

**WIJESUNDARA**

**v**

**WIJESUNDARA**

COURT OF APPEAL  
AMARATUNGA, J.  
CALA 26/02  
D.C. MT.LAVINIA 2826/2000  
MARCH 13, 2003

*Civil Procedure Code, sections 24, 25(b), 42, and 93(2) – Action brought by recognised Agent – Holder of a Power of Attorney – Fact that the action has been filed through an Attorney apparent on the face of the plaint – Application to amend answer after first date of trial refused –Validity.*

The plaintiff respondent instituted action against the defendant petitioner seeking a divorce and custody of the child. The defendant-petitioner filed answer denying the allegations of malicious desertion and counter claimed a divorce. The trial was fixed for 30.5.2001. The defendant petitioner sought to amend the answer on 25.2.2002. The trial judge refused the application. On leave been sought, it was contended that the plaint in its caption or in the body does not state that it is an action of the plaintiff by his attorney, therefore the defendant was not aware when she filed her answer that it was filed through an attorney and this fact came to light only when the defendant's attorney-at-law perused the record at a later stage and therefore the defendant is entitled to amend the answer. The failure to state either in the caption, or in the body of the plaint that the plaintiff has filed his action by his attorney is a fatal defect.

**Held:**

- (i) The caption clearly shows that at the time of filing action both parties were resident in the U.K.
- (ii) In terms of section 24 of the Civil Procedure Code a party can make an appearance through his recognised Agent duly appointed by him. In this case, the proxy filed by the registered attorney is a proxy given to him by 'J' the Power of Attorney holder.
- (iii) In terms of section 25(b) persons holding a general Power of Attorney, from parties not resident within the local limits of the jurisdiction of court, shall file in court a copy of the Power of Attorney or a copy thereof certified by a registered attorney.
- (iv) Section 42 is not applicable, the action has not been brought in a representative capacity, but by the holder of a Power of Attorney, a recognised Agent.

*Per Amaratunge J.,*

"In the absence of any specific requirement in the Code to have such particulars either in the caption or in the body of the plaint, this court is unable to add a new requirement to actions filed through recognised Agents."

The plaintiff has complied with section 25(b) by filing a copy of the Power of Attorney along with plaint.

- (v) It appears on the face of the plaint, that at the time the plaint was filed, the plaintiff was resident in the U.K; this was sufficient notice for the defendant to ascertain whether the action has been filed through an attorney or not.

**APPLICATION** for leave to appeal from the order of the District Court of Mt.Lavinia.

**Cases referred to:**

1. *Kareeza v Jayasinghe* – (1986) 1 CALR 109
2. *Liyanage v Seneviratne* – (1986) 1 CALR 306
3. *Dharmadasa v Goonewardena* – 2 CLW 385

*Ranjan Mendis with C.A.S.Jayaweera Bandara* for defendant-petitioner.

*L.C.Seneviratne, P.C., with Rohan Sahabandu* for plaintiff-respondent.

*Cur.adv.vult*

June 20,2003

**GAMINI AMARATUNGA, J.**

This is an application for leave to appeal against an order made by the learned District Judge of Mt.Lavinia refusing an application made on behalf of the defendant- appellant to file an amended answer. The facts relevant to this application are as follows.

The plaintiff-respondent by his plaint filed in the District Court of Mt.Lavinia on 21/1/2002 claimed a divorce against the defendant-appellant, for an order for the custody of the child and the other reliefs prayed for in the plaint. The ground upon which the divorce was claimed was malicious desertion. The defendant wife filed answer denying the allegation of malicious desertion and counter claimed a divorce on the ground of adultery of the plaintiff and malicious desertion. After the pleadings the Court has fixed trial for 30/5/2001. However as there was an application made on behalf of the defendant to have the case laid by the trial was not taken up on that day and after an inquiry relating to the said application and when the case was to be fixed for trial the defendant has moved for permission to file an amended answer. A draft amended answer bearing the date 25/2/2002 has also been filed in the District Court. After considering the submissions made by the par-

ties the learned District Judge has made order dated 20/6/2002 refusing permission to file an amended answer. This application for leave to appeal is against that order.

The fact that the plaintiff has filed his action through an attorney is not in dispute. So is the fact that the application to amend the answer has been made after the first day fixed for trial. According to the submissions made by the learned counsel for the appellant before me, the necessity to file an amended answer arose consequent to the discovery of a serious procedural defect in the plaint, discovered after the defendant filed her answer. This defect pointed out in paragraph 5 of the amended answer and explained in the submissions of the learned counsel for the defendant-appellant is the failure of the plaintiff to set out in his plaint that his action has been filed through an attorney.

The learned counsel pointed out that the plaintiff's plaint in its caption or in the body of the plaint does not state that it is an action of the plaintiff by his attorney. In view of the absence of any indication in the plaint that it is an action filed through an attorney, the defendant at the time she filed her answer was not aware that the action has been filed through an attorney and this fact came to light only when the defendant's attorney-at-law perused the record at a later stage. According to the submission of the learned counsel for the defendant-appellant the failure to state either in the caption or in the body of the plaint that the plaintiff has filed his action by his attorney is a fatal defect and therefore there is no proper plaint, constituted according to law, before Court. The defendant appellant wanted to raise this matter as an issue to be tried at the trial and for this purpose wished to raise it by way of an amended answer. Before I proceed to deal with the learned District Judge's reasons for refusing to allow the proposed amendment I wish to deal with the above legal submission of the learned counsel for the defendant-appellant.

The caption of the plaint of the plaintiff is as follows:

Dr. Rohan Lalith Wijesundara,  
111,5th Lane, Colombo 3.  
(presently No 11C, Holycroft Avenue,  
Hampstead, London NW 37 QC.United  
Kingdom)

-Plaintiff-

Saumya Dilrukshi Wijesundara (nee) Karunaratna,  
No 14A, St. Mary's Road, Mt.Lavinia  
(presently C/o Palitha Gunatilake,  
Renolds Drive, Queensbury Edgeware, United  
Kingdom)

This caption clearly shows that at the time of filing the action both parties were resident in the United Kingdom. It is not disputed that the power of attorney given by the plaintiff to S.S.B.D.H.Jayawardena has been filed in the District Court along with the plaint and that it contains the rubber stamp impression of the District Court of Mount Lavinia bearing the date on which the plaint has been filed. In terms of section 24 of the Civil Procedure Code a party may appear, make an application or act in Court by his recognized agent or by a registered attorney duly appointed by the party. In this case the proxy filed by the registered attorney is a proxy given by S.S.B.D.H.Jayawardana, the power of attorney holder of the plaintiff. According to section 25(b) of the Civil Procedure Code, persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of Court shall file in Court a copy of the power of attorney or a copy thereof certified by a registered attorney. In this case a copy of the power of attorney has been filed in Court.

It was the submission of the learned counsel for the defendant-appellant that what was served on the defendant-appellant was only a copy of the plaint attached to the summons and in the absence of any statement in the caption or in the body of the plaint that the action has been filed through an attorney, there was no way for the defendant to know that position. The learned counsel also submitted that there is no requirement for a defendant to peruse the record before filing answer and therefore the failure of the plaintiff to state in the plaint that action has been filed through an attorney deprived an opportunity to the defendant to include an averment in the answer relating to the legality of the plaint. The learned counsel submitted that the plaint has not been prepared in accordance with section 42 of the Civil Procedure Code. With respect, this submission is not tenable in law. Section 42 which enacts that 'when the plaintiff sues in a representative character, the plaint should show

not only that he has an actual interest in the subject-matter, but that he has taken the steps necessary to enable him to institute an action concerning it has no application to his case'.

This action has not been brought by the holder of the power of attorney in a representative character. He is only a recognized agent within the meaning of section 24 of the Civil Procedure Code. The plaintiff is the grantor of the power of attorney, Dr. Wijesundara. The holder of the power of attorney therefore is not the plaintiff and the provisions of section 42 has no bearing on the facts of this case. It is true that generally, when an action is filed through an attorney, the caption usually states that it is an action by the plaintiff by his attorney named in the plaint. However in the absence of any specific requirement in the Civil Procedure Code to have such particulars either in the caption or in the body of the plaint this Court is unable to add a new requirement to actions filed through recognized agents. The plaintiff has complied with the requirement set out in section 25(b) by filing a copy of the power of attorney along with the plaint.

It was the submission of the learned Counsel for the defendant-appellant that in the absence of a specific averment in the answer that the plaint has been prepared according to law, she will be precluded from raising an issue to this effect. It is well established that issues are restricted to pleadings. *Kareeza v Jayasinghe*<sup>(1)</sup>, *Liyanage vs Senviratne*<sup>(2)</sup> An issue of law which goes to the very root of the case should be allowed in the interests of justice even though it does not arise out of the pleadings. *Dharmadasa v Goonawardana*.<sup>(3)</sup>

The learned trial judge in considering the defendant's application to amend the answer has considered the two requirements set out in section 93(2) of the Civil Procedure Code. The learned judge has come to the conclusion that since the defendant too has counter-claimed for divorce, no grave and irremediable injustice would be caused to her by refusing an amendment to the answer. The learned counsel for the defendant-appellant submitted that if the plaintiff's plaint is rejected the defendant would be in the position of the plaintiff and this would give her an added bargaining power with regard to her claim for alimony and the settlement of property. However this Court cannot see how such change of posi-

tion would *ipso facto* give a stronger bargaining power to the defendant. She certainly has a bargaining power if the other party suggests a settlement or a compromise. But as at present there are no signs of such a possibility. Whether a person stands in the capacity of the plaintiff or defendant, the ultimate relief available will depend on the findings made at the trial.

The learned trial judge has held that the defendant is also guilty of delay. However the learned counsel's submission was that the fact that the action has been filed through an attorney was not apparent on the face of the plaint and the application for amendment was made as soon as that fact was discovered and hence there was no delay. However I have already stated that it appears on the face of the plaint that at the time the plaint was filed the plaintiff was resident in the United Kingdom. This was sufficient notice for the defendant to ascertain whether the action has been filed through an attorney or not. However since this Court is satisfied that no grave and irremediable injustice would be caused to the defendant by refusing to allow the answer to be amended, there is no necessity to examine whether the trial judge's conclusion that the defendant is guilty of delay is correct or not. Since there is no possibility of any prejudice being caused to the defendant the application for the amendment of the answer must necessarily fail.

For the foregoing reasons I hold that the learned judge's order refusing permission to file the amended answer is correct and accordingly I refuse leave to appeal and dismiss this application without costs.

*Application dismissed.*