

**ABREW
v
SEKERAM**

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA No. 370/2001
D.C. COLOMBO 18085/L
MARCH 22, 2002

Civil Procedure Code, sections 121 and 175 – Witness not in list – Leave of court sought to call witness – Inadvertance – Is it a special circumstance?

Held -

- (i) Section 175(1) confers on court a discretion to permit a witness not listed to be called if special circumstances appear to render such course advisable in the interests of justice.
- (ii) The burden of satisfying court of the existence of special circumstances is on the party seeking to call such witness.
- (iii) "Inadvertence" does not come within 'special circumstances' envisaged under section 175(1).

APPLICATION for leave to appeal.

Cases referred to:

1. *Asilin Nona v Wilbert Silva* – (1997) 1 Sri LR 176
2. *Kandiah v Wisvanathan and another* (1991) 1 Sri LR 269

Ranjan Suwandaradne for petitioner.

Rohana Jayawardena for respondent.

May 24, 2002

UDALAGAMA, J.

This is an application for leave to appeal against the order of the learned District Judge dated 03.10.2001 in D.C. Colombo case No. 18085/L refusing an application to call a witness not listed in terms of section 121 of the Civil Procedure Code.

It is apparent that the list dated 22.05.2001 is well after the time period specified in section 121 aforesaid and that the plaintiff-petitioner sought by same to list additional witnesses and documents. It is also apparent from the submissions made by the learned Counsel for the plaintiff-petitioner in the court below, on the same date the impugned order was made, that by inadvertence the plaintiff had failed to list the Post Master to prove a document to be marked in evidence.

As held in *Asilin Nona v Wilbert Silva*⁽¹⁾ section 175(1) of the Code imposes a bar against calling witnesses who are not listed in terms of section 121 of the Civil Procedure Code. The 1st proviso to section 175(1) confers on the court a discretion to permit a witness not so listed to be called if special circumstances appear to render such course advisable in the interest of justice. The burden of satisfying the court of the existence of special circumstances is on the party seeking to call such witnesses.

As stated above, the special circumstances submitted by counsel for the plaintiff in the court below appears to be 'inadvertence'. Learned counsel has also referred us to a case⁽²⁾ and specifically to the observance of Justice Wijeratne, who in fact refers to the hardships caused to parties and the delay caused to courts which contribute to the laws delays and importantly stresses the necessity cast on attorneys-at-law to list witnesses and documents as required by law. As held in the same case, whether leave of court should be granted under section 175(2), is a matter which I am inclined to hold is eminently within the discretion of the trial judge.

It appears that the learned District Judge in the instant case was not impressed by the reasoning of the learned counsel who moved for leave of court to call the Post Master as a witness.

I see no reason to interfere with the discretion exercised by the learned District Judge, even though the impugned order appears highly technical to the learned counsel who stated so in his written submissions to this court.

- Leave is refused with costs fixed at Rs. 5250/-

NANAYAKKARA, J. - I agree

Application refused.