

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

**S.C.Appeal 50/08
HC: WP/HCCA/Col.170/07/LA
D.C.Mt.Lavinia:875/05/Spl**

L.H.G.Elias,
No.27, Volverton Drive,
Victoria,
Australia.
By his Attorney B.V.A.Dekker of No.56, Asiri
Mawatha, Kalubowila, Dehiwela.)

Plaintiff

Vs

1. Muhajid A.Cader,
No.15B, Sunandarama Road,
Kalubowila,
Dehiwela.
2. Anton Gajasinghe,
No.34-A/1, Edirigoda Road,
Nugegoda.

Defendants

AND

Anton Gajasinghe,
No.34-A/1, Edirigoda Road,
Nugegoda.

2nd Defendant-Petitioner

Vs

L.H.G.Elias,

No.27, Volverton Drive,
Victoria,
Australia.

(By his Attorney B.V.A.Dekker of No.56, Asiri Mawatha,
Kalubowila, Dehiwela)

Plaintiff-Respondent

Muhajid A.Cader,
No.15B, Sunandarama Road,
Kalubowila,
Dehiwela.

1st Defendant-Respondent

AND NOW BETWEEN

L.H.G.Elias,
No.27, Volverton Drive,
Victoria,
Australia.

(By his Attorney B.V.A.Dekker of
Of No.56, Asiri Mawatha,
Kalubowila, Dehiwela)

Plaintiff-Respondent-Appellant

Vs

Anton Gajasinghe,
No.34-A1, Edirigoda Road,
Nugegoda.

2nd Defendant-Petitioner- Respondent

Mujahid A.Cader,
No.15B, Sunandarama Road,
Kalubowila,
Dehiwela.

**1st Defendant-Respondent
Respondent**

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

Counsel: V.K.Choksy for Plaintiff-Respondent-Petitioner
K.K.Farooq for 1st Defendant-Respondent-Respondent
M.Farook Thahir with N.M.Reyaz for 2nd Defendant-Petitioner-Respondent

Argued on : 04th November 2010.

Decided on : 28th June 2011

Suresh Chandra J,

The Plaintiff instituted action against the 1st and 2nd Defendants alleging that the premises owned by him had been structurally damaged as a result of the Defendant's construction which had effected very deep excavations on the ground of the 1st defendant's premises. Although the Defendants had agreed to rectify the damage, they had failed to do so

and the plaintiff claimed damages in a sum of Rs.2,016,783/- jointly and severally from the Defendants. The Plaintiff filed this action through his Attorney as he resided abroad. The 1st Defendant was the owner of the adjoining premises to his residence and the 2nd Defendant was the contractor who carried out building operations on the premises of the 1st Defendant.

The 1st Defendant filed answer denying the allegations in the plaint and stated that the Plaintiff's action was prescribed and also claimed Rs.325,000/- as damages caused to his premises by way of a claim in reconvention.

The 2nd Defendant filed answer denying the allegations in the plaint and took up the position that the Power of Attorney annexed to the plaint only empowered the Attorney to file action against the 1st Defendant.

The Plaintiff filed a replication and denied the claim in reconvention of the 1st Defendant and annexed to same marked P12 a fresh Power of attorney.

When the trial was taken up, admissions and issues were recorded and defendants raised an issue as to whether the Plaintiff can maintain the action against the 2nd Defendant on the power of attorney filed with the plaint.

Parties tendered written submissions regarding the said issue and the learned District Judge answered the issue in favour of the plaintiff. Being aggrieved by the said decision the 2nd Defendant appealed to the Civil Appellate High Court and the High Court set aside the order of the learned District Judge.

The present appeal is from the said judgment of the High Court, the Court having granted leave on the following questions as set out in paragraph 20 (a), (c), (d) (e) and (g) of the petition of the Appellant.

(a) Whether the Provincial High Court of Civil Appeal of the Western Province erred in answering Issue No.19(a) Is this an action filed by the plaintiff through his lawful attorney B.V.A.Dekker?

and Issue No.19(b) if so is the said B.V.A.Dekker empowered to file action against the 2nd defendant on the strength of the Power of Attorney marked P1 annexed to the plaint?

in favour of the 2nd Defendant and accordingly dismissing the action with costs against the 2nd Defendant;

(c) Whether the Provincial High Court of Civil Appeal of the Western Province has erred in holding that the said Power of Attorney filed with the plaint in the District Court of Mount Lavinia as "P1" did not in fact grant B.V.A.Deckker the power to have instituted the said action.

(d) Whether the Provincial High Court of Civil Appeal has erred in law by holding that the 2nd Power of Attorney filed by the Plaintiff in the District Court of Mount Lavinia with the Replication as P12 does not ratify the actions of B.V.A.Deckker.

(e) Whether the Provincial High Court of Civil Appeal had erred in law in failing to consider whether the proxy could not have been rectified at any time.

(g) Whether the Provincial High Court of Civil Appeal has erred in law in not holding that the 2nd Defendant's objections in the District Court was belated.

When the objection was raised in the answer of the 2nd Defendant regarding the validity of the power of attorney and put in issue when the trial was taken up, parties had been required to file written submissions. The learned District Judge in his order held that the Power of Attorney given originally (P1) and filed with the plaint did not grant the plaintiff the power to file action against the 2nd Defendant, but by the second Power of Attorney (P12) which was annexed to the replication of the Plaintiff, power was granted to file the action and that in fact the second power of attorney ratified the action that had been filed by the plaintiff. The learned District Judge also held that no prejudice was caused to the 2nd Defendant by reason of the second power of attorney.

On the 2nd Defendant filing a leave to appeal application to the Civil Appellate High Court, this order was set aside on the basis that the original power of attorney (P1) empowered the attorney to file action only against the 1st Defendant. With regard to the second power of attorney (P12) the court held that there was no defect in the first power of attorney as it had empowered the attorney to file action against the 1st Defendant only and not against the 2nd Defendant. The Court went on to state further that when an action is filed through an agent, such agent must at the time of filing action have the power and/or authority to act on behalf of the principal.

Several authorities were cited by both Counsel when this appeal was argued, but there is no authority directly in point regarding the issue that has arisen in this case. Most of the decided case are regarding proxies and defective proxies and filing of the power of attorney or a copy of it when instituting an action or thereafter. A fair amount of laxity has been seen in curing defective proxies as they have been considered as technical matters which do not prejudice the interests of the parties seriously.

In the instant case, a perusal of the power of attorney marked P1 shows that it contains a special power as well as a general power. The special power specifies that the authority is being given to file action against the 1st Defendant only. The general power is given to the Attorney in relation to matters in general. The second power of attorney P12 is a general

power of attorney which does not specify any special powers and is one under which the Attorney could act in general regarding the affairs of the principal.

The dispute in this case is whether the first power of attorney was adequate to file action against both defendants or whether the second power of attorney could cover up what was not there in the first power of attorney. There is no prohibition to grant a second power of attorney to the same Attorney which is what has been done in this case. The question arises as to whether the authority that was given in the first power of attorney could cover the action filed against the 2nd Defendant. A power of attorney serves a purpose similar to that of a proxy, in both an authority is being given by a principal to carry out certain functions. In a proxy given regarding litigation, authority is given to institute or defend an action, while a power of attorney is wider in that it can authorize a person to act on one's behalf regarding his affairs either generally or specifically.

In the present instance the first power of attorney has granted a specific authority in the following manner:

“To institute action against Mr.Mujahid A.Cader to claim damagesand in connection of the said case to attend to all matters pertaining to it.”

This recital in the said Power of Attorney is followed by a General Authority to the following effect:

“Generally to do execute and perform all such further and other acts, deeds matters and things whatsoever which my said Attorney shall think necessary or proper to be done in and about or concerning my business, estates, lands, houses, debts, or affairs as fully and effectually to all intents and purposes as I might or could doit being my intent and desire that all matters and things respecting the same shall be under the full management, control and direction of my said attorney.”

It is my view that the combined effect of these two recitals would be to grant a special power and a general power to the Attorney which would be sufficient to institute action against the 1st Defendant as well as the 2nd Defendant. Viewed in this light there was no need to have a second power of attorney. However, it would appear that the plaintiff out of an abundance of caution had granted a second power of attorney which would amount to a ratification of what the attorney had authorized in the first instance. Although the learned District Judge considered that there was a lapse in the first power of attorney, there was no such lapse and therefore his decision that the first power of attorney being inadequate is not correct.

It was submitted on behalf of the 2nd Defendant that the decision in Gricilda Hewa v Thomas Hewa 1998 (3) SLLR 43 was authority for the proposition that when there is no authority

granted to the agent to act, such person had no authority to act. But in the present case as shown above the agent had the authority to act in terms of the general authorization of power in the said power of attorney and therefore this decision has no application to the present case.

However the Judges of the Civil Appellate High Court construed the first power of attorney as a special power of attorney and set aside the order of the learned District Judge. But as stated above regarding the position of the first power of attorney, this finding is erroneous, and therefore the judgment of the Civil Appellate High Court cannot stand.

The objection taken up by the 2nd Defendant, which was highly technical, could have been taken up by him before filing answer in terms of S.46(2) of the Civil Procedure Code as was held in *Actalina Fonseka v Dharshani Fonseka* 1989 (2) SLR 95 rather than waiting to take it up in his answer and thereafter when the matter was taken up for trial while framing issues. It is a highly technical matter which has delayed the dispensation of justice in this case regarding a matter which needed quick disposal. For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law.

The questions of law referred to above on which leave was granted by this Court are answered in favour of the Plaintiff. In the above circumstances the Plaintiff would be entitled to pursue his action against both defendants. The appeal is allowed and the judgment of the Civil Appellate High Court is set aside, the order of the learned District Judge in so far as the continuing of the action against both defendants is concerned is affirmed. The District Court is directed to hear and dispose of this action expeditiously as a considerable period of time has lapsed from the time that the action has been filed due to the objection raised by the 2nd Defendant. The 1st Defendant shall pay Rs.10,500/- as costs and the 2nd Defendant shall pay Rs.21,500/- as costs to the Plaintiff.

JUDGE OF THE SUPREME COURT

TILAKAWARDANE J

I agree.

JUDGE OF THE SUPREME COURT

AMARATUNGA J

I agree.

JUDGE OF THE SUPREME COURT