

SIRIWARDENA AND OTHERS
vs.
JOHN KEELS CO. LIMITED

COURT OF APPEAL
AMARATUNGA J.
CALA APPL. 376/2002
D. C. RATNAPURA 15457/M
MARCH 5, 2003

Civil Procedure Code - Section 27, 247 - Proxy defective? - is the Plaintiff bad in law? - Could the defect on the proxy be cured? Is the time limit set out in Section 247 a positive legal bar?

When the Plaintiff - Respondent seized the land in question on the decree entered against the 1st Defendant, the 3rd and 4th Defendants successfully preferred their claims to the land in question on the basis that they were the lawful owners. Thereafter the Plaintiff instituted action against all 4 Defendants to obtain a declaration that the transfer deeds are null and void and to obtain a declaration that the said property is liable to be seized in execution of the decree issued by Court.

The Plaintiff was signed by one "S" Attorney at Law. The proxy contained the names of one "A" "S" one "J" and one "T". The Defendant in their answer objected to the validity of the Plaintiff on two grounds

- (1) that since the four Attorneys are not practising in partnership and/or that the other three Attorneys are not the Assistants of 'A', the Plaintiff cannot present a plaint in the names of all four of them and
- (2) the plaint has been signed by an Attorney at Law other than the Attorney to whom the proxy has been given.

The trial Judge over ruled the objection.

Held :

- (1) It is a fact that the Plaint has been signed by an Attorney at Law one of the Attorneys named in the proxy. Thus it has been signed by an Attorney on record; further the Plaintiff had sought to revoke the proxy given to Attorney at Law 'A' and has filed a fresh proxy in the name of "S" and some others. This is an indication that "S" had authority of the Plaintiff to act on his behalf.
- (2) If the Proctor had in fact the authority of his client to do what was done on his behalf, although in pursuance of a defective appointment and if in fact his client had his authority to do so, then the defect is one which in the absence of any positive legal bar could be cured.
- (3) As regards the time frame set out in Section 247, as the Plaint had been signed by an Attorney at Law whose name appears in the defective proxy(s), this defect is curable. It appears that the Attorney at Law "S" who had signed the plaint had the Plaintiff's authority to act for him. Thus the time limit set out in Section 247 is not a positive legal bar preventing the Plaintiff from curing the defect in the proxy.

APPLICATION for leave to appeal from an Order of the District Court of Ratnapura.

Cases referred to :

1. *Treaby vs. Bawa* - 7 NLR 22
2. *Tilakaratne vs. Wijesinghe* - 11 NLR 270
3. *Kadiragama Das vs. Suppiah* - 56 NLR 172
4. *Dias vs. Karavita* - 1999 1 Sri LR 98
5. *Udeshi vs. Mather* - 1988 1 Sri LR 12
6. *Paul Coir (Pvt.) Ltd. vs. ECJ Vaas* - 2002 1 Sri LR 13

Navin Marapana for Petitioners

Hugo Anthony for Respondent

Cur. adv. vaulf.

May 22, 2003

GAMINI AMARATUNGA J.

This is an application for leave to appeal against the order of the learned District Judge of Ratnapura rejecting an objection raised on behalf of the defendant-petitioners that there was no proper plaint before Court for the plaintiff-respondent to proceed with the action it has filed against the defendants.

The facts relevant to the objection are as follows. The 1st defendant has obtained monetary assistance from the plaintiff to run his tea factory at Karanketiya. On a cause of action which has arisen on the said money transactions; the plaintiff has filed case No. 3611/M in the District Court of Colombo against the 1st defendant. The 1st defendant by deed No. 2609 of 1986 has transferred his property described in the schedule to the plaint filed in the present action to his two sons, the 2nd and 3rd defendants. Both of them have in turn transferred the said property by deed 3143 of 1989 to the 4th defendant and the latter has by deed 4048 of 1994 has entered into a planting agreement with the 3rd defendant. When the plaintiff seized the land in question on the decree entered against the 1st defendant by the District Court of Colombo, the 3rd and 4th defendants have successfully preferred their claims to the land in question on the basis that they were the lawful owners of the said property. The present action has been filed against all four defendants to obtain declarations that all transactions relating to the transfer of the relevant land have been carried out fraudulently with a view to prevent the plaintiff from seizing the said land in execution of the decree obtained by him in the District Court action instituted in Colombo against the 1st defendant; to obtain a declaration that the said deeds are null and void and to obtain a declaration that the said property is liable to be seized in execution of the decree issued by the District Court of Colombo.

The plaint in the present action has been filed in the District Court of Ratnapura on 29/07/1999. The plaint has been signed by K. Sivaskandarajah, Attorney-at-Law. The proxy filed contained four names as registered attorneys for the plaintiff, namely B. L. Abeyratna, K. Sivakandarajah, Ms. C. N. Jaysuriya and Mrs. N. W. Thambiah. It is not stated in the proxy that B. L. Abeyratna and the other Attorneys-at-Law are practicing in partnership or that they are the assistants of Mr. B. L. Abeyratna.

In the answer of the defendants filed on 10.12.1999 objection has been taken to the validity of the plaint on two grounds. The first ground is that since the four Attorneys named in the proxy are not practicing in partnership and/or that the other three Attorneys are not the assistants of Attorney B.L. Abeyratna, the plaintiff cannot present a plaint in the names of all four of them. The other objection is that since the plaint has been signed by an Attorney-at-law other than the Attorney to whom the proxy has been given the action is not maintainable on that proxy. Despite this objection the replication dated 09/06/2000 has been signed by Attorney B. L. Abeyratna. Thereafter on 25/02/2002 the same objection to the plaint set out above was raised before the learned District Judge and thereupon the parties were directed to file written submissions.

After considering the written submissions the learned District Judge has made order overruling the objection on the basis that the defect in the proxy can be cured. The submission of the learned Counsel for the petitioner is that the learned District Judge has failed to appreciate that the objection was not regarding the defect in the proxy but the objection was that there was no proper plaint before Court as it has not been signed by the Attorney-at-Law to whom the proxy has been given. But this distinction is only a matter of terminology. The alleged defect in the plaint is directly connected to the defective proxy. The argument proceeds as follows. The proxy given to four Attorneys-at-law not practicing in partnership or in the capacity of the principal Attorney-at-Law and his assistants is bad in law. The plaint signed by an Attorney-at-law named in the proxy other than the Attorney-at-law named first in the proxy is therefore bad in law.

It is a fact that the plaint has been signed by Attorney-at-law K. Sivaskandarajah one of the Attorneys named in the proxy. Thus it has been signed by an Attorney on record. However, the proxy is defective for the reason that it is in favour of four Attorneys-at-law. Therefore the real objection flows from the defect in the proxy and if that defect is cured the objection cannot be maintained.

There are instances where proxies which did not carry the name of the Attorney-at-law or the signature of the party were allowed to be rectified. In *Treaby vs. Bawa*¹¹⁾ it has been held that the omissions to insert the name of the Attorney in the proxy is curable. This case has been considered by the learned District Judge. In *Thilakarathna vs. Wijesinghe*¹²⁾ the plaintiff has failed to sign the proxy and it has been held that this omission was curable.

It appears from paragraph 17 of the written submissions filed on behalf of the defendants in the District Court that the plaintiff has sought to revoke the proxy given to Attorney B. L. Abeyratna and has filed a fresh proxy in the name of K. Sivaskandara and some others. This is an indication that Mr. Sivaskandara had authority of the plaintiff to act on his behalf. It has been held that the provisions of section 27 of the Civil Procedure Code are not mandatory but only directory. *Thilakaratna vs. Wijesinghe (Supra)*; *Kadigama Das vs. Suppiah* ⁽³⁾ and *Dias vs. Karavita* ⁽⁴⁾. In *Udeshi vs. Mather* ⁽⁵⁾ Athukorale J has stated that in considering whether a party should be allowed to cure a defect in the proxy, the question to be considered is whether "the proctor had in fact the authority of his client to do what was done on his behalf although in pursuance of a defective appointment. If in fact his client had his authority to do so, then the defect is one which, in the absence of any positive legal bar could be cured." (page 21) See also *Paul Coir Pvt. Ltd., vs. E. C. J. Vass* ⁽⁶⁾

In this case there is no positive legal bar preventing the Court from allowing the plaintiff to cure the defect in the proxy. In the written submissions filed in the District Court on behalf of the defendants it is stated that since the action has been instituted in terms of section 247 of the Civil Procedure Code there is a time frame set out in the section. This submission seems to suggest that if the plaintiff is allowed to rectify the defect in his proxy, it has the effect of regularizing the defect in the plaint resulting in defeating the time bar.

However in this case, as I have already pointed out the plaint had been signed by an Attorney-at-Law whose name appears in the defective proxy. The defect in the proxy is curable. It appears that the Attorney-at-law who had signed the plaint had the plaintiff's authority to act for him. In these circumstances it is my view that the time limit set out in section 247 is not a positive legal bar preventing the plaintiff from curing the defect in the proxy. The learned District Judge has correctly identified the real basis of the defendant's objection and has made his order according to law.

The defendants have cited number of cases where it had been held that when there is a registered Attorney on record a party cannot himself perform the acts to be performed by the Attorney. Those cases have no relevance to the present issue as they deal with a completely different question. There is no merit in this application and accordingly leave to appeal is refused and the application is dismissed with costs fixed at Rs. 10,000.

Application dismissed