

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

W.K. Piyasiri  
of Udagama, Illukgodella,  
Tissamaharamaya.

DEFENDANT-APPELLANT

C.A. Case No.953/1999 (F)

D.C. Hambantota Case  
No.68/97/L

-Vs-

Albert de Silva Warnasooriya (Deceased)  
of Yodawewa.

PLAINTIFF-RESPONDENT

Rajitha Samson de Silva Warnasooriya  
No.365, Kirinda Road,  
Tissamaharamaya.

Substituted PLAINTIFF-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : S.N. Vijith Singh with Chitrananda Liyanage for  
the 1<sup>st</sup> Defendant-Appellant  
W. Dayaratne, PC with Samadini Anuradha,  
Harsha de Silva and Asanka Kahadawaarachchi for  
the substituted Plaintiff-Respondent

Decided on : 19.07.2018

A.H.M.D. Nawaz, J.

The learned President's Counsel for the Substituted Plaintiff-Respondent raised a preliminary objection to the maintainability of this appeal at the very outset when the matter was taken up for argument.

- 1) Mr. Chandrasena Attorney-at-Law had filed the proxy on behalf of the 1<sup>st</sup> Defendant-Appellant (hereinafter sometimes referred to as "the 1<sup>st</sup> Defendant" or the "Appellant").
- 2) On 23.11.1999 the petition of appeal was filed in the District Court on behalf of the 1<sup>st</sup> Defendant-Appellant by a different Attorney-at-Law namely one Mr. Piyaratne Bandara.

In other words whilst a proxy of one Mr. Chandrasena, AAL was on record, another Attorney-at-Law called Mr. Piyaratne Bandara filed both the notice of appeal as well as the petition of appeal.

Mr. W. Dayaratne, PC contended on behalf of the substituted Plaintiff-Respondent that since this procedure is contrary to the Civil Procedure Code the petition of appeal is bad in law and the appeal must be rejected. Mr. Vijith Singh for the 1<sup>st</sup> Defendant-Appellant argued that the proxy given by the 1<sup>st</sup> Defendant to Mr. Piyarathne Bandara restricted him to file only the petition of appeal and further contended that notwithstanding the 2<sup>nd</sup> proxy, the power of the 1<sup>st</sup> proxy holder remained in force.

Both counsel acknowledged the legal proposition that has stood for years namely two proxies could not exist side by side for a party. The cases which affirmed the legal principle have laid down that no Attorney-at-Law other than the Attorney who is on record could file the notice and petition of appeal - see *Seelawathie v. Jayasinghe* (1985) 2 Sri L.R. 260; *Fernando v. Fernando* (1997) 3 Sri L.R. p.1.

In fact Section 27 of the Civil Procedure Code states that:-

Section 27(1) of the Civil Procedure Code states that, "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 provisions of this Chapter (Chapter V) may be served on a registered attorney, instead of the party whom he represents, may be made.

When so filed, the proxy 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 satisfied so far as regards the client (Section 27(2) of the Code).

These provisions have been interpreted by our Courts from early times-see *Letchumanan v. Christian* 4 N.L.R 323 which proclaimed that a recognized agent appointed by a party to a case such as an Attorney-at-law can be named even at a later stage. In this case the Plaintiff had by an oversight omitted to insert the name of the proctor in his proxy. The Court held that the proper course to adopt in such a case was not to order the plaint to be taken off the file, and cast the Plaintiff in costs, but to supply the omission then and there and proceed with the case in due course-see *Treaby v. Bawa* 7 N.L.R 22.

As regards Section 27(2) of the Civil Procedure Code, the Supreme Court in *Fernando v. Fernando* (1997) 3 Sri L.R 1 held that a proxy is valid until all proceedings in the action are ended and judgment is satisfied.

In *M.M. Haniffa v. A.M. Idroos* 2015 BLR 24, it was held that a revision and leave to appeal application could be initiated by another new Attorney-at-Law other than the registered Attorney on record, which does not form a step in the proceedings of the original court.

In *Jeevani Investments v. Wijesena Perera* (2005) 3 Sri L.R 350 citing Saravanapavan's case (1984) 1 Sri L.R 268 the Court held that appellate proceedings are a continuation of proceedings commenced in the original court.

I had occasion to cite a slew of cases such as the above in the case of *Serasundara v. K.K.G. Dyaneius* CA 1423/99 (CA minutes of 24.04.2016).

This follows that no appeal could be filed by a new Attorney-at-Law as it is the continuation of the original case. Justice Eva Wanasundera in *Haniffa's case (supra)* held that there cannot be two contracts of agency as the Civil Procedure Code limits agency to one registered Attorney-at-Law.

As the relationship between a client and an Attorney-at-Law is one of an agency, the question arises as to whether this power to take steps right throughout could be restricted by the client only to litigate in the District Court without giving the power to prefer an appeal.

Mr. Vijith Singh cited the case of *Mohideen Ali v. Hassim* 62 N.L.R 457 at 459 to advance the argument that an authority granted by a lay client to his proctor in writing can be limited. In fact Basnayake, C.J stated at p 459:-

*“A (proxy) undoubtedly limits the proctor’s authority. He cannot go counter to it; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by writing either expressly or impliedly. Such extension of the proctor’s authority may be given orally or may be inferred from the lay client’s conduct.”*

In the circumstances of this case the authority/power given to the Attorney in the District Court on the proxy given to him, was restricted to the District Court proceedings by writing and the conduct of the client in as much as a new proxy was given to a different Attorney to prefer an appeal.

I do not for a moment gainsay the ability of the client to enlarge or limit the powers granted to his Attorney-at-Law but if one peruses the powers granted to the two Attorneys-at-Law in their respective proxies, they are coterminous and grant similar powers. Whilst the proxy given to Ms. Chandrasena who has filed the notice of appeal and petition of appeal grants her powers all the way up to execution, the proxy given to

Piyarathne Bandara also covers the same aspects of litigation. There is no express limitation of Piyarathna Bandara in that his remit of acts has been restricted to the original court. Mr. Vijith Singh quite ingeniously argued that when the District Court accepted the proxy of the 2<sup>nd</sup> Attorney to file notice and petition of appeal without the power of the 1<sup>st</sup> Attorney being revoked, the District Court had sanctioned the 2<sup>nd</sup> Attorney to function. Though I accept the contention that the power of an Attorney could be limited or expanded, the District Court cannot bring about the limitation or expansion as Courts do not rewrite contracts for parties more particularly those contracts such as proxies that govern the terms of employment of an Attorney-at-Law except in the case of a revocation where the leave of court is required by the Civil Procedure Code.

The Courts have insisted on embargo of two registered Attorneys as the last paragraph of Section 27(2) refers to the effective validity of the 1<sup>st</sup> proxy lasting until all proceedings in the action are ended and judgment satisfied so far as regards the client.

Mr. Vijith Singh contended that this terminal point of the relationship can be written by the client and the 1<sup>st</sup> Registered Attorney. He cited the Supreme Court decision of *In Hatton National Bank Ltd., v. Helenluc Garmens Ltd.*, (1999) 2 Sri L.R. 365 wherein the legality of the waiver of the Prescription Ordinance made by the 2<sup>nd</sup> and 6<sup>th</sup> defendants in the case was considered by the Supreme Court. The 2<sup>nd</sup> and 6<sup>th</sup> defendants in the case were the guarantors who had agreed in the guarantee to waive the defence of prescription. The Court held that such a waiver was valid. The 2<sup>nd</sup> and 6<sup>th</sup> defendants had agreed in clause 16 of the guarantee that "we and each of us hereby agree that so long as the monies herein mentioned or any part thereof is owed by the customer to the bank or has not already been paid to the bank by the customer or by us the liability of us and each of us to pay same shall subsist and the monies herein mentioned shall be recoverable from and be the liability of us and each of us jointly and severally notwithstanding anything to the contrary herein or in any rule of law or equity or the Prescription Ordinance or any statute contained and we hereby further agree that we or any of us shall not plead the Prescription Ordinance or any of its provisions or any rule of statute or

other law is a bar to the Bank suing us or anyone of us for the recovery of the monies herein mentioned or any part thereof”.

In his well-established text, The Law of Contract Volume II Dr. Weeramantry (in Section 844 at page 797) states under the heading: “agreements not to plead limitation” that “it is not contrary to public policy for the parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English law if supported by consideration, whether it is made before or after the limitation period has expired. The same observation holds good for our law, except that an agreement may not be supported by consideration. “

It was in this background that Dheeraratne, J. said in the above case that the parties can contract out of the provisions of the Prescription Ordinance. Assuming without conceding that it is not contrary to public policy that a Registered Attorney and his client can contract out of Section 27(2) of the Civil Procedure Code, no such contracting out took place between the Attorney Ms. Chandrasena and the 1<sup>st</sup> Defendant to the effect that Ms. Chandrasena was prohibited from filing a notice and the subsequent petition of appeal.

In the circumstances I take the view that the the 2<sup>nd</sup> Attorney was prohibited from filing a notice and a petition of appeal as it was only the 1<sup>st</sup> Attorney who had been empowered to perform all these acts on behalf of the 1<sup>st</sup> Defendant-Appellant.

From the foregoing I would uphold the preliminary objection that this appeal cannot be maintained and accordingly I proceed to dismiss this appeal.

**JUDGE OF THE COURT OF APPEAL**