

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

Jayakodi Arachchige Ran-Naide
Budanapitiya, Wellawa

1st Substituted - Plaintiff-
Appellant

Vs

C.A.NO.1015/93 (F)
D.C.KURUNEGALA CASE NO.267/L

Jayakodi Arachchige Priyanka
Wimalasooriya
Budanapitiya, Wellawa

Defendant-Respondent

BEFORE : **K.T.CHITRASIRI, J.**
H.N.J.PERERA, J.

COUNSEL : Sanath Jayathilaka for the 1st Substituted-
Plaintiff-Appellant

Manohara de Silva P.C. with A.Wijesundera and
Hirosha Munasinghe for the Defendant-Respondent

ARGUED ON : 17.02.2014

WRITTEN : 15.06.2011, 29.08.2012 & 23.07.2013 by the
SUBMISSIONS : 1st Substituted-Plaintiff-Appellant
FILED ON : 25.05.2010 by the Defendant-Respondent

DECIDED ON : 29th APRIL 2014

CHITRASIRI, J.

When this matter was taken up for argument before this Bench, both Counsel informed Court that two preliminary issues have been raised by the defendant-respondent when the appeal was taken up for hearing earlier, before another Division of this Court. Hence, they both invited this Court to make an order on those two issues before looking at the merits since those are directed towards the maintainability of this appeal. They further submitted that both parties have already filed comprehensive written submissions in this regard. Accordingly, they moved that an order be made on those preliminary objections, considering the submissions that they have already filed.

Having perused the docket, it is found that both parties have filed submissions in respect of the aforesaid preliminary issues raised by the defendant-respondent. Those two preliminary issues raised on 26.02.2010 read thus:

- (1) *Whether the plaintiff-appellant could maintain this appeal
In view of the fact that the other plaintiffs and the 2nd
defendant have not been named as parties to the appeal;*
- (2) *Whether the notice of appeal and the petition of appeal are
valid for the reason that the plaintiff's earlier proxy has not
been revoked with leave of Court.*

I will first examine the validity of the notice of appeal dated 08.09.1993 and of the petition of appeal dated 21.10.1993 that were filed with a proxy of Ranjani Herath Attorney-at-Law without revoking the earlier proxy given to M.D.Wijekoon by the appellant. Admittedly, the proxy of the Attorney M.D.Wijekoon was in force by the time the notice and the petition of appeal were filed. An application to revoke the same had also been made when the notice and the petition of appeal were tendered. However, the Court had not made an order accepting the proxy of Ranjani Herath; neither it had made order revoking the proxy of Wijekoon.

Then the question is whether the subsequent proxy of Ranjani Herath could be accepted as the valid proxy of the appellant when the earlier proxy given to M.D.Wijekoon has not been properly revoked.

I will first look at the statutory provisions relevant to the issue. The definition given in Section 5 of the Civil Procedure Code to the words "Registered Attorney" reads thus;

"an attorney-at-law appointed under Chapter V by a party or his recognized agent to act on his behalf;"

Validity and/or effect of such an appointment of a registered attorney are stipulated in Section 27 of the Civil Procedure Code and it reads as follows:

27. (1) the appointment of a registered attorney 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; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.

(2) When so filed, it shall be in force until revoked with leave of the court and after notice to the registered attorney by a writing signed by the client and filed in Court, or until the client dies, or until the registered attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.

The provisions referred to above clearly show, the manner in which a proxy is filed and revoked. It is the duty of the Court to follow the manner referred to, in the said Section 27 when revoking a proxy. Unless and until the aforesaid procedure is adhered to by court, no proxy could be revoked. Till then the proxy filed earlier will be in force if any such proxy had been filed. Admittedly, the said procedure referred to in Section 27 of the Civil Procedure Code had not been followed in this instance to revoke the proxy of Wijekoon though a mere application to revoke the same had been made. Court had not made an order revoking the earlier proxy. Neither had it made an order accepting the proxy of Ranjani Herath.

The manner in which a notice of appeal and a petition of appeal are to be filed is stipulated in Section 755 of the Civil Procedure Code. Accordingly, every notice of appeal and petition of appeal shall be signed by the Appellant or by his/her registered attorney. Hence, Attorney Wijekoon should have signed the notice and the petition of appeal in this instance since his proxy had not been properly revoked. Therefore, the proxy of Ranjani Herath has no force or effect and accordingly, it cannot be considered a proxy filed in terms of Section 755 of the Civil Procedure Code.

Having discussed the provisions contained in the Civil Procedure Code as to the revoking of a proxy, I will now refer to the authorities relevant to the issue. In **Perera v. Perera, [1981 2 S.L.R. 41 at 44]** it was held thus:

“(2)Under the provisions of section 755(3) the petition of appeal shall be signed by the appellant or his registered Attorney and so long as there is a proxy on record it is only the registered Attorney who has the authority to sign the petition of appeal.”

In the case of **Fernando v. Sybil Fernando and another, [1997 (3) S.L.R. at page1]** it was decided that:

“A litigant has a statutory right to act for himself unless the law provides otherwise (section 24 CPC). But so long as an instrument of the appointment (proxy) under section 27(1) CPC of a Registered Attorney-at-Law is in force, a litigant who has executed such an instrument must act through his registered attorney until all proceedings in the action are ended and

judgment satisfied so far as regards that litigant while the proxy is in force, he cannot himself perform any act in court relating to the proceedings of the action. When the instrument (proxy) is filed, it shall be in force, unless revoked, or until the client or registered attorney dies or become incapable to act or until all proceedings in the action are ended and judgment satisfied so far as regards the client (section 27(2) CPC. Where therefore there is an attorney on record, the notice and petition of appeal must be signed by such attorney and by no one else; if it is signed by the party himself or by some other attorney, it is not in conformity with the law and must be rejected.

The provision in section 755(1) CPC, that every notice of appeal “shall be signed by the appellant or his registered attorney” must be conferred with reference to the content and other clauses of the Code.

Where the notice of appeal is signed by the appellant himself when he had a registered attorney on record, the lapse is fatal and is not curable in terms of section 759(2) CPC”.

The authorities referred to above also clearly show that the notice of appeal and the petition of appeal shall be signed by the registered attorney whose proxy on record and not by anyone else. The proxy on record in this instance is of M.D.Wijeikoon. His proxy has not been revoked. Therefore, the valid proxy is the proxy of M.D.Wijekoon and not of Ranjani Herath though a proxy given to her had been filed when filing the notice and the petition of appeal. In the circumstances, it is my opinion that the notice and the petition

of appeal filed by the appellants are defective since those have not been signed by their attorney on record.

Section 759(2) of the Civil Procedure Code refers to instances where the Court of Appeal is empowered to make orders curing the defects, if any when filing notice and the petition of appeal. However, such defects are not curable in terms of the said Section 759(2) unless it had been caused due to a mistake, omission or defect on the part of the appellant. I do not find such a ground in this instance for this Court to act in terms of the said Section 759(2) of the Civil Procedure Code. Moreover, the authorities referred to above too; do not permit me to accept the proxy of Ranjani Herath making use of the said Section 759(2) of the Civil Procedure Code. Hence, I am unable to allow the appellant to grant relief even under Section 759(2) of the Civil Procedure Code.

For the aforesaid reasons I, upholding the second preliminary objection raised on behalf of the respondent decide to dismiss this appeal. In the light of the above decision, it is not necessary for me to consider the merits in respect of the first preliminary objection raised by the defendant-respondent.

Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J

I agree.

JUDGE OF THE COURT OF APPEAL