

**KANDIAH
V.
WISVANATHAN AND ANOTHER**

COURT OF APPEAL
W.N.D. PERERA, J. AND WIJAYARATNE, J.
C.A. APPLICATION 192/91
WITH C.A. (L/A) 28/91
DISTRICT COURT, MT. LAVINIA
CASE NO. 154/SPL
23 AND 25 JULY 1991.

*Civil Procedure - Production of unlisted document - Civil Procedure Code,
Section 175 (2)*

Held:

When an unlisted document is sought to be produced by a party in a District Court trial, the question as to whether leave of court should be granted under section 175(2) of the Civil Procedure Code is a matter eminently within the discretion of the trial Judge. The precedents indicate that leave may be granted:

- (1) where it is in the interests of justice to do so;
- (2) where it is necessary for the ascertainment of the truth;
- (3) where there is no doubt about the authenticity of the documents (as for instance certified copies of public documents or records of judicial proceedings);
- (4) where sufficient reasons are adduced for the failure to list the document (as for instance where the party was ignorant of its existence at the trial).

Where the court admits such a document, an appropriate order for costs will generally alleviate any hardship caused to the said party.

Leave may not be granted where the other side would be placed at a distinct disadvantage.

When an objection is taken to the admissibility of a document, it is desirable that such objection should be recorded immediately before any further evidence goes down.

Per Wijeyaratne, J. - "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."

Cases referred to:

1. *Read v. Samsuddin* 01 NLR 292
2. *Fernando v. Fernando* 7 NLR 147
3. *Killanchiya v. Clarke* 2 Weer 80, 2 Leader 153
4. *Jones v. Chennell* 8 Ch. D. 506
5. *Andris Hamy v. Dinneris Appu* 2 Times 161, 162
6. *Girantha v. Maria* 50 NLR 519
7. *Silva v. Kindersley* 18 NLR 86
8. *Sayed Mohammed v. Perera* 58 NLR 240

APPLICATION in revision of the order of the District Judge of Mount Lavinia.

Maureen Seneviratne, PC with *Hilton Seneviratne* for plaintiff petitioner.

A.K. Premadasa, P.C. with *D.P. Mendis* and *G.H.A. Suraweera* for 1st defendant - respondent.

Cur.adv vult.

13 September 1991.

WIJEYARATNE, J.

The plaintiff-petitioner has filed this action against her brother (the 1st defendant-respondent) and the Commissioner of National Housing (2nd defendant-respondent) averring that her mother was the tenant of premises No. 27, Lorenz Road, Bambalapitiya under the Trustees of the Shri Sammangoda Pillaiyar Kovil (Hindu Temple), Bambalapitiya, and these premises have subsequently (on 10.1.74) vested in the 2nd defendant-respondent as an excess house under the Ceiling on Housing Property Law, No. 1 of 1973. She avers that she, along with some other members of her family, was occupying these premises with her mother as the tenant, while the 1st defendant-respondent was residing with his family at Wattala, and after the death of her mother on 27.7.73 the 1st defendant-respondent was attempting by fraudulent means to have himself recognised as "tenant" and thereafter to purchase the premises from the 2nd defendant-respondent.

Hence, the plaintiff-petitioner has filed this action to have herself declared as the lawful tenant and that she is entitled to make an application to purchase the house from the 2nd defendant-respondent.

She has also prayed for an interim injunction -

- (a) restraining the 1st defendant-respondent from entering into an agreement with the 2nd defendant-respondent for the purchase of these premises;

- (b) restraining the 1st defendant-respondent from harassing the plaintiff-petitioner and other family members and preventing them having access to these premises;
- (c) restraining the 1st defendant-respondent from ejecting the plaintiff-petitioner and other family members therefrom.

The 1st defendant-respondent has taken up the position that he succeeded to the tenancy on the death of his mother having paid the rents and hence he was entitled to apply to the 2nd defendant-respondent to purchase these premises.

The 2nd defendant-respondent has stated before court that he would be abiding by the decision of the court and consequently would not be participating in the trial.

After certain admissions were recorded, issues were framed and the trial had commenced. On 6.2.91, while the plaintiff-petitioner was giving evidence-in-chief, the proceedings read as follows:-

"Further, I also sent a letter to the Trustees of the Kovil. I produce marked P20 a photocopy of this letter dated 28.5.80 (this is subject to proof). I sent a copy of this letter to the Commissioner of National Housing (this letter is read)."

It would appear that at this stage an objection was taken by learned counsel for the 1st defendant Mr. A.K. Premadasa, P.C., that this document had not been listed, but this objection has not been specifically recorded.

The record of the proceedings continues as follows:-

"Miss Seneviratne states that though this document is not listed at the time it was marked there was no objection and therefore she has the right to tender it in evidence.

The defence states that under sections 121 and 175 it is essential to list all documents and a document not so listed can only be admitted with leave of court."

Thereafter the learned District Judge had postponed his order for a later date after noting that unlisted documents could only be admitted

with the leave of court. He had also given a date to counsel to submit written submissions and postponed the order for a later date. He has also noted the fact that the Trustees of the Kóvil had not been listed or noticed to produce the original of this letter and that this factor is relevant.

Subsequently, by order dated 14.2.91 he disallowed the application stating that what is sought to be produced is a photocopy and not a carbon copy. For this purpose the person who has the possession of the document should have been noticed to produce the original before court but this has not been done. He has also stated that being an important document relied on by the plaintiff, there is no sufficient reason given for the failure to list this document and that the requirements of the law cannot be flouted, and made order disallowing the production of this document through the plaintiff.

This present application has been filed to revise the said order dated 14.2.91.

The relevant sections of the Civil Procedure Code are as follows:-

- "50. If a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.
51. If he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.
52. In the case of any such document not being in his possession or power, he shall, if possible, state in whose possession or power it is.
53. In the case of any action founded upon a bill of exchange, promissory note, cheque, or any negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the court, against the claims of any other person upon such instrument, the court may make such decree as it would have made if the plaintiff had produced the instrument in court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

54. A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the action.
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.

175. (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 opposite party or handed over to a witness merely to refresh his memory."

It should be noted that the requirement for listing of documents by the defendant in a District Court trial was only introduced by section 383 of the repealed Administration of Justice (Amendment) Law, No. 25 of 1975, and subsequently by amendments made by Law No. 20 of 1977 to the present Civil Procedure Code (except in partition cases where special provision is made). Under the old Civil Procedure Code a defendant in a District Court trial need not list his documents.

Under the old Civil Procedure Code all the parties in Courts of Requests cases had to list their documents and witnesses under section 820(2) (since repealed).

The sections material to this application are sections 121(2) and 175(2) which were introduced by Law No. 20 of 1977.

There are similar provisions in Order VII, Rules 14 and 18 of the Indian Civil Procedure Code, which read as follows:-

"Order VII, Rule 14.

- (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.
- (2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

Order VII, Rule 18.

- (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.
- (2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory."

It should be noted that Order VII, Rules 14(1) and 14(20) in the Indian Code correspond substantially to sections 50 and 51 respectively in our Code.

Order VII, Rule 18(1), in the Indian Code corresponds to section 54 of our Code.

There does not appear to be any provision in the Indian Code comparable to section 121(2) in our Code whereby all parties have to file lists of documents not less than fifteen days before the date of trial after notice to the other side.

It should be noted that both sections 51 and 121(2) require the listing of documents by a plaintiff and documents not so listed may not be produced without the leave of court (vide sections 54 and 175(2) respectively).

Order VII, Rule 18(1), (which corresponds to our section 54), prohibits the reception in evidence of documents which are not produced in

court by the plaintiff when the plaint is presented or which are not entered in the list to be added or annexed to the plaint, except with the leave of court.

Hence the question has been considered in India as to the circumstances in which leave of court should be granted.

In Sanjiva Row's "Code of Civil Procedure (Act V of 1908)" revised by Malik and Singhal, 3rd Edn. 1963, Vol. II at page 1528, it is stated as follows:-

"The object of Rules 14 and 18 is to exclude evidence, the existence of which is doubtful, and to provide against false documents being put in after the institution of a suit, but from the mere fact that the document was not originally disclosed, but disclosed at a late stage, the court will not hold that the documents had been fabricated falsely. And the mere fact, that a document is produced at a late stage is not sufficient for its rejection. If the defendant knows the case he had to meet, and the case would not be changed by the admission of the document and the admission of the document would not work such prejudice as cannot be compensated for by costs or otherwise, the document will be admitted in evidence; and the Court may, even in like cases, receive the document in evidence, if it is produced even at a very late stage, if sufficient reasons are assigned for the delay and no prejudice is caused to the other side.

In the matter of admitting documents in evidence, the Court has a discretion, and while, generally speaking, it will be a wise exercise of the discretion to admit such evidence, the question must be decided, in each case, in the light of its particular circumstances.

... Even where the rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it, nor indeed when the Court is satisfied that the documents are genuine."

As to whether leave of court should be granted under section 175(2)

is a matter eminently within the discretion of the trial Judge and would depend on the facts and circumstances of each case.

The precedents indicate that leave may be granted -

(1) Where it is in the interests of justice to do so.

In the case of *Read v. Samsudin* (1), *Fernando v. Fernando* (2) and *Killanchiya v. Clarke* (3) it was held that technical objections should be disregarded in the interests of justice and documents admitted if defendant was not prejudiced.

In the first named case Bonser C.J. quoted the following passage from the judgment of Sir George Jessel, M.R., in the case of *Jones v. Chennell* (4):

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."

In the case of *Andris Hamy v. Dinneris Appu* (5) Sampayo J. stated -

"It has been pointed out more than once that Section 54 does not create an absolute bar, but in furtherance of justice and for proper investigation of cases, the Court should admit documents even though they are not included in any list."

(2) Where it is necessary for the ascertainment of the truth.

In the case of *Girantha v. Maria* (6), Gratiaen J. held that the paramount consideration is the ascertainment of the truth and permitted the calling of a witness in the interests of justice under the proviso to section 175 (as it then stood) of the Civil Procedure Code. It can be said that similar considerations apply in the case of unlisted documents.

(3) Where there is no doubt about the authenticity of the documents

(as for instance certified copies of public documents or records of judicial proceedings).

- (4) Where sufficient reasons are adduced for the failure to list a document (as for instance where the party was ignorant of its existence at the time).

Where the court allows the reception in evidence of an unlisted document, an appropriate order for costs will generally alleviate any hardship caused to the other party.

Leave may not be granted where the other side would be placed at a distinct disadvantage.

The question then arises whether the learned District Judge should have given leave for the admission of this document.

At the outset of the hearing learned counsel for the plaintiff-petitioner submitted that no objection was taken immediately at the time of marking this document as P20, and invited attention of court to section 154 of the Civil Procedure Code and the explanation attached thereto and she relied on the decisions in *Silva v. Kindersley* (7) and *Sayed Mohammed v. Perera* (8), which lay down that when no objection is taken when the document is produced, it is deemed to constitute legally admissible evidence.

Here in this case the objection appears to have been taken almost immediately after the marking of this document and after one sentence of evidence had been recorded. It cannot be said that no objection was taken though it is desirable that the objection should be taken and recorded immediately before any further evidence goes down. Hence I am of the view that the validity of the objection could have been considered by the learned District Judge.

Then the next question arises whether the learned District Judge has correctly exercised his discretion in refusing leave to produce this document.

In the objections filed by the 1st defendant-respondent it is stated that the first date of trial in this case had been 28.7.82 and that it was only on 6.2.91, which was the 29th date of trial, that it was sought

to produce this document after obtaining leave of court. This position has not been denied by the plaintiff-petitioner in the counter objections though it was sought to give various reasons for postponement of trial on the various dates.

This is a document which comes from the plaintiff-petitioner herself, being a photocopy of a letter sent by her, and she should have been aware of its existence. No explanation whatsoever has been given by the plaintiff-petitioner for the failure to list this document for such a long period of time.

Therefore it cannot be said that the learned District Judge has wrongly exercised his discretion in refusing to admit this document.

It is only if the plaintiff-petitioner is given leave under section 175(2) to produce this document that the other question as to whether she could prove the same by way of secondary evidence would arise. In view of the above finding it is unnecessary to go into these matters.

I therefore affirm the order of the learned District Judge dated 14.2.91 refusing leave to produce this document.

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.

The application is dismissed with costs payable by the plaintiff-petitioner to the 1st defendant-respondent.

The connected Leave to Appeal Application No. 28/91 too stands dismissed.

W.N.D. PERERA, J. - I agree

Application dismissed.