

JAYATILAKE
v
LIYANAGE AND ANOTHER

COURT OF APPEAL
AMERATUNGA, J.,
BALAPATABENDI, J.
C.A.L.A. 333/2000
D.C. GALLE 14035/L
FEBRUARY 26, 2002

Civil Procedure Code, section 25(b)- Power of Attorney – Action filed by Power of Attorney holder – Maintainability – Plaintiff does not show that the plaintiff is out of the territorial jurisdiction – Is the plaint defective?

The action was filed by the plaintiff's Power of Attorney holder. Objection was taken that the plaint does not show that the plaintiff is out of the jurisdiction. The Court directed the petitioner to amend the caption.

Held:

- (1) A Power of Attorney is valid - section 25(a) - only if the grantor is not within the jurisdiction of the court.
- (2) The caption of the plaint indicated that the plaintiff was resident within the local limits of the court. The plaint is defective and direction to amend the caption is valid.

An **APPLICATION** for leave to appeal from the Order of the District Court of Galle.

Cases referred to:

1. *Udeshi v Mather* - Sri Skantha Law Reports - Vol.IV - 40(CA)
2. *Udeshi v Mather* - (1988) 1 Sri LR 2 (SC)
3. *Alia Markar v Pathu Muttu and Natchiya* - (1900) - 2 Browns Reports 64
4. *William Silva v M.D.Sirisena* - 68 NLR 206

Manohara R.de Silva for petitioner.

Respondent absent and unrepresented.

January 24, 2003

AMARATUNGA, J.

This is an application for leave to appeal filed by the plaintiff-petitioner against the order of the learned District Judge directing the petitioner to amend the caption of the plaint. The action was filed by the plaintiff's Power of Attorney holder for declaration of title to the property described in the plaint. 01

On the 2nd trial date the learned Counsel for the defendant raised a preliminary objection to the maintainability of the action. He has submitted firstly that the plaint does not show that the plaintiff is out of the jurisdiction; secondly that the copies of the Power of Attorney were not tendered to court together with the plaint and thirdly that the Power of Attorney does not disclose that the attorney has the power to institute that action. On this objection the plaintiff filed written submissions. The plaintiff's submissions were that the Power of Attorney had been filed in Court and in any event any omission to do so is curable. With regard to the submission the plaint does not show that at the time of filing the action the plaintiff was out of the jurisdiction of court, the plaintiff's submission was that it is a matter to be proved by evidence at the trial. 10

The learned Judge has confined his order to the objection that the plaint does not disclose that at the time of filing action the plaintiff was out of the territorial jurisdiction of the Court. 20

The absence of any reference in the Judge's order to the other two objections raised by the learned counsel enables me to presume that the learned Judge was satisfied that the Power of Attorney was before Court and that it empowered the Attorney to file this action. The learned Judge has only dealt with the submission that the plaint does not indicate that the plaintiff was out of the territorial jurisdiction of the court at the time the action was filed. In this connection the relevant provision of the Civil Procedure Code is section 25(b) which runs as follows: 30

"25. The recognized agents of parties by whom such appearances and applications may be made or acts may be done are-

- (b) *Persons holding general powers of attorney from persons not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done authorizing them to make such appearance and make application, and do such act on behalf of such parties...." (Emphasis added)*

In *Udeshi v Mather*,⁽¹⁾ this Court having considered the afore-said provision held that a Power of Attorney is valid, in respect of section 25(a) of the Civil Procedure Code, only if the grantor is not resident within the jurisdiction of the Court. This decision went up in appeal to the Supreme Court and the judgment of the Supreme Court is reported in *Udeshi v Mather*.⁽²⁾ The Supreme Court has reversed the decision of the Court of Appeal and has allowed the appeal on different grounds. However the Supreme Court did not contradict, dissent from, vary or set aside the view of the Court of Appeal that if a power of attorney is to be valid there must be proof before court that the grantor of the power of attorney is not resident within the jurisdiction of the Court. The authorities considered by Atukorale, J. in the judgment of the Supreme Court support the view adopted by the Court of Appeal in *Udeshi v Mather (supra)*. Those cases clearly support the proposition that in terms of section 25(b) that a Power of Attorney is valid only if the grantor is not resident within the jurisdiction of the Court. In *Alia Markar v Pathu Muttu and Natchiya*⁽³⁾, objection was taken to the validity of the proxy of the appellant, a Mohamaden woman, on the basis that she and her two attorneys who signed her proxy on the strength of the Power of Attorney given to them are all resident within the local limits of jurisdiction of the Court and therefore the attorneys had no authority to sign the proxy. This objection was upheld but since the objection had not been taken in the lower Court, the appellant was allowed to rectify her proxy.

In *William Silva v M.D. Sirisena*⁽⁴⁾ at the time the action was instituted on a proxy given by the attorney the plaintiff was resident within the limits of the jurisdiction of the Court. In appeal when the validity of the proxy was canvassed, the court upheld the objection and held that there was no valid action and accordingly dismissed the action.

These cases clearly show that in terms of section 25(b) of the Civil Procedure Code the attorney has authority to act for the grantor of the Power of Attorney only if the latter is not within the local limits of the jurisdiction of the court.

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In this instant case the caption of the plaint indicated that the plaintiff was resident within the local limits of the Court. There was no material before Court to show the contrary. Therefore the learned Judge came to the correct conclusion that the plaint was defective. Accordingly he directed the plaintiff to amend the caption. The plaintiff should have complied with this direction without unnecessarily wasting his time and money and the valuable judicial time of this Court. There is no merit whatsoever in this application. Accordingly leave to appeal is refused and the application is dismissed. The fact that the respondents have not appeared before this Court prevents me from ordering heavy costs against the petitioner. No costs.

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BALAPATABENDI, J. - I agree.

Application dismissed.