

DISTILLERIES COMPANY LTD

v.

KARIYAWASAM AND OTHERS

COURT OF APPEAL
UDALAGAMA, J.
NANAYAKKARA, J.
C.A.L.A. 163/2001
D.C. COLOMBO 5668/SPL
JUNE 20TH, 27TH 2001

Civil Procedure Code - S. 24, S. 27, S. 181, S. 757(1) - Affidavit can it be affirmed anterior to the date the Petition had been subscribed to? What is support? Proxy - who can sign same?

Held :

- (i) In terms of S. 757(1) the Petition need not precede in point of time to that of the affidavit so as to enable a party to support the contents of the Petition.

Per Nanayakkara, J.

“The object of the Civil Procedure Code is to prevent civil proceedings from being frustrated by any kind of technical irregularity or lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a court from dispensing justice.” The court should not approach the task of interpretation of a provision of law with excessive formalities and technicality. A provision of law has to be interpreted contextually giving consideration to the spirit of the law.”

- (ii) In this case the proxy has been given in the name of one Prasanna Gunawardena, his Consultants and his Assistants as registered Attorneys-at-Law. Although the Civil Procedure Code does not recognise a status called “Consultants”, if an Attorney at Law wishes to have that appellation at the end or the beginning of his name in addition to his status, as registered Attorney, it does not thereby invalidate the proxy filed, as long as a duly appointed Attorney at Law is empowered to act by a party in the case. There is nothing irregular or improper in this appointment.
- (iii) The Petition has been subscribed to by Prasanna Gunawardena and Company. However, the description of the Petition should correspond with the names given in the proxy and if the Petition has been subscribed

to as Prasanna Gunawardena & Company, the Proxy too should have been given in the said Company's name instead of Prasanna Gunawardena, his Consultants and his registered Attorneys as evidenced by the Proxy.

Per Nanayakkara, J.

"The Proxy therefore is flawed and defective which flaw or defect is traceable to the proxy and not so much to the subscription of the Petition."

- (iv) The important question that has to be determined is whether Prasanna Gunawardena & Company, had in fact the authority of his client to do what was done on his behalf, on the strength of the Proxy given to the subscriber by his client.

There is no doubt that Prasanna Gunawardena & Company, had ample authority. The defect or the flaw is curable under the law, and does not affect the validity of the Petition, however the Petitioner should rectify the defect in the proxy in conformity with the relevant provisions of the Civil Procedure Code.

APPLICATION for Leave to Appeal from the order of the District Judge of Colombo.

Cases referred to :

1. *Kobbekaduwa v. Jayawardena* - 1983 - 1 Sri LR 416
2. *Damayanthe Abeywardena v. Hemalatha Abeywardena* - 1993 - 1 SLR 277
3. *Chandrasiri v. Abeywickrema* - 1998 3 SLR 227
4. *Seneviratne Banda v. Chandrawathie* - 1997 Vol. 1 SLR 12
5. *Velupillai v. The Chairman, Urban District Council* - 39 NLR 464
6. *Kirtwanthe v. Navaratne* - 1990 2 Sri LR 393
7. *Mackinon's v. Grindlays Bank* - 1986 2 Sri LR 272
8. *Seelawathie v. Jayasinghe* - 1985 2 Sri LR 266
9. *Fernando v. Fernando* - 1997 3 Sri 1
10. *Tilakaratne v. Wijesinghe* - 11 NLR 270
11. *Treaby v. Bawa* - 7 NLR 22
12. *Tea Small Factories Ltd., v. Weeragoda* - 1994 3 Sri LR 353

K. N. Choksy P.C., with S. S. C. Thambiah, S. Jayawardena, V. K. Choksy and Ms. K. Wijetunga for Petitioner.

Wijedasa Rajapakse P.C., with *G. G. Arulpragasam* and *Kapila Lyanagamage* for Plaintiff Respondents.

Fatz Musthapa P.C., with *Chanaka de Silva* for 2nd, 3rd and 5th-16th Respondent.

K. Kanag-Iswaran P.C., with *A. Rodrigo* for 1st Respondent.

Cur. adv. vult.

July 13, 2001.

NANAYAKKARA, J.

When this matter was taken up for hearing on the 25th June 2001 counsel for the plaintiff-respondent (respondent) raised two preliminary objections. Basing his first objection on the provision of section 757(1) of the Civil Procedure Code. Counsel submitted that the affidavit filed by the 16th Defendant-petitioner (petitioner) does not support the petition as contemplated by section 757(1) of the Civil Procedure Code as the affidavit had been affirmed to on a date anterior to the date the petition had been subscribed to. It was argued on behalf of the respondent, as the date of the affidavit submitted by the petitioner precedes the date of the petition, the petitioner could not have possibly supported the contents of the petition by his affidavit, as contemplated by section 757(1) of the Civil Procedure Code.

Drawing the attention of the court to the affidavit of the petitioner, learned counsel argued that it had been affirmed to on the 23rd of May 2001, while the petition had been signed on the 24th of May 2001, and thereby the petitioner had supported the contents of a non existing petition by his affidavit. In support of his argument, learned counsel has drawn our attention to the following decisions :-

Kobbekaduwa v. Jayawardena,⁽¹⁾

Damayanthie Abeyawardena v. Hemalatha Abeyawardena⁽²⁾

Chandrasiri v. Abeywikrema⁽³⁾

Counsel also invited us to have recourse to the meaning of the word "support" given in the "**Random House Dictionary**" of the English Language, in interpreting the section.

Learned counsel for the petitioner in reply to the objection raised by the respondent adverting to the same authorities cited by counsel for the respondent, argued that an affidavit has only to bear the date it is attested on or affirmed to and the petition has to bear the date it is lodged in the Registry of the court, and the law does not require that both petition and affidavit should bear the same date. If it is so it can cause immense practical difficulties and hardships to parties. All that is expected of a petitioner under section 757(1) of the Civil Procedure Code is to verify matters contained in the petition by way of an affidavit.

At this stage it will be useful to refer to the relevant section of the Civil Procedure Code. Relevant section 757(1) reads thus:

"Every application for leave to appeal against an order of court made in the course of any civil action, proceeding or matter, shall be made by petition duly stamped, addressed to the Supreme Court and signed by the party aggrieved or his registered Attorney and shall be supported by affidavit and shall contain the particulars required by section 758. The appellant shall with such petition tender as many copies as may be required for service on the respondents".

When this section is carefully analyzed it becomes evident that the averments contained in the affidavit should only be supportive of the contents of the petition and for that purpose it does not stipulate that the petition has to be anterior to the date of petition. In other words the petition need not precede in point of time to that of the affidavit so as to enable a party to support the contents of the petition.

An affidavit that is required to be submitted along with the petition under section 757 (1) of the Civil Procedure Code should only furnish prima facie proof of the material facts set out or alleged in the petition and it should be confined to the

statement of such facts as the declarant is able of his own knowledge and observation to testify in accordance with section 181 of the Civil Procedure Code.

If the argument urged by learned counsel for the plaintiff-respondent was to prevail, this court would be compelled to reject many applications that are filed with petitions and affidavits under section 757 (1) of the Civil Procedure Code in limine, even if they bear the same date unless the court was absolutely certain that the petition was anterior in point of time to that of the affidavit.

This can be explained clearly by way of an illustration, if an affidavit bearing the same date as the petition is affirmed to in the morning, and the petition is signed in the evening, it can be argued that the petitioner by his affidavit has supported the contents of a non existing petition. If we were to uphold this contention it would inevitably lead to grave hardships and practical difficulties to the parties in cases. It should be stated at the outset that the argument advanced by learned counsel for the respondent is of a highly technical nature. Even if one were to accept the argument advanced by learned counsel for the respondents-respondents, as the correct technical legal position the question that has to be determined in the instant case is whether, it has caused any prejudice to the respondent. It is my view, if it has not caused any such prejudice, the court can act on it. I must state that the authorities submitted by learned counsel for the respondent does not support the proposition he advanced in the course of his argument. I am of the view that the decision reached in the case of *Seneviratne Banda v. Chandrawathie*,⁽⁴⁾ will provide some useful guidance in solving the present problem. It was a case filed under the Maintenance Ordinance where the liability to pay maintenance is of a civil nature, it was argued in that case that there was no proper application in terms of section 13 of the Maintenance Ordinance as there was only an affidavit filed without a petition as contemplated by the section. Nevertheless the court held that as the affidavit set out all the facts material to the application

there was sufficient compliance with section 13 of the Maintenance Ordinance. This is a case where there was a total absence of a petition. But as far as the present application is concerned, as both the petition and affidavit are there, I am of the view that the process of reasoning used in that case by analogy can be applied to the instant case even if some irregularity has occurred by the fact that the affidavit had been affirmed to before the petition was subscribed to, as alleged by the respondent.

The object of the Civil Procedure is to prevent civil proceedings from being frustrated by any kind of technical irregularity or lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a court from dispensing justice. As Lord Chief Justice Abraham pertinently remarked in the case of *Velupillai v. The Chairman, District Council Jaffna*⁽⁵⁾, that the court of law is a court of justice and it is not an academy of law should be always uppermost in one's mind. The court should not approach the task of interpretation of a provision of law with excessive formalism and technicality. The Code of Civil Procedure provides a series of rules designed to facilitate the orderly and impartial conduct from the stage of drafting of the pleadings until the judgment and execution of decree. Therefore the rules of procedure has been designed and formulated to facilitate due administration of justice. In this regard observations made by Justice Kulatunga in the case of *Kiriwantha v. Navaratne*,⁽⁶⁾ will also become pertinent. "The Court should bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of law. At the same time the court will not permit mere technicalities to stand in the way of court doing justice". In the case of *Macknons v. Grindlay's Bank*⁽⁷⁾ Chief Justice Sharvananda stated as follows:

"All rules of court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose"

Similarly the problem of construing or interpreting a provision of law cannot be solved merely by adopting the literal

interpretation of a section or meaning given to a word in a dictionary as urged by learned counsel for the plaintiff-respondent. A provision of law has to be interpreted contextually, giving consideration to the spirit of the law.

Learned counsel for the respondent's second objection was based on the question whether the duly appointed registered Attorney - at - Law has subscribed to the petition. Basically his argument was that the petition is purported to have been filed by Mr. P. S. Gunawardena, his consultants and several other assistants as registered Attorneys - at - Law, but the petition had been subscribed to neither by Mr. Gunawardena nor by his consultants nor by his assistants, but it has been signed by Mr. Prasanna Gunawaradena & Company which is not a legal entity or partnership in the eyes of the Law. If it is a legal entity or partnership Company's or partnership's name should have reflected in the proxy filed. As the subscription of the petition does not correspond with the proxy the petition is fundamentally flawed. Therefore the resulting position is that petition has not been filed by a duly appointed registered Attorney in terms of section 24 of the Civil Procedure Code. In support of his argument learned counsel has drawn our attention to the following decisions reached in *Seelawathie v. Jayasinghe*⁽⁸⁾, and *Fernando v. Fernando*⁽⁹⁾.

Learned counsel for the petitioner in reply has submitted that names and the descriptions given in the proxy are that of duly enrolled attorneys - at - Law and if learned counsel for the respondent challenges or disputes their positions as Attorneys - at - Law, the onus of proving that they are not duly appointed Attorneys - at - Law is on the respondent. Arguing further learned counsel submitted that the petitioner in terms of section 27 of the Civil Procedure Code, has empowered the Attorneys - at - Law named in the proxy, to appear before court for and on behalf of the petitioner. He further argued even if there is an oversight or a defect in the proxy it is curable under the law and contended that a defect in a proxy is not a valid ground to reject an application. In this connection the learned counsel has referred us to the following decisions:

Tilakaratne v. Wijesinghe⁽¹⁰⁾, and *Treaby v. Bawa*⁽¹¹⁾.

As the objection of counsel for the respondent is based on the proxy and the petition filed by the petitioner it is important to examine the proxy and the petition that have been filed on behalf of the petitioner in this case. As far as the proxy is concerned, the proxy has been given in the name of Mr. Prasanna Gunawardena, his consultants and his assistants as registered Attorneys - at - Law. Although the Civil Procedure Code does not recognize a status called "consultants", if an Attorney - at - Law wishes to have that appellation at the end or the beginning of his name, in addition to his status as registered Attorney - at - law it does not thereby invalidate the proxy filed, as long as a duly appointed Attorney - at - Law is empowered to act by a party in the case. The proxy that has been filed in this case bears a number of names including Mr. Prasanna Gunawardena, his consultants and his assistants as registered Attorneys - at - Law to act on behalf of the petitioner taken by itself. I see nothing irregular or improper in this appointment. As far as the petition is concerned counsel for the petitioner himself admits that it has been filed by Mr. Prasanna Gunawardena. His consultants and his assistants as registered Attorneys - at - Law but the petition has been subscribed to by Prasanna Gunawardena & Company. I am in agreement with the learned counsel for the respondent when he says that subscription of the petition should correspond with the names given in the proxy, and if the petition has been subscribed to as Prasanna Goonewardena & Company, the proxy too should have been given in the said Company's name instead of Prasanna Goonewardena his consultants and his registered assistant Attorneys - at -Law as evidenced by the proxy. Therefore I am of the view that the proxy given by the respondent in this case in that respect is flawed and defective which flaw or defect is traceable to the proxy and not so much to the subscription of the petition as the learned counsel pointed out. In the final analysis issue in this case boils down to the question of the validity of the proxy and not to the validity of the petition. The important question that has to be determined is whether

Prasanna Goonewardena & Company had in fact the authority of his client to do what was done on his behalf on the strength of the proxy given to the subscriber by his client.

I am of the view that there is absolutely no doubt that Prasanna Goonawardena & Company - the subscriber to the petition had ample authority to do what was done on behalf of the client. The next question that has to be determined is whether the defect or flaw is curable under the law. I consider even if the petition has been subscribed to by Prasanna Goonewardena & Company it is an irregularity which is curable under the law in view of the decisions reached in the cases of *Tilakaratne v. Wijesinghe (Supra)* and *Tea Small Factories Ltd. v. Weragoda⁽¹²⁾*, and does not affect the validity of the petition. In this connection the observation made in a case cited by both parties will become useful. Justice Dr. Amarasinghe observed in *Fernando v. Fernando (Supra)*.

“Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicality.”

This will provide very useful guidance in dealing with the problem at hand. For the above mentioned reasons I reject the preliminary objections raised by counsel for the plaintiff-respondent and direct the petitioner to rectify the defect in the proxy in conformity with the relevant provisions of the Civil Procedure Code.

UDALAGAMA, J. - I agree.

Preliminary objection overruled.

Plaintiff asked to rectify the defect in the proxy in conformity with the provisions of the Civil Procedure Code.