

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

1. S. Manivannan
2. M. Gangadaran
3. V. Chandra Hassen  
All of Court Lodge Estate,  
Kandapola

**Case No. CA(PHC) `54/2003**

**Respondent-Respondent-Appellants**

**P.H.C. Kandy Case No. 483/2000 (Rev)**

**Vs.**

**M.C. Nuwaraeliya Case No. 14138/98**

Bernard Kurukuladhithya,  
Court Lodge Estate,  
  
Kandapola

**Respondent-Petitioner-Respondent**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

Dr. Sunil Cooray with Chathurika Elvitigala for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants

Priyantha Gamage for Respondent-Petitioner-Respondent

**Argued on:** 04.06.2018

**Decided on:** 12.02.2019

**Janak De Silva J.**

This is an appeal made against the judgment of the learned High Court Judge of the Central Province holden in Kandy. The learned High Court Judge was exercising revisionary jurisdiction over an order made by the learned Magistrate of Nuwaraeliya.

The following preliminary objections were raised by the learned counsel for the Respondent-Petitioner-Respondent (Respondent) when the matter was taken up for argument:

- (1) The petition of appeal has been signed by a different attorney-at-law and not the one on record
- (2) The petition of appeal has not been signed by the proxy holder but by the Appellants themselves
- (3) The petition of appeal is confined to three elementary paragraphs and no question of law has been proposed
- (4) All the parties before the High Court have not been made parties to this appeal

Parties were heard orally and also filed written submissions on the preliminary objections.

#### ***Petition of Appeal***

The proxy of Mr. Mervin De Silva, Attorney-at-Law has been filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents-Respondents-Appellants in the High Court (Appeal Brief page 55). It is dated 2<sup>nd</sup> December 2002. The learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants submitted that this proxy bears the case no. as 76/98 whereas the case number of the present case in the High Court was 483/2000 (R). However, I am of the view that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants cannot now be heard to state that this proxy was not for this case. Indeed, there was an earlier High Court Kandy case no. 76/98 relating to the dispute between parties. However, it was concluded before this case. More importantly, when the proxy of Mr. Mervin De Silva was tendered to the High Court on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents-Respondents-Appellants there was an issue on whether it should be accepted as it was tendered on the date the matter was fixed for inquiry. The learned High Court Judge made order on 02.12.2002 accepting the said proxy (Appeal Brief page 32). The 2<sup>nd</sup> Respondent-Respondent-Appellant having moved the High Court to accept this proxy cannot now be heard to state that the proxy of Mr. Mervin De Silva was not tendered for this case. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents-Respondents-Appellants cannot approbate and reprobate.

In *Ranasinghe v. Premadharmā and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda J. held:

“In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm”

Therefore, I hold that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents-Respondents-Appellants appointed Mr. Mervin De Silva as their attorney on record in the High Court.

The proxy of Mr. Siri Ratnayake Attorney-at-Law dated 2<sup>nd</sup> December 2002 has been tendered on behalf of the 3<sup>rd</sup> Respondent-Respondent-Appellant (Appeal Brief page 58). Therefore, I hold that the 3<sup>rd</sup> Respondent-Respondent-Appellant appointed Mr. Siri Ratnayake as his attorney on record in the High Court.

It is an established principle that until a proxy is revoked it will be in force. [*Ran-naide v. Wimalasooriya* (C.A. No. 1015/93(F); C.A. Minutes of 29.04.2014)]. The proxies of Mr. Mervin De Silva and Mr. Siri Ratnayake were not revoked and remained valid and effective up to the time the petition of appeal was filed in the instant case.

The Court of Appeal (Procedure for Appeals from High Courts) Rules 1988 (1988 Rules) regulate the procedure relating to appeals made to this Court against orders made by the High Court in the exercise of its jurisdiction under Article 154P(3)(b) and 154P (4) of the Constitution. Part I of the 1988 Rules apply to the instant case as it is an appeal made against an order made by the High Court exercising revisionary jurisdiction under Article 154P(3)(b) of the Constitution.

Rule 4(1) of the 1988 Rules states that every petition of appeal shall be signed by the appellant or his Attorney-at-Law. Rule 4(2) states that where the appeal is on a matter of law the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an attorney-at-law that such matter of law is a fit question for adjudication by the Court of Appeal.

The petition of appeal in this case has been signed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants themselves (Appeal Brief page 2). Below that there is a certification that it contains matters of law which are fit questions for adjudication by this Court. Below the certification there is a signature of "Attorney-at-Law for the appellants" and a seal of Mr. Aftab Jameel, Attorney-at-Law.

The question is whether this complies with the requirements in Rule 4(1) of the 1988 Rules.

It is true that the petition of appeal bears the signature of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants. It is also true that Rule 4(1) of the 1988 Rules states that the petition of appeal can be signed by the appellants or their attorneys-at-law. 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. [*Fernando v. Sybil Fernando* (1997) 3 Sri.L.R. 1, *Jinadasa and another v. Sam Silva and others* (1994) 1 Sri.L.R. 232, *Hamed v. Deen and others* (1988) 2 Sri.L.R. 1, *Seelawathie and another v. Jayasinghe* (1985) 2 Sri.L.R. 266, *Kandiah v. Vairamuttu* (60 N.L.R. 1)].

The proxies of Mr. Mervin De Silva and Mr. Siri Ratnayake filed on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants respectively were not revoked and remained valid and effective up to the time the petition of appeal was filed in the instant case. Both those proxies specifically authorize the two attorneys-at-law to inter alia appeal against any order made by the High Court. Where there is a registered attorney on record every petition of appeal must be signed by that registered attorney and the failure to do so is fatal. [*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]. As Seneviratne J. held in *Seelawathie and another v. Jayasinghe* (supra. page 270):

"Permitting either the Appellant or the Attorney-at-Law to sign the petition of appeal would mean that two parties are acting at the same time in course of proceedings of a case. Further, permitting such a practice would lead to disorder and confusion in court proceedings"

In these circumstances, I hold that the petition of appeal is not in conformity with Rule 4(1) of the 1988 Rules and must be rejected.

The learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants relied on the judgment in *Aluthewage Harshani Chandrika and another v. Officer-in-Charge, Police Station, Kalutara and others* [CA(PHC) 65/2003; C.A.M. 10.09.2013] where it was held by A.W.A. Salaam J. that there is no requirement in an appeal from the judgment of the High Court in its exercise of the revisionary powers, for the registered attorney-at-law to sign the petition of appeal. The Court took this view since the word "registered attorney-at-law" does not appear in Rule 4(1) of the 1988 Rules or Article 154P (6) of the Constitution. With the greatest respect to Justice A.W.A. Salaam, I am unable to agree with the reasoning.

Rule 4(1) of the 1988 Rules allows the petition of appeal to be signed by "the appellant or his Attorney-at-Law". The Supreme Court when making the 1988 Rules appears to have made a clear distinction between an attorney-at-law and his attorney-at-law for Rule 4(2) of the 1988 Rules refers to an attorney-at-law.

When does an attorney-at-law become, in relation to an appellant, his Attorney-at-Law? It is only when an appellant authorizes him to act on behalf of the appellant. That is done through the filing of a proxy. The inveterate practice is to file a proxy with the petition filed in the High Court when a party files an application in revision against an order made by a Magistrate. Unless revoked, that proxy is valid when a notice of appeal is filed against the judgment of the High Court acting in revision.

In any event, even if it is accepted that there is no need in terms of the 1988 Rules for a registered attorney-at-law to sign the petition of appeal in an appeal from the judgment of the High Court in its exercise of the revisionary powers, in the instant case two proxies were filed on behalf of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents-Respondents-Appellants which were valid and effective up to the date the petition of appeal was filed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants therefore cannot be heard to state that the two proxies have no effect in law. They cannot approbate and reprobate.

For the foregoing reasons, I hold that the petition of appeal filed in this case is defective as it is not in conformity with Rule 4(1) of the 1988 Rules and that the appeal must be dismissed *in limine* on that ground alone.

### ***Question of Law***

The Respondent submits that the petition of appeal is confined to three elementary paragraphs and no question of law has been proposed. While it is true that the petition of appeal is barest in content and may not be the best practice to be followed by legal practitioners, it contains the questions of law in compliance with Rule 4(2) of the 1988 Rules. Hence the third objection is overruled.

### ***Necessary Parties***

The next point is whether the appeal is bad in law for failure to make all parties before the High Court parties to this appeal.

This requires a consideration of certain facts pertaining to the litigation. The proceedings began in the Magistrates Court in terms of section 66 of the Primary Courts Procedure Act. The learned Magistrate made order directing that possession of the portion of land depicted in 3R16 should be given to V. Babu who was the 3<sup>rd</sup> Respondent in the Magistrates Court. Possession of the rest of the land in dispute was given to the 4<sup>th</sup> to 14<sup>th</sup> Respondents in the Magistrates Court.

The learned High Court Judge set aside the set judgment and directed that while V. Babu, the 2<sup>nd</sup> Respondent in the High Court, be given possession of the portion of land depicted in 3R16 and Bernard Kurukuladhithya the Petitioner in the High Court be given possession of the rest of the land. In this appeal, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents-Appellants are seeking to set aside the judgment of the learned High Court Judge and to affirm the order of the learned Magistrate. In that context only Bernard Kurukuladhithya, the Respondent in this case will be adversely affected by the High Court judgment been set aside. As he has been made a party to this appeal, I overrule the fourth objection raised by the Respondent.

For the reasons set out above, I uphold preliminary objections (1) and (2) raised by the Respondent dismiss the appeal. No costs.

Judge of the Court of Appeal

**K.K. Wickremasinghe J.**

I agree.

Judge of the Court of Appeal