

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for Leave to Appeal under section 5(c) (1) of the High Court of the Provinces (Special Provisions Act) No.19 of 1990 as amended by Act No. 54 of 2006.

SC. Appeal No. 138/11

S.C Leave to Appeal

Application No. HC.CALA.No.98/11

Civil Appellate High Court of Jaffna

Case No. 83/09

District Court of Jaffna

Case No. 664/Land

1. Mr. MariyamamahSandiyapillai
No.16/2, New Chemmani Road,
Nallur North, Jaffna.
2. Mr. KarthigesuSivanesan
No.16/4, New Chemmani Road,
Nallur North, Jaffna.
Presently resident abroad
(The 2nd Plaintiff appears by his
Power of Attorney holder

KarthigesuPulendrarajah of the
same address)

Plaintiff-Appellants-Petitioners

Vs.

1. KarunakaranNavartnasingham
2. Mrs. GuneluxumyMaheswaran
(Widow)
3. VinayagamoorthyKumaraguru
4. Wife Thanaluxumy

All of New Chemmani Road
Nallur North, Jaffna.

Defendant-Respondents-

Respondents

BEFORE : SISIRA J.DE ABREW,J.
UPALY ABEYRATHNE,J. &
NALIN PERERA, J.

COUNSEL : Dr. Sunil F.A. Cooray instructed by
S.Kumarasingham for the Plaintiff-Appellants-
Petitioners.
G. Jeyakumar with P.Krishanthan for the Defendant-
Respondents-Respondents.

Written Submissions of

the Appellants filed on : 08/11/2011

Written Submissions of

the Respondents filed on : 15/02/2012

ARGUED ON : 20.09.2016.

DECIDED ON : 3.11.2016

SISIRA J.DE ABREW J.

Plaintiff-Appellant-Petitioners(hereinafter referred to as the Plaintiff-Appellants) filed action in the District Court of Jaffna against the Defendant-Respondent-Respondents (hereinafter referred to as the Defendant-Respondents) for, inter alia, a declaration of title that the Plaintiff-Appellants are entitled to 1/3 share of the land described in the schedule to the plaint. On the date of the trial the Defendant-Respondents submitted that the proxy of the Plaintiff-Appellant was defective. The learned District Judge agreed with the said submission and by his order dated 27.3.2009, dismissed the action of the Plaintiff-Appellants. Being aggrieved by the said order of the learned District Judge, the Plaintiff-Appellants appealed to the Civil Appellate High Court of Jaffna (hereinafter referred to as the High Court) and the said High Court by its judgment dated 11.2.2011, affirmed the order of the learned District Judge and dismissed the appeal. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellants have appealed to this court. This court, by its order

dated 28.9.2011, granted leave to appeal on the questions of law set out in paragraph 53(a) to (f) of the petition dated 16.3.2011 which are set out below:

1. Is the judgment in case No. 83/09 in the Civil Appellate High Court of Jaffna one entered in disregard of the well established principle emerging from the decided cases that as long as there is authorization given to the registered Attorney to act on their behalf by the party/parties concerned the proxy is valid and the defects in such a proxy are curable?
2. Has the Civil Appellate High Court of Jaffna erred in holding that the proxy is invalid and non existence merely for the reason that it does not contain the necessary details?
3. Has the Civil Appellate High Court of Jaffna erred in failing to consider that the proxy has been signed by the 1st Plaintiff and the Attorney (Power of Attorney holder) for the 2nd the Plaintiff indicating authorization given by them to their Registered Attorney S. Kanagasingham and in as much as there is authorization the absence of necessary details which can be supplied with the permission of court will not render the proxy invalid?
4. Has the Civil Appellate High Court of Jaffna erred in failing to provide an opportunity to fill the omissions in the proxy and thereby repeated the same error by the District Court of Jaffna in the said case No.664/L?
5. Has the Civil Appellate High Court of Jaffna erred in failing to consider the said Registered Attorney from the date of filing the action on 30.2.2006 up to the filing of the Petition of Appeal and thereafter in pursuing the appeal had continued to do several acts and

taken several steps on behalf of the Plaintiff-Appellant in the said case NO.664/L and DC Jaffna (as reflected in journal entries and proceedings) and had stood authorized by the petitioners to do so and for that reason dismissal of the action is unjustifiable merely on the ground of absence of necessary in the proxy filed by the Petitioners?

6. Has the Civil Appellate High Court of Jaffna erred in not considering the effect of the case law relating to the question of proxy and given its judgment contrary to the decided cases?

The 2nd Plaintiff-Appellant in this case has given a Power of Attorney to K Pulendrarasa to file the case. The learned District Judge, in his order, held that the proxy filed on behalf of the Plaintiff-Appellants was defective as it did not contain the date and the place where the authority was given to the Registered Attorney-at-Law by the Plaintiff-Appellant. The learned District Judge also held that the name that appears in the Power of Attorney is Puliyendrarasa but the name that appears in the proxy is Pulendrarasa. The learned High Court Judges summarized the grounds on which the case was dismissed by the learned District Judge. The said grounds are as follows:

1. The name of the Power of Attorney filed by the Plaintiff-Appellants differed from the caption.
2. The proxy of the Plaintiff-Appellants did not contain necessary details and was not signed properly.

The learned High Court Judges however did not agree with the 1st ground stated above as they were of the opinion that a correct Power of Attorney could be filed and that the caption could be amended with permission of court. The

learned High Court Judges held that the proxy was defective and made the following observation.

“This is a case of want of proxy as opposed to a defect in the proxy.”

Learned counsel for the Plaintiff-Appellants submitted that the defect of a proxy could be cured and that a case should not be dismissed on the ground that a proxy was defective. Learned counsel for the Plaintiff-Appellants did not make submission on the basis that the proxy was correct. He admitted that there were certain defects in the proxy which could be cured. The most important question that must be decided in this case is whether or not the defective proxy filed on behalf of the Plaintiff-Appellant could be rectified and that opportunity should be given to the Plaintiff-Appellant to rectify the proxy. I now advert to this question. It is undisputed that Mr. Kanagasingham Attorney-at-Law has filed the proxy on behalf of the Plaintiff-Appellants and he was present throughout the case. It is also undisputed that there is a dispute between parties with regard to the land described in the plaint and it has been brought before court. When this type of dispute is brought before court, it becomes the duty of court to resolve the dispute. This duty of court which is considered to be sacred should not be trammelled by technical objections. To support this view, I rely on the judgment of Abrahams CJ in the case of Vellupillai Vs The Chairman Urban District Council Jaffna 38 NLR 464 wherein His Lordship observed thus: “This is a court of Justice, it is not an Academy of Law”. In my view, when court observes a defect in a proxy filed on behalf of a litigant, an opportunity should be given to the litigant to rectify the error without suppressing the dispute between parties being resolved. However before I conclude, I would like to consider certain judicial decisions.

In Treaby Vs Bawa 7 NLR 22 it was observed that

‘The plaintiff having, by an oversight, omitted to insert in the proxy which he had signed the name of the proctor whom he employed to appear before the Court and conduct his case, and the defendant having objected in his answer to the maintenance of the action against him:’

It was held “that the proper course to adopt in such a case was not to order the plaint to be taken off the file and cast the plaintiff in costs, but to supply the omissions then and there and proceed with the case in due course.”

In K. Kadirgamadas Vs K Suppaiah 56 NLR 172 the following facts were observed:

‘When the petition of appeal was filed on behalf of the defendants, the Proctor who presented it had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for some of the appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties, represented all the defendants at various stages of the proceedings earlier.

Supreme Court held “that the irregularity in the appointment of the Proctor was cured by the subsequent filing of a written proxy.”

In Paul Coir (Pvt) Ltd Vs Waas [2002] 1SLR 13 the following facts were observed:

'The plaintiff filed action on 24. 12. 1992 to recover Rs. 400,000/- plus interest and costs from the defendant company (the defendant). On 15. 12. 1994, the date of trial, objection was taken for the first time by the plaintiff's counsel that the proxy of the defendant was defective. The counsel moved that the proxy and the answer filed by the defendant be rejected and the action be fixed for trial ex parte. Both parties filed written submissions on this application, and the same attorney-at-law for the defendant filed a fresh proxy in his favour, along with his written submissions. The fresh proxy ratified and confirmed that the same attorney-at-law had earlier acted on behalf of the defendant with his authority, consent, concurrence and approval.

While the first proxy was signed by one Director with his rubber stamp affixed but not bearing the common seal of the company, the fresh proxy bore the common seal of the company with signatures of two Directors as required by section 34 (1) (a) of the Companies Act, No. 17 of 1982 and Article 110 (1) of the Articles of Association of the Company'.

Supreme Court held:

“(1) If according to the intention of parties the attorney-at-law had in fact the authority of his client to do what was done on his behalf although in pursuance of a defective appointment, in the absence of

a legal bar, the defect could be cured. The provisions of section 34 (1) (a) of the Companies Act, though specific, are similar to the general provisions of section 27 of the Code. So are the provisions of Article 110 (1) of the defendant's Articles of Association. Such provisions are directory and not mandatory.

(2) The fresh appointment (proxy) filed in this case cured any defect arising out of alleged non-compliance with section 34 (1) (a) of the Companies Act and Article 110 (1) of the Articles of Association of the defendant Company.”

For the above reasons, I hold that defects in a proxy filed on behalf of a party in a case could be rectified and that an opportunity should be given to the party to rectify the defects. In my view the learned District Judge has fallen in to grave error when he dismissed the case without giving an opportunity to Plaintiff-Appellants to rectify the defects in the proxy. The learned Judges of the High Court too have fallen into the grave error when they dismissed the appeal without considering the above legal literature. When I consider aforementioned matters, I hold that the District Court and High Court should have permitted the Plaintiff-Appellants to rectify the defects in the proxy and proceeded with the case. In these circumstances I answer the 1st to 4th and the 6th questions of law raised by the Plaintiff-Appellants in the affirmative. The 5th question of law does not arise for consideration in view of the answer given to the 1st to 4th and 6th questions of law.

For the above reasons, I set aside the order of the District Court dated 27.3.2009 and the judgment of the High Court dated 11.2.2011 and direct the

learned District Judge to give an opportunity to the Plaintiff-Appellants to rectify the defects in their proxy and proceed with the case. I allow the appeal. The Plaintiff-Appellants are entitled to recover the costs of the action in this court.

Appeal allowed.

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.