
JEEVANI INVESTMENTS**VS.****WIJESENA**

COURT OF APPEAL.
EKANAYAKE, J.
SILVA, J.
CA 886/94(F).
DC COLOMBO 15513/L.
MAY 6, 2005.

Civil Procedure Code, sections 27(1), 27(2) - Appointment of a Registered Attorney-at-Law – Can a relisting application be filed by a person who is not the registered Attorney?—Supreme Court (Court of Appeal) – Appellate Procedure-Copies of Records Rules 1978 - Rule 13(b).

HELD:

- (1) The proxy on behalf of the appellant has been filed in the District Court by Attorney W, and when the appeal was rejected due to non payment of brief fees the attorney on record was W. The notice of appeal/appeal have been filed by Attorney W. The proxy given to W has not been revoked nor have any of the events stipulated in section 27(2) occurred.

The relisting application has been filed by Attorney E.

- (2) When a proxy is filed it shall be in force until revoked with the leave of 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 or is removed or suspended or otherwise becomes incapable to act and until all proceedings in the action are ended and judgment is satisfied as regards the client.
- (3) The relisting application is bad in law as it has not been filed through the Attorney on record - W.
- (4) According to Rule 13(b) of the SC Rules if the appellant fails to comply with any direction given by the Court of Appeal to comply with such directions, as the court may think fit to give, court has the discretionary power to reject the appeal.

APPLICATION for relisting.**Cases referred to :**

1. *Letchemanan vs. Christian* 4 NLR 323
2. *Seelawathie vs. Jayasinghe* 1985 2 Sri LR 296

Asoka Fernando for 3rd defendant-appellant-petitioner.

Sanath Jayatilleke for plaintiff-respondent-respondent.

Sahana Mahfi for 2nd defendant-respondent-respondent.

Cur.adv.vult.

September 20, 2005.

CHANDRA EKANAYAKE, J.

This is an application made by the 3rd defendant-appellant-petitioner (hereinafter sometimes referred to as "petitioner") by the petition dated 19.11.2003 moving to set aside the judgment of the Court of Appeal dated 18.11.1996 marked X8 along with the petition dismissing the appeal on the ground of non payment of brief fees, for an order relisting this appeal and order directing the Registrar to call for the original case record in D. C. Colombo Case No. 15513/L to this Court. The 2nd defendant-respondent-respondent (hereinafter some times referred to as the 2nd defendant) by his statement of objections dated 06.05.2004 has moved this Court that the application of the petitioner be allowed.

The plaintiff has objected to the above application of the petitioner by statement of objections dated 6th May 2004 pleading inter *alia* amongst other grounds that the present relisting application has been made by a person other than the registered Attorney-at-law, who is a stranger in court who has no right to be entertained or be heard and moved to reject the said application.

After conclusion of oral submissions by Counsel, parties have tendered their written submissions and same have been filed.

By the aforesaid petition, the petitioner had averred inter *alia* that this appeal bearing No. C. A. 886/94 was preferred against the judgment of the learned Additional District Judge of Colombo dated 26.07.94 as averred in paragraph 14 of the petition. When no correspondence with regard to this appeal was received inquiries were made and then only the petitioner became aware that this appeal had been rejected on 18.11.1996 due to his failure to deposit brief fees. It is further averred that according to the

draft minute of this court dated 18.11.96 this appeal had not been listed on that day and therefore what has to be inferred is that same had been dismissed not in open court but in the Chambers of the Judge. The petitioner has averred in paragraph 16 of the petition, that this appeal had been dismissed,

- (a) without notice to pay brief fees.
- (b) without notice to appear before Court on 18.11.1996.
- (c) without calling the case in open court.

Accordingly the petitioner had moved for reliefs prayed by him in the petition.

Judgment of this Court dated 18.11.96 is as follows:

“This appeal comes up for an order of Court today. Previously the Court directed the appellant to deposit fees for the preparation of a copy of the record. The appellant failed to comply with that directive. Accordingly, the appeal is rejected in terms of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure—Copies of records) Rules 1978.”

However there is no indication whether this order had been made in open court or in the chambers. Examination of previous minutes in the docket reveals that no mention date had been given for 18.11.1996. It was urged by the counsel for the Plaintiff that according to the certified copy of the list of cases scheduled before this court on 18.11.1996 that this case was not included in the above list. On a perusal of the above list the above position is found to be correct.

As evidenced by the first minute available in the docket a direction has been given to the Registrar of this Court in terms of rule 13(b) of the Supreme Court (Court of Appeal - Appellate Procedure - Copies of Records) Rules, 1978 to inform the appellant to deposit such fees before 31.10.1996 and on which day the appeal will be mentioned for a final order of Court. Minute bearing the date 05.09.1996 shows that notice had been issued on the appellant. The next minute is the minute dated 15.11.1996 which being the last minute prior to 18.11.1996 (the date the order of rejection was made). According to the rubber stamp placed under the minute of 15.11.1996 it has to be observed that although notices have been issued on the Appellant and the Attorney-at-law requesting them to deposit the necessary fees for appeal briefs neither the Appellant nor his Attorney-at-law had deposited the said amount. Thereafter on 18.11.1996 the appeal had been rejected by Hon.Dr. Ranaraja J. However it has to be observed that the notice which had been issued as evidenced by the minute of 05.09.1996 had not been returned.

Rule 13(b) of Supreme Court (Court of Appeal-Appellate Court Procedure-Copies of Records) Rules, 1978 reads as follows:

13(b) "Where the appellant fails to pay the fees due under these rules, the Court of Appeal may direct the appellant to comply with such directions as the Court may think fit to give, and may reject the appeal if the appellant fails to comply with such directions."

According to the above rule if the Appellant fails to comply with any directions given by the Court of Appeal to comply with such directions as the court may think fit to give, court has the discretionary power to reject the appeal. It was urged by the counsel for the Plaintiff that the present re-listing application has been made by a person other than the regular Attorney-at-law and hence there is in law a stranger in court who has no right to be entertained or to be heard. The present application for re-listing (dated 19th November 2003) has been filed by an Attorney-at-law Kapila Dushantha Epitawela with an affidavit of one S. R. Kumara Weerasinghe who is said to be the Managing Director of the 3rd Defendant Company dated 19.11.2003. The objection taken up by the Plaintiff was that the above petition has been filed by an Attorney-at-law other than the Plaintiff's registered attorney on record and his position was that when the above petition was filed there was a valid proxy on behalf of the party by another registered Attorney-at-law. To verify this, this court called for the original record in District Court Colombo Case No. 15513/L and same is available for perusal of this Court.

Perusal of the District Court case record reveals that the proxy on behalf of the 3rd Defendant has been filed in the District Court by Wijesinghe Associates and until the record in the said DC Colombo case 15513/L was forwarded to this court after preferring this appeal there had been no change of the registered Attorney on record and for all purposes aforesaid proxy has remained valid. After the appeal was rejected by the order of this Court dated 18.11.1996 the 3rd Defendant filed petition dated 19.11.2003 through an Attorney K. D. Epitawela. At this inquiry into the re-listing application made by the 3rd Defendant the Plaintiff took up the aforesaid objection that the 3rd Defendant has filed the present petition through a different registered attorney-at-law without revoking the proxy which had been held on his behalf by Wijesinghe Associates as evidenced by the original District Court record. In this regard it would be pertinent to consider sub-sections 27(1) and (2) of the Civil Procedure Code which read as follows:

"27(1) The appointment of a proctor 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 proctor, instead of the party whom he represents, may be made.

(2) When so filed, it shall be in force until revoked with the leave of the court and after notice to the proctor by a writing signed by the client and filed in court, or until the client dies, or until the proctor 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.”

According to the above sub section (2) of section 27, when a proxy is so filed it shall be in force until revoked with the leave of the court and after notice to the proctor by a writing signed by the client and filed in court or until the client dies or until the proctor dies, is removed or suspended or otherwise becomes incapable to act and until all proceedings in the action are ended and judgment is satisfied as regards the client. In the case before us obviously the judgment is not satisfied. According to the notice of appeal and the petition of appeal filed by the 3rd Defendant both had been filed by the same attorney-at-law who held the proxy on behalf of the 3rd Defendant *viz.*: Wijesinghe Associates. In response to the above objection the petitioner in this case took up the position that since this being a re-listing application the 3rd Defendant petitioner need not file the re-listing application through the same registered attorney who earlier held the proxy on his behalf. For all purposes it has to be conceded that the proxy filed by Wijesinghe Associates on behalf of the 3rd Defendant has not been revoked when this relisting application was filed in this Court.

In the light of the aforesaid circumstances now necessity has arisen to consider the decision in *Letchemanan vs. Christian*⁽¹⁾. In the above case it was held that :

“No proctor is entitled to appear for a client unless he has a proxy signed by such client; and there cannot be more than one proctor at the same time on the record”.

In the instant case obviously there had been two proxies of two attorneys-at-law on behalf of the 3rd Defendant when this relisting application was filed.

In the case of *Seelawathie vs. Jayasinghe*⁽²⁾ *per* Senevirathne, J.(P/CA):

"It is a recognized principle in court proceedings that when there is an attorney-at-law appointed by a party such party must take all steps in the case through such attorney-at-law"

In the case at hand the present re-listing application has been filed not through the attorney-at-law appointed by the 3rd Defendant but by another attorney-at-law.

For the reasons enumerated above I conclude that the objection taken by the plaintiff with regard to filing of the petition by the 3rd Defendant through an attorney-at-law other than who held the proxy is a valid objection and on this ground alone the 3rd Defendant's present application has to be rejected. In those circumstances the necessity to consider the other objections does not arise.

Though not averred in the petition, petitioner has urged in the written submissions filed in this Court that the application for relisting is distinct and separate from the appeal which has been rejected now and since it is so rejected the original proxy given to Mr. Sarath Perera attorney-at-law in the District Court is not in operation now, and thus the plaintiff has no proper appearance before this Court. **It has to be noted that the plaintiff in D. C. Case No. 15513/L is the same person who is the Plaintiff-Respondent named in the present petition and therefore the proxy filed by Attorney-at-Law Sarath Perera on behalf of the plaintiff will remain valid for all purposes until it is duly revoked or until the occurrence of any of the events stipulated in section 27(2) of the Civil Procedure Code. But in this case neither the above proxy is duly revoked nor any of the events stipulated in section 27(2) has occurred. Therefore the proxy filed by the attorney-at-law Sarath Perera remains valid up to the filing of objections and even upto now.** For the foregoing reasons I conclude that the above contention of the petitioner's Counsel is of no merit and same is hereby rejected.

Accordingly the 3rd Defendant-Appellant-Petitioner's application is hereby rejected. In all circumstances no order is made with regard to costs here.

The Registrar of this Court is directed to forward the record in Case No. 15513/L to the respective District Court forthwith.

RANJITH SILVA, J. – *I agree.*

Application allowed.