

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

Madduma Achariyage Dayaratna alis
Paulis,
No. 6, Mihiri Pedesa, Asiri Uyana,
Katubedda.

Presently at:

No. 945, Aluth Mawatha Road,
Colombo 15.

PLAINTIFF

Vs.

Mahinda De Silva,
No. 852/1, Aluth Mamatha Road,
Colombo 15.

Case No.CA 1311/98 (F)

DEFENDANT

AND NOW BETWEEN

DC Colombo Case

No. 15872/L

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Paulis,
No. 6, Mihiri Pedesa, Asiri Uyana,
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No. 945, Aluth Mawatha Road,
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PLAINTIFF - APPELLANT

Vs.

Mahinda De Silva,
No. 852/1, Aluth Mamatha Road,
Colombo 15.

DEFENDANT - RESPONDENT

Before : P.R. Walgama, J

**Council : A. K. Sumanasooriya for the Plaintiff -
Appellant.**

**: Manohara de Silva PC with Hirosha Munasinghe
for the Defendant - Respondent.**

Argued on : 25.11.2014

Decided on : 27.01.2017

CASE NO- CA /1311/98 (F)- 27.01.2017- ORDER

P.R. Walgama, J

The matter to be resolved before this court is the preliminary objection raised by the Defendant - Respondent, as to the maintainability of the instant appeal of the Plaintiff- Appellant on the basis that the

Notice of Appeal and the Petition of Appeal has not been filed by the Attorney -at- law on the record of the Plaintiff-Respondent.

It is contended by the counsel for the Defendant-Respondent that the notice of appeal has been signed by S.P.K. Gunaratne Attorney -at- law , and the Petition of Appeal has been signed by Mr. Sajeewa Gunaratne Attorney- at -law, do not bear the signature on record.

The journal entry dated 04.06.1992 bears testimony that the plaintiff has given the proxy to Mr. Bernard De Zoysa Attorney -at- law , which was never revoked.

It is submitted by the counsel for the Respondent that as Mr. Bernard de Zoysa informed court that he intends to revoke the proxy and the court has granted a further date for the Plaintiff to file a fresh proxy. Eventually a fresh proxy has been filed by Mr. Sanjeewa Gunaratne. Further it is to be noted that there had not been a revocation of the earlier proxy filed by Mr Bernard De Zoysa Attorney- At- law.

In addition it is noted that there is no proof that Sajeewa Gunaratne and S.P.K. Gunaratne is one and the same person.

For brevity and convenience sake the relevant section of the Civil Procedure Code is reproduced herein below;

Section 27 (2)

“when so 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, 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 is satisfied so far as regards the client”

The counsel for the Defendant- Respondent has adverted court to Section 91 of the Civil Procedure Code which deals with the revocation of the proxy.

Section- 91

“every application made to court in the course of an action, incidental thereto, and not a step in the regular procedure shall be made by motion by the applicant in person or his counsel or registered attorney, and a memorandum in writing of such motion shall be at the same time delivered to the court.”

Therefore it is contended by the counsel for the Respondent that a mere oral application is not sufficient to have a proxy revoked.

In addition to the afore said the counsel for the Defendant- Respondent had drawn the attention of court to section 755(1) and section 755(3) of the

Civil Procedure Code which has explicitly stated as a mandatory requirement that the notice of appeal and the petition of appeal shall be signed by the appellant or his registered attorney. Therefore it is seen from the case record that the original proxy holder Mr. Bernard de Zoysa's proxy has not been formally revoked, and as such the notice of appeal and the petition of appeal filed by Mr. S.P.K. Gunaratne and Mr. Sanjeewa Gunaratne will have no force in law.

The said issue has drawn the attention of our superior courts and in those cases there Lordships had observed thus;

“ MANAMPERI SOMAWATHIE .VS. BUWANESHWARI- 1990
(1) SLR-223

“when a party gives a proxy to an attorney-at-law it remains in force until revoked with leave of court after written notice to such registered attorney. The proxy so filed is binding on the party dies or until all the proceedings in the action are ended judgment satisfied so far as regards the party. Once a registered attorney is on record the party could necessarily act only through the registered attorney.”

There are plethora of judicial pronouncements which had taken cognisance of the well settle above stated law.

The counsel for the Plaintiff- Appellant submits to court as per journal entry dated 27.10.1994, that the court had granted the application for Mr. Bernard de Zoysa to revoke the proxy and had discharged him from his duties as the registered attorney of the Plaintiff. But it is clearly seen what has been recorded on 27.10.1994 is not what the counsel for the Plaintiff – Appellant stated. It is apparent that the Learned District Judge has not made any order as to the revocation of the said proxy and no order has been made as to the acceptance of a new proxy by another attorney-at-law. But it is seen from the proceedings that there is no formal revocation or of an acceptance of a fresh proxy by court.

The counsel for the Plaintiff – Appellant thrust on many judicial pronouncements which has mainly dealt with the technicalities and the effect thereto.

When considering the legal matrix in relation to the core issue to be resolved as a preliminary issue this court is of the view that the said objection should be upheld and appeal should be dismissed in limine.

Accordingly objection is upheld, and appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL