ? – Consequences.

On leave being sought –

HELD :

Per Wijeyaratne, J.

- (1) Upon the literal reading of the provisions of section 121 read with section 175, it is true that the document that has not been listed as required by law should not be allowed in evidence. However, the purpose of reading such document is to establish facts and assist Court in determining the facts. The purpose of reading documents in evidence is either to support the contention of the party or to destroy the case of the opposite side.
- (2) Mere delay in producing the documents or failure to list same on the part of the defendant should not stand in the way of serving ends of justice, through the establishment of the truth.

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- (3) In this particular instance the trial Judge who allowed another document, which is referred to in the other document to establish such fact is not justified in rejecting the 2nd document. He has not used his discretion judiciously.

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

Case referred to :

Kandiah vs. Visvanadan 1991 1 Sri LR 269.

S. A. D. S. Suraweera for petitioner.

M. U. M. Ali Sabry for respondents.

Cur. adv. vult.

August 1, 2005.

WIJEYARATNE J.,

This is an application for leave to appeal from the Order of the Learned District Judge refusing to allow the document marked V14 to be read in evidence by the witness for the defendant when giving evidence. This document was to be marked at the trial in a case instituted by the plaintiff seeking a declaration that the plaintiff is entitled to right of servitude over the land of the defendant given access of his land described in schedule 02 of the plaint or in the alternative to declare the plaintiff entitled to such right of way of necessity.

The defendant filing answer denied the existence of such road or the right of the plaintiff to use such road over her land and said

that the means of access to the land claimed by the plaintiff was given in the plan bearing number 65/64 marked as lot 05 in the said plan.

After parties raised several issues on the disputed fact, the case proceeded to trial by the plaintiff giving his evidence, leading other evidence of the other witnesses and reading the several documents in evidence and thereafter the defendant called two witnesses and through the last witness tried to produce these documents, a plan showing the sub division of lots 9 and 10 in the said plan No. 65/64 being subdivided.

The defendant's counsel moved to mark this plan No. 310-2K through the last witness of the defense who also produced deed No. 48 dated 03.01.2002 by which the plaintiff in the present action conveyed the lot 02 of Plan No. 310-2K marked V14 being sub division of lot 9 and 10 of Plan No. 65/64. However, when this plan V14 was to be read in evidence, the counsel for the plaintiff objected to the same on the ground that the same has not been listed under-section 121 of the Civil Procedure Code.

After hearing submissions in support of the objections and in defense, the Learned Trial Judge made order refusing to allow such document being marked. The Learned trial Judge refused the application on the basis that it is not a fit case for him to exercise the discretion under section 175(2) of the Civil Procedure Code because the trial commenced on 21.01.1997.

The defendant has not taken any steps to list these documents even as at 01.04.2002. The Learned District Judge appears to have considered that the defendant is not justified in not listing this

document even after several years of the commencement of the trial. However the defendant's position was that the defendant was not relying on this document to prove her case and that was not one of his documents but that of the plaintiff who suppressed the existence of such documents and such document is contrary to the position taken up by the plaintiff and the claim made in his plaint and in evidence.

The very document is dated 22.08.2001 the date after the closure of the plaintiff's case.

Being aggrieved by the said order of the Learned District Judge refusing to allow to read such document in evidence, the defendant made this application for leave to appeal. Court granted leave on the question whether the Learned District Judge has used his discretion under section 175(2) of the Civil Procedure Code lawfully and justifiably.

In considering the argument it is significant to note that the Learned District Judge has allowed V13, Deed No. 48 dated 03.01.2002 to be read in evidence without any objection from the Plaintiff. The document sought to be imported and rejected namely V14 is the very document that is referred to in document V13 read in evidence.

Examining the evidence on record it is clear that the defendant's counsel attempted to establish the fact that the very Plaintiff who denied the existence on plan No. 65/64 and having acted upon it has during the pendency of the action too acted upon the same and proceeded to subdivide lot No. 9 and 10 of 65/64 dated 06.04.1964. V13 clearly established that the very plaintiff has transferred the rights on said deeds describing the property

conveyed as subdivided lots 9 and 10 of Plan No. 65/64, the alternative is that facts so established is inconsistent with the plaintiff's position from his conduct and the fact that the plaintiff's evidence in support of his claim cannot justifiably be acted upon.

Upon the literal reading of provisions of section 121 read with section 175, it is true that the document has not been listed as required by law and should not be allowed in evidence. However the purpose of the reading of such document is to establish facts and assist Court in determining the facts after ascertaining the truth is most important to be borne in mind of the trial Judge. The purport of reading documents in evidence is either to support the contention of the party or to destroy the case of the opposite party.

In the case of *Kandiah vs. Visvanadan*⁽¹⁾ it was held that whether leave of Court should be granted under section 175(2) to read the document not listed under 121(2) is a matter eminently within a discretion of the trial Judge. The same Judgment held further the precedents indicated the instances of granting such leave as –

- (1) where it in the interest of justice to do so.
- (2) where it is necessary for the ascertaining of the truth
- (3)
- (4) where sufficient reasons are adduced for the failure to list the documents. (as for instance where a party is ignorant of its existence before the trial)

This instance eminently fit the facts of the present case. The defendant's position of the fact that they became aware, of these documents subsequently ; the very date of the documents indicates the preparation of the same only after the closure of the plaintiff's case. The reading of the evidence in document marked V14 was

sought in the name of justice and for the ascertainment of the truth namely the plaintiff who denied the plan No. 65/64 being acted upon has himself acted contrary to his evidence and denial of such facts. Besides, when the Court has allowed the document V13 conveying the land described as being depicted in Plan V14, there is no justification for shutting out such plan only because even otherwise the Court that admitted document marked V13 cannot overlook the fact of the description of the property conveyed by the plaintiff with reference to the plan, the use of which he denied.

In such circumstances, the mere delay of producing these documents or failure to list the same on the part of the defendant should not stand in the way of serving ends of justice through the establishment of the truth and in this particular instance the learned Trial Judge who allowed one document to establish such fact is not justified in rejecting the 2nd document. Therefore he has not used his discretion judiciously.

Accordingly the appeal is allowed and the Learned District Judge is directed to admit the document marked V14 bearing plan No. 310-2K dated 22.08.2001 prepared by J. M. D. T. Patrick Reginald, Licensed Surveyor and the Order is made setting aside the impugned order of the Learned District Judge dated 16.07.2002 rejecting the said document marked V14. The Learned Trial Judge is directed to admit the said document in evidence and proceed with the trial accordingly to law. The appeal is allowed with costs.

Appeal allowed.

Trial judge directed to admit the document in evidence.