

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

Madduma Acharige Dayaratne Alias Paulis,  
No. 6, Mihiri Place, Asiri Uyana, Katubedda.

**Case No. C.A. 1311/98(F)**

**Plaintiff-Appellant (Deceased)**

**D. C. Colombo Case No. 15872/L**

Wadumesthrige Padma Dayaratne,  
Nee De Silva,  
No.6, Mihiri Place, Asiri Uyana, Katubedda.

**Substituted Plaintiff- Appellant**

**Vs.**

Mahindra De Silva,  
No.852/1, Aluth Mawatha Road,  
Colombo 15.

**Defendant - Respondent**

**Before:** M.M.A. Gaffoor J.

Janak De Silva J.

**Counsel:** A.K. Sumanasooriya for Substituted Plaintiff-Appellant

Manohara De Silva P.C. with Hirosha Munasinghe for Defendant-Respondent

**Written Submissions tendered on:**

Substituted Plaintiff-Appellant on 23<sup>rd</sup> March 2015 and 24<sup>th</sup> January 2018

Defendant-Respondent on 6<sup>th</sup> March 2015 and 24<sup>th</sup> January 2018

**Argued on:** 14<sup>th</sup> November 2017

**Decided on:** 12<sup>th</sup> March 2018

**Janak De Silva J.**

A preliminary objection was raised by the Defendant-Respondent (Defendant) when this matter was taken up for argument. It was submitted that the notice of appeal and petition of appeal is not signed by the Attorney-at-Law on record for the Plaintiff-Appellant (Plaintiff). Hence the argument was made that the appeal was bad in law and should be dismissed.

The determination of this objection requires an examination of the procedural rules governing the filing and revocation of proxy. In this context it is important to bear in the mind the following pronouncement of A.R.B. Amerasinghe J. in *Fernando v. Sybil Fernando and others*:<sup>1</sup>

“There is the substantive law and there is the procedural law. Procedural law is not secondary: The maxim *ubi ius ibi remedium* reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action.”<sup>2</sup>

Section 24 of the Civil Procedure Code (CPC) permits a party to an action to make or do certain appearances, applications or acts in any court in person, by his recognized agent or by a registered attorney duly appointed by that party. Section 5 of the CPC defines a “registered attorney” to mean an attorney-at-law appointed under Chapter V by a party or his recognized agent to act on his behalf.

Section 27(1) of the CPC requires the appointment of a registered attorney to be made in writing signed by the client. There is no dispute between the parties that Mr. W.H. Bernard De Soyza Attorney-at-Law was appointed by the Plaintiff to be his registered attorney. Journal entry dated 04.06.1992 indicates that the plaint was filed along with the proxy of Mr. W.H. Bernard De Soyza Attorney-at-Law.

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<sup>1</sup> (1997) 3 Sri.L.R. 1

<sup>2</sup> *Ibid.* page 13

On 27.10.1994 the action was taken up for trial. The proceedings read as follows:

“පැමිණිලිකාරිය නැත.

නීතිඥ බර්නාඩ් සොයිසා මහතා පැමිණිල්ල වෙනුවෙන් පෙනී සිටියි.

විත්තිකරු සිටියි.

නීතිඥ රාමයා රාජපක්ෂ මහත්මිය විත්තිය වෙනුවෙන් පෙනීසිටියි.

පැමිණිල්ලේ නීතිඥ මහතා පැමිණිලිකාරිය වෙනුවෙන් ගොනු කර ඇති පෙරකලාසිය අවලංගු කිරීමට අවශ්‍ය බව කියා සිටියි. පැමිණිලිකාරිය අද දින අධිකරණයේ නැත. දැනට වලංගුව පවතින පැමිණිල්ලේ පෙරකලාසිය ගොනු කරන ලද නීතිඥවරයා අද දින අධිකරණයේ සිටියි.

විත්තිය මෙම නඩුව නිෂ්ප්‍රභා කරන ලෙස ඉල්ලා සිටියි.

පෙරකලාසිය ගොනු කරන ලද නීතිඥවරයා අද දින අධිකරණයේ සිටින බැවින් පැමිණිල්ල නිෂ්ප්‍රභා කල නොහැක.

නව පෙරකලාසිය සහ විභාගය 1995.2.16 වෙනිදිනට.”

The Plaintiff submitted that court had on this day granted leave to revoke the proxy of Mr. W.H. Bernard De Soyza Attorney-at-Law and that he had been discharged from his duties as the registered attorney of the Plaintiff. This necessitates an examination of the procedure to be followed in the revocation of a proxy.

Section 27(2) of the CPC states that once a proxy is filed, it shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court. In *Tillekeratne v. Wijesinghe*<sup>3</sup> Hutchinson C.J. held that section 27 of the CPC is directory and this view is supported in *Kadirgamadas v. Suppiah*<sup>4</sup> and *Lorna Maritime Corporation v. Mohammed Saleh Bawazir and Others*.<sup>5</sup> However, Hutchinson C.J. was referring to the procedure to be followed in the appointment of a proctor and not the revocation of a proxy.

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<sup>3</sup> 11 N.L.R. 270

<sup>4</sup> 56 N.L.R. 172

<sup>5</sup> (1986) 3 C.A.L.R. 133

J.A.N. De Silva C.J. in *S.P. Gunatilleke v. S.P. Sunil Ekanayake*<sup>6</sup> was concerned whether the wording of section 27 of the CPC permitted such a liberal construction.<sup>7</sup>

Section 27 of the CPC clearly specifies the manner in which a proxy should be filed and revoked. It is the duty of the court to follow the provisions in section 27(2) of the CPC when revoking a proxy. Unless and until that procedure is adhered to by court, no proxy could be revoked. Till then the proxy filed earlier will be in force.<sup>8</sup>

It is true that a party dissatisfied with his registered attorney is at liberty to revoke the proxy and appoint another Attorney-at-Law as his registered attorney. But in revoking the proxy, a party has to follow the procedure prescribed in section 27(2) of the CPC. Revocation must be made with the leave of court and after notice to the registered attorney.<sup>9</sup> A.R.B. Amerasinghe J. in *Fernando v. Sybil Fernando and others*<sup>10</sup> stated as follows:

“The protective character of the laws of civil procedure, among other things, requires orderliness so that there might be clarity and certainty and no confusion. **If a party is dissatisfied with his registered attorney, he is at liberty to revoke the proxy filed in court and either appoint some other attorney or act for himself.** If the registered attorney dies, or is removed or suspended or otherwise becomes incapable, he may either appoint some other attorney or act for himself. **However, that must be done in the manner prescribed by sections 27 and 28 of the Civil Procedure Code, for justice, in my view, requires that the work of a court must be conformable to laws, including civil procedure laws.**”<sup>11</sup>  
(emphasis added)

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<sup>6</sup> (2010) 2 Sri.L.R. 191

<sup>7</sup> Ibid. page 200

<sup>8</sup> *Ran-Naide v. Wimalasooriya* [C.A. No. 1015/93(F); C.A. Minutes of 29.4.2014]

<sup>9</sup> *Wanigaratna v. Dissanayake* (2002) 2 Sri.L.R. 331

<sup>10</sup> (1997) 3 Sri.L.R. 1

<sup>11</sup> Ibid. page 15

Several aspects of the litigation are sought to be protected by the procedure set out in section 27(2) of the CPC. Once a client appoints a registered attorney to act on his behalf, he must be able to take comfort in the fact that the registered attorney will continue to act for him and look after his interests until he is informed otherwise. In *Daniel v. Chandradeva*<sup>12</sup> the Supreme Court emphasized the importance of the instructing attorney revoking the proxy only after warning the client and giving him a reasonable time to appoint another registered attorney. In fact, prior to Civil Procedure Code (Amendment) Act, No. 8 of 2017, the registered attorney could not initiate an application for revocation of the proxy. It had to be done by the client. The court must have clear notice of the registered attorney appointed to look after the interests of a party. The court is also duty bound to ensure that leave to revoke a proxy is not granted unless the client is fully aware of the proposed revocation. Whether an application for revocation of proxy should be allowed or not is a matter for the discretion of court.<sup>13</sup> In view of the purposes of section 27(2) of the CPC, I am of the view that the procedure set out therein is mandatory in nature.

The question then is whether the proxy of Mr. W.H. Bernard De Soyza Attorney-at-Law was duly revoked. In this case there is no application in writing signed by the Plaintiff and filed in court as required by section 27(2) of the CPC. Court did not and could not have granted leave for the revocation of the proxy on 27.10.1994 as firstly, there was no written application signed by the Plaintiff as required by section 27(2) of the CPC and secondly, as court rejected the application of the Defendant to dismiss the action as the registered attorney for the Plaintiff marked his appearance. Clearly court considered Mr. W.H. Bernard De Soyza Attorney-at-Law to be the registered attorney of the Plaintiff when proceedings ended on 27.10.1994.

Trial began on the next date namely 16.2.1995 with the raising of issues. Journal entry of that date shows that a new proxy was filed on behalf of the Plaintiff. The proceedings of that date indicate that Mr. Sajeewa Gunaratne is the registered attorney-at-law for the Plaintiff. The question is whether this amounts to an implied leave for the revocation of proxy as in *Wanigaratna v. Dissanayake*<sup>14</sup> Weerasuriya J. held that there can be implied leave for the

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<sup>12</sup> (1994) 2 Sri.L.R. 1

<sup>13</sup> *Fernando v. Mathew* (15 N.L.R. 88)

<sup>14</sup> (2002) 2 Sri.L.R. 331

revocation of a proxy.<sup>15</sup> However in that case revocation papers were filed and the only question was whether leave was granted by the court given that there was no express granting of leave.

But no revocation papers were filed at all in this case after 27.10.1994. All what has happened is that a proxy of Mr. Sajeewa Gunaratne was filed as the registered attorney-at-law for the Plaintiff while the proxy of Mr. W.H. Bernard De Soyza Attorney-at-Law for the Plaintiff was still in force. Courts appear to have strictly construed the requirements of section 27(2) of the CPC. In *National Insurance Corporation Ltd. v. Violet*<sup>16</sup> the Court of Appeal refused to recognize the revocation of proxy of the original registered attorney although the revocation papers were filed before a fresh proxy was filed as the application for revocation was not supported before court and permission obtained for revocation.

The Plaintiff submitted that after 16.2.1995 the action proceeded on more than 15 trial dates with the new proxy filed on record. It was submitted that all the steps taken thereafter was taken by the new attorney on record and that even the counsel for the Plaintiff appeared on his instructions and no objection was raised by the Defendant before the District Court. Objection to the jurisdiction of a court must be raised at the earliest opportunity available. In *Hatton National Bank Ltd. v. M.S. Hebtulabhoy & Co. Limited and Others*<sup>17</sup> Suresh Chandra J. appears to take the view that any objection to a defective proxy or absence of a proxy is a jurisdictional issue and must be raised at the first opportunity. He was relying on the judgement of J.A.N. De Silva C.J. in *S.P. Gunatilake v. S.P. Sunil Ekanayake*.<sup>18</sup> However, in that case J.A.N. De Silva C.J. was of the view that the total failure to file a proxy does not in any way effect the validity of the proceedings. I am of the view that the same reasoning is applicable when there is a valid proxy on record and another proxy is filed without duly revoking the original proxy. Therefore, any objection on that ground need not have been raised before the District Court as that defect did not affect the jurisdiction of the District Court.

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<sup>15</sup> Ibid. at page 336

<sup>16</sup> (2002) 3 Sri.L.R. 337

<sup>17</sup> (2011) 1 Sri.L.R. 328

<sup>18</sup> (2010) 2 Sri.L.R. 191

One may contend that even though there are two proxies on record, court should accept and act on the second proxy as the intention of the litigant to retain the services of a new registered attorney is clear. The same point can be raised in a situation where the litigant acts on his behalf while there is a registered attorney appointed by him to look after his interests. However, courts have consistently held that as long as a proxy is valid a litigant must act through his registered attorney and that he cannot perform any act in court relating to the proceedings.<sup>19</sup>

Section 755 of the CPC sets out the manner in which a notice of appeal and petition of appeal must be filed. Where there is a registered attorney on record every notice of appeal and petition of appeal must be signed by that registered attorney. The failure to do so is fatal.<sup>20</sup>

For the reasons set out above, the registered attorney for the Plaintiff on the days that the notice of appeal and petition of appeal were filed was Mr. W.H. Bernard De Soyza Attorney-at-Law. The notice of appeal and petition of appeal is not signed by him. Instead it is signed by Mr. Sajeewa Gunaratne whose proxy was filed as the registered attorney-at-law for the Plaintiff while the proxy of Mr. W.H. Bernard De Soyza Attorney-at-Law for the Plaintiff was still in force. It is trite law that court cannot recognize two registered attorneys appearing for the same party in the same cause.<sup>21</sup> Therefore, I am of the view that the notice of appeal and petition of appeal filed in this appeal is not valid in law.

The Plaintiff has submitted that if there is any defect, it is one that is curable in terms of section 759(2) of the CPC. He relied on the judgement of the Supreme Court in *Dayarathne and another v. Wijerathna and others*.<sup>22</sup> However, in that case the Supreme Court was of the view that a notice of appeal addressed to the original court can be cured by resorting to section 759(2) of the CPC even if there was a defect. It did not deal with a situation where there were two proxies on record. In *Jayasekera v. Lakmini and others*<sup>23</sup> the Supreme Court was confronted with a situation where one of the parties to the original action was not made a party to the appeal and Ekanayake

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<sup>19</sup> *Fernando v. Sybil Fernando* [(1997) 3 Sri.L.R. 1], *Jinadasa and another v. Sam Silva and others* [(1994) 1 Sri.L.R. 232], *Seelawathie and another v Jayasinghe* [(1985) 2 Sri.L.R. 266], *Hameed v. Deen and others* [(1988) 2 Sri.L.R. 1]

<sup>20</sup> *Fernando v. Sybil Fernando* [(1997) 3 Sri.L.R. 1], *Perera v. Perera et al* [(1981) 2 Sri.L.R. 41], *Arulampalam v. Daisy Fernando* [(1986) 1 C.A.L.R. 651]

<sup>21</sup> *Silva v. Cumaratunga* 40 N.L.R. 139, *Seelawathie and Another v. Jayasinghe* (1985)2 Sri. L. R. 266

<sup>22</sup> S.C. Appeal No. 07/2012; S.C. Minutes of 15.06.2012

<sup>23</sup> (2010) 1 Sri.L.R. 41s

J. granted relief in terms of section 759(2) of the CPC taking the view that the power of the court to grant relief under section 759 (2) is wide and discretionary and is subject to such terms as the court may deem just. This case again did not deal with a situation where there were two proxies on record. I am of the view that section 759(2) of the CPC cannot be resorted to when a second proxy has been filed while the original proxy is still valid. A similar view was taken Chithrasiri J. *Ran-Naide v. Wimalasooriya*.<sup>24</sup>

The Plaintiff further submitted that the preliminary objection raised by the Defendant is of a technical nature and that courts should dispense with such mere technical objections. He relied on the judgement of the Supreme Court in *Elias v. Cader and another*<sup>25</sup> wherein it was stated that 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 the case.

The Importance of procedural law was alluded to by A.R.B. Amerasinghe J. in *Fernando v. Sybil Fernando and others*<sup>26</sup> in the following pronouncement:

“The concept of the laws of civil procedure being a mere vehicle in which parties should be safely conveyed on the road to justice is misleading, for it leads to the incorrect notion that the laws of civil procedure are of relatively minor importance, and may, therefore be disobeyed or disregarded with impunity. The expression of a concern that the laws of civil procedure must not be a juggernaut car that throws its passengers out to be run over by it, I suppose, was figuratively meant to say that with greater force. However, with great respect, all that the dictum does is to obscure the role of the laws of civil procedure: The English word "juggernaut" is derived from the Hindi word "Jagganath" and the Sanskrit word "Jaganatha" meaning the lord or protector of the world. It was a title of Krishna, the eighth avatar of Vishnu. There had been for a long time, especially at Puri in Orissa, an annual pageant in which an image of this deity was dragged in procession on an enormous car under which devotees threw themselves to be crushed.

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<sup>24</sup> C.A. No. 1015/93(F); C.A. Minutes of 29.4.2014

<sup>25</sup> S.C. Appeal No. 50/2008; S.C. Minutes of 28.06.2011

<sup>26</sup> (1997) 3 Sri.L.R. 1

Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly. On the contrary, as the indispensable vehicle for the attainment of justice, civil procedural law has a protective character. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of law.”<sup>27</sup>

I am unable to agree that the objection raised by the Defendant is merely technical in nature. The appointment of a registered attorney is an important step in the dispensation of justice. Important consequences flow from such an appointment. It allows the courts to act on the basis that the registered attorney has been duly authorized to act on behalf of the litigant. The litigant is bound by the actions of his registered attorney. For instance, section 58 of the Evidence Ordinance states that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

For the reasons set out above, I uphold the preliminary objection raised by the Defendant and dismiss the appeal. I make no order as to costs.

Judge of the Court of Appeal

**M.M.A. Gaffoor J.**

I agree.

Judge of the Court of Appeal

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<sup>27</sup> Ibid. page 13