Present: Lascelles C.J. and Ennis J.

1914.

SINNATAMBY *v.* JOHNPULLE *et al.*

170—D. C. Colombo, 37,092.

Power of attorney—Agent authorized to sign principal's name—Agent signing his name.

The first defendant, by his power of attorney, authorized C, "in the event of any sale, mortgage, lease, exchange, or purchase for me and in my name, and as my act and deed, to sign, execute, &c., all deeds and other writings necessary for giving effect and validity to the same respectively, or to any contract, agreement, or promise for effecting the same."

Held, that a deed executed by C in his own name, and not by the first defendant by his attorney (C) did not bind the first defendant.

APPEAL from a judgment of the District Judge of Colombo (H. A. Loos, Esq.). The facts are set out in the judgment.

The deed in question ran as follows:—

I, John Saviel Cassie Chetty, the attorney of Emanuel Francis Jusy Johnpulle, duly appointed by Power of Attorney No. ———.

(*Signed*) JOHN SAVIEL CASSIE CHETTY.

Bawa, K.C., for the plaintiff, appellant.—The attorney has used such words in the agreement as show that he is acting solely as the agent of the first defendant.

The attorney, it is submitted, has executed the agreement in the name of his principal, for there is no difference between "E. F. J. by his attorney J. S. C." and "J. S. C. for E. F. J." *Wilke v. Barke.*[1]

Under the English Conveyancing Act of 1881 (44 and 45 Vict., c. 41, section 46) an attorney can execute a deed in his own name, and that would bind his principal. This would apply, as our law of agency is English law.

The words of the power are "to act for me and in my name or otherwise." The attorney here has acted "otherwise," as he is authorized to do.

The power to execute a deed need not necessarily be in writing, and the attorney's power to act could have been proved by parol evidence. *Meera Saibo v. Paulo Silva,*[2] *Grey & Co. v. Arabin.*[3]

Grenier, K.C. (with him *Retnam*), for defendant, respondent.—The attorney, to make his principal liable, should execute the deed and sign it in the name of the principal. *Fontin v. Small,*[4] *Berkly v. Hardy,*[5] *Story on Agency 68.*

[1] *2 East. 142.* [2] *4 N. L. R. 231.* [3] *Ram. 43-55, 103.*
[4] *1 Strange 705.* [5] *5 B. & C. 355.*

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An agent making a deed in his own name, the conveyance is void. It will make no difference that in the deed the agent described himself as such. If he says " Know all men by these presents that I, A. B., as agent of C. D., do hereby grant and convey," or if he signs it " A. B. for C. D.," in such a case it is still his own deed, and not the deed of his principal. *Story on Agency, 175 and 176.*

All such deeds are absolutely void, and not good even by estoppel against the attorney. *Story on Agency, 179, note.*

The words " or otherwise " cannot have the extended meaning contended for, for where there is a power to do a particular act, followed by general words, the general words are not to extend beyond what is necessary for doing the particular act. *Perry v. Hole.*[1]

Powers of attorney should be strictly construed. *Attwood v. Manning,*[2] *Jacobs v. Morris,*[3] *Uduma Lebbe v. Uduma Lebbe.*[4]

Weinman (with him *Tisseverasinghe*), for second defendant, respondent.—Section 46 of the Conveyancing Act does not apply to the case, as there is no authority of the donor of the power to the donee to execute the agreement in his own name as required by that section.

The appellant having gone to trial on the written power of attorney cannot be permitted to fall back on a parol power.

Cur. adv. vult.

June 19, 1914. LASCELLES C.J.—

The plaintiff sues the first defendant on an agreement by which the first defendant is alleged to have undertaken, in consideration of a loan of Rs. 500 from the plaintiff, to lease certain property to the plaintiff, either at the expiration of the subsisting leases of the premises or when those leases had been determined by order of Court. The plaintiff alleges that the first defendant, instead of carrying out the agreement, has leased them to the second defendant. The action is for the penalty of Rs. 3,000 reserved by the agreement, for the return of the Rs. 500 alleged to have been advanced, or for cancellation of the lease in favour of the defendant and for a lease to the plaintiff, and repayment of the Rs. 500.

The first defendant's answer pleads that the plaintiff obtained the agreement sued on by fraud in collusion with one Cassie Chetty. The suggestion is that Cassie Chetty, in collusion with the plaintiff, obtained the first defendant's signature to a power of attorney, representing the power of attorney to be a document of a different nature, and that the agreement sued on was fraudulently executed by Cassie Chetty on the first defendant's behalf.

[1] *29 L. J. Ch. 677.*
[2] *7 B. & C. 278.*
[3] *(1902) 1 Ch. 816.*
[4] *(1912) 16 N. L. R. 29.*

The following ten issues were agreed to by the parties, namely:—

(1) Was the power of attorney (marked B) granted under the circumstances set out in paragraphs (5) (*a*) and 5 (*b*) in first defendant's answer?

(2) Was the indenture sued upon executed in the circumstances set out in paragraphs 5 (*c*) and 5 (*d*) of the first defendant's answer?

(3) Is the agreement sued upon illegal on the ground that it is champertuous?

(4) Is plaintiff entitled to claim specific performance?

(5) Was there a breach of the conditions of the indenture No. 1,944?

(6) If so, what damages has plaintiff sustained thereby?

(7) Was the sum of Rs. 500 paid to the first defendant or on his account?

(8) If not, is the failure on the part of the plaintiff to pay to the first defendant the sum of Rs. 500 as agreed upon in the indenture sued upon fatal to plaintiff's claim?

(9) Was the second defendant guilty of fraud in accepting the lease in his favour?

(10) Is the plaintiff entitled to get the lease in favour of the second defendant set aside?

Subsequently, on March 11, 1914, the following three further issues were added, namely:—

(11) Did the power of attorney authorise the attorney to bind the first defendant to enter into the deed No. 1,944 subjecting the first defendant to the penalty of Rs. 3,000?

(12) Is the agreement No. 1,944 a valid agreement and binding on the first defendant? Was it validly executed by the first defendant by his attorney?

(13) Does the plaint disclose a cause of action against the second defendant?

Later, a further issue, No. 14, was added in the following terms:—

(14) Even if the issues Nos. 11 and 12 are answered in favour of the defendants, are the defendants estopped from denying the validity of the said agreement No. 1,944?

On April 7, 1914, the case went for trial, apparently with the consent of the parties, on issues 11, 12 and 14, these issues being treated as preliminary issues. No evidence was called. Counsel addressed the Court on these issues, and also on issue 13, with regard to the second defendant's liability.

On issue No. 11 the Judge held that the power of attorney "B" executed by the first defendant in favour of Cassie Chetty did not authorize the latter to enter into the deed No. 1,944 subjecting the first defendant to the penalty of Rs. 3,000.

There can, I think, be no doubt of the correctness of this decision. There is nothing in the power of attorney which could reasonably be construed as giving the power. The District Judge further

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found that the deed No. 1,944, being executed by Cassie Chetty in his own name, and not by the first defendant by his attorney, did not bind the first defendant. Here, again, I think the District Judge is right.

The opinion has been expressed in text books of authority that section 46 of the Conveyancing and Law of Property Act, 1881, applies only where the donor of the power expressly gives the donee authority to act in his name (*vide Boustead on Agency 304* and *Halsbury's Laws of England, vol. I., section 443*).

This interpretation of the section is a matter of opinion, and is perhaps not wholly free from doubt, but I am unable to say that the learned District Judge is wrong in following these authorities.

But in the present case there is no room for doubt as to the form in which the donee of the power was authorized to sign deeds. The power of attorney authorizes Cassie Chetty "in the event of any sale, mortgage, lease, exchange, or purchase for me and in my name, and as my act and deed, to sign, execute, &c., all deeds and other writings necessary for giving effect and validity to the same respectively, or to any contract, agreement, or promise for effecting the same." The form of execution is clearly specified.

Mr. Bawa contended that by the general words in the first clause of the instrument the attorney was authorized to sign in his own name. The words are "on my behalf and in my name or otherwise for all and each and every or any of the following purposes." The words "or otherwise" in this collocation clearly cannot over-ride the special provision subsequently made for the execution of deeds by the attorney in the principal's name.

Then it is argued that by the law of Ceylon a formal power of attorney is not necessary, and that Cassie Chetty's power to act for the first defendant could have been proved by parol evidence; and in this connection we were referred to *Meera Saibo v. Paulo Silva*[1] and *Grey & Co. v. Arabin.*[2]

But at this stage of the trial it is not open for the plaintiff to plead that Cassie Chetty was verbally authorized by the first defendant to sign the deed.

The case went to trial on the footing that such authority as Cassie Chetty had to sign the agreement was to be found in the power of attorney; and the first issue was fixed on this footing.

With regard to the 14th issue, the case is in some confusion. This issue, it is to be noted, arose only if issues Nos. 11 and 12 were answered in favour of the defendants.

I cannot but think that it was owing to some mistake or slip that this issue was included among the preliminary issues on which the case went to trial. The issue was one which could not be decided without evidence. The learned District Judge is of opinion that the plaintiff must fail on this issue, which does not set out the

[1] *4 N. L. R. 231.* [2] *Ram. 43-55, 109.*

particulars of the estoppel relied on, and the plaintiff had pleaded no estoppel. There may have been good reason for refusing to accept the issue in its present form; but when once the issue has been fixed, apparently with the consent of the parties, I think that it must be tried.

I would set aside the judgment of the Court below, and remit the case for trial of the 14th issue. In the circumstances, and in view of the plaintiff's failure to object to the trial of issue No. 14 with the other preliminary issues, I would allow no costs of the appeal; all other costs to be in the discretion of the District Judge.

Set aside.

ENNIS J.—I agree.