

**PAUL COIR (PVT) LTD**

**v.**

**WAAS**

**COURT OF APPEAL.**

**JAYASINGHE, J.**

**JAYAWICKREMA, J.**

**CA 535/96 (REV).**

**DC NEGOMBO 7723/M.**

**09<sup>TH</sup> DECEMBER, 1999.**

*Civil Procedure Code, Ss.24, 27(1) - Proxy of a Company - Companies Act, No. 17 of 1982, Ss.34(1), 38(1) - Applicability - Contract of Agency - Requirement of placing the common seal.*

The Plaintiff Respondent instituted action against the Defendant Respondent (Company). The proxy of the Defendant Respondent Company, was signed by one of the Directors and it did not bear the common seal of the company. The proxy contained the rubber stamp of the Managing Director. The Plaintiff Respondent moved that the proxy and the answer of the Defendant Respondent Company be rejected, and the matter taken up *ex parte*. The Defendant Respondent tendered written submissions, and thereafter filed a fresh proxy signed by two Directors under the common seal. The Court upheld the objections of the Plaintiff Respondent and fixed the matter for trial *ex parte*.

It was contended by the Defendant Respondent that the first Proxy was not defective, and that in any event, the second proxy cured the allegedly defective proxy.

**Held :**

(1) An Attorney at Law acts as an agent of his client. An agency relationship is constituted by way of a contract. Under S.34(1) A, Companies Act a contract may be made on behalf of the company in writing under the common seal; in the absence of the common seal, no agency relationship is constituted between the Defendant and the Attorney.

(2) There is no proxy before Court, as the 'Proxy' filed of record is void, and since there was no proxy the question of curability does not arise.

**APPLICATION** in Revision from the Order of the District Court of Negombo.

**Cases referred to :**

1. *L.J. Pieris & Co. vs L.C.H. Pieris* 74 NLR 261
2. *In Re Wijesinghe* 14 NLR 43
3. *MacFoy vs United Africa Co. Ltd.*, (1961) 3 ALI ER 1169
4. *Craig vs Kanseen* (1943) 1 ALL ER 108
5. *Tilakeratne vs Wijesinghe* 11 NLR 270
6. *Kadiragamadas vs Suppiah* 56 NLR 172
7. *Udeshi vs Mather* [1988] 1 Sri.L.R. 12

*S.F.A. Cooray with Chitrananda Liyanage, Niroshini de Silva and Muditha Premachandra* for Defendant Petitioner.

*J.W. Subasinghe P.C.*, with *J.A.J. Udawatte* and *Tilan Liyanage* for Plaintiff Respondent.

*Cur. adv. vult.*

February 17, 2000.

**JAYASINGHE, J.**

The Plaintiff-Respondent instituted action in the District Court of Negombo against the Defendant-Petitioner limited liability Company for the recovery of a sum of Rs. 400.000/- with interest at 24% and for costs. The Defendant-Respondent filed proxy on 28. 09. 1993 and its answer on 26. 04. 1994 denying the Plaintiff's claim. When the case was taken up for trial on 15. 12. 1994 the Counsel for the Plaintiff objected to the proxy filed by the Attorney-at law, W. L. A. Victor Rodrigo and moved that the said proxy and the answer of the Defendant be rejected and urged that the action be fixed for trial *ex parte*. The content of the Plaintiff's objection was that the proxy filed by the Defendant was signed by one of the Directors of the Defendant Company and that it does not bear the Common Seal of the Company. The proxy contained the rubber stamp of the Managing Director. Parties thereafter filed written submissions. After the filing of written submissions by the Plaintiff a fresh proxy had been tendered by the Defendant along with its written submissions. The said proxy had been signed by two Directors having placed the Common seal.

The learned District Judge upheld the Plaintiff's objection and rejected the Defendant's proxy and proceeded to fix the case for trial *ex parte*. The learned District Judge refused to consider the proxy filed by the Defendant along with its written submissions. This application is to revise the said order of the learned District Judge.

Two question of law came up for consideration before this Court when this application was taken up for consideration:-

Firstly whether the proxy which bore the signature of only one Director was defective and

secondly whether the second proxy filed along with the Defendant's written submissions cured the allegedly defective proxy and consequently fixing the action for *ex parte* trial was erroneous. Mr. Cooray submitted that the requirement of the appointment of an Attorney-at-law are contained in Section 27(1) of the Civil Procedure Code.

Section 27(1) provides that;

"the appointment of a Registered Attorney 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, and every such appointment shall contain an address at which service of any process which under the provisions of this chapter may be served on the Registered Attorney, instead of the party whom he represents, may be made".

He submitted that there was an appointment of a registered Attorney and that if the Court is satisfied there is compliance of Section 27(1) in that it was signed by the client there was a valid proxy and that in any event a technical defect in the said appointment was curable by the second proxy filed along with the written submissions. Mr. Cooray also sought to rely on Section 38(1) of the Companies Act No. 17 of 1982.

Section 38(1) provides that:

“A document or record of proceedings requiring authentication by a Company shall be signed by a Director Secretary or other authorized Officer of the Company and may not be under its Common Seal”. In *L. J. Pieris & Co. vs. L. C. H. Pieris*<sup>(1)</sup> it was held that a document, that is a proxy to be filed in Court can be said to be signed by a Company when it is authenticated as required by Section 34(1) of the Companies Ordinance. Here the proxy by a company in favour of a proctor had been signed by only one Director although it bore the Common Seal. Thamotheram, J. observed that “the real question to my mind is . . . . . had the proctor the authority of his client, i. e. Company, to institute action and otherwise do what Section 26 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. Section 34(1) of the Companies Ordinance states that a document or proceeding requiring authentication by a Company may be signed by a Director Secretary or other authorised Officer of the Company and need not be under its Common Seal. “Authenticate” means to establish the truth of, to establish the authority of, make valid. This is all that is required for the purpose of a valid proxy. The original proxy in this case was in writing and purported to be signed by the proctors client, the Company. The question for decision of the Court was whether in fact it was signed by him when it was purported to be signed. It is here that section 34(1) has relevance. 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 has authority of his client to do what he is permitted to do under Section 27 of the Civil Procedure Code. I am of the view that the original proxy is good”.

Mr. Cooray also submitted that even if the first proxy was defective that defect was cured by the second proxy which was tendered with the written submissions of the Defendant. The

second proxy had the Common Seal which was placed in the presence of two Directors who had also placed their signatures. The Defendant Company appointed the same Attorney-at-law again and the Defendant company in effect went on to ratify whatever that has been done by the said Mr. Rodrigo in this case including the filing of answer.

Mr. Subasinghe, President's Counsel submitted that under section 24 of the Civil Procedure Code, a party to an action may either act in person or by an Attorney-at-law duly appointed by that party under the mandatory provisions of Section 27(1). The appointment of the Registered Attorney shall be in writing signed by the client and filed in Court. He submitted that this section would ordinarily apply unless other statutory provision is enacted prescribing a different procedure in specific instances. He argued that the proxy constitutes a contract for rendering professional services between the Registered Attorney and the client. The learned President's Counsel relied on a passage from "Professional Ethics and Responsibilities of a Lawyer" by Dr. A.R.B. Amerasinghe. He has observed that "The Registered Attorney performs the functions previously performed by proctors in employing and instructing Counsel, carrying out his advice and organising the case behind the lines for eg. in obtaining the evidence which Counsel needs, in taking proofs from witnesses, securing their attendance and the likes, Where he fails in his duty he may be guilty of being in breach of his contract . . . ." "Where an Attorney intends to function in a contentious civil matter, only as a registered Attorney and not also as Counsel he should ensure that the Attorney who is to appear as Counsel is retained and instructed. Otherwise he would be acting in breach of his contract in terms of his proxy and also in breach of his contract in terms of his proxy and also in breach of his duty of care". He also relied on an observation made by Hutchinson C. J. in *Re Wijeyesinghe*<sup>(2)</sup> "a proctor or a procurator is one who acts as agent for another person". He relied on these authorities to satisfy Court that the relationship between a proctor and his client arises out of a

contract of agency. He submitted that this contract has to be made in conformity with the prescribed procedure i. e. set out in Section 34(1) of the Companies Act. Mr. Subasinghe submits that the Defendant being a juristic person incorporated under the Companies Act No. 17 of 1982 and special provision is made in Section 34(1) of the statute for the execution of a contract made by an incorporated Company. The proxy given by such a Company has therefore to be in writing under the Common Seal of the Company. He submits that the said proxy does not conform to Section 34 is therefore void and a nullity, He relied on a dictum by Lord Denning in *MacFoy vs. United Africa Co. Ltd.*,<sup>(3)</sup> "If an act is void then it is in law a nullity, it is not only bad but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without much a do, though it is sometime convenient to have the Court to declare it to be so and any proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there; it will collapse". He submitted that the proxy is incurably bad and cannot be rectified. For instance as it was held in *Craig vs. Kanseen*<sup>(4)</sup> a failure to serve summons was not a mere irregularity but a defect which is a nullity. Mr. Subasinghe further submitted that *L. J. Peiris and Co. vs. L. C. H. Pieris*(*supra*) has been wrongly decided in that the decision was based entirely upon the consideration of section 34 of the Companies Ordinance and that the application of section 30 has not been taken cognizance of. He submitted that the decision has been made *per incuriam* and should not be followed. Mr. Subasinghe also submitted that the second proxy dated 08. 02. 1996 has been tendered to Court without notice to the Plaintiff and thus the Plaintiff has been deprived of an opportunity to raise an objection when it was tendered. He submits that the first proxy being void and a nullity cannot be rectified. Section 38 of the Companies Act refers to the authentication of documents and translations. It provides that a document or record of proceedings requiring authentication by a company may be signed by a director and need not be

under its Common Seal. I am inclined to agree with Mr. Subasinghe's submission that *L. J. Peiris & Co, Ltd. (supra)* has been wrongly decided. In the case of a proxy the question of authentication does not arise. It is not open for the Defendant to rely on Section 38 which deals with authentication and section 38 has no application to the present situation. I am also inclined to agree with Mr. Subasinghe's submission that this is a situation which falls properly within section 34 of the Companies Act and that it is a Contract of Agency.

In *Tilakaradne vs. Wijesinghe*<sup>(5)</sup> by an oversight the proxy had not been signed by the Plaintiff and the proctor had acted without any objection in the lower Court. An objection was taken up in appeal.

The Court held that the mistake could be rectified by the plaintiff signing it. In *Kadiragamadas vs. Suppiah*<sup>(6)</sup> the proctor who filed the petition of appeal on behalf of the substituted Defendants had not been appointed in writing. The court permitted the Defendants to cure the defect by filing a written proxy. In *Udeshi vs. Mather*<sup>(7)</sup> it held that a defective proxy can be rectified and the acts done there on ratified by the principal where the defects are curable. The question is whether the proctor had the authority of his client to do what was done on his behalf although in pursuance of a defective appointment. 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 the acts done and the appearances made in his behalf by the attorney-at-law would be void and of no legal effect. *Tilakaradne vs. Wijesinghe (supra)* and *Kadiragamadas vs. Suppiah (supra)* related to transactions between natural persons and the appointment of the Attorney was in terms of Section 27(1) of the Civil Procedure Code. In this instance the Defendant being a juristic person, section 30(1) A provides that a contract on behalf of a Company may be made as follows:

- (a) a contract which is made between private persons would be by law required to be in writing, may be made on behalf of the Company in writing under the common Seal of the Company.

There is no doubt that an Attorney-at-law acts as an agent of his client. An Agency relationship is constituted by way of a contract. Under section 34(1)(a) contract may be made on behalf of the Company in writing under the Common Seal, in the absence of the Common Seal, no agency relationship is constituted between the Defendant and the attorney. I am inclined to the view that there is no proxy before Court as the 'proxy' filed of record is void. Since there was no proxy the question of curability does not arise. The application is dismissed with costs fixed at Rs. 2100/-.

**JAYAWICKRAMA, J.** - I agree.

*Application dismissed.*