

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

Habib Bank AG Zurich
Weinbergstrasse, 8006. Zurich,
Switzerland and formerly of
No.149, 151, Main Street,
Colombo 11
and formerly having a
Branch office and a place of
business at No.471, Galle Road,
Colombo 03.

**S.C.Appeal No: 134A/09
CHC CaseNo: 281/2001(1)**

PLAINTIFF

Hatton National Bank Limited,
No.481, T.B.Jayah Mawatha,
Colombo 10.

And now having a branch office and
A place of business at No.149-151,
Main Street,
Colombo 11.

SUBSTITUTED PLAINTIFF

Vs

M.S.Hebtulabhoy & co. Ltd.,
No.257, Grandpass Road,
Colombo 14.

DEFENDANT

AND

Hatton National Bank Limited,
No.481, T.B.Jayah Mawatha,
Colombo 10.

And now having a branch office and a place
of Business at
No.149-151, Main Street,
Colombo 11.

**SUBSTITUTED PLAINTIFF-
PETITIONER**

Vs

M.S.Hebtulabhoy & Co. Limited,
No.257, Grandpass Road,
Colombo 14.

DEFENDANT-RESPONDENT

Habib Bank AG Zurich,
Weinbergstrasse, 8006,
Zurich, Switzerland.

**ORIGINAL PLAINTIFF
RESPONDENT**

AND NOW

Hatton National Bank Limited,
No.481, T.B.Jayah Mawatha,
Colombo 10.

And now having a branch office and
a place of Business at
No.149-151, Main Street,

Colombo 11.

SUBSTITUTED PLAINTIFF-
PETITIONER-APPELLANT

Vs

M.S.Hebtulabhoy & Co. Limited,
No.257, Grandpass Road,
Colombo 14.

DEFENDANT-RESPONDENT-
RESPONDENT

Habib Bank AG Zurich,
Weinbergstrasse, 8006,
Zurich, Switzerland.

ORIGINAL PLAINTIFF
RESPONDENT - RESPONDENT

Before: Amaratunga J,
Imam J,
Suresh Chandra J.

Prasanna Jayawardena for Substituted-Plaintiff-Appellant
C.J.Fernando for Defendant-Respondent

Argued on: 17th September 2010.

Decided on: 28th June 2011

Suresh Chandra J,

This is an appeal from the order dated 8th July 2009 of the Commercial High Court .

The Plaintiff Bank filed action on 19th November 2001 against the defendant praying for the recovery of a sum of Rs.89.3 Million together with interest due thereon. The Defendant filed answer on 26th February 2004 praying for a dismissal of the plaintiff's action. The case was thereafter fixed for trial.

On 20th January 2005 the substituted Plaintiff made an application to have itself substituted in place of the original plaintiff in terms of section 404 of the Civil Procedure Code on the ground that the business of the original plaintiff in Sri Lanka had been transferred to the Substituted Plaintiff Bank. On 9th May 2005 the Defendant filed its objections to the proposed substitution. By order dated 5th August 2005 Court allowed the application for substitution.

The Defendant made an application against the said order for substitution to this Court and the said application was dismissed. On 30th January 2006 the defendant had made an application in open Court to the effect that the original proxy filed by the original plaintiff was defective and the defendant stated it would make an application in future. The Original plaintiff filed a fresh proxy dated 28th February 2006 by motion dated 3rd March 2006. The Defendant on 13th March 2006 filed a motion and moved to have the case dismissed on the basis that the original proxy filed by the original plaintiff was defective. The substituted Plaintiff filed its statement of objections to the said application of the Defendant on 15th May 2006.

Thereafter the substituted Plaintiff by motion dated 7th August 2006 tendered a fresh proxy dated 2nd August 2006 on behalf of the original plaintiff setting out the fact that the substituted plaintiff had recently become aware that the aforesaid proxy dated 28th February 2006 had been defective due to inadvertent clerical and/or typographical errors and moving that the said fresh proxy dated 2nd August 2006 be accepted. The defendant filed written submissions objecting to the proxy dated 2nd August 2006. The defendant's then registered Attorneys-at-Law withdrew the proxy filed by them on behalf of the defendant and on 19th March 2007 a new proxy given by the Defendant to another Attorney-at-Law was tendered on behalf of the defendant and the defendant made an application to file a further statement of objections.

The defendant filed its statement of objections objecting to the substituted plaintiff's statement of objections dated 15th May 2006. Thereafter, the Commercial High Court directed the substituted plaintiff to file a petition in this connection and when the case had been called on 21st November 2007 for inquiry the substituted plaintiff withdrew its earlier applications and moved to file a petition praying for the acceptance of a corrected proxy signed by the original plaintiff.

Accordingly the substituted plaintiff filed a petition dated 10th January 2008 along with an annexed affidavit and a fresh proxy dated 9th January 2008 of the original plaintiff signed by the Power of Attorney holder of the original plaintiff bank and prayed that the said fresh proxy dated

9th January 2008 be accepted and that the said fresh proxy be filed of record. The defendant filed its statement of objections dated 19th March 2008 and the parties had agreed to have the matter regarding the acceptance of the proxy dated 9th January 2008 be decided by way of written submissions which they filed. The learned Judge of the Commercial High Court delivered his order on 8th July 2009 refusing to accept the aforesaid proxy dated 9th January 2008 on the basis that the original plaintiff was no longer a party in the case.

The Substituted plaintiff on making an application for leave to appeal to this court, leave was granted on 10th November 2009 on the following question of law”

- (i) Has the learned High Court Judge erred in holding that the substitution of the substituted plaintiff Bank raised a legal bar to the subsequent curing of any defect which may have existed in the proxy filed by the original plaintiff bank;
- (ii) Has the learned High Court Judge erred in failing to realize that the substituted plaintiff was entitled in law to tender the proxy marked X17 of the original plaintiff bank for the purpose of regularizing the record if any defect had existed in the original proxy marked X2;
- (iii) Has the learned High Court Judge erred in failing to correctly apply the principle of law that, a defect in a proxy can be cured provided it is evident that the person executing the proxy intended to grant the authority of that proxy to the Attorney-at-law in whose favour the proxy has been executed.
- (iv) Where the party whose proxy is sought to be rectified is not before Court, can a party substituted in his place rectify an error in the original proxy and tender a new proxy for the original party.

This case which was instituted in November 2001 has been proceeded with only up to the stage of the filing of answer by the defendant so far and throughout the intervening period much time has been spent on technical objections regarding the filing of proxies, rectifications and objections regarding substitution. This is the second time that it has come up to the Supreme Court as it had come up earlier regarding the question of substitution which was rejected by this Court in 2006.

It is rather disheartening to note that the objection regarding the defect in the proxy had been raised by the defendant for the first time in January 2006 which was after about five years from

the filing of the original action and that too after the substitution referred to above had taken place. From then onwards it had been a case of raising objections to the filing of proxies which was done by the plaintiff apparently to cure defects in the original proxy if any as stated by them.

The plaintiff has filed three proxies thereafter seeking to cure defects in the proxies. It is the last proxy dated 9th January 2008 which is the subject matter of the present application before Court. It is to be noted that it is only against the last proxy that was filed by the plaintiff that the Court has made an order.

This begs the question as to the validity of the other three proxies filed on behalf of the plaintiff and the substituted plaintiff which remain in the record. There is of course one thread running through all these proxies, it is the same Attorneys-at-law who have been authorised by the plaintiff and the substituted plaintiff which makes it clear that the intention of the plaintiff and the substituted plaintiff to authorise the same Attorneys-at-law regarding their action against the defendant, which basis has been accepted in a series of cases. Vide *Udeshi v Mather* 1988 1 SLR 12, *Paul Coir (Pvt) Ltd v Waas* 2202 1 SLR13; *Pinto v Trelleborg Lanka (Pvt) Ltd* 2003 3SLR 214.

The learned High Court Judge has refused to accept the proxy dated 9th January 2008 on the basis that a defective proxy can be cured only if there was no positive rule of law against such curing. Having considered the cases regarding the curing of defective proxies the learned High Court Judge has arrived at this conclusion.

The Defendant in their written submissions have stated that once the substitution has been effected (which was challenged by them and which failed) the original party has no part to play in the action and the subsequent filing of the proxy in 2008 has no validity. Although the substituted party steps into the shoes of the plaintiff, it does not debar the plaintiff to cure a technical defect such as the curing of a proxy which is defective. The substituted plaintiff has taken it upon itself after the defendant had raised a query regarding the original proxy after the substitution had taken place, to have taken steps to cure what it considered as defective proxies if any while stating that the original proxy was valid and went to the extent of stating that those steps were being taken out of an abundance of caution without prejudice to the validity of the original proxy. This would mean that the original proxy was still considered valid by the plaintiff and the substituted plaintiff.

It is my view that once substitution had taken place and was affirmed by this Court on being challenged by the defendant, the application of the defendant regarding the validity of the proxy raised after about five years from the time of filing of the action should not have been allowed. In the recent decision of the Supreme Court, *S.P.Gunethilake vs Sunil Ekanayake S.C.26/2009* decided on 15.12.2010, Chief Justice J.A.N.de Silva has exhaustively dealt with the effect of section 27 of the Civil Procedure Code, taking into consideration all the relevant cases and in respect of the objection taken belatedly regarding the defect or absence of a proxy observed thus "if jurisdictional objections are permitted at the very end of proceedings and upheld, all proceedings would have to be held void thus wasting precious judicial time and resources and

causing grave injustices. Therefore jurisdictional objections are required to be taken at the first opportunity, the failure of which would constitute acquiescence to jurisdiction of the court.” In the present case the objection regarding the proxy was raised only after the substitution of the plaintiff had taken place, and after the said substitution was challenged in the Supreme Court, which objection was taken by the defendant almost five years after entering an appearance in the case. Once the substituted plaintiff was in place the case should have proceeded from that point.

In the above circumstances I am of the view that the order of the learned High Court Judge cannot stand and the questions of law on which leave was granted by this Court are answered in favour of the plaintiff. The appeal of the plaintiff is allowed and the order of the learned High Court Judge is set aside and the High Court is directed to proceed with the trial in the case expeditiously. As both parties have contributed to the delay in proceeding with the case on technicalities, each party will bear its own cost.

JUDGE OF THE SUPREME COURT

N.G.AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT

S.I.IMAM J.

I agree.

JUDGE OF THE SUPREME COURT