

**WIJERATNE AND ANOTHER
v.
WEERATUNGA**

COURT OF APPEAL
ISMAIL, J. (P/CA),
TILAKAWARDENA, J.
C.A.L.A. NO. 180/98
D.C. COLOMBO NO. 5117/SPL
DECEMBER 9, 1998
MARCH 4TH AND 23RD 1999

Civil Procedure Code – S. 39, 46 (2), 75, 463 – Failure to Stamp the Proxy – Is it fatal – Attorney-General undertaking the defence – Stamp Duty Act – Amendment No. 27 of 1997 – S. 14 (c) – S. 71.

Held:

1. The CPC makes it clear that neither in regular actions (S. 39) nor in answers filed under s. 75 is there any requirement that the documents should be stamped at the time of presentation. There is no explicit or implied provision for denial of the acceptance of the document presented to Court contained in these aforesaid sections.
2. S. 46 (2) CPC shows that Court is bound to afford to the plaintiff an opportunity to supply the deficiency in stamping.
3. Thus, it is clear that insufficiency of stamping is not a fatal defect.
4. Although no specific application has been made under s. 463, CPC for the Attorney-General to undertake the defence, it is not a bar to the defence being undertaken by the Attorney-General, the fact that the Attorney-General has not made an Application in terms of s. 463 does not disentitle him from assigning a State counsel to appear for a defendant who is a Public Officer.
5. The filing of the Proxy by the Attorney-General unequivocally declares that the Attorney-General has undertaken the defence and that is sufficient compliance with s. 463 CPC.

6. Any document filed by the Attorney-General does not need stamp duty.

APPEAL from the order of the District Court, Colombo.

Cases referred to:

1. *Salgado v. Peiris* – (1909) 12 NLR 379.
2. *Sandanam v. Jamaldeen* – 71 NLR 145.
3. *Sita Rajasingham v. Maureen Seneviratne and Another* – 1995 – 2 SLR – 69.
4. *Jayawickrema v. Amarasuriya*
5. *De Silva v. Illangakoone* – 57 NLR 457.
6. *The Secretary to the Treasury – Colombo v. Mediwake* – 74 NLR 505.
7. *Vettivelu v. Wijeratne* – 60 NLR 442.

J. W. Subasinghe, PC with *Jayatissa Herath* for plaintiff-appellant-petitioners.

Ms. Farzana Jameel, SC for respondent.

Cur. adv. vult.

May 5, 1999.

SHIRANEE TILAKAWARDANE, J.

The plaintiff-appellants-petitioners instituted action in the District Court of Colombo on 4th May, 1998, seeking *inter alia* for an interim injunction to stay the decision of the defendant-respondent preventing the 2nd plaintiff-appellant-petitioner from attending school and sitting for the General Certificate of Education (Advanced Level) Examination in August, 1998, as a school candidate.

The statement of objections of the defendant-respondent was filed on 20.5.98 and inquiry was fixed for 3.6.98. In the meantime the plaintiff-appellants-petitioners filed objections to the acceptance of the papers of the defendant-respondent for the reason that the proxy had not been stamped and in the circumstances moved for an *ex parte* trial. These objections were rejected by the trial judge.

The District Judge by Order (P7) dated 13.7.98, refused the interim injunction-rejected the objections and awarded costs of the inquiry to the defendant-respondents. This application is against the Order.

The issue that arises in this case is whether the failure to stamp the proxy tendered by the Attorney-General on behalf of the defendant-respondent is a fatal defect, and consequently should the documents preferred by the defendant-respondent have been rejected.

The full Bench decision of *Salgado v. Peiris*⁽¹⁾ settled the law that a Petition of Appeal to the Supreme Court which has been preferred will be rejected if not sufficiently stamped. Section 755 of the Civil Procedure Code by implication required a proper stamp duty to be produced at the time of presentation of the written appeal. This was the law that applied before the amendment No. 20 of 1977 of the Civil Procedure Code.

In the subsequent case of *Sandanam v. Jamaldeen*⁽²⁾ it was, however, held that in an application for conditional leave to the Privy Council, a deficiency arising from a *bona fide* error in the stamping is not a fatal defect.

In the case of *Sita Rajasingham v. Maureen Seneviratne and another*⁽³⁾ Justice Dheeraratne, dealing with a case where there was an insufficiency of stamping in a petition purging the default of appearance held that, "a right of a party to maintain a proceeding cannot be denied to that party on the ground of insufficiency of stamping of a document, unless the law *expressly or impliedly* provided for such denial". He held, further, that the petition was wrongly rejected for the deficiency of stamping and that the correct procedure was for the Court to have called for the deficiency of the stamping to be supplied by the party who tendered the document to the Court.

The Civil Procedure Code makes it clear that neither in regular actions filed under section 39, nor in answers filed under section 75 of the Civil Procedure Code is there any requirement that the documents should be stamped *at the time of presentation*. Furthermore, there was no explicit or implied provision for denial of the acceptance of the document presented to Court contained in these aforesaid sections.

In fact section 46 (2) (h) gives discretion of a judge to reject the plaint, if it is ". . . written on paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamps

within a time to be fixed by Court fails to do so". This means that the Court is bound to afford to the plaintiff an opportunity to supply the deficiency in stamping.

Furthermore, in the case of *Jayawickrama v. Amarasooriya*⁽⁴⁾ it was held that, "when a judge having considered the question of the sufficiency of stamp duty accepts a plaint or answer, or has accepted it having inadvertently omitted to consider the question, the remedy, if indeed any exists, must be by means of an action as the Attorney-General as representing the crown, to which all stamp duties are a debt, may be deemed to be entitled to take".

Therefore, it is clear that insufficiency of stamping is not a fatal defect.

In the present case the Attorney-General has appeared and filed a proxy on behalf of the defendant-respondent. Counsel for the plaintiff-appellant-petitioner contended that the defense could only be undertaken after a specific application in terms of section 463 of the Civil Procedure Code.

Section 463 of the Civil Procedure Code as amended provides that "If the Attorney-General undertakes the defense of an action against a Minister, Parliamentary Secretary, or Public officer the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action".

In this context "undertakes the defense" connotes a great deal more than a mere decision to provide legal representation. It involves the acceptance of responsibility by the State for the satisfaction of a decree which might otherwise have been awarded in favour of a plaintiff against the public officer individually.

It has not been disputed in this case that the action against the defendant is for an act that he performed in the furtherance of his duties as a principal and, therefore, in his capacity as a public officer of a government school. It is also relevant that in the case of *De Silva v. Illangakoone*⁽⁵⁾ it was held that a principal issuing a school leaving certificate does so only in his official capacity.

Admittedly, no specific application has been made under the aforesaid section 463 for the Attorney-General to undertake the defense of the defendant. But this has been held not to be a bar to the defense being undertaken by the Attorney-General as was held in the case of *The Secretary to the Treasury, Colombo v. Mediwake*⁽⁶⁾. It was also held in the case of *Vettivelu v. Wijeratne*⁽⁷⁾. "The fact that the Attorney-General has not made an application in terms of section 463 of the Civil Procedure Code does not disentitle him from assigning a crown counsel to appear for a defendant who is a public officer".

In these circumstances the filing of the proxy by the Attorney-General unequivocally declares that the Attorney-General has undertaken the defense and that such is sufficient compliance with section 463 of the Civil Procedure Code.

Furthermore, any document filed by the Attorney-General does not need stamp duty, in terms of section 5 (14) (c) of the Stamp Duty Act of 1982. Section 71 of the Stamp Duty Act as amended by Act, No. 27 of 1991 defines a document to include a Power of Attorney.

We, therefore, see no reason to interfere with the Order of the District Judge rejecting the application for the non-acceptance of the defendant's documents.

The District Judge has also refused the interim injunction on the basis that no *prima facie* case has been established by the plaintiff-appellant-petitioners has referred to the document V4. This has been an application for a school leaving certificate purportedly made at the request of the 2nd plaintiff-appellant-petitioner. Considering the fact that 3 separate teachers had placed their signatures on the document, the District Judge has held that it is improbable that the 3 teachers who had signed V4 were all part of a deliberate conspiracy. Especially in the light of their favourable comments about the student. We see no reason to interfere with this finding.

The Leave to Appeal application is refused. Application is dismissed with costs.

ISMAL, J. (P/CA) – I agree.

Application refused.