

1965 Present : Tambiah, J., and Sirimane, J.

T. H. WILLIAM SILVA, Appellant, and M. D. SIRISENA,
Respondent

S. C. 101/33 (Inty.)-D. C. Colombo, 447/9/M

Appointment of Proctor-Persons who are entitled to sign proxy-Recognized agent- Institution of action by him on behalf of principal- Requirement that principal should not be resident within the jurisdiction of the Court-Ratification of action instituted on a proxy signed by wrong person-Civil Procedure Code, ss. 24, 25, 27 (1), 392, 393, 394.

A proxy given by a person to a proctor must be signed only by that person himself or by a recognized agent as defined by section 25 of the Civil Procedure Code, A person holding a power of attorney as the agent of a party is debarred by section 25 (6) from appointing a proctor on behalf of his principal if the principal is resident within the jurisdiction of the Court at the time when the action is instituted there.

A plaint was filed on 3rd September 1958 in the name of G as plaintiff. The proxy, however, was not signed by G, nor did he fix or cause to be fixed even a facsimile of his signature on a rubber stamp. Although G- was resident within the jurisdiction of the Court, one S was appointed by G as his agent by a Power of Attorney which was filed in Court. At the foot of the proxy was the imprint of a rubber stamp containing the words " G by his attorney " in block letters, followed by the signature of S. On 18th May 1959 G died without taking part at the trial. On 22nd January 1962 S was substituted as legal representative and plaintiff in place of the deceased G.

Held, (i) that S was not a recognized agent competent to act on behalf of G ; therefore, the original plaintiff G was not properly before Court.

(ii) that it could not be contended that the proxy was, in fact, a proxy signed by G.

(iii) that there was no valid action filed on behalf of G.

(iv) that it could not be contended that G had ratified the action of S in bringing an action or that S had adopted the action of G.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with D. R. P. Goonetilleke and N. R. M. Daluwatte for the Defendant-Appellant.

H. V. Perera, Q.G., with G. T. Samerawickreme, for substituted Plaintiff-Respondent.

Cur. adv. vult.

In this case a plaint, filed on 3rd September, 1958, has on the face of it, the name M. D. Gunasena as the plaintiff. In this action the defendant-appellant, who is alleged to be the tenant of No. 119, Norris Road, was sued in ejectment.

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It is common ground that at the time of the institution of this action M. D. Gunasena was resident within the jurisdiction of the Court. M. D. Sirisena was appointed by M. D. Gunasena as his agent, by the Power of Attorney, which was filed in Court. On 18th May 1959, M. D. Gunasena died without taking part at the trial. On 26th October 1961, M. D. Sirisena applied for Probate of the Last Will and Testament of M. D. Gunasena and on 22nd January, 1962 he applied that he be substituted as the legal representative in the action purported to have been brought by M. D. Gunasena and the application was allowed. This application appears to have been made under sections 392 and 393 of the Civil Procedure Code.

At the trial the defendant's counsel framed, inter alia, the following issues :

9. Was the original plaintiff, M. D. Gunasena properly before Court?

10. If not, can the substituted plaintiff proceed on with this case ? Counsel for the substituted respondent raised the following issues in reply to the above issues :

11. Even if the answer to issue No. 9 is in the negative, is the substituted plaintiff, M. D. Sirisena, properly before Court ?

12. Is the proxy granted by the substituted plaintiff to Mr. A. L. Gunasekera on 2nd January 1962, a valid appointment in law ?

13. Have the steps taken in this connection since the date of institution by proctor A. L. Gunasekera been ratified by the substituted plaintiff ?

14. Has the defendant by his conduct, acquiesced in the appointment of Mr. A. L. Gunasekera as proctor for plaintiff, and is he today estopped from objecting to the original proxy of the plaintiff ?

The learned District Judge answered Issue 9 in the negative and Issue 10 in the affirmative, holding that the substituted plaintiff-respondent had ratified the steps taken in the action. He also answered Issue 14 in the negative and answered Issues 11, 12 and 13 in the affirmative. In the result, he held that the action in the name M. D. Gunasena was properly constituted. It is from this order that the defendant has appealed.

The first question for decision is whether M. D. Gunasena, the alleged plaintiff was properly before Court. The second question that arises for a decision is whether the substituted plaintiff can ratify the alleged act of M. D. Gunasena in bringing the action.

The first question is covered by authority. In *Alio Markar v. Pathu Muttu & Isa L. J. Natchiya* [12 Browne Reports, 64.], it was held that a Moorish woman, who resided within the jurisdiction of the Court, was not properly before

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Court when a plaint had been filed in her name by an attorney on a proxy granted by her attorney to a proctor. Bonser, C. J. in the course of his judgment said as follows : (vide 2 Browne

Reports, p. 66).

" Mr Bawa took the preliminary objection that she was not properly before Court. He relied upon sections 24 and 25 of the Civil Procedure Code, and he contended that the proxy given to the proctor to conduct the legal proceedings on behalf of another must be signed either by that person himself, or by such a person as is designated by the Code to be a recognized agent".

" I think that Mr. Bawa's contention is correct and that the proxy must either be signed by the party in person or by a recognized agent, as defined by section 25. "

A perusal of the relevant sections of the Civil Procedure Code supports the view expressed by Bonser, C. J. The relevant part of the section 27 (1) of the Civil Procedure Code is as follows :

" The appointment of a proctor to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in Court."

Section 24 of the Civil Procedure Code enacts-

" Any appearance, application, or act in or to any Court, required or authorized by law to be made or done by a party to an action or appeal in such Court, except only such appearances, applications, or acts as by any law for the time being in force only advocates or proctors are authorized to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognized agent, or by a proctor duly appointed by the party or such agent and on behalf of such party ".

Therefore it is clear that only a party or his recognised agent can appoint a proctor.

Section 25 sets out the various types of recognized agents who could appear on behalf of a principal. Among them are " persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court, within which limits, the appearance or application is made or act done ". (vide section 25 (b).) Since M. D. Gunasena was residing within the jurisdiction of the Court when the action was brought. M. D. Sirisena had no status to appoint a proctor on behalf of M. D. Gunasena.

In this case the learned District Judge rightly held that M. D. Sirisena was not a recognized agent to act on behalf of M. D. Gunasena in a Court of Law, and the plaintiff was not properly before Court. But Mr. H. V. Perera contended that the proxy granted in this case is, in fact, a proxy signed by M. D. Gunasena.

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I have examined the proxy closely and I am unable to agree with this contention. M. D. Gunasena has not signed this proxy, nor has he fixed or caused to be fixed even a facsimile of his signature on a rubber stamp. The word " signed " is defined in the Interpretation Ordinance so as to include a mark. At the foot of the proxy is found the imprint of a rubber stamp containing the words " M. D. Gunasena by his attorney " in block letters, followed by the signature of M. D. Sirisena. In England, the furthest that the Courts have gone is to hold that a person could either sign his signature or use a rubber stamp of the facsimile of his signature vide *Goodman v. T. Eban* [1 L. R. (1954) 1 Q. B. D. 550.]).

Further, M. D. Sirisena has signed the proxy as the attorney of M. D. Gunasena. He has not signed as M. D. Gunasena. Therefore, the contention of counsel, that this is a signature of M. D. Gunasena placed on the proxy by the hands of his agent, M. D. Sirisena, fails.

Counsel for the respondent also contended that there is nothing in the Civil Procedure Code

which disables a person who wishes to bring an action to delegate to an agent, who is not a recognised agent within the meaning of section 27 of the Civil Procedure Code, to sign the party's signature in a proxy. As stated earlier, on a consideration of section 24 and other relevant sections of the Civil Procedure Code, it seems to me that it is a statutory requirement that only a party or a recognized agent can sign a proxy authorising a proctor to appear and act in the action.

In this case, Mr. A. L. Gunasekera, who filed the case, was not a proctor appointed by M. D. Gunasena or his recognised agent and there is no valid action filed on behalf of M. D. Gunasena.

Counsel submitted that M. D. Gunasena had ratified the action of M. D. Sirisena in bringing an action. M. D. Gunasena died without ratifying the action commenced on a proxy given by M. D. Sirisena. Sirisena only applied to be substituted in the action under the provisions of sections 393 and 394 of the Civil Procedure Code. When there is no action pending, a person cannot be substituted.

Mr. H. V. Perera also urged that M. D. Sirisena as the legal representative could adopt the action brought by M. D. Gunasena. But the answer to this contention is that M. D. Gunasena never brought this action

The learned District Judge relied on three cases, viz. *Tillekeratne v. Wijesinghe* [2 (1908) 11 N. L. R. 210] ; *Nelson de Silva v. Gasinader* [(1953) 55 N. L. R. 121.] and *Kathirgamadas v. Suppiah* [4 (1953) 56 N. L. R. 172.] for the proposition that an irregularity in the appointment of a proctor could be cured by subsequent ratification. In the case reported in 11 N.L.R. 270, the party to the action ratified the act of his proctor by subsequently granting a proxy. It was held that the requirement that a proxy should

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be signed by a party was directory and not mandatory. Piling of an action or defending an action is an important juristic act, and when the word " shall " in section 27 of the Civil Procedure Code is used, the duty enforced is normally regarded as mandatory. But it is not necessary for me to go into that aspect of the matter in the instant case since that case can be distinguished from the facts of the present case. In the instant case, at the time of substitution, M. D. Gunasena was dead. Further, M. D. Sirisena has in no way stated in his application that he ratifies the acts of M. D. Gunasena. His application is for substitution under sections 333 and 334 of the Civil Procedure Code.

In the case reported in 55 N. L. R. 121 (*Nelson de, Silva v. Casinader*), the proctor on record was alive when his son, who was also a proctor, made an application for execution. In that case it was held that the son's appearance was acquiesced by the other party to the litigation and his proctor and that there was a practice whereby one proctor is, by courtesy, allowed to appear for the proctor on record. The facts of that case are clearly distinguishable from the instant case.

In *Kadirgamadas v. Suppiah* (*supra*) plaintiff brought an action through a duly appointed proctor. The plaintiff died and a person was substituted in the plaintiff's place. From an order of substitution an appeal was filed by a proctor who had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for the defendants. The proxy was given after the appealable time had expired. It was held in that case that the fact that the proctor who filed the appeal did not have the proxy in his favour at the time the appeal was filed, was only an irregularity. But it must be noted that in that case there was a proper action in the name of plaintiff pending at the time the substitution was made.

Mr. H. V. Perera also contended that the defendant appeared and therefore was bound by the orders of Court. The defendant cannot be bound by an order made in an action which was never brought by a plaintiff. Mr. Perera also urged that Sirisena, as executor, could adopt the action of

Gunasena. But in view of my finding that M. D. Gunasena did not bring this action, even if he caused the action to be brought, it is not possible for an executor to ratify an act of a deceased who did not grant a proxy in the case.

For these reasons. I set aside the order of the learned District Judge and dismiss the action with costs in both courts.

SIRIMANE, J.-I agree.

Order net aside.

- End -