S. P. GUNATILAKE V. S. P. SUNIL EKANAYAKE

SUPREME COURT
J. A. N. DE SILVA, C.J.
K. SRIPAVAN, J AND
C. EKANAYAKE, J.
S. C. APPEAL NO. 26/2009
S. C. (CALA) 130 A//2008
NCP/HCCA/65/2007
D. C. POLONNARUWA 5341/L
JUNE 29TH, 2010

Civil Procedure Code - Section 27 - appointment of a registered Attorney-failure to file proxy-subsequent filing of proxy-validity-objection to jurisdiction - failure to take such objections at the first opportunity - consequences?

This is an appeal against the judgment of the Provincial (Civil) Appellate High Court. The original Plaintiff died whilst the District Court action was pending and the Attorney-at-Law for the deceased Plaintiff on record filed a petition and affidavit to substitute the present substituted Plaintiff in place of the Deceased Plaintiff. The District Court allowed the substitution and after trial judgment was delivered in favour of the substituted Plaintiff. The Respondent appealed against the judgment. The substituted plaintiff filled an application for writ pending appeal. The District Court allowed the application and issued a writ in favour of the substituted Plaintiff. The Respondent preferred an appealed against the said order. The Court of Appeal refused leave and dismissed the application. The Respondent thereafter preferred a special leave to appeal application to the Supreme Court which was later refused. The final appeal was fixed before the Civil Appellate High Court of Anuradhapura. In appeal the Respondent took up a preliminary objection that there was no proxy filed on behalf of the substituted Plaintiff in the District Court, and there was no proper application before Court to substitute him or even to represent him by an Attorney-at-Law. The substituted Plaintiff submitted that the failure to object in the original Court coupled with the subsequent filing of a proxy cured any defect which may have invalidated the proceedings.

The High Court of Appeal (Civil) Anuradhapura allowed the appeal on the ground that no valid proxy had been before the District Court on behalf of the substituted Plaintiff thereby rendering the judgment dated 02.02.2002 of the District Judge null and void.

This appeal to the Supreme Court is against the aforesaid decision of the Civil Appellate High Court.

Held

(1) Even when an Attorney is incapable of appearing or making applications due to the total failure to file proxy, such default should not in any way affect the validity of the proceedings.

Per J. A. N. de Silva, CJ. –

> ".....Mr. Iddawela's name continued to be in the record as being the Attorney for the Plaintiff. On 21/11/2001 the trial recommenced and the record notice Mr. Iddawela as having appeared for the substituted Plaintiff. No objection to this was taken up by the Defendant. From that point onwards this Court notes no less than seventeen journal entries with Mr. Iddawela's name appearing for the substituted Plaintiff, whilst the substituted Plaintiff's presence in Court is also duly noted. At no time was an objection taken to Mr. Iddawela's appearance."
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> "The aforementioned facts in my opinion, provides a sufficiently strong indication that the substituted Plaintiff had at the material times granted Mr. Iddawela the authority to appear and make applications on behalf of him, despite the substituted Plaintiff not filing a proxy as an overt manifestation of the granting of such authority."

(2) The substituted Plaintiff by virtue of filing a proxy belatedly has succeeded in ratifying the appearances and applications of the registered Attorney and thereby supplying all such acts with legal validity.

Obiter:

Jurisdictional objections are required to be taken at the first opportunity, the failure of which would constitute acquiescence to jurisdiction of the Court.

Cases referred to;

(1) *Paul Coir v. Waas* – 2002 (1) SLR 13

(2) *L. J. Peiris & Co. Ltd. V. Peiris* – 74 NLR 261

(3) *Attorney – General v. Silva* – 61 NLR 500

(4) *Tillekeratne v. Wijesinghe* – 11 NLR 270

(5) *Nelson De Silva v. Casinathan* – 55 NLR 121

(6) *Jalaldeen v. Rajaratnam* – 1986 (2) SLR 201

(7) *Udeshi v. Mather* – 1998 (2) SLR 12

(8) *Kadirgamadas v. Suppiah* – 56 NLR 172

APPEAL from the judgment of the Provincial High Court (Civil Appellate) of Anuradhapura.

Ananda Kasturiarachchi with *Theja Malawarachchi* for the Plaintiff-Respondent-Appellant.

W. Dayaratne, PC., with *Ranjika Jayawardena* for the Defendant-Appellant-Respondent.

Cur.adv.vult.

December 15th 2010

J. A. N. DE SILVA CJ.

This is an appeal against the judgment of the provincial Civil Appellate High Court of Anuradhapura which the Appellant seeks to set aside. The facts of this case are as follows.

One RP Anamma (hereinafter referred to as the Plaintiff) instituted action in the District Court of Polonnaruwa praying for a declaration of title and the eviction of the Defendant- Appellant Respondent (hereinafter referred to as the Respondent). The case proceeded to trial where the Plaintiff and the land officer of the district secretariat gave evidence. Thereafter the Respondent too gave evidence. On

28.02.2001 Court was informed of the death of the Plaintiff and an order was made by Court for the appropriate steps be taken for substitution. On the following date of the trial the Attorney at law for the deceased Plaintiff on record, one Mr. Iddawela, filed a petition and affidavit moving Court to substitute the present Appellant as the substituted Plaintiff (hereinafter referred to as substituted Plaintiff). The Respondent filed objections but Court allowed the substitution. Subsequently further evidence was led by the Respondent and a judgment was found in favour of the Substituted Plaintiff, by the learned District Court Judge.

The Respondent gave notice of appeal and subsequently filed a petition of appeal. The substituted plaintiff in the meantime filed an application for writ pending appeal. This was objected to on various grounds. This learned district Judge overruled the objections and issued a writ as prayed for.

The Respondent appealed against the said order for writ of execution to the Court of Appeal. The learned Judges of the Court of Appeal refused leave and dismissed the application. The Respondent thereafter preferred a special leave to appeal application to this Court which was later refused.

The substituted Plaintiff had also filed an application for acceleration before the Court of appeal. However that application too had been refused.

The final appeal was fixed before the Civil Appellate High Court of Anuradhapura where the substituted Plaintiff had filed a proxy as well as papers for substitution. In appeal the Respondent took up a preliminary objection that there had been a failure to file a proxy on behalf of the substituted

Plaintiff and therefore there was no proper application before Court to substitute him or to represent him by an Attorney at law.

The substituted Plaintiff objected on the basis that an objection on the ground of a valid proxy not being filed had not been taken at any stage previously and that such an objection cannot be raised for the first time in appeal. The substituted Plaintiff also submitted that the failure to object coupled with the subsequent filing of a proxy cured any defect which may have invalidated the proceedings.

After hearing submissions from both parties that learned Judged of the Civil Appellate Court of Anuradhapura allowed the appeal on the ground that no valid proxy had been before Court thereby rendering the **Judgment dated 2002-02-02 of the learned District Court Judge null and void.**

Being aggrieved of the said order the substituted Plaintiff moved this Court to grant special leave to appeal and leave was granted on the following questions.

[a] Did the Honourable Judge of the Civil Appellate High Court err in law when they allowed the appeal on the ground that the petitioner was not properly substituted in to the District Court?

[b] Did the Honourable Judges of the Civil Appellate High Court err in holding that the petitioner was not properly substituted?

[c] Did the Honourable Judges of the Civil Appellate High Court err in holding, that (due to) the proxy of the substituted Plaintiff had not been filed of record at the time of the substitution the proceedings became illegal and void *ab inito?*

[d] Did the Honourable Judges of the Civil Appellate High Court err is not considering that the Respondent had acquiesced and/or accepted the substituted Plaintiff in all subsequent proceedings in the District Court and (was) thereby stopped from objecting to the appeal on the ground of proxy?

[e] Did the Honourable Judges of the Civil Appellate High Court err in holding that there was a valid final appeal for the exercise of appellate jurisdiction?

I would first consider the question of the validity of the proxy as it appears to be the central issue from which all other issues flow. Several authoritative judgment of this Court and of the Court of Appeal were placed before this court and I shall consider their applicability in due course.

Section 27 of the Civil Procedure Code reads as follows.

(1) 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 a registered Attorney, instead of the party whom he represents, may be made.*

(2) ***When so filed, it shall be in force until revoked with the leave of the Court and after notice to the registered Attorney by a writing signed by the client and filed in Court,*** *or until the client dies, or until the registered Attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.*

3. *No counsel shall be required to present any document empowering him to act. The Attorney-General may appoint a registered Attorney to act specially in any particular case or to act generally on behalf of the State.*

The form of an appointment of a registered Attorney is found in the 1st Schedule to the civil procedure code.

Now section 27(1) states with clarity that a party in order to be represented by an Attorney must make such appointment in writing and such document is further required to be filed in Court.

This Court has on several occasions dealt with the question of a defective proxy being filed of record and they may be of assistance in deciding the question before us, i.e. total absence of a proxy.

The latest of these authorities is the case of *Paul Coir v. Waas 2002* [1] in which Justice Wigneswaran cites with approval a passage from Justice Thamotheram's judgment in the case of *LJ Peiris & Co. Ltd v. Peiris* [2].

> *"The relationship of a Proctor and client may well be a contract of agency but there is no law requiring that the contract should be in writing. A proxy is a writing given by a suitor to Court authorizing the Proctor to act on his behalf. It does not contain the terms of the contract between the suitor and the Proctor. That contract is a distinct one and has nothing to do with the proxy which is an authority granted by virtue of that contract."*

Thamotheram J also proposes the following questions to be answered to ascertain compliance with section 27(1).

"(1) Is there a contract of agency between the Proctor and his client? No writing is required to establish this.

(2) Is there a writing, appointing a client's Proctor giving him authority to act on the client's behalf for the purposes mentioned in Section 27 of the Civil Procedure Code?

(3) Is this writing signed by the client?"

Therefore both justices seek to draw a distinction between the actual contract of agency between the Attorney and the client and the proxy which is to be filed in Court.

I see no reason to hold a position contrary to the learned justice's assertions.

Therefore it is now necessary to consider as to whether the default of not filing a proxy could be cured by the belated filing of proxy in view of the authority given by contract previously to the proctor to appear and make applications on the client's behalf.

In *Paul Coir v. Waas (supra)* the Justices were of the view that the proxy is not the contract of agency between the proctor and the suitor and that the two were distinct and separate. They held further that existence of such an agency depended on the validity of the contract.

In *AG v. Silva*[3] the application had been made by a proctor without a proxy. The said proctor filed a proxy after the objection was taken and a submission was made that the previous defective acts of the proctor were rectified by such subsequent filing of proxy. HNG Fernando J in his judgment suggests that such rectification may be allowed under two circumstances. Namely, when the defect is pointed

out at the earliest time and the Plaintiff is then made to file a fresh plaint.

This argument seems to suggest that Fernando J was of the view that the totality of proceedings that took place under the default constituted a nullity. His lordship refers to circumstances in which undesirable consequences would flow if unreserved rectification were to be allowed. Both examples cited relate to the default of the party instituting the proceedings. Would similar consequences ensue if the opposite party would be in default? If this were so would not a defaulter be in a position to profit from his default. If a party Defendant's default were to be brought to the attention of Court in the twilight stages of a trial would then the entire proceedings have to be recommenced?

If this were to be so, we would have disparate consequences where the Plaintiff defaults and in circumstances where the Defendant defaults. This should not be so. Rules of procedure must be certain, unambiguous and equal in application to all parties to an action. They form the foundation of fair play.

Hence it is my view that this difference can be obviated by taking the position that it is not the proceedings thereunto that are rendered a nullity, but all appearances and applications made by the proctor or the counsel as his agent.

In *Tillekeratne v. Wijesinhe*[4], the Plaintiff had granted a proxy to a proctor, which by oversight, had not been signed by the Plaintiff. The proctor acted on the proxy without any objection in the lower Court. When the case was taken up in appeal, the defendant's counsel objected to the status of the proctor in the case.

It was held by his lordship Hutchinson CJ that the requirements in section 27 of the Civil Procedure Code were merely directory and that the mistake in the proxy could be rectified at this stage by the Plaintiff signing it. It was further held that such signature would be a ratification of all the acts done by the proctor in the action.

The case of *Nelson De Silva v. Casinathan*[5] was also submitted for our consideration, which seem to take the position that even though the proxy was held to be bad as the objection **had not been taken in the lower Court** and **since the defect did not affect the merits of the case,** Court did not reverse the decree.

The said line of thinking offers much attraction due to its simplicity. However I am concerned as to whether the wording of section 27 permits such liberties. Section 27 does not reveal whether an objection to the non conformance with the provision needs to be taken at the first available opportunity and if so whether the failure to raise an objection at that time estoppes the raising of the objection later.

There are certain objections which must be raised at the earliest opportunity available. The objection to the jurisdiction of a Court is one.

In *Jalaldeen v. Rajaratnam*[6] it was held that

"An objection to jurisdiction must be taken at the earliest opportunity. Further, issues relating to the fundamental jurisdiction of the Court cannot be raised in an oblique or veiled manner but must be expressly set out. The action was within the general and local jurisdiction of the

District Court. Hence its decision will stand until the wronged party has matters set right by taking the course prescribed by law."

In my view this is because of the effect of the failure giving rise to the objection, that such promptness is required.

If a Court inquires into a matter for which it has no jurisdiction all subsequent acts constitute a nullity. If jurisdictional objections are permitted at the very end of proceedings and upheld, all proceedings would have to be held void thus wasting precious judicial time and resources and causing grave injustices. Therefore jurisdictional objectional objections are required to be taken at the first opportunity the failure of which would constitute acquiescence to jurisdiction of the Court.

A similar analysis may be useful in respect of the present question. The Respondent argues that the proceedings constitute a nullity due to the failure of the Plaintiff to file a valid proxy, whilst the appellant submits that the omission can be cured. Thus if I were to be persuaded by the submissions of the Respondent that the default of the Plaintiff amounts to a nullity according to the same analysis as above I would have to hold that the Respondent would be precluded from raising the objection to file proxy at this late stage.

Having discussed the authorities on the legal question consequences of failure to file a valid proxy I would now proceed to examine the provisions of section 27. Section 27(1) throws light on the purpose of filing a proxy. The purpose is to **appoint** a registered Attorney to appear or make any

application before court. It is mandatory that the proxy contain an address for the process to be served.

Section 27(2) adverts to the circumstances in which the proxy "loses its force." The first of which is revocation **with the leave of Court. When such revocation is granted, unless fresh proxy is filed,** the case is considered to be equivalent to a situation where a party remains unrepresented. However proceedings may continue on that footing. Obviously the proceedings that had thus far transpired would remain unaffected.

The other methods by which a proxy loses its force are the death of the client, the suspension or removal of the Attorney etc. The death of the client occasions the demise of the agency relationship and therefore requires little explanation. The other grounds support the inference drawn earlier as each of those instances render the "Attorney" incompetent to "appear or make application before Court". Yet the consequences are the same. Once the Attorney meets with such incapacity he is no longer the client's representative. The client is considered to be unrepresented then on. The foregoing analysis lends little support to the proposition that the "loss of force" of a proxy touches on the validity of the proceedings in toto.

Therefore it stands to reason that even in the case of an Attorney when he is incapable of appearing or making application due **to the total failure to the file proxy,** such default should not in any way affect the validity of the proceedings.

The case of *Udeshi v. Mather*[7] is of assistance at this point. Atukorale J's judgment in my view clearly

lays down the conditions in which the doctrine of rectification would not apply. Accordingly the first is a situation where some other legal bar stands in the way of curing the default. But more importantly the fundamental question to be asks is whether the proctor had in fact the authority of his client to do what was done although in pursuance of a defective appointment.

The case of *Kadirgamadas v. Suppiah*[7] is of direct authority. In the said case the petition of appeal was filed on behalf of the defendant. The proctor had not been appointed In writing as required by section 27 of the civil procedure code. He had however without objection from any of the parties, represented all the defendants at various stages of the proceedings. It was held by Gunasekera J that the irregularity of the appointment of the proctor was cured by the subsequent filing of a written proxy.

Therefore an analysis of the facts thus far established is necessary to ascertain whether the proctor had in fact the authority.

The journal entry dated 28.02.2001 confirms that Court was informed of the Plaintiff's death, and that Court had directed that appropriate steps be taken. On the next date, that being 28-03-2001, Mr. Iddawela who had hitherto appeared for the Plaintiff filed a petition and an affidavit moving Court to order substitution.

On 25-06-2001 the Respondent filed his objections to the substitution. However the learned District Court permitted the substitution and fixed a date for further trial. Mr. Iddawela's name continues to be in the record as being the Attorney for the Plaintiff.

On 21-11-2001 the trial recommenced and the record notes Mr. Iddawela as having appeared for the substituted Plaintiff. No objection to this was taken up by the Defendant.

From that point onwards this court notes no less than seventeen journal entries with Mr. Iddawela's name appearing for the substituted Plaintiff, whilst the substituted Plaintiff's presence in Court is also duly noted. At no time was an objection taken to Mr. Iddawela's appearance.

On 28-05-2008 on the direction of Court the petitioner filed a proxy naming the same Mr. Iddawela as his Attorney.

The aforementioned facts in my opinion, provides a sufficiently strong indication that the substituted Plaintiff had at all material times granted Mr. Iddawela **the authority to appear and make applications on behalf of him,** despite the substituted Plaintiff not filing a proxy as an overt manifestation of the granting of such authority. The facts of the substituted Plaintiff's regular presence at all Curt proceedings and the retaining of Mr. Iddawela in the Civil Appellate High Court proceedings is highly suggestive of this.

Therefore I hold that the substituted Plaintiff by virtue of filing a proxy belatedly, has succeeded in ratifying the appearances and applications of the registered Attorney and thereby supplying all such acts with legal validity. Hence this appeal is allowed. We set aside the judgment of the Civil Appellate High Court dated 16th September 2008. The judgment of the learned District Court Judge is restored. We order no costs.

SRIPAVAN, J - I agree.

WKANAYAKE, J. - I agree.

appeal allowed.