

DAMAYANTHI ABEYWARDENE AND ANOTHER
v.
HEMALATHA ABEYWARDENE AND OTHERS

COURT OF APPEAL.
S. N. SILVA, J. AND
P. EDUSSURIYA, J.
C.A.L.A. APPLICATION NO. 119/88.
D.C. GALLE NO. 2567/SPL.
30 OCTOBER, 17 NOVEMBER, 1992,
12 AND 25 FEBRUARY 1993.

Company Law – Companies Act No. 17 of 1982, sections 210, 211, 212, 214 and 216 – Summary procedure – Affidavits – Hearsay evidence – Interlocutory application – Recognized agent – Civil Procedure Code sections 181, 373, 376, 437 and 25 (b) – Section 183 (a) of the Civil Procedure Code as amended by Act No. 79 of 1988 – Evidence Ordinance, section 60.

The petitioner – respondent (Hemalatha Abeywardena) a long time resident in England filed this application in terms of sections 210 and 211 of the Companies Act No. 17 of 1982 in respect of the company Mussendapotta Estates Ltd., in which she held 32% of the shares. The Company in question is a private Company established by one Abraham Abeywardena with the objective of managing a 200 acre estate owned by him in Galle. The Articles of Association of the Company are intended to retain the ownership of the estate within the family of the said Abraham Abeywardena. The petitioner–respondent is the widow of one of the sons of Abraham Abeywardena. She has been issued letters of administration of the estate of that son. It appears that she becomes entitled to 32% of the shares of the Company in that capacity. She filed application in the District Court complaining of oppression (section 210 (1) and mismanagement (section 211(1)) against the two respondent-petitioners, being the children of the other son of Abraham Abeywardena. It appears that their father managed the estate after the death of Abraham Abeywardena and that the petitioner–respondent's husband was in England at the relevant time. The complaint is that after the death of their

father, the respondent-petitioners have unlawfully got themselves appointed as directors and are carrying on the affairs of the Company in a manner oppressive to the other members and prejudicial to the interests of the Company. The respondent-petitioners are entitled to 52% of the shares of the Company.

Upon the application being filed by way of summary procedure as required by section 212 of the Companies Act, the District Court issued an *Order Nisi* declaring that the two respondent-petitioners are not Directors of the Company and that a new Board be constituted.

The application was supported with the affidavit of one T. Nadeson who held the power of Attorney of the petitioner-respondent. The affidavit contained matter not within the knowledge and observation of Nadeson and the documents annexed were not originals except for the power of Attorney. The District Judge acted on the affidavit as if in an interlocutory application and entered *order nisi*.

Held :

01. Section 210 and 211 of the Companies Act No. 17 of 1982 provide a statutory scheme for the intervention by court in the management of a company. Section 214 of the Companies Act restricts the classes of persons who may file an application for intervention by Court. Section 212 prescribes the applicable procedure. In terms of that section every application has to be made by way of summary procedure and every person sought to be affected by the order shall be named as a respondent in the petition. Section 376 of the Civil Procedure Code provides that a petition filed by way of summary procedure should be supported by affidavits and other documentary evidence necessary to furnish *prima facie* proof of the material facts set out or alleged in the petition. In regard to a person who may depose to an affidavit and its contents, reference should be made to sections 437 and 181 of the Civil Procedure Code. Section 437 provides that whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, affidavits or written statements of facts conforming to the provisions of section 181 may be sworn or affirmed to by the person professing to make the statement embodied in the affidavit, before any court of Justice of the Peace or Commissioner of Oaths within the local limits of whose jurisdiction he is at the time residing. The rule in section 181 confines an affidavit to a statement of such facts as the declarant is able of his own knowledge and observation to testify to and is intended to restrict the contents of affidavits to direct evidence as is prescribed in section 60 of the Evidence Ordinance. By necessary implication it excludes hearsay from such affidavits. The only exception is that in interlocutory applications a statement of what is believed, as to the relevant facts, may be included. This exception is subject to a proviso that reasonable grounds for such belief should also be set forth in the affidavit.

02. The interlocutory applications referred to in section 181 of the Civil Procedure Code are those in which relief is sought in the course of a proceeding and incidental to the final relief sought in the case. They are distinct from cases where the final relief is sought either by way of plaint or petition. Where the application is for final relief it cannot be characterized an interlocutory application merely because it is made by way of petition. In terms of section 373 read with section 376 of the Civil Procedure Code an application by way of summary procedure is instituted by petition supported by affidavits and documentary evidence required to furnish *prima facie* proof of the material facts set out or alleged in the petition. Therefore an affidavit filed with a petition under section 212 of the Companies Act is not one filed in an interlocutory application. It would not be open to include in such an affidavit matters which the declarant believes to exist as provided in the exception to section 181. It should contain only direct evidence and not hearsay or other evidence or matters not admissible as direct evidence.
03. The fact that T. Nadeson holds a power of attorney and is a recognized agent pertains to his capacity to file an affidavit on behalf of the petitioner-respondent. It does not lend any extra credence to the affidavit. His affidavit must comply with the requirements of the Civil Procedure Code. Even if the provisions of section 183 (a) of the Civil Procedure Code brought by the Civil Procedure Code (Amendment) Act No. 79 of 1988 (not yet in operation at the time of this case) are applied, the relevant amendment permits an attorney to file an affidavit instead of the party to the action where such party is absent from Sri Lanka. The proviso to this section states that in such situation the person making the affidavit must be one having personal knowledge of the facts of the cause of action and must in his affidavit swear or affirm that he deposes from his own personal knowledge.
04. Nadeson was not a member of the company and had no personal knowledge of the affairs of the company or the management of the estate. He was neither present nor entitled to be present at the meetings of the company. His affidavit contains several matters resting entirely on his belief. It cannot be said to contain direct evidence merely because it is said to be based on letters which have not been properly admitted.
05. The petition filed in D.C. Galle is not supported by affidavits or documentary evidence as may furnish *prima facie* proof of the material facts set out and alleged in the petition.

Cases referred to :

1. *Samarakoon v. Ponniah* 32 NLR 257.
2. *Simon Fernando v. Goonesekera* 47 NLR 512.
3. *Kanagasabai v. Kirupamoorthy* 62 NLR 54.
4. *In re Clive Mills Co., Ltd.*, (1964) 34 Company Cases 731, 749.
5. *In re Bengal Luxmi Cotton Mills Ltd.*, (1965) 35 Company Cases 187.

APPLICATION for Leave to Appeal and Appeal from the Order of the District Judge of Galle.

K. Kanag-Iswaran, P.C. with A. Tittawella and H. Cabraal for petitioner.

H. L. de Silva, P.C. with S. Mahenthiran for respondents.

Cur. adv. vult.

March 19, 1993.

S. N. SILVA, J.

The respondent-petitioners filed an application for leave to appeal and for revision in respect of the order dated 13.9.1989 of learned District Judge. It was agreed by counsel that this matter could be argued on the basis that leave has been granted. Accordingly, written submissions were tendered and learned President's Counsel addressed court to clarify matters that arose from the written submissions.

The petitioner-respondent (a long time resident in England) filed application in terms of sections 210 and 211 of the Companies Act No. 17 of 1982 in respect of the company 'Mussendapotta Estates Ltd'. This is a private company established by one Abraham Abeywardena with the objective of managing a 200 acre estate owned by him in Galle. The Articles of Association of the company are intended to retain the ownership of the estate within the family of the said Abraham Abeywardena. The petitioner-respondent is the widow of one of the sons of Abraham Abeywardena. She has been issued letters of administration of the estate of that son. It appears that she becomes entitled to 32% of the shares of the company in that capacity. She filed the application in the District Court complaining of oppression {section 210 (1)} and mismanagement {211 (1)} against the two respondent-petitioners being the children of the other son of Abraham Abeywardena. It appears that their father managed the estate after the death of Abraham Abeywardena and that the petitioner-respondent's husband was in England at the relevant time. The complaint is that after the death of their father, the respondent-petitioners have unlawfully got themselves appointed as directors and are carrying on the affairs of the company in a manner oppressive to the other members and prejudicial to the interests of the company. The respondent-petitioners are entitled to 52% of the shares of the company.

Upon the application being filed by way of summary procedure, as required by section 212 of the Companies Act No. 17 of 1982, the District Court issued an *Order Nisi* in respect of the reliefs sought in paragraph (c) (1) and (ii) of the prayer to the petition. That is,

(i) a declaration that the 1st & 2nd respondents (the two respondent-petitioners) are not Directors of the company, and

(ii) a direction that a new Board of Directors be constituted as prayed for.

The two respondent-petitioners and the 2nd respondent-respondent (being a daughter of the said Abraham Abeywardena) filed objections to the *Order Nisi*. Learned President's Counsel appearing for the two respondent-petitioners raised a preliminary objection that the application is bad since it is not supported by affidavits and other documentary evidence as required by law. It was submitted that the affidavit which was not of the petitioner-respondent but her attorney, one T. Nadeson, contains matters not within the knowledge and observation of that person and that the documents filed with the affidavit (other than the Power of Attorney) are not originals and are not admissible as evidence. Learned District Judge rejected this objection by the order appealed from on the basis that the affidavit has been filed in an interlocutory application and that the deponent being the attorney of the petitioner-respondent has duly affirmed to its contents. He has also observed that the affidavit confirms the averments of the petition and that the contents are supported by documents some of which are originals.

At the hearing of this appeal the argument related mainly to the validity of the affidavit of Mr. Nadeson. Learned President's Counsel for the respondent-petitioners submitted that learned District Judge was in error when he held that the affidavit was filed in an interlocutory application. It was submitted that the affidavit was filed with the petition being the application for relief in the case. It was also submitted that the affidavit does not conform to the requirements of sections 181 and 376 of the Civil Procedure Code. In relation to the provisions of sections 210 and 211 of the Companies Act, it was submitted that in considering the nature of the application and the relief sought, there should be strict compliance with the requirements of the Civil Procedure Code as to the contents of the affidavit. Learned President's

Counsel appearing for the petitioner-respondent conceded that the affidavit is not one filed in an interlocutory application. However, it was submitted that the affidavit is valid since it has been filed by a recognized agent of the petitioner-respondent in terms of section 25(b) of the Civil Procedure Code and its contents are supported by the documentary evidence annexed to the petition.

Sections 210 and 211 of the Companies Act provide a statutory scheme for the intervention by court in the management of a Company. The corresponding provisions in the earlier law were sections 153(A) and 153(B) of the Companies Ordinance introduced by the Amending Act No. 15 of 1964. Similar provisions are found in sections 397 and 398 of the Indian Companies Act 1956. Section 214 of the Companies Act No. 17 of 1982 restricts the classes of persons who may file an application for intervention by court. Section 212 prescribes the applicable procedure. In terms of that section every application has to be made by way of summary procedure and every person sought to be affected by the order shall be named as a respondent in the petition. This leads us to a consideration of the provisions of the Civil Procedure Code relating to summary procedure. Section 376 states as follows :

" With the petition, and so far as conveniently can be attached thereto, shall be exhibited such affidavits, authenticated copy records, processes, or other documentary evidence as may be requisite to furnish *prima facie* proof of the material facts set out or alleged in the petition, or the court may in its discretion permit or direct the petitioner to adduce oral evidence before the court for this purpose, which shall be taken down by the court in writing ".

It is to be seen from this section that a petition filed by way of summary procedure should be supported by affidavits and other documentary evidence necessary " to furnish *prima facie* proof of the material facts set out or alleged in the petition ". In regard to the person who may depose to an affidavit and its contents, reference should be made to sections 437 and 181 of the Code. Section 437 provides that " that whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, affidavits or written statements of facts conforming to the provisions of section 181 may

be sworn or affirmed to by the person professing to make the statement embodied in the affidavit before any court or Justice of the Peace or Commissioner of Oaths within the local limits of whose jurisdiction he is at the time residing.....". Section 181 is as follows :

" Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit."

The rule in section 181 which confines an affidavit to " a statement of such facts as the declarant is able of his own knowledge and observation to testify to " is intended to restrict the contents of affidavits to direct evidence as prescribed in section 60 of the Evidence Ordinance. By necessary implication it excludes hearsay from such affidavits. The only exception is that in interlocutory applications a statement of what is believed, as to the relevant facts, may be included. This exception is subject to a proviso that reasonable grounds for such belief should also be set forth in the affidavit. The significance of the constituent elements of section 181, the rule, the exception and the proviso to the exception, are made clear in the judgments of the Supreme Court in the cases of *Samarakoon v Ponniah* ⁽¹⁾, *Simeon Fernando v Goonesekera* ⁽²⁾ and *Kanagasabai v Kirupamoorthy* ⁽³⁾.

Learned District Judge considered the objection on an incorrect premise when he observed that the affidavit has been filed in an interlocutory application. Learned President's Counsel for the petitioner-respondent, as noted above, rightly conceded this matter. The interlocutory applications referred to in section 181 are those in which relief is sought in the course of a proceeding and incidental to the final relief sought in the case. They are distinct from cases where the final relief is sought either by way of plaint or petition. Where the application is for final relief it cannot be characterised an interlocutory application merely because it is made by way of petition. Section 212 of the Companies Act provides that every application under the provisions of sections 210 and 211 shall be made by way of summary procedure. In terms of section 373 read with section 376 of the Civil Procedure Code an application by way of summary procedure is instituted by petition supported by

affidavits and documentary evidence required to furnish *prima facie* proof of the material facts set out or alleged in the petition. Therefore an affidavit filed with a petition under section 212 of the Companies Act is not one filed in an interlocutory application. Such an affidavit will be governed by the rule in section 181 of the Civil Procedure Code referred above and should contain only direct evidence. That is, a statement of such facts as the declarant is able of his own knowledge and observation to testify to, in relation to the matters set out or alleged in the petition. It would not be open to include in such affidavit, matters which the declarant believes to exist as provided in the exception to section 181. It certainly cannot include hearsay or other evidence or matters not admissible as direct evidence.

The next aspect to be considered is the significance of the requirements of section 181 of the Civil Procedure Code, referred above, in relation to a proceeding instituted under section 212 of the Companies Act. Sections 210 and 211 vests an extensive jurisdiction in the court to intervene in regard to alleged oppression and mismanagement in a company. The court is empowered generally to make orders as it thinks fit for remedying or preventing the matters complained of or apprehended. Without prejudice to the generality of these powers, the court is empowered to make specific orders in terms of section 216. Such orders are made on the basis of the proof adduced with the petition including the affidavits subject however to any objection the respondents may take upon an order *nisi* or an interlocutory order being made. Hence the requirements of section 181 of the Civil Procedure Code are significant in relation to such proceedings. Learned President's Counsel for the respondent-petitioners relied on two judgments of the High Court of Calcutta in relation to the corresponding provisions of sections 397 and 398 of the Indian Companies Act 1956 and Order 19, rule 3 sub-rule (1) of the Indian Civil Procedure Code. In *re Clive Mills Co. Ltd.* ⁽⁴⁾ Mitra, J observed as follows :

"An application under sections 397 and 398 of the Act is not an interlocutory application. The matter is finally disposed of by the order made on the application itself. Nothing remains outstanding, unless orders are made keeping certain matters outstanding. The application is disposed of on the basis of the

averments in the pleadings, unless the matter is directed to be tried on evidence. The pleadings in the matter, including the petition and the affidavits are to be treated as evidence, and that being so, the rules of evidence must be strictly adhered to. The averments in the petition and in the affidavits which are verified as based on information, are by their very nature, hearsay evidence. And if such averments are the foundation of the case made out by the petitioner, or the foundation of the defence made out by the respondents, the court should not rely or act upon the same. To do otherwise, would be to ignore the fundamental principles of the rules of evidence. If the averments in the pleadings are such that, but for them, an order cannot be made, persons who have personal knowledge of the facts stated must come forward and put what they have to say on affidavits. If other persons, having no personal knowledge of the facts, are set up to verify facts stated in petitions or affidavits, as being based on information supplied and believed to be true, the averments so verified cannot be relied on by the court. I must make it clear, however, that my views in this matter are confined to proceedings under sections 397 and 398 of the Companies Act, 1956, in which orders are asked for on the basis of charges laid in the petition and affidavits. These views should not be taken to apply to other proceedings under the Companies Act, 1956, or to interlocutory matters in other proceedings. "

In a later case *In re Bengal Luxmi Cotton Mills Ltd* ⁽⁵⁾ the same Judge repeated the foregoing observations and held that rules of evidence must be strictly adhered to in relation to the applications that are made for intervention by court under the corresponding sections. We are of the view that these observations are useful in relation to the application of the corresponding provisions of our law, referred to above. Hence we hold that the affidavits filed in an application to court in terms of section 212 of the Companies Act for intervention by court in respect of alleged oppression or mismanagement as stated in sections 210 and 212 have to strictly comply with the provisions of sections 376, 437 and 181 of the Civil Procedure Code. They have to furnish *prima facie* proof of the material facts set out or alleged in the petition and as such should contain only direct evidence, that is, statements of such facts as the declarant is able of his own knowledge and observation

to testify to. They cannot contain matters resting in the belief of the declarant or hearsay or other matters that may be inadmissible as evidence.

Learned District Judge has observed that the affidavit confirms the averments in the petition. Indeed, on a comparison it is revealed that the affidavit is a verbatim repetition of the averments of the petition. However, the correct test is not to consider whether one confirms the other upon a comparison of this nature. Repetition of the averments of a petition in the affidavit is an evil that we often note in affidavits that are filed. Learned Judge has regrettably seen a virtue in this evil. The correct test is to ascertain whether the affidavit contains direct evidence, that is, statements of such facts as the declarant is able of his own knowledge and observation to testify to and whether this evidence together with the documentary evidence furnishes *prima facie* proof of the matters of fact set out or alleged in the petition.

Learned President's Counsel for the petitioner-respondent submitted that the said T. Nadeson holds a power of attorney of the petitioner-respondent and he is a recognized agent of the petitioner-respondent in terms of section 25 (b) of the Civil Procedure Code. This submission in our view, pertains to the capacity of T. Nadeson to file an affidavit in these proceedings on behalf of the petitioner-respondent. However, the fact that he is a recognized agent of the petitioner-respondent does not lend any extra credence to the affidavit. The affidavit, whether it be of the recognized agent or of any other person should satisfy the requirements of the Civil Procedure Code referred above. Learned President's Counsel also submitted that the grounds urged on behalf of the respondent-petitioner in effect seek to apply the provisions of section 183(a) of the Civil Procedure Code introduced by Civil Procedure Code (Amendment) Act No. 79 of 1988, which was not in operation, to this case. The relevant amendment permits an attorney to file an affidavit instead of the party to the action where such party is absent from Sri Lanka. The proviso to this section states that in such situation the person making the affidavit must be one "having personal knowledge of the facts of the cause of action and must in his affidavit swear or affirm that he deposes from his own personal knowledge". In fact there is no such statement in the affidavit of T. Nadeson and if this amendment was in operation the matter would have been

beyond argument. However, section 181 of the Civil Procedure Code has always been in operation and as found above this section requires only direct evidence to be contained in an affidavit filed in proceedings of this nature.

T. Nadeson being the holder of the power of attorney is not a member of the company and has no personal knowledge of the affairs of the company or the management of the estate. His affidavit contains several matters resting entirely on his belief ; They are :

(i). that the company has remained as a *de facto* partnership of the children of the late Abraham Abeywardena (paragraph 7);

(ii) that the meeting of the Directors held on 12.9.1985 was not a duly convened meeting and that neither the 1st nor the 2nd respondent (respondent-petitioners) were Directors at that time and that there was no quorum for the meeting (paragraph 13 ;

(iii) that the 32nd Annual General Meeting held on 21.12.1985 was not validly convened (paragraph 16).

Suffice it to say that this person was neither present nor entitled to be present at any of these meetings. Learned President's Counsel for the petitioner-respondent submitted that these averments are supported by letters 'X5' and 'X6' of the 3rd respondent-respondent (Mrs. Jayasinghe, a daughter of Abraham Abeywardena). The contents of these letters are in themselves inadmissible and could properly be produced only by the 3rd respondent-respondent. If the petitioner-respondent intended to rely on the contents of these letters she should have filed an affidavit of the 3rd respondent-respondent. However, the affidavit of T. Nadeson cannot be said to contain direct evidence merely because they are said to be based on letters, the contents of which have not been properly admitted. Therefore we see no merit in the submissions of learned President's Counsel for the petitioner-respondent.

The resulting position is that the petition of the petitioner-respondent filed in the District Court of Galle is not supported by affidavits or documentary evidence as may furnish *prima facie* proof of the material facts set out and alleged in the petition. In the circumstances learned District Judge was in error when he reported

to make an Order *Nisi* on the basis of that petition. We accordingly allow this appeal and set aside the Order *Nisi* that has been issued in the case and the order dated 13.09.1988. It is to be noted that this decision is not based on the merits of the allegations contained in the petition. Considering all the facts and circumstances we would refrain from making an order for costs either in this Court or in the District Court. Accordingly the parties will bear their respective costs.

P. EDUSSURIYA, J. – I agree.

Appeal allowed.

Order nisi set aside.
