

COLOMBO SHIPPING CO., LTD.
v.
CHIRAYU CLOTHING (PVT) LTD.
(Case No. 2)

COURT OF APPEAL

DE SILVA, J.,

WEERASURIYA, J.

C.A. NO. 61/97

D.C. COLOMBO NO. 16614/MR

AUGUST 28, 1998

SEPTEMBER 15, 1998, DECEMBER 4, 1998

Civil Procedure Code – S. 65 – Summons to be served on the agent – Who is an agent?

The plaintiff-respondent instituted action against the 1st defendant-petitioner alleging breach of contract in delivering goods to a party other than the consignee and claimed damages. The summons on the 2nd defendant-respondent has been served on the 1st defendant-petitioner's address and the same was returned to court. Thereafter the plaintiff-respondent obtained an order to amend the plaint to read as "1st defendant acted as agent of the 2nd defendant" and obtained an order to serve summons on the 1st defendant-petitioner as agent of the 2nd defendant.

Held:

1. There are four key elements in S. 65 CPC – viz
 - (i) agent must personally carry on business or work of the principal within the jurisdiction.
 - (ii) the principal's business must be carried on within the jurisdiction of the court by the agent.
 - (iii) agent must personally carry on such business/work at the time of service.
 - (iv) principal must reside outside the jurisdiction of the court.
2. The 1st defendant-petitioner has represented itself to be the agent of the 2nd defendant and the plaintiff-respondent has acted on such representations, therefore the 1st defendant-petitioner is estopped from claiming that it is an agent for a limited purpose.
3. The 1st defendant-petitioner has also described itself as the agent of the 2nd defendant on the "cargo receipts". It has held itself out as the agent of the 2nd defendant who has ostensible or apparent authority.
4. In any event the 1st defendant-petitioner has not adduced any evidence documentary or otherwise to show that his authority to act for the 2nd defendant is limited.

Cases referred to:

1. *The Lalandra* 1932 – All ER 391.
2. *The Okura* 1914 – 1 KB 715.
3. *The Hostein* 1936 – 2 All ER 1660.
4. *Hely Hutchinson v. Brayhead Ltd. and another* 1967 – 3 All ER 98.

APPLICATION for revision of the order of the District Court of Colombo.

S. Sivarasa, PC with *Basheer Ahamed* for petitioner.

G. D. C. *Weerasinghe* for the respondent.

Cur. adv. vult.

January 29, 1999.

DE SILVA, J.

This is an application to revise the order of the learned District Judge dated 16th January, 1997 wherein the District Judge allowed an application to serve summons on the 1st defendant-petitioner as the agent of 2nd defendant.

The facts pertaining to this case are briefly as follows:

The plaintiff-respondent entered into a contract with a party called CIS Incorporated in the USA for the manufacture of garments. One of the conditions of the contract was CIS Industries to nominate the Freight Forwarder who would ship the goods in a carrier of its choice and to act as the agent of the CIS Industries. According to the contract party to be notified on arrival of the goods in USA was W. G. Company, New York, who was to clear the goods. CIS Industries Incorporated in USA nominated the 1st defendant as Freight Forwarder.

There was a delay in the shipment and the period in the letter of credit expired. In view of this Philadelphia National Bank was named as the consignee which opened the letters of credit. This was done to enable the buyer to pay the Bank and obtain documents.

The goods had been cleared by Carrol & Company referred to above who was the buyer's agent and the plaintiff was not paid. Thereafter the plaintiff-petitioner sent letters of demand to the 1st defendant-petitioner. The 1st defendant-petitioner has not replied these letters.

The plaintiff-respondent instituted action in the District Court of Colombo against the 1st defendant-petitioner alleging breach of contract in delivering goods to a party other than the consignee and claiming damages in a sum of US Dollars 24,277.33 equivalent to Sri Lanka Rs. 1,068,202.52.

The 1st defendant-petitioner in its answer denied liability and *inter alia* stated that –

(a) That the Buyers Consolidators Ltd. had been nominated by the CIS Industries Incorporated of USA as its agent.

(b) At all times material to the action the 1st defendant-petitioner acted as an agent of Buyers Consolidators Ltd. of Hongkong.

In view of this position in the answer the plaintiff-respondent sought to add the 2nd defendant as a party to the action whom the 1st defendant-petitioner was claiming as its principal. The learned District Judge permitted the 2nd defendant to be added as a party. The defendant-petitioner appealed against this order and the Court of Appeal by order dated 05.05.1995* set aside the order of the District Judge on the basis that the addition amounted to an amendment of the plaint and on the ground of delay.

The plaintiff-respondent thereafter filed this action bearing No. 16614/MR in the District Court of Colombo against the defendants on 10.06.1995 alleging breach of contract in delivering goods to a party other than the consignee and claiming damages in a sum of US Dollars 24,277.33.

The summons on the 2nd defendant in this case has been served on the 1st defendant-petitioner's address and the same was returned to court. The plaintiff-respondent thereafter sought an amendment to the plaint by incorporating the following words to the caption. "Through its agent 1st defendant Colombo Shipping Company" and amending paragraph 24 by stating "1st defendant acted as agent of 2nd defendant". The 1st defendant-petitioner objected to this. Written submissions were filed by parties and the District Judge by order dated 16th January, 1997, allowed the application to serve summons on the 1st defendant-petitioner as agent of the 2nd defendant. The present application is to revise this order.

*1995 2 SLR 97.

The question for determination by this court is whether the 1st defendant-petitioner is an agent of the 2nd defendant on whom the summons may be served in terms of the provisions of section 65 of the Civil Procedure Code.

Section 65 of the Civil Procedure Code reads as follows : "In an action relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons issued, service on any manager or agent who at the time of service personally carries on such business or work for such person within such limits shall be deemed good service, and for the purpose of this section the master of a ship is the agent of his owner or charterer".

It is to be noted that there are four key elements in the above provision that qualify the agent on whom a service of summons may be made. Firstly, the agent must personally carry on business or work of the principal within the jurisdiction. Secondly, the principal's business must be carried on within the jurisdiction of the court by the agent. Thirdly, the agent must personally carry on such business or work, at the time of service. Fourthly, the principal must reside outside the jurisdiction of the court.

The object of the application of the plaintiff-respondent to the District Court was to serve the summons on the 2nd defendant through the 1st defendant-petitioner. Counsel for the 1st defendant-petitioner submitted that the plaintiff-respondent endeavoured to impose on the 1st defendant-petitioner a character and obligation it does not hold or have, namely an agent on whom summons may be served and that the 2nd defendant is appearing through the 1st defendant-petitioner.

It was also submitted that the 1st defendant-petitioner does not carry on the business of the 2nd defendant in Sri Lanka. The 1st defendant-petitioner does its own business and in the course of its business it received the goods on behalf of the 2nd defendant at the time material to this action and not at the time of service of summons.

1st defendant-petitioner relied on the decisions of certain English cases. In *the Lalandra*⁽¹⁾ a firm of shipping agents booked freight and sold passenger tickets in England for a foreign Corporation on a

commission basis. The writ against the foreign corporation served on the shipping agent was set aside, as the shipping agent merely sold and did not make contracts on behalf of the foreign corporation.

In the case of *Okura*² it was pointed out that the agent had no authority to enter into contracts, but merely obtained orders and submitted to the foreign company for approval. The foreign company was not doing business here by a person and therefore was not resident here.

In *The Holstein*³ service of writ of summons *in personam* was effected on the London agents against a foreign shipping company. The agents were general agents for shipping companies. The foreign company in question had no financial interest in the firm. No staff of the London agents was assigned exclusively to the business of the foreign company. The remuneration of the London agents was wholly by commission. They paid their own office rent. They booked and collected freight and accepted bill of lading option declarations. As regards passenger tickets they issued them and signed as agents for the foreign shipping company. It was held that service on such a general agent was bad. The question was whether the agents were such agents of the foreign company that it can be said that the foreign company is resident in England by the agent. The agents did not carry on the business of the foreign shipping company at that address or anywhere else, except in the sense as part of its own business, the firm acted as agents for the foreign company. There was no ground to say that the foreign shipping company is carrying on business in this country by its agent.

It appears from the decisions of all these cases that each case is a question of fact to be decided upon the evidence.

It is an admitted fact that when the plaintiff-respondent handed over the goods to the 1st defendant-petitioner handed over the cargo receipts to the plaintiff-respondent. These receipts are annexed to the plaint marked F4A, F4B and F4C which are three consignments. In these documents the 1st defendant-petitioner described itself as the agent of the 2nd defendant.

The 1st defendant-petitioner contended that the documents were "cargo receipts" and not contracts made by the plaintiff-respondent with the defendant and the 2nd defendant was not doing business

by the 1st defendant-petitioner but rather through the 1st defendant-petitioner and therefore is not an agent.

At this stage it is relevant to note the wording of section 65 of the Civil Procedure Code, "at the time of service personally carries on such business or work for such person". The 1st defendant-petitioner in its answer states that it only accepts goods on behalf of the 2nd defendant. It is reasonable to conclude that 1st defendant-petitioner work for the 2nd defendant which situation is covered by section 65.

In any event the 1st defendant-petitioner has described itself as the agent of the defendant on the "Cargo Receipts P4A, P4B and P4C". It has therefore held itself out as the agent of the 2nd defendant who has ostensible or apparent authority.

In *Hely-Hutchinson v. Brayhead Ltd. and another*⁽⁴⁾ apparent authority of an agent is thus explained by Denning, L.J. :

"Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus when the Board of Directors appoint one of their members to be a managing director they invest him not only with implied authority, but also with ostensible authority to do all such things as fallen within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director."

Furthermore, in the instant case the 1st defendant-petitioner has represented itself to be the agent of the 2nd defendant through F4A, P4B and P4C and the plaintiff-respondent has acted on such representation. Therefore the 1st defendant-petitioner is estopped from claiming that it is an agent for a limited purpose. In any event the 1st defendant-petitioner has not adduced any evidence documentary or otherwise to show that his authority to act for the 2nd defendant is limited. In these circumstances I hold that the 1st defendant-petitioner is an agent within the scope of section 65 of the Civil Procedure Code and permit the plaintiff-respondent to have the summons served on the 1st defendant-petitioner as agent of the 2nd defendant. I dismiss the application with costs.

WEERASURIYA, J. – I agree.

Application dismissed.