VELAPPA CHETTY *v.* MEYDIN.

1895.
December 6, 10, and 16.

D. C., Chilaw, 1,258.

Procedure—Motion to take plaint off the file—Action raised by attorney of plaintiff—power of attorney not duly stamped at time of filing action—Defect cured on the day such motion was made—Bonâ fides *of agent—Stamp Ordinance No. 3 of 1890, s. 31—Civil Procedure Code, s. 25—Action on promissory note—Right to demand particulars of admitted payments.*

Where defendant moved that plaint be taken off the file, as the agent who brought the action in the name of his principal did not appear to be authorized by a properly stamped power of attorney, and on the day of the discussion of the motion the defect was cured,—

Held, that it was wrong to order the plaint to be taken off the file and restored again to it as from the date on which the defect was cured, inasmuch as the Ordinance No. 3 of 1890, section 31, rendered such powers valid as from the date of its execution, and the agent seemed to act *bonâ fide*.

In an action on a promissory note it is not usual to deliver particulars of payments admitted by plaintiff, where the note does not appear *ex facie* to be barred.

THE circumstances under which the plaintiff appealed in this case are fully stated in the judgment of the Supreme Court.

The argument took place on the 6th and 10th December, 1895.

Layard, A.-G. (with him *Sampayo*), for appellant.

Dornhorst and *Jayawardana*, for respondent.

Cur. adv. vult.

16th December, 1895. WITHERS, J.—

Two orders are appealed from in this case. The more important one is that of the 17th October last, directing "the plaint to be "taken off the file and again restored as from this date, plaintiff "bearing all costs so far incurred."

This order was made under the following circumstances :—

On the 15th August an action was instituted against the defendant respondent on his promissory note dated the 19th day of September, 1889, for Rs. 1,000 and interest.

It was instituted by the presentment of a plaint in the name of Kolentha Velan Chetty (one of the payees of the note) by his attorney Velappa Chetty.

The plaint was entertained and filed. It was duly stamped, and it contained the requisite particulars (except the place of residence of the plaintiff, which was afterwards supplied). It was presented by a proctor on the plaintiff's behalf, and signed by the proctor.

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A copy of the plaintiff's agent's power, certified by a proctor, was filed with the plaint, at the foot of which it is noted as a document produced with the plaint.

Summons was issued for the defendant to appear and answer on the 3rd October. The defendant by his proctor appeared the previous day and called for the original power. He also moved that the plaint should be returned for amendment, the name of the plaintiff's place of residence not being mentioned in the plaint.

This motion was discussed on the 3rd, and the plaint was returned for amendment, the 10th October being appointed (I suppose) for the answer.

On that day, however, no answer was put in, but a motion was apparently made (though I can find no memorandum in writing of it) for further time to file answer. The entry in the journal is: "Counsel present; time to file answer allowed till plaintiff gives "details of payments admitted by him," which is followed by a formal order.

(This is the *other* order appealed from, and I shall deal with it presently.)

On the 14th October defendant's proctor steps in with another motion that the plaint be taken off the file, with costs to be paid by the plaintiff's agent, on the ground that the original power of attorney executed in India was not duly stamped according to the requirements of the local statute.

The document was in fact at the time not duly stamped for use in this Colony, but by the 17th October it was duly stamped.

So rectified it was produced to the Court that day, and then the Court made the order first referred to, namely, that the plaint be taken off the file and restored as from the 17th, and that plaintiff do bear all costs incurred so far.

The Judge thought the plaint bad on account of the defect in the power of attorney on the date of presentation. So he said in effect this:—Had I known the imperfection of the power of attorney under which the plaint was presented and filed, I should have rejected it. I do now what I should have done then. I put matters in *statu quo*. I will now entertain it as the power of attorney is effectual for use in the Colony, but the action must be considered as instituted from this date, the 17th October.

Was the Judge right in making this order?

Mr. Attorney-General argued that he was not.

The 31st section of the Stamp Ordinance, No 3. of 1890, rendered the power of attorney valid as from the date of execution. It was consequently valid when the plaint was presented on the

15th August. Hence the Judge had no power to reject the plaint on the 17th October, and so alter the date of institution of the action. He distinguished it from the Badulla case (72, D. C., Badulla, 30th May, 1895), where the plaint was returned for amendment because there the defect was in the constitution of the plaintiff's case.

There the plaintiff had claimed a right which he had not valued (a most requisite particular), whether regard be had to the stamp to be imposed on the pleading or to the interest of the defendant, who is entitled to know what value his opponent puts on a right he claimed.

That case could not go on till the plaint was amended in that particular. In the Badulla case the defect was a substantive one. In this an adjective one. We were pressed by Mr. Dornhorst to follow the principle in that case.

Had the Judge known the power of attorney to be ineffectual for local use for want of being stamped according to local law, he (it is conceded) would not have accepted the plaint at all. Therefore he can only entertain it when the document authorizing the institution of the action is put in order.

The Code does not provide for a case of the kind. The plaint could not well be returned for amendment, for the power was no part of the pleadings. It could only be rejected as unauthorized by a duly stamped power.

But if, after allowing the plaint to be filed, would the Judge have necessarily rejected it on discovering that the power of attorney was not duly stamped? He would not have received it if he had known of the defect, but, having entertained the plaint, would he have necessarily rejected it *proprio motu* on discovering the defect?

I think it would depend on the circumstances of the case. If the person presenting the plaint was not *bonâ fide* acting as the agent of the principal under the defective power, he would reject it.

But might he not, if the proceedings are otherwise in order, say: I will not let summons go out, or the defendant shall not be required to answer unless within a given time the document is put in order; and if this is not done within the time fixed I shall reject the plaint altogether.

It has not been usual, so far as I can find, to order a pleading to be "taken off the file" when the proceedings are unauthorized. In the English Equity cases an opportunity is given to perfect the authority, if possible.

Mr. Dornhorst laid special stress on the 25th section of the Civil Procedure Code, which enacted that when a recognized agent

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presents his plaint he shall file with it the original power of attorney or a properly certified copy of it. He did not do so here, it was urged, because his copy was but waste paper.

Still it was a certified copy, and he did produce it with the plaint, and by the backward operation of the 31st section of Ordinance No. 3 of 1890 it was rendered good at the date of presentation.

It may be, as it is here, of great importance to a plaintiff what the date of instituting his action is. Even if the Judge had a discretion to do as he has done, I think it was not well exercised. The agent was acting in good faith all through for the plaintiff, his principal. He instituted the plaint as his agent, and his authority, if suspended by the defect of his stamped document, was rendered valid by the defect having been cured as from the date of his written authority.

The course taken by the Judge was to cause a fresh action to be instituted on the 17th October, and to dismiss the old plaint.

The conclusion I come to is that this course was not warranted by the circumstances of the case, and I would reverse the order.

The order to adjourn the answer till delivery of particulars as to the alleged payment of interest was wrong. It is not usual to deliver particulars in actions on promissory notes. The allegation that interest had been paid was not material to the plaint as instituted in August. It would be very material if the plaint had been instituted on the 17th October, for the note sued on would be barred on the face of it.

Both orders should, in my opinion, be reversed with costs.

The defendant should be required to answer within one week of the record being received by the lower Court.

BROWNE, A.J.—

I quite agree with my brother's view that the particular action to be taken, or order made in each case must depend upon the special facts of the proceedings in that action. Very possibly had the defendant here called for inspection of the power of attorney ere he moved for details of payments, or took any steps whatever in the action, he would have succeeded in having had the plaint rejected as having been improperly presented when there was no authority of existing local validity, and improperly received by reason of such unknown defect. He had all the more occasion to make such a motion in that, according to the journal entry, not even the copy of the power was filed with the plaint, although the schedule to the plaint states it was produced with the plaint.

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He, however, both called for particulars, and moved only that the plaint be returned for amendment. The result of his action was that plaintiff was enabled to produce—first the copy, and subsequently the original ; and even before he exhibited the latter to have it stamped as soon as the absence of the Ceylon stamp was brought to his notice by the surmise of the defence that there was this defect. Defendant has so facilitated all this being done that I regard the position of affairs here as analogous to that contemplated by section 34 of Ordinance No. 3 of 1890, and that the learned District Judge, had the power been still unstamped in Ceylon when produced, should have ordered only a stay of the proceedings until it should be stamped.

A fortiori, therefore, as it had been stamped ere he had to make order on the motion of the 14th October, he should have refused the motion, but might have allowed defendant his costs thereof if the latter had been duly diligent and had acted in no spirit of mere delay or evasion of liability.

I agree in the proposed order.