

SITA RAJASINGHAM
v.
MAUREEN SENEVIRATNE AND ANOTHER

SUPREME COURT.
BANDARANAYAKE, J.
DHEERATHNE, J.
PERERA, J.
S.C. 5/93
C.A. 194/91
D.C. COLOMBO 4907/21
JULY 17, 1995.

Civil Procedure Code – Civil Procedure Sections 86 and 755 (Before the 1977 Amendment) – Stamp Duty Act. No. 43 of 1982 (as amended by Acts. No., 71 of 1988, No. 27 of 1991 and No. 29 of 1993) – Sections 2(b), 33(1) and 71 – Stamp Ordinance No. 22 of 1909 sections 3 and 33 – Stamp Ordinance No. 3 of 1890 section 34.

A petition was filed in the office of the District Court by the defendant-appellant in terms of section 86 of the CPC to purge her default of appearance within 14 days of service of the decree. The Learned judge sitting in chambers rejected the petition as it bore no stamps. Proper stamp duty was later tendered but after the lapse of the 14 day period. After inquiry at which the parties were heard the Learned judge held that the petition was rightly rejected and that the stamp duty cannot be supplied after 14 days from the service of the decree.

Held:

That a right of a party to maintain a proceeding cannot be denied to that party on the ground of insufficiency of stamping of a document unless the law expressly or impliedly provided for such denial.

APPEAL from an order of the Court of Appeal.

A. K. Premadasa P.C. with *Manohara de Silva* for 2nd appellant.
P. A. D. Samarasekera P.C. with *G. L. Geethananda* for respondent.
P. G. Dep SSC for A.G. as amicus.

Cases referred to:

1. *Salgado v. Peiris* (1909) 12 NLR 379.
2. *Sandanam v. Jamaldeen* (1968) 71 NLR 145.
3. *Sathasivan v. Cadiravel Chetti* (1919) 21 NLR 93.
4. *British Ceylon Corporation v. The United Board* (1934) 36 NLR 225.

5. *Usouf v. Nadarajah Chettiyar* (1957) 58 NLR 435.
6. *Thenuwara v. Thenuwara* (1960) 62 NLR 501.
7. *Jayawickrama v. Amarasooriya* (1914) 17 NLR 174.

Per Dheeraratne, J.

"In the absence of any statutory provision in relation to the petitions filed under section 86 of the CPC, requiring that stamps should be supplied at the time of its presentation; or that such a petition filed without stamps is valueless and therefore should be rejected; or that such a petition which is unstamped should not be acted upon, I am inclined to the view that there was no legal justification for the Learned District Judge to make order rejecting the petition filed on 25.2.1991. I hold that the petition was wrongly rejected and that the proper course should have been for the court to call for the deficiency of stamps to be supplied by the party who tendered that document".

Cur. adv. vult.

July 21, 1995.

DHEERARATNE, J.

Judgment was entered by the District Court for the plaintiff-respondent against the 2nd defendant-appellant (appellant) *ex parte* on account of the latter's default of appearance. After the decree was served on the appellant on 13.2.91. within 14 days of such service, on 25.2.91 petition and affidavit in terms of section 86 of the CPC were filed in the office of the District Court on behalf of the appellant, to get the *ex parte* decree vacated. Petition and affidavit were accompanied by a new proxy but none of those documents were stamped. On the same day viz. 25.2.91 the Learned District Judge sitting in chambers made order (JE. 63) refusing to accept the proxy, petition and affidavit as they did not bear stamps. It is obvious that the attention of the appellant or her attorney was not drawn to the judge's order of rejection and that they became aware of that order several days later. On 20.3.91 appellant's attorney tendered a receipt for the payment of a sum of Rs. 15 as stamp duty chargeable on those rejected documents and moved court to accept them; circumstances under which stamps were not promptly tendered to court were also explained. After inquiry at which both counsel for the appellant and the plaintiff – respondent were heard, the Learned District Judge refused to vacate the order made on 25.2.91. The Learned District Judge took the view that it was lawful to supply at a later date the stamp duty for the proxy, but the stamp duty on the

petition cannot be supplied after the lapse of 14 days from service of the decree. He made no reference in his order to the alleged deficiency of stamps in the affidavit; but there is no doubt that in terms of section 5(1) of the stamp Duty Act. No. 43 of 1982 the affidavit is exempted from stamp duty. Regarding the petition, the Learned District Judge thought it was rightly rejected because the court was bound by the full bench decision in the case of *Salgado v. Peiris*⁽¹⁾.

Salgado v. Peiris (supra) is a decision on non-stamping a petition of appeal to the Supreme Court drawn and signed by a pleader in terms of section 755 of the CPC (before the amendment 20 of 1977) at the time of its presentation. The section by **implication** required a proper stamp to be produced at the time of presentation of a written petition of appeal, because the latter part of that section which provided an alternative mode of preferring an appeal by an appellant, namely, *viva voce* informing his wish to appeal to the secretary or chief clerk of the court, **specifically** required the production at that time "a proper stamp required for a petition of appeal". *Salgado's* case is thus an undoubted authority for the proposition as the law stood before the CPC amendment of 1977, that a petition of appeal to the Supreme Court should be rejected if it is not sufficiently stamped on the day of its presentation. See the observation of H. N. G. Fernando CJ. in *Sandanam v. Jamaldeen*⁽²⁾.

The same principle established in *Salgado's case* was adopted in the line of cases dealing with the application of schedule B in part ii of the repealed Stamp Ordinance No. 22 of 1909, which expressly provided for an appellant to deliver to the secretary of the District Court together with his petition of appeal proper stamps for the decree or order of the Supreme Court and certificate in appeal. See for example *Sathasivan v. Cadiravel Chetti*⁽³⁾.

Considerations applicable to the present case are totally different. As far as section 86 of the CPC is concerned there is no express or implied requirement that the petition should be duly stamped at the time of its presentation. The requirement for stamping a petition filed in terms of section 86 (3) of the CPC comes from the provisions of the Stamp Duty Act, No. 43 of 1982. Section 2(b) of the Act provides that every "document" presented or filed in civil proceedings instituted in

the District Court is chargeable with stamp duty. A new feature of the Stamp Duty Act (as amended by Acts No. 71 of 1988, 27 of 1991 and 29 of 1993) absent in its legislative predecessors, is the presence of a separate definition of a "document" in section 71 as opposed to an "instrument". A document is defined as follows:

In relation to legal proceedings in any court includes an appointment of an attorney, plaint, answer, replication or other pleadings, petition, application, affidavit, appointment, summons, judgment, decree, order or of any description, award, writ, warrant, inventory, account, mandate, bond or recognizance, citation, application other than motion, interrogatories, answer to interrogatories, injunction or notice.

Section 2(b) of the Act does not require that a "document" should be stamped at the time of its presentation.

The Court of Appeal found an added reason to justify the order rejecting the petition. That is that the petition which is unstamped cannot be "acted upon" in view of section 33(1) of the Stamp Duty Act. This position is untenable because section 33(1) deals exclusively with "instruments". The word "instrument" is defined in section 71 of the Act as follows:-

Instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

It is clear that a petition filed in terms of section 86 of the CPC, being a "document" in relation to legal proceedings and not being an "instrument", is not affected by the provisions of section 33(1) of the Stamp Duty Act. [cf. observations of Macdonell CJ. in *British Ceylon Corporation v. The United Board* ⁽⁴⁾ at 246 on sections 3 and 33 of the Stamp Ordinance No. 22 of 1909 and observations of Garvin SPJ. at 257 on section 36 of the Stamp Ordinance No 3 of 1890, in both statutes of which there was no definition of a "document" but only of an "instrument"]

A problem analogous to the present one arose with regard to deficiency in stamping petitions for granting conditional leave to appeal to the Privy Council under the Privy Council Appeals

Ordinance No. 31 of 1909 (now repealed by Act, No. 44 of 1979). There too no statutory requirement provided for stamping petitions at the time of presentation. Probably the last and yet the most important decision in that regard is the case of *Sandanam v. Jamaldeen* (*supra*). Fernando CJ. in that case declined to follow the judgments in *Usoof v. Nadarajah Chettiayar* ⁽⁶⁾ and *Thenuwara v. Thenuwara* ⁽⁶⁾ for the reason that considerations justifying rejection of appeals to the Supreme Court on account of deficiency of stamps were applied in those two cases without appreciating the difference in statutory requirements. In Sandanam's case the Supreme Court ordered the deficiency of stamps to be supplied although the appealable period had lapsed. The principle established in *Sandanam's case* (following *Jayawickrama v. Amarasooriya* ⁽⁷⁾) was that a right of a party to maintain a proceeding cannot be denied to that party on the ground of insufficient stamping of a document unless the law expressly or impliedly provided for such denial.

In the absence of any statutory provision in relation to a petition filed under section 86 of the CPC, requiring that stamps should be supplied at the time of its presentation; or that such a petition filed without stamps is valueless and therefore should be rejected; or that such a petition which is unstamped should not be acted upon, I am inclined to the view that there was no legal justification for the Learned District Judge to make order rejecting the petition filed on 25.2.1991. I hold that the petition was wrongly rejected and that the proper course should have been for the Court to call for the deficiency of stamps to be supplied by the party who tendered that document.

For the reasons given above the appeal is allowed and the order of the Learned District Judge made on 8.10.1991 and the judgment of the Court of Appeal affirming that order are set aside. The District Court is directed to accept appropriate stamp duty tendered (or to be tendered) in respect of the petition filed on 25.2.91 and proceed with the inquiry as contemplated in section 86(2). Parties will bear their own costs of proceedings of this court and of the Court of Appeal.

BANDARANAYAKE, J. – I agree.

PERERA, J. – I agree

Appeal allowed.