

UMMA ANINA

V

JAWAHAR

COURT OF APPEAL

AMARATUNGA, J. AND

WIMALACHANDRA, J.

C.A. 1192/03

D.C.COLOMBO NO. 9425/RE

JULY 18, 2004

SEPTEMBER 2, 2004

Civil Procedure Code, sections 25(b), 181, 183A and 437 – Amendment Act, No. 79 of 1988 – Affidavit not in conformity with section 183A – Principal and power of attorney holder – reside within the jurisdiction of Court – Application through power of attorney holder – Validity?

The defendant-petitioner through his power of attorney holder sought to revise the consent judgment entered on the basis that there never was a settlement. The plaintiff-respondent contended that -

- (i) the purported affidavit of the power of attorney holder is not in conformity with section 183A.
- (ii) that the petitioner is not entitled to make the revision application through his power of attorney holder, as the petitioner resides within the local limits of the jurisdiction of the court.

Held:

- (i) Section 183A deals with who may make an affidavit *in lieu* of a party to the action.

The affidavit filed does not contain, an averment that the defendant-petitioner is out of the island nor is there an averment that, the defendant-petitioner is unable or incapable to make the required affidavit.

- (ii) There is no averment that the facts stated are within the personal knowledge of the declarant – that he is able of his own knowledge and observation to testify to.
- (iii) If the principal and the power of attorney holder reside within the jurisdiction of court, the power of attorney holder is not entitled to act on behalf of the principal.

APPLICATION in revision from an order of the District Court of Colombo.

Cases referred to:

1. *Abeywardena v Abeywardena* (1993) – 1 Sri LR 272
2. *Kangasabai v Kirupamoorthy* – 62 NLR 54
3. *William Silva v Sirisena* – 68 NLR 206

S. Mandaleswaran with P. Peramunagama and I. Kalingawansa for defendant-petitioner

Palitha Kumarasinghe for plaintiff-respondent.

Cur.adv.vult

October 12, 2004

L.K. WIMALACHANDRA, J.

The defendant-petitioner through his power of attorney holder filed this application in revision against the consent judgment entered by the learned Additional District Judge of Colombo dated 14.7.2003, on the basis that there never was a settlement. The defendant-petitioner states that the learned Judge had entered the judgment in favour of the plaintiff and the alleged settlement was never explained to the petitioner. He further states that the learned Judge was out of judicial temperament at that moment and forced the petitioner to enter into the said settlement.

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When this matter was taken up for argument the following preliminary objections were raised by the plaintiff-respondent.

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- (i) the purported affidavit of the power of attorney holder of the defendant-petitioner is bad in law and inadmissible in that the purported affidavit is not in conformity with section 183A of the Civil Procedure Code.
- (ii) the petitioner is not entitled to make this application through his power of attorney holder as the petitioner resides within the local limits of the jurisdiction of the Court.

It is common ground that the affidavit that was tendered with the petition is from one Shahul Hameed, who is the power of attorney holder of the defendant-petitioner. In the said affidavit the power of

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attorney holder states that "I am the affirmation and the attorney of the defendant-petitioner". It is to be noted that from paragraph two onwards the said Shahul Hameed states that:-

"(2) The plaintiff-respondent (hereinafter referred to as the "Plaintiff") instituted this action against me.

(a) for ejectment of myself and.....

(b) for an order that I do pay.....

(3) I filed answer.....

(a)money was paid by my son. Rizwan

(b)agree to sell same to my son the said Rizwan

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(8) I had to invoke the revisionary jurisdiction.

According to the answer filed in the District Court and the petition filed in this Court, Rizwan is the son of the defendant-petitioner and not the son of the power of attorney holder. Moreover the said Shahul Hameed is not the person who made the revision application.

It is the submission of the learned counsel for the defendant-petitioner that the affidavit is drawn on the basis that the said Shahul Hameed is in the shoes of the defendant-petitioner and hence it is a valid affidavit. The words "I" and "my" in the affidavit refer to the defendant-petitioner.

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Since the said Shahul Hameed filed the affidavit in his capacity as the power of attorney holder of the petitioner, the affidavit filed should be in accordance with the provisions of Section 183A of the Civil Procedure Code.

Section 183A deals with who may make an affidavit *in lieu* of a party to the action. The relevant portion of section 183A reads as follows:

"Where any person is required under the provisions of this Code, or under any other law for the time being in force, to make an affidavit, then-

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(a)

(b)

- (c) where any party to the action is absent from Sri Lanka, his attorney duly authorized to bring, conduct or defend the action, as the case may be, and
- (d) Where any party to the action or where there is more than one party to the action such of the parties as are in Sri Lanka, or when such attorney of the parties as is just above mentioned, is or are unable, for want of personal knowledge or bodily or mental infirmity, to make the required affidavit, any recognized agent of such party...

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may make an affidavit in respect of these matters, instead of the party to the action.

It is to be observed that in the affidavit filed by Shahul Hameed, there is no averment to state that the defendant-petitioner is out of the island nor is there an averment that the defendant-petitioner is unable or incapable to make the required affidavit.

Furthermore, there is no averment in the affidavit that the facts stated therein are within the personal knowledge of the declarant and that he is able of his own knowledge and observation to testify to. The affidavit should clearly state, what the facts are, within the declarant's personal knowledge. It is also necessary to disclose the nature and source of knowledge with sufficient particularity. When there is no averment in the affidavit that the declarant deposes such facts from his personal knowledge, it contravenes the provisions of the proviso to section 183A of the Civil Procedure Code.

The proviso to section 183A is similar to the first part of section 181 of the Code which deals with as to what statements may an affidavit contain. Section 181 states as follows:

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"Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to....."

In the case of *Abeywardena v Abeywardena* ⁽¹⁾

S.N. Silva, J. (as he then was) made the following observations:

"The fact that T. Nadeson holds a power of attorney and is a recognized agent pertains to his capacity to file an affidavit on behalf of the petitioner-respondent. It does not lend any extra

credence to the affidavit. His affidavit must comply with the requirements of the Civil Procedure Code. Even if the provisions of sections 183 (A) of the Civil Procedure Code brought by the Civil Procedure Code (Amendment) Act, No. 79 of 1988 (not yet in operation at the time of this case) are applied, the relevant amendment permits an attorney to file an affidavit instead of the party to the action where such party is absent from Sri Lanka. The proviso to this section states that in such situation the person making the affidavit must be one having personal knowledge of the facts of the cause of action and **must in his affidavit swear or affirm that he deposes from his own personal knowledge”** (emphasis added)

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In the instant case, there is no averment in the affidavit filed by Shahul Hameed to state that he had personal knowledge of the facts stated therein and also there is no statement that he deposed such facts from his own personal knowledge.

In the circumstances, I am of the view that the affidavit tendered by the said Shahul Hameed is not in conformity with the proviso to section 183(A) of the Civil Procedure Code, and hence there is no valid application before Court.

Besides this infirmity in the said affidavit, when compared with the petition reveals that the affidavit is nothing more than a repetition of the averments of the petition.

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It is apt to refer to the following observation made by S.N. Silva, J. (as then he was) in *Abeywardena v Abeywardena (supra)* at 281.

“Learned District Judge has observed that the affidavit confirms the averments in the petition. Indeed, on a comparison it is revealed that the affidavit is a *verbatim* repetition of the averments of the petition. However, the correct test is not to consider whether one confirms the other upon a comparison of this nature. Repetition of the averments of a petition in the affidavit is an evil that we often note in affidavits that are filed. Learned Judge has regrettably seen a virtue in this evil. The correct test is to ascertain whether the affidavit contains direct evidence, that is, statements of such facts as the declarant is able to his knowledge and observation to testify to and

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whether this evidence together with the documentary evidence furnishes *prima facie* proof of the matters of fact set out or alleged in the petition."

It is also a fundamental rule of procedure that a petition cannot be converted into an affidavit by the addition of a verifying clause, 130 on affirmation or oath to the effect that the statements in the petition are true (section 182 of the Civil Procedure Code).

In *Kanagasabai v Kirupamoorthy*⁽²⁾ the Supreme Court held that when affidavits are filed in civil proceedings, it is the duty of Judges, Justices of the Peace and Proctors to see that the rules governing affidavits in sections 181, 437 etc. of the Code are complied with.

In these circumstances, I am of the view that the affidavit of Shahul Hameed has serious defects which contravene the provisions of section 183(A). Accordingly, I hold that there is no valid affidavit before Court. Hence there is no valid application for revision in the absence of a valid affidavit. 140

The second preliminary objection raised by the plaintiff-respondent is that the defendant-petitioner is not entitled to make the present application in revision through his power of attorney, Shahul Hameed, as the defendant-petitioner is residing within the jurisdiction of the District Court of Colombo. The affidavit which is in question is from the said Shahul Hameed, who is the power of attorney holder of the defendant-petitioner.

By looking at the caption of the petition and the affidavit filed in the application in revision, both the defendant-petitioner, namely, Aliya Buhari Umma Anina and the power of attorney holder, Shahul Hameed, reside in the same house at No. 20/7, Ketawalamulla Lane, Colombo 9, within the local limits of the jurisdiction of this Court. 150

It was held in the case of *William Silva v Sirisena*,⁽³⁾ that a person holding a power of attorney as the agent of a party is debarred by section 25(b) of the Civil Procedure Code from appointing a proctor on behalf of his principal, if the principal is residing within the jurisdiction of the Court at the time the action is instituted there.

Thus it is clear if the "principal" and the "power of attorney holder" reside within the jurisdiction of Court, the power of attorney holder is not entitled to act on behalf of the "principal" as his recognized agent.

In any even the learned counsel for the defendant-petitioner has conceded in his written submissions filed of record, that the "power of attorney" given to the said Shahul Hameed by the defendant-petitioner is not valid in terms of section 25(b) of the Civil Procedure Code as the defendant-petitioner, admittedly, resides within the jurisdiction of this Court.

For these reasons, the two preliminary objections raised by the plaintiff-respondent are upheld and the application in revision is accordingly dismissed with costs.

AMARATUNGA, J. - I agree.

Application dismissed