PAUL COIR (PVT) LTD
v.
WAAS

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
WIGNESWARAN, J.
SC APPEAL NO. 68/2000
CA NO. 535/96 (REV.)
DC NEGOMBO CASE NO. 7723/M
30 APRIL AND 14 MAY, 2001

Civil Procedure Code – Appointment of a registered attorney – Proxy – Section 27 of the Civil Procedure Code – Section 34 (1) (a) of the Companies Act, No. 17 of 1982 – Rectification of a defective appointment – Ratification.

The plaintiff filed action on 24. 12. 1992 to recover Rs. 400,000/- plus interest and costs from the defendant company (the defendant). On 15. 12. 1994, the date of trial, objection was taken for the first time by the plaintiff's counsel that the proxy of the defendant was defective. The counsel moved that the proxy and the answer filed by the defendant be rejected and the action be fixed for trial *ex parte*. Both parties filed written submissions on this application, and the same attorney-at-law for the defendant filed a fresh proxy in his favour, along with his written submissions. The fresh proxy ratified and confirmed that the same attorney-at-law had earlier acted on behalf of the defendant with his authority, consent, concurrence and approval.

While the first proxy was signed by one Director with his rubber stamp affixed but not bearing the common seal of the company, the fresh proxy bore the common seal of the company with signatures of two Directors as required by section 34 (1) (*a*) of the Companies Act, No. 17 of 1982 and Article 110 (1) of the Articles of Association of the Company.

Held:

(1) If according to the intention of parties the attorney-at-law had in fact the authority of his client to do what was done on his behalf although in pursuance of a defective appointment, in the absence of a legal bar, the defect could be cured. The provisions of section 34 (1) (a) of the Companies Act, though specific, are similar to the general provisions

of section 27 of the Code. So are the provisions of Article 110 (1) of the defendant's Articles of Association. Such provisions are directory and not mandatory.

(2) The fresh appointment (proxy) filed in this case cured any defect arising out of alleged non-compliance with section 34 (1) (*a*) of the Companies Act and Article 110 (1) of the Articles of Association of the defendant Company.

Per Wigneswaran, J.

"The only difference between natural persons and a company might be the fact that a company is a legal entity not blessed with bones, marrow and flesh. But, a company has to work through human beings. The intention of such human beings could no doubt be ascertained. In fact, the subsequent proxy filed ratifying the earlier acts of the attorney-at-law on record was evidence of intention of the company."

Cases referred to:

1. *Udeshi and Others v. Mather* – (1988) 1 Sri LR 12 (SC).
2. *Tillekeratne v. Wijesinghe* – (1908) 11 NLR 271.
3. *K. Kadiragamadas v. K. Suppiah* – (1953) 56 NLR 172.
4. *L. J. Peiris Co., Ltd. v. L. C. H. Peiris* – (1970) 74 NLR 261.
5. *MC Foy v. United Africa Coy Ltd* – (1961) 3 ALL E.R. 1169.
6. *Craig v. Kanseen* – (1943) 1 ALL E.R. 108.
7. *Oriental Bank Corporation v. Ottilia Louisa Sophia Corbet* – (1881) 4 Supreme Court Circular 158.
8. *Silva v. Cumaratunga* – (1938) 40 NLR 139.
9. *Regina v. Jayasundera* – (1917) 4 CWR 390.

APPEAL from the judgment of the Court of Appeal reported in (2000) 2 Sri LR 167.

S. F. A. Cooray with *C. Liyanage* for defendant-appellant.

J. W. Subasinghe, PC with *J. A. J. Udawatta* for the plaintiff-respondent.

Cur. adv. vult.

September 21, 2001

WIGNESWARAN, J.

The plaintiff-respondent-respondent (hereinafter referred to as "the plaintiff") filed action in the District Court of Negombo on 24. 12. 1992 to recover Rs. 400,000/- plus interest and costs from the defendant-petitioner-appellant (hereinafter referred to as "the defendant"). Summons was issued and reissued and finally the Negombo Fiscal reported to Court that the Managing Director of the defendant Company had been served with summons on 20. 07. 1993. Proxy was filed on behalf of the defendant Company on 28. 09. 1993 and Court accepted same and gave 10. 12. 1993 as the date for answer. Further, dates were obtained and answer was filed ultimately on 26. 04. 1994 and the case was fixed for trial on 11. 08. 1994.

On 05. 08. 1994 the plaintiff's list of witnesses and documents was filed by his attorney-at-law with notice to the defendant's attorney-at-law. Summons was allowed on the appropriate witnesses (vide J.E. 8). So too on 11. 08. 1994 the attorney-at-law for the defendant with notice to the attorney-at-law for the plaintiff filed his list of documents and witnesses (vide J.E. 9). On 11. 08. 1994 the trial was postponed for 15. 12. 1994. On 30. 09. 1994 an additional list of witnesses and documents was filed by the attorney-at-law for the plaintiff with notice to the defendant's attorney-at-law. (vide J.E. 10).

On 15. 12. 1994 an objection was taken for the first time by the counsel for the plaintiff that the proxy filed on behalf of the defendant was defective, marking the Memorandum and Articles of Association of the defendant Company as P1 and P2 and the proxy as "X". The counsel moved that the proxy and the answer filed by the defendant be rejected and the action be fixed for trial *ex parte*. Written submissions were called for and filed by both parties. The same attorney-at-law for the defendant also filed a fresh proxy in his favour along with his written submissions. The fresh proxy ratified and confirmed

that the same attorney-at-law had eariler acted on behalf of the defendant with its authority, consent, concurrence and approval. While the first proxy was signed by one Director of the defendant Company with his rubber stamp affixed but not bearing the common seal of the Company, the second proxy bore the common seal of the defendant Company with signatures of two Directors of the Company with Directors' rubber stamp affixed. 30

The District Judge made order on 31. 07. 1996 that "there was no valid proxy on record" and there was thus no appearances on behalf of the defendant, and therefore fixed the case for *ex parte* trial for 22. 08. 1996. 40

This order was the subject of Appeal (CALA No. 197/96) and revision (CA No. 535/96) to the Court of Appeal, which by order dated 17. 02. 2002 confirmed the order of the District Judge and dismissed both applications with costs. This Court granted special leave to appeal on 04. 12. 2002.

The matters in respect of which special leave to appeal was granted are as follows :

"(*a*) did the Court of Appeal err in law by holding that the principle [laid down in *Tillakaratne v. Wijesinghe* 11 NLR 270, *Kadirgamadas v. Suppiah* 56 NLR 172, and *Udeshi v. Mather* (1988) 1 SLR 12] that the requirement that the appointment of an attorney-at-law under s. 37 of the Civil Procedure Code shall be in writing and signed by the party is only directory and not mandatory, and that a party can subsequently ratify what had previously been done by the attorney-at-law on his behalf, applies only to natural persons and not to a Company registered under the Companies Act, in view of the provisions of s. 34 (1) of that Act; 50

(*c*) did the Court of Appeal err in law in holding that *Peiris v. Peiris* 74 NLR 261 was wrongly decided and that an appointment of an attorney-at-law by a registered Company must be in terms 60 of section 34 (1) (*a*) of the Companies Act."

The fundamental question that arises for consideration in respect of the above two matters is whether proxy "X" filed on 28. 09. 1993 and accepted by Court, was void.

There is no doubt that the Court initially accepted the said proxy as evidence of the fact that the attorney-at-law mentioned in the proxy was in fact acting for and on behalf of the defendant. So did the plaintiff and his registered attorney-at-law. In fact, lists of witnesses and documents were served on him as representing his client.

There is no dispute as to the state of the law with regard to 70 defective appointments of registered attorneys-at-law, in that the Courts have held that such defects can be cured and the acts purported to have been done on the strength of such defective appointments are capable of being ratified by the party concerned. In fact, in this case too, a new proxy, ratifying the acts done by the same attorney-at-law earlier in the case, has indeed been filed.

Again there cannot be any controversy as to the fact that Courts have consistently held in matters of this nature, that the question that had to be considered was whether the Proctor (registered attorney-at-law now), had in fact the authority of his client to do what was 80 done on his behalf, although in pursuance of a defective appointment. It has been held that if in fact he had his client's authority to do so then the defect is one which in the absence of any positive legal bar could be cured. On the contrary if in fact he did not have such authority of his client, the acts done and the appearances made on his behalf by the Proctor would be void and of no legal effect. (vide Justice Athukorala in *Udeshi and Others v. Mather*[1] at page 21).

The reasons that appear to have prompted the Court of Appeal to hold that the proxy was void in the instant case were :

(1) that the law relating to curability of defective appointments hitherto recognised by Courts in *Tillakaratne v. Wijesinghe*[2], *Kadirgamadas v. Suppiah*[3] and *Udeshi v. Mather* (*supra*) applied only to natural persons and not to juristic persons, such as Companies registered under the Companies Act. 90

(2) Under the provisions of section 34 (1) (*a*) of the Companies Act a contract may be made on behalf of the Company in writing under the common seal, and in the absence of the common seal of the Company on the proxy no written contract of agency was established between the defendant Company and its registered attorney-at-law. 100

(3) The "proxy" filed of record was void, and since there was no proxy the question of curability did not arise.

(4) *Peiris v. Peiris*[4] was wrongly decided.

In supporting this finding of the Court of Appeal learned President's Counsel appearing for the plaintiff has submitted as follows :

(i) An attorney-at-law must be *duly* appointed by a party. (section 24 of the Civil Procedure Code).

(ii) A proxy has to be in writing *under the common seal* of the Company when the client who signs the proxy is a Company (section 27 of the Civil Procedure Code read with section 34 (1) (*a*) of the Companies Act, No. 17 of 1982). 110

(iii) A proxy constitutes a written contract of agency. When the common seal of the Company is not affixed to the proxy there is *no* written contract of *agency*. The act is, therefore,

void and thereby a nullity. (*Mc Foy v. United Africa Coy Ltd.*[5] and *Craig v. Kanseen*[6]).

(iv) While sections 24 and 27 of the Civil Procedure Code are general provisions, section 34 (1) (*a*) of the Companies Act is a special provision. (*Generalia specialibus non derogant*). The general provisions cannot supersede, oust nor override the special provisions. 120

(v) None of the cases such as *Tillekeratne v. Wijesinghe*[2], *K. Kadirgamadas v. K. Suppiah*[3], *Udeshi and Others v. Mather*[1] *L. J. Peiris and Co., Ltd. v. L. C. H. Peiris*[4] mentioned by the counsel for the defendant had considered any specific provisions such as section 34 (1) (*a*) of the Companies Act in coming to their conclusions.

(vi) Section 34 (1) (*a*) of the Companies Act was a positive legal bar. Taken together with Article 110 (1) of the Articles of Association of the defendant Company, the absence of 130 compliance with the said Article made the proxy a nullity which cannot be rectified.

(vii) In *Oriental Bank Corporation v. Ottilia Louisa Sophia Corbet*[7] cited by the counsel for the defendant it was the agent who appointed the Proctor. Therefore, the question of the common seal of the Corporation being affixed did not arise in that case.

The conclusion of the Court of Appeal and the supporting submissions above-mentioned would now be examined.

In *Tillekeratne v. Wijesinghe* (*supra*) the plaintiff granted proxy to a Proctor which, by an oversight, was not signed by the plaintiff. The 140 Proctor acted on the proxy without any objection in the lower Court. When the case was taken up in appeal, the defendant's counsel

objected to the status of the Proctor in the case. The counsel for the defendant-respondent contended that the requirement of section 27 of the Civil Procedure Code was imperative and that an authority (proxy) not signed by the client was void. Chief Justice Hutchinson stated as follows :

"In my opinion that is only directory. If a plaintiff appearing throughout the action by a proctor, whom he has instructed to act for him, but whose proxy he had forgotten to sign, were to recover judgment, and if the omission to sign were then discovered and the proxy signed, the Court could not, in my opinion, hold that the whole of the proceedings on the part of the plaintiff up to and including the judgment were void because of the non-signature of the proxy; or, if the plaintiff failed in the action and it was dismissed with costs, the Court could not hold that the decree under such circumstances was of no effect against the plaintiff. No doubt the enactment means, though it does not in terms say so, that the appointment is to be signed and filed before the proctor does anything in the action. But, if the omission to sign is not because the proctor has not in fact any authority, and if the client afterwards ratifies what has been done in his name by signing the authority, in my opinion that satisfies the requirements of the enactment." 150 160

In *K. Kadirgamadas et al v. K. Suppiah* (*supra*) when the petition of appeal was filed, the Proctor who presented it had not been appointed in writing as required by section 27 of the Civil Procedure Code to act for some of the defendant-appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties represented all the defendants at various stages of the proceedings earlier. 170

Justice E. H. T. Gunasekera with Justice Pulle concurring held: *". . . in our opinion the irregularity in the appointment was cured by the subsequent filing of a written proxy."*

I have referred to Justice Athukorala's dictum in *Udeshi and Others v. Mather* earlier.

What these three cases held was that even though specific provisions of the law directed that an act had to be performed in a certain manner, the mere fact that such an act was not so performed, would not vitiate the proceedings so long as the parties who should have performed the act together had the intention to so perform the act. 180 In other words the intention of parties was held to be as important as the expression of such intention by a physical act. If the intention was suspect or illogical as in a case where there was an earlier proxy of another attorney-at-law on record, then the acts of the usurping attorney-at-law were frowned upon. Justice Maartensz held in *Silva v. Cumaratunga*[8] that ". . . *Court cannot recognise two proctors appearing for the same party in the same case*".

Thus, despite an attorney-at-law being not duly appointed by a party in terms of section 27 of the Civil Procedure Code, Courts have granted relief if the intention to duly appoint that attorney-at-law on 190 the part of the client at the relevant time was perceivable.

The only difference between natural persons and a Company might be the fact that a Company is a legal entity not blessed with bones, marrow and flesh. But, a Company has to work through human beings. The intention of such human beings could no doubt be ascertained. In fact, the subsequent proxy filed ratifying the earlier acts of the attorney-at-law on record in this case was evidence of the "intention" of the Company. What is important to remember in respect of the *ratio decidendi* of the cases above-mentioned is that an argument was before Courts that an unsigned proxy was void. In other words the 200 nexus between the lawyer and the client being not visible on record, there could not be any relationship contractual or otherwise between them and therefore the authority even if granted was void. Despite such an argument, Courts have consistently held that what was relevant was whether the authority of the client to the attorney-at-law

in question to do what was done on behalf of the client, had *in fact* been granted. If it had in fact been granted at the relevant time then the physical evidence of such grant could be subsequently made available. As between a Director of a Company signing under his personal seal on behalf of the Company instead of affixing the Company Seal and a natural person *not* signing a proxy, certainly the latter is a far more serious lapse. Still the Courts have held that if the intention to sign the proxy was there at the relevant time and no legal bar to such signing was existent as between the client and the lawyer, then such defective appointment was curable. If at all, the question of nullity could only relate to the document of appointment in terms of the relevant sections. But, if the Courts have held that despite irregularities in the document the intention of parties is to take precedence, there are good reasons for such a conclusion. Such reasons were set out by Chief Justice Hutchinson in *Tillekeratne v. Wijesinghe* (*supra*) with which I am in respectful agreement with.

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General provisions in section 27 of the Civil Procedure Code and/ or specific provisions in section 34 (1) (*a*) of the Companies Act only set out the physical acts expected of parties. As stated earlier Courts have granted relief even if such physical acts were lacking or not forthcoming, so long as the intentions of parties were definite and perceivable, despite the visible non conformation with the provisions of the abovesaid sections. Whether there was agency visible between the lawyer and the client on the basis of the documents filed was not what the Courts looked for. It was the real intention of parties at the relevant time which the Courts examined. They held that such intention could be established subsequently by ratification and confirmation. But, certain legal bars were recognised. For example, despite intention of parties, Courts would not recognise two registered attorneys-at-law appearing for the same party in the same case. But, such legal bars to ratification cannot be held to include provisions of section 34 (1) (*a*) of the Companies Act. Those provisions, though specific, are similar to the general provisions in section 27 of the Civil Procedure Code. So too the provisions of Article 110 (1) of the Articles

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of Association of the defendant-appellant-Company. Courts have held such provisions directory and not mandatory. But, Courts have given recognition to a proxy in the record on behalf of one lawyer, at a time when steps were taken by another lawyer without a proxy. [vide *Reginahamy v. Jayasundera*[9] and *Silva v. Cumaratunga* (*supra*).] Another matter that might be recognised by Courts as a bar would be the resulting conflict of interests between a client and his lawyer purporting to act on his behalf. There would be a bar to the same lawyer appearing for both sides, for example. There could be other such bars. In other words what the Courts will examine is whether, despite defective appointments the lawyer concerned in the normal course could have appeared for the client. If he could have and no legal bars stood in his way, then despite the defective appointments Courts have granted him the right of appearance provided his previous acts had been ratified and a proper appointment was filed, though belatedly. Such an appointment (proxy) had been filed in this case on 13. 02. 1996. Thus, any defect arising out of the alleged non-compliance with an article in the Articles of Association too was cured when the defendant Company ratified what registered attorney-at-law Mr. Rodrigo had done for and on behalf of the defendant Company until such new proxy was filed.

In this connection the decision in *L. J. Peiris and Co., Ltd. v. L. C. H. Peiris* (*supra*) is relevant and notable. Justice Thamotheram with Chief Justice H. N. G. Fernando concurring said at page 2(

"The learned District Judge was right when he said: 'The relationship of a Proctor and client may well be a contract of agency, but there is no law requiring that the contract should be in writing. A proxy is a writing given by a suitor to Court authorising the Proctor to act on his behalf. It does not contain the terms of the contract between the suitor and the Proctor. That contract is a distinct one and has nothing to do with the proxy which is an authority granted by virtue of that contract' . . ."

"The real question to my mind is . . . had the Proctor the authority of his client, i.e. the Company, to institute the action and otherwise do what section 27 of the Civil Procedure Code enables a person having such authority to do? The question is not who can act on behalf of the Company, but has the Company given the required authority in writing".

At page 23 –

"Section 27 of the Civil Procedure Code reads: 'the appointment of a Proctor to make any appearance or application or do any act as aforesaid shall be in writing signed by the client, and shall be filed in Court'. This is a procedural requirement which must be satisfied to enable a Proctor to act on behalf of his client. This is not a provision of law that requires a contract of agency between a Proctor and his client to be in writing." 280

". . . The Court in this connection is not concerned with the validity of the appointment of the Proctor as the Company's agent but with certainty that the Proctor had the authority of his client to do what he is permitted to do under section 27 of the Civil Procedure Code." 290

This was a case in which the original proxy filed on behalf of a Company incorporated under the Companies Ordinance bore the Seal of the Company and the signature of one Director only *instead of two Directors,* which defect was corrected in a fresh proxy.

I am in respectful agreement with Justice Thamotheram's decision above-mentioned and find no reasons to agree with the decision of the Court of Appeal nor with the submissions of the learned President's Counsel appearing for the plaintiff that the said case *L. J. Peiris & Co., Ltd. v. L. C. H. Peiris* (*supra*) was wrongly decided. A proxy does not constitute the contract of agency between the client and the attorney-at-law, and is not required to contain the terms of 300

that contract. The defective proxy filed in this case was not void, and was capable of ratification.

I thus find that the subsequent proxy filed in this case gave authority *ratifying previous acts* of the *attorney-at-law*. *Such ratification confirms* the "intention" of the defendant Company at the time the defective proxy was handed over to the attorney-at-law. Whatever shortcomings that were existent in such earlier proxy were erased as soon as the ratifying and confirming new proxy was filed and the intention of the Directorate of the Company at the time of handing over the original proxy, subsequently became evident. 310

Clearly, the Court of Appeal and the District Court have erred in their respective conclusions. The questions on which leave was granted are answered in the affirmative. I set aside the order of the Court of Appeal dated 17. 02. 2000 and also the order of the District Judge dated 31. 07. 1996 and make order that the answer of the defendant be accepted and the original Court do proceed with the case according to law. Taxed costs will be payable by the plaintiff to the defendant in all three Courts in respect of the matter in appeal. 320

FERNANDO, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.