

**ROGERS AGENCIES (PVT) LTD  
VS  
PEOPLE'S MERCHANT BANK LTD**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA).  
BASNAYAKE, J.  
CALA 370/2004.  
DC COLOMBO 26645/MR.  
FEBRURAY 09, 2005.

*Civil Procedure Code, sections 121(2) and 175(2) - Filing of list of witnesses/ documents after the case was fixed for trial - Applicability of section 175 (2) - Can the whole list be accepted ?- Objection to be taken at what point of time? - Meaning assigned to "before the day fixed for hearing".*

The Trial Judge overruled the objections of the plaintiff - petitioner to the marking of a document /witnesses filed by the defendant - respondent after the case was fixed for trial on the ground that it was a belated objection and accepted the entire list of documents witnesses filed by the defendant respondent after the case was fixed for trial on the ground that it was a belated objection.

On leave being sought,

**HELD:**

1. The meaning assigned to the words "before the day fixed for hearing" is the first date on which the trial is fixed for hearing.
2. The question whether the trial Judge can allow the entire list of documents in the event of overruling an objection raised by a party in respect of a single document contained in such list, should be answered in the negative

*Per Somawansa, J.(P/CA) :*

"The trial Judge's finding that the plaintiff-petitioner's objection was belated is an error as the procedure adopted in the original courts when objecting to a document/witness, is namely, to object when the document in question is sought to be marked or when the witness in question is called to the witness box to give evidence."

**APPLICATION** for leave to appeal from an order of the District Court of Colombo.

**Case referred to :**

*Kandiah vs. Wiswanathan 1991 1 Sri L. R. 269.*

*C. Paranagama* for petitioner,

*Palitha Kumarasinghe* for respondent.

*Cur. adv. vult.*

June 3, 2005.

**ANDREW SOMAWANSA, J.**

This is an application for leave to appeal against an order made by the learned District Judge of Colombo dated 07.09.2004 whereby the learned District Judge having overruled the objection of the plaintiff - petitioner to the marking of a document not only permitted the said document -V6 to be marked in evidence but accepted the entire list of documents and witnesses

filed by the defendant - respondent after the case was fixed for trial to be a duly filed list of documents and witnesses.

At the inquiry both parties agreed to resolve the question of leave as well as the main matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are as per journal entry (6) dated 18.01.2002 the trial had been fixed for 13.05.2002. On that day as per journal entry (8) trial had been re-fixed for 13.09.2002. As per journal entry (10) dated 13.09.2002 issues had been settled and further trial had been fixed for 27.01.2003 and on the said date the trial had been re-fixed for 23.05.2003. In the meantime, as per journal entry (14) dated 13.05.2003 the defendant - respondent's Attorney-at-Law had filed an additional list of witnesses. The said journal entry is as follows :

“විත්තිකරුගේ නීතිඥ මයා පැමිණිලිකරුගේ නීතිඥ වෙත දැන්වීම් යටමින් සාක්ෂි හා ලේඛණ ලැයිස්තුව පිලිගත යොනු කරන ලෙසත්, සාක්ෂි කරුවන්ට සාක්ෂි සිතාපි නිකුත් කරන ලෙසත් අයදා සිටී.

1. යොනු කරන්න.
2. සිවිල් නඩු සංග්‍රහයේ 121(ii) වගන්තියට අනුකූල නොවේ.
3. විරෝධතා වලට යටත්ව සාක්ෂි සිතාපි සපයා ඉල්ලීම් කල පසුව සාක්ෂි සිතාපි නිකුත් කරන්න.”

Thereafter as per journal entry (15) dated 13.05.2004 the plaintiff - petitioner has closed his case and further trial had been postponed to 07.09.2004 on which date when the defendant-respondent's case commenced, one A. Wimalaratne was called by the defendant-respondent to give evidence. In the course of his evidence counsel for the defendant - respondent sought to mark in evidence the document marked V 6 a complaint made to the Colombo Frauds Bureau on the basis that the said document is listed in the additional list of documents and witnesses filed by the defendant - respondent on 09.05.2003. Counsel for the plaintiff - petitioner objected to the production of the said document marked V6 on the basis that the said document had been listed after the commencement of the trial and that the said document has not been listed in compliance with the provisions contained in section 121(2) of the Civil Procedure Code. Section 121(2) of the Civil Procedure Code reads as follows :

**“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”.**

It appears to me 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 are clear and no other meaning could be assigned to the aforesaid words. Accordingly it is apparent that as per journal entry (6) dated 18.01.2002 the first date on which the trial had been fixed for is 13.05.2002 and the defendant - respondent's additional list of witnesses and documents have been filed on 09.05.2003 clearly not in compliance with the requirements in section 121(2) of the Civil Procedure Code.

Section 121(2) of the Civil Procedure Code is to be read with section 175(2) of the Civil Procedure Code which reads as follows :

**“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”**

In the case of *Kandiah vs. Wiswanathan*<sup>(1)</sup>

“When an unlisted document is sought to be produced 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"

When one examines the reasons given by the learned District Judge for over-ruling the objections of the plaintiff - petitioner, it appears that he has solely gone on the basis that the objections raised by the plaintiff - petitioner is belated.

On an examination of the reasons given by the learned District Judge over ruling the plaintiff - petitioner's objection, it is to be seen that as submitted by the counsel for the plaintiff - petitioner the learned trial judge has without considering any of the matters referred to by both counsel in

their submissions over - ruled the objections solely on the ground that the objection taken by the plaintiff - petitioner to the questioned document marked V6 was belated. The Learned District Judge's reasoning is that the additional list of witnesses and documents dated 09.05.2003 marked P4 had been accepted subject to objections and the plaintiff - petitioner had failed to take up any objection at any of the trial dates after the aforesaid additional list marked P4 was filed and not even at the closure of the plaintiff - petitioner's case did the plaintiff- petitioner take up this objection. In the circumstances, the learned District Judge has come to a finding that the plaintiff - petitioner's objection was belated and proceeded not only to allow the aforesaid document V6 to be marked but also accepted the whole list of witnesses and documents listed in the additional list which I think is an error on the part of the learned District Judge.

It is to be seen that the objection taken by the plaintiff - petitioner was in respect of document marked V6 and the parties made submissions on the question of admissibility of document marked V6 only. In the circumstances an admission of the entire additional list of witnesses and the documents without the plaintiff - petitioner being given a hearing has certainly placed the plaintiff - petitioner at a distinct disadvantage and certainly the order is bad in law. The learned District Judge has not addressed his mind to provisions contained in section 175(2) of the Civil Procedure Code in granting leave of Court to produce a document in evidence. Court has to be satisfied with certain requirements as laid down in *Kandiah vs. Wiswanathan (supra)*. In any event, my considered view is that the objection taken by the plaintiff - petitioner is not belated for the plaintiff - petitioner has objected to the document marked V6 at the appropriate time and at the first opportunity he got. This it appears is the procedure adopted in the original Courts when objecting to a document or witness viz : to object when the document in question is sought to be marked or when the witness in question is called to the witness box to give evidence. The reason is obvious for though listed, documents may not be produced or witnesses may not be called and then again there may be no reason or necessity to object to a document or a witness listed in an additional list.

In any event, I would say that there is no practice or procedure known to law to allow an entire list of witnesses and documents simply by over -

ruling an objection taken in respect of a single document in such a list of witnesses and documents and that too for the reason that objections had not been taken up at the time of filing of such a list of witnesses and documents.

Counsel for the defendant - respondent contends that no prejudice would be caused to the plaintiff - petitioner by admitting the police statement V6 in that the plaintiff petitioner has the right to cross - examine the witness on the document and that the plaintiff - petitioner will not be placed at a disadvantage by allowing the said document marked V6. In support of this submission counsel for the defendant - respondent had cited a series of decisions. I have no reason to disagree with them but none of those decisions deal with a situation as that we are faced with in the instant action. The cases cited by counsel for the defendant - respondent deals with the proposition that non - compliance with the procedure is not fatal to an action, that this is a Court of Justice and is not an academy of law, that it is not the duty of the judge to throw technicalities in the way of the administration of justice and that a Court should not be fettered by technical objections solely based on procedure are not relevant to the instant application.

In this application the proposition of law the Court is called upon to adjudicate is as to whether the trial judge can allow the entire list of documents in the event of over-ruling an objection raised by a party in respect of a single document contained in such list.

I am of the view that the proposition of law as aforesaid should be answered in the negative. For the foregoing reasons, I would allow this application for leave to appeal and set aside the order of the learned District Judge dated 07.09.2004. I direct the learned District Judge to make a fresh assessment of the objections taken by the plaintiff - petitioner in accordance with the law. Costs fixed at Rs.5000 to be paid by the defendant - respondent to the plaintiff - petitioner.

**BASNAYAKE, J. – I agree.**

*Application allowed. District Judge directed to make a fresh assessment of the objections taken by the plaintiff-petitioner in accordance with the law.*