

GRICILDA HEWA
v.
THOMAS HEWA

SUPREME COURT
AMERASINGHE, J.,
GUNAWARDANA, J.,
WEERASEKERA, J.
S.C. NO. 163/97
S.C.L.A. (SPL) NO. 50/97
C.A. NO. 34/96
D.C. COLOMBO NO. 16505/L.
SEPTEMBER 9TH, 1998.

Rei Vindicatio Action – Preliminary Objection – No power of attorney on record – Should a power of attorney be tendered at the time of filing of the plaint – Civil Procedure Code s. 25 (b) – Is it fatal.?

The appellant instituted a *Rei Vindicatio* action and on the basis of a preliminary objection the learned District Judge dismissed the action for the alleged reason that a power of attorney or a copy thereof was not in the case record. The Court of appeal affirmed this decision. –

Held:

1. S. 25 (2) of the Civil Procedure Code imposes no obligation on a person appearing as a recognised agent and holding a general power of attorney to tender same or a copy thereof at the time of filing a plaint.

Per Amerasinghe, J.

"It seems to me that in matters of this nature, the important thing is that the person in fact had authority to act and not whether the instrument of authorisation was filed at the time of the institution of the action".

2. The failure to file the power of attorney or a certified copy thereof in court, as stipulated in s. 25 (b) is only an irregularity, which can be cured later.

APPEAL from the judgment of the Court of Appeal.

Cases referred to:

1. *Aitken Spence & Co. v. Fernando* – (1900) 4 NLR 35 at 37.

2. *Udeshi v. Mather* – 1982 1 SLR 12 at 22.
3. *Kumarihamy v. Punchi Menika* – (1936) 38 NLR 385 at 387.

Romesh de Silva, PC with *V.P.A. de Almeida* for the appellant.

Wijedasa Rajapakse for the respondent.

Cur. adv. vult.

September 23, 1998.

AMERASINGHE, J.

The appellant instituted a *rei vindicatio* action against the respondents in the District Court of Colombo. At a certain stage, on the basis of a preliminary objection the learned District Judge dismissed the action for the alleged reason that a power of attorney or a copy thereof was not in the case record. The appellant appealed against the order of the District Court dated 20th February, 1996. The court of Appeal on 19th March 1997, affirmed the decision of the learned District Judge and dismissed the appeal. The Court of Appeal stated that there was no power of attorney on record at the date of the order of the learned District Judge and that according to the date stamp on the power of attorney which has been filed along with the petition of appeal, it had been tendered on 8. 4. 96.

The position of the petitioner was that power of attorney No. 332 dated 6. 11. 93 was filed with a motion on the 14th of October, 1994. The action had been filed on 18. 11. 93 and the judgment was delivered on the 20th of February, 1996. Learned counsel for the respondents admitted that a copy of a motion was received by the respondents by registered post but he denied that the power of attorney was in fact filed. The motion book of the District Court relating to the relevant period is not available and there were no other records relating to filing of the power of attorney. However, it is not understood why trouble would have taken to send a copy of the motion to the respondents while not filing the power of attorney referred to in that motion. There was nothing to be gained by withholding the power of attorney. A perusal of the copy of the power of attorney No. 332 shows that it was certainly in existence on the 8th of November, 1993. This appears from the date stamp of the Registrar-General, to whom the power of attorney had been tendered for registration. In the circumstances, I am of the view that the appellant's claim that the

power of attorney was filed together with the motion on 14th October 1994, is acceptable.

However, the question remains whether a power of attorney must be tendered at the time of filing the plaint. Section 25 (b) of the Civil Procedure Code requires that a person holding general powers of attorney who seeks to appear as a recognized agent must file the power of attorney or a copy thereof in court. In my view, section 25 (b) of the Civil Procedure Code imposes no obligation on a person appearing as a recognized agent and holding general powers of attorney to tender the power of attorney or a copy thereof at the time of filing a plaint.

In *Aitken Spence & Co. v. Fernando* at 37 Bonser, CJ, after conferring with Moncrieff, J. expressed the view that a power of attorney or a copy of it might, under section 25 (b), be filed at any stage of the case. It seems to me that in matters of this nature, the important thing is that the person in fact had authority to act and not whether the instrument of authorisation was filed at the time of the institution of the action. In the matter before us, the authority had existed and therefore the filing of the copy of the power of attorney on 14th October, 1994, was in order.

If the view is taken that the power of attorney or its copy must ordinarily be filed at the time of the institution of the action, the failure to do so would not be a fatal irregularity. In *Udeshi v. Mather*, at 22 it was observed that it is now settled law that the failure to file the power of or a certified copy thereof in court, as stipulated in section 25 (b), is only an irregularity which can be cured later.

An irregularity of this nature cannot be permitted to vitiate proceedings unless such irregularity affected the merits of the case or the jurisdiction of the court: *Kumarihamy v. Punchi Menika*, – at 387.

For the reasons stated above I would allow the appeal and set aside the judgment of the Court of Appeal with costs.

GUNAWARDANA, J. – I agree.

WEERASEKERA, J. – I agree.

Appeal allowed.