

**SALIH**  
**v**  
**HEMAWATHIE**

COURT OF APPEAL.  
AMARATUNGA, J., AND  
BALAPTABENDI, J.  
CALA 403/2005 (LG).  
DC COLOMBO 9234 / AE.  
NOVEMBER 11, 2002

*Civil Procedure Code, sections 30, 121 (2) and 175 (2) – Amendment Act, No. 20 of 1977 – Listing of documents – Time period – Additional list – Acceptance-Applicability of section 175(2) – Factors to be considered.*

The petitioner sought to list the documents in question in the second additional list filed just fourteen days before the third date fixed for trial. This was objected to by the defendant and the trial judge upheld the objection.

**Held:**

- (1) Section 121 (2) requires the parties to file their list of witnesses and documents not less than fifteen days before the date fixed for trial.

*Per Amaratunga, J.*

According to my view 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. Accordingly I hold that the document sought to be produced was not properly listed.

- (2) Even if a document is not properly listed under section 175(2) such document can be produced with leave of court; however the section does not specify in what circumstances a court should grant leave to produce an unlisted document.
- (3) In the instant case the court has refused leave to produce the document on the ground that the plaintiff has not given a sufficient reason for her failure to list the document earlier.

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

**Cases referred to:**

*Kandiah v Visvanathan* – 1991 1 SRI L. R. 269.

*S. Mithrkrishnan* with *U. D. Mowjooth* for appellant.

*W. Dayaratne*, for respondent.

*Cur. adv. vult*

November 11, 2002.

**GAMINI AMARATUNGA, J.**

This court having considered the plaintiff-petitioner's application 01  
for leave to appeal has granted leave to appeal on 27/3/2002. After  
leave was granted both parties agreed to file written submissions  
and moved this court to decide the appeal after considering the  
written submissions.

This appeal is against an order made by the learned Additional 10  
District Judge disallowing the plaintiff-appellant to mark a document  
in evidence. The appellant has filed this case to eject the defendant  
who is her tenant on the basis that she has sublet the premises in  
question. On the day fixed for trial i.e. 8/6/2001 it was postponed 10  
for 22/8/2001. On that date it was postponed for 23/10/2001 On  
8/10/2001, 2<sup>nd</sup> additional list of witnesses and documents was filed  
on behalf of the plaintiff-appellant. On 23/10/2001 the trial was  
taken up and the plaintiff commenced to give her evidence. In the  
course of her evidence she sought to mark an extract - a certified  
copy - of the Trade License Register kept at the Colombo Municipal  
Council. This document marked and produced as X1 with the  
appellant's leave to appeal application shows that at the premises  
relevant to the action two other persons have registered a 20  
business. Thus this document is a vital item of evidence to  
substantiate the plaintiff-appellant's claim that the defendant has  
sublet the premises.

The learned counsel for the defendant objected to the production of the document on the basis that since the document has not been listed in accordance with the provisions of section 121(2) of the Civil Procedure Code, it is an unlisted document in the eyes of the law and for that reason it cannot be produced.

There is no dispute that the list by which the plaintiff sought to list the document in question is the 2<sup>nd</sup> additional list filed just 14 days before the third date fixed for trial. On two days fixed for trial, the trial was not taken up. According to section 121 (2) of the Civil Procedure Code 'Every party to an action shall, not less than fifteen days before the date fixed for trial' file a list of documents relied upon by such party and to be produced at the trial. According to my view 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. Accordingly I hold that the document sought to be produced was not properly listed.

Even if a document is not properly listed, under section 175 (2) of the Civil Procedure Code such document can be produced with leave of court. What are the considerations applicable to the granting of leave to produce a document not listed ? The Civil Procedure Code of 1898 did not contain a provision similar to section 175(2) of the present Civil Procedure Code and section 175(2) had been introduced by section 30 of Act, No. 20 of 1977. Before this new subsection was introduced, section 175 merely catered for the calling of a witness not listed in the list of witnesses when the court is of opinion that if special circumstances appear to it to render such a course advisable in the interests of justice. When the amending Act introduced section 175(2) it provided for the production of a document with the leave of court. The new section does not specify in what circumstances a court should grant leave to produce an unlisted document. In *Kandiah v Visvanathan*<sup>(1)</sup> Wijeratna, J. commenting on this said that considerations similar to those applicable in allowing an unlisted witness to be called are relevant in considering whether leave should be granted to produce

an unlisted document. Having examined previous authority Wijeratna, J. set out those considerations as follows:

- 1 Where it is in the interests of justice to do so.
- 2 Where it is necessary for the ascertainment of truth.
- 3 Where there is no doubt about the authenticity of the document.
- 4 Where sufficient reasons are adduced for the failure to list a document.

In this instant case the learned Judge has refused leave to produce the document on the ground that the plaintiff has not given a sufficient reason for her failure to list the document earlier. According to the plaintiff's own evidence she has made inquiries at Colombo Municipal Council about the person who was carrying on a business at the relevant premises only in June 2001. There is no evidence that upto that time she has made any effort to find out this evidence which is very relevant and vital to her case. It is to be noted that this action has been instituted in September 2000. The first trial date was 8/6/2001. Even upto that date she has not made any endeavour to secure this vital evidence. She has obtained the certified copy only on 8/10/2001, i.e even after the 2<sup>nd</sup> trial date. It is stated in the petition that the plaintiff became aware of the existence of this document only after 21/8/2001. If she had made inquiries at the Colombo Municipal Council when she first discovered that the defendant had sublet the premises she could have discovered the existence of this document. According to her evidence she first learnt about subletting in November 1999. But I note that the plaint has been filed in September 1999. In view of this her evidence that she first learnt about subletting in November 1999 cannot be true. In these circumstances I am of the view that the plaintiff has failed to give a satisfactory explanation for her failure to list this document earlier. Accordingly the learned trial Judge's decision not to grant leave to produce the document in question is correct.

Although this document is not admitted, it is still open to the plaintiff to prove the fact of subletting on other evidence. The document in question is only one item of evidence relating to

subletting. Therefore I affirm the order of the learned District Judge and dismiss this appeal with costs fixed at Rs. 5000/-

**BALAPATABENDI, J.** - I agree.

*Appeal dismissed*