FERNANDO
v.
SYBIL FERNANDO AND OTHERS

SUPREME COURT.
DR. AMERASINGHE, J.,
PERERA, J. AND
DR. BANDARANAYAKE, J.
S.C. APPEAL NO. 2/97.
C.A. NO. 56/89 (F).
D.C. COLOMBO 3356 L.
MAY 14, 1997.

Civil Procedure Code – Notice of appeal signed by party not by the registered attorney – Is the defect curable? sections 24, 27(1) and (2), 755(1), 759(2) Civil Procedure Code..

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 confered 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.

***Per* Dr. Amerasinghe, J.**

> "There is substantive law and there is the procedural law. Procedural law is not secondary: The maxim *ubi ius ibi remedium* reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action".

"The concept of the laws of civil procedure being a mere vehicle in which parties should be safely conveyed on the road to justice is misleading, for it leads to the incorrect notion that the laws of civil procedure are of relatively minor importance, and may therefore be disobeyed or disregarded with impunity.

"Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly. On the contrary, as the indispensable vehicle for the appointment of justice, civil procedural law has a protective character. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. In this sense the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any depriviation except in accordance with the accepted rules of procedure."

Cases referred to:

1. *Mohideen Ali v. Cassim* (1960) 62 NLR 457, 459.
2. *Jinadasa and Another v. Sam Silva and Others* (1994) 1 Sri LR 232, 266
3. *Kandiah v. Vairamuttu* (1958) 60 NLR 1, 3.
4. *Seelawathie and Another v. Jayasinghe* (1985)2 Sri LR 266, 268, 269, 271.
5. *Hameed v. Deen and Others* (1988) 2 Sri LR 1.
6. *Romanis Baas v. Ravenna Kader Mohideen and Another* (1881) 4 SC C 61.
7. *Silva v. Andiris* (1916) 4 CWR 310.
8. *Reginahamy v. Jayasundera* (1917) 4 CWR 390.
9. *Letchemanan v. Christian* (1898) 4 NLR 323.
10. *Gunasekera v. De Zoysa et al* (1951) 52 NLR 357.
11. *Fernando v. Fernando* (1900) 2 Leader LR 66.
12. *Kadirgamanadas et al v. K. Suppiah et al* (1953) 56 NLR 172.
13. *Tilekeratne v. Wijesinghe* (1908) 11 NLR 270.
14. *Assauw v. Billimoria* (1892) 2 CLR 86.
15. *Perera v. Perera and Another* (1981) 2 Sri LR 41.
16. *Silva v. Cumaratunga* (1938) 40 NLR 139.
17. *Arulampalam v. Daisy Fernando* (1986) Vol. 1 Colombo Appellate Law Reports 651.
18. *Manamperi Somawathie v. Buwanesiri* (1990) 1 Sri LR 223, 225, 226.
19. *Read v. Samsudin* (1895) 1 NLR 292, 294.
20. *James v. Chenneld* 8 Ch. D. 506.
21. *Velupillai v. The Chairman, V.D.C. Jaffna* (1936) 39 NLR 464, 465.
22. *Dulfa Umma et al v. UDC Matale* (1939) 40 NLR 474, 478.
23. *Re Coles and Ravenshear* (1907) 1 KB 1, 4.
24. *Nothman v. Barnet London Borough Council* (1978) 1 WLR 220, 228.
25. *Re Vandenwalls Trusts* (No 2) (1974) 3 All ER 205, 213.
26. *Dupprt Sheels Ltd. v. Sirs* (1980) 1 CR 181.

27. *Kiriwanthe and Another v. Navaratne and Another* (1990) 2 Sri LR 343.
28. *Macdugall v. Paterson* (1851) 11 CB 755, 773.
29. *Morisse v. Royal British Bank* (1856) 1 CB (NS) 67, 84-85.
30. *Re Ayre and Leicester Corporation* (1892) 1 QB 136.
31. *Sheffield Corporation v. Lurford* (1929) 2 KB 180.
32. *Re Shuter* (No 2) (1960) 1 QB 142.
33. *Annision v. District Auditor for the Metropolitan Borough of St. Pancras* (1962) 1 QB 489.
34. *Sharp v. Wakefield* (1891) 1 AC173, 179.
35. *Frome United Breweries v. Bath Justices* (1962) AC 586, 605.
36. *Fernando v. Perera and Others* (1909) 1 Cur LR 51.

APPEAL from judgment of the Court of Appeal.*

Romesh de Silva PC with *Ms. Saumya Amerasekare* for the appellant.

P. A. D. Samarasekera PC with *Keerthi Sri Gunawardena* for the respondents.

Cur. adv. vult.

June 4, 1997.
DR. AMERASINGHE, J.

Mr. U. E. S. B. Fernando, (hereinafter referred to as the appellant) instituted action against Mrs. Sybil C. M. Fernando and Mr. U. D. S. Fernando, presently in the United Kingdom by his Attorney, and Mr. U. D. S. Fernando. The appellant had sought a declaration of title based on prescription to a certain land. After a heavily contested, long, and exhaustive hearing, the District Court pronounced judgment in favour of the defendants and dismissed the action of the appellant on the 22nd of February 1989.

The appellant was dissatisfied with the judgment pronounced by the District Court and sought to appeal against that judgment and purported to give notice of his appeal.

When the appeal came up for hearing on the 13th of March 1996, the Court of Appeal pointed out that the notice of appeal dated the 28th of February 1989, had been personally signed by the appellant, and not by his duly appointed registered Attorney-at-Law. In the circumstances, the notice of appeal, in terms of section 755 (1) of the Civil Procedure Code, seemed, in the opinion of the Court, to be

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defective. The appellant moved the Court of Appeal and sought permission to tender a fresh notice of appeal signed by a registered Attorney-at-Law. However, the registered Attorney-at-Law who had signed the more recent notice was not the registered Attorney-at-Law at the date when the notice of appeal in question was filed. The earlier registered Attorney-at-Law, *albeit* some years after the statutorily prescribed period for the filing of the notice of appeal, but before the matter came up for hearing, had become a Cabinet Minister and, therefore, ceased to practice. After considering the submissions of learned counsel for the appellant and the respondents, on the 10th of May 1996, the Court of Appeal rejected the notice of appeal and dismissed the petition of appeal on the ground that, since at the date of the notice of appeal there was a duly appointed registered attorney, the notice of appeal should have been signed by that attorney and not by the appellant personally.

Aggrieved by the decision of the Court of Appeal, the appellant sought special leave to appeal to this Court by his petition dated the 19th of June 1996. On the 15th of January 1997, this Court granted him leave upon the following questions:

(1) Whether a party is entitled to sign a notice of appeal under section 755 (1) of the Civil Procedure Code, during the subsistence of a proxy granted to an instructing attorney.

(2) Whether in any event any such defect in the notice of appeal can be rectified after the lapse of the appealable period.

Section 24 of the Civil Procedure Code (CPC) states as follows:

"Any appearance, application, or act in or to any court, required or authorized by law to be made or done by a party to an action or appeal in such court, except only such appearances, applications, or acts as by any law for the time being in force only Attorneys-at-Law are authorized to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognized agent, or by an Attorney-at-Law duly appointed by the party or such agent to act on behalf of such party ..."

The instrument of appointment of a registered attorney is substantially in terms of Form No. 7 of the First Schedule to the CPC and is commonly referred to by lawyers in Sri Lanka as a "proxy": Cf. per Basnayake, C.J. in *Mohideen Ali v. Cassim*[1] at p. 419. The proxy is required to be filed in court – section 27(1) CPC –, and "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 ...": (section 27(2) CPC).

It was not in dispute that (1) the proxy filed in this matter was in force when the notice of appeal was filed; and (2) that the notice of appeal was signed by the appellant personally and not by the attorney whose proxy had been filed. In the circumstances, was the notice of appeal defective?

Section 754 of the Civil Procedure Code prescribes the legal mode of preferring an Appeal. Section 754(3) states that "Every appeal to the Court of Appeal from any judgment or decree of any original court, shall be lodged by giving notice of appeal to the original court within such time **and in the form and manner hereinafter provided,"** Section 754 (4) goes on to state that "The notice of appeal shall be presented to the court of first instance, for this purpose by **the party appellant or his registered attorney** within a period of fourteen days from the date when the decree or order appealed against was pronounced ... and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. **If such conditions are not fulfilled, the court shall refuse to receive it."** Section 755 (1) states that **"Every notice of appeal ... shall be signed by the appellant or his registered attorney ..."**

The emphasis is mine.

Learned counsel for the appellant submitted that, upon a plain reading of section 755(1) of the Civil Procedure Code, a Notice of appeal may be signed either by the appellant or by his registered attorney. On the other hand, learned counsel for the respondents

submitted that, since there was a registered attorney on record at the time the notice was lodged, the notice had to be signed by that attorney.

A litigant has a statutory right to act for himself unless the law provides otherwise: (section 24 CPC). Therefore, there is no difficulty in understanding why, in section 755 (1), it is stated that a notice of appeal may be signed by the appellant **or** his registered attorney: if he had been acting for himself at the trial, he may himself sign the notice of appeal. A litigant may, however, elect to act through a registered Attorney-at-Law. If he elects to act through a registered Attorney-at-Law, he must formally appoint such an attorney in writing and file the instrument of such appointment in court: (section 27(1) (CPC). When so filed, such an instrument shall be in force, unless revoked, or until the client or registered attorney dies or 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) CPC).

So long as such an instrument of the appointment 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: See the decision of the present Supreme Court in *Jinadasa and Another v. Sam Silva and Others*[2] at p.266. That was also the view of the former Supreme Court: See *Kandiah v. Vairamuttu*[3] at p. 3. That has also been the view of the present Court of Appeal: See *Seelawathie and Another v. Jayasinghe*[4]; *Hameed v. Deen and Others*[5].

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.

This was the view taken by the former Supreme Court when it was construing rule 2 of the Rules and Orders of the 12th of December 1843 whioh was in terms identical with section 755 of the Civil Procedure Code of 1889 which provided that "All petitions of appeal

shall be drawn and signed by some advocate or proctor, or else the same shall not be received": See *Romanis Bass v. Ravenna Kader Mohideen and Another*[6].

It was also the view taken by the former Supreme Court in construing section 755 of the Civil Procedure Code of 1889. In *Silva v. Andiris*[7] and in *Reginahamy v. Jayasundera*[8] petitions of appeal filed by a proctor who was not the proctor on record were rejected.

Letchemanan v. Christian[9] was not concerned with appeals; however, it did show the importance attached to the orderly conduct of proceedings: It was held in that case that no proctor was entitled to appear for a client unless he had a proxy signed by such client: it was not open for the proctor on record to employ another proctor to act for him, for there cannot be more than one proctor at the same time on record.

Gunasekera v. De Zoysa et al.[10], is not contrary to the principle laid down by the court. In that case a proctor who was not the proctor on record, initiated proceedings for revision. The Court, following *Fernando v. Fernando*[11], entertained the application on the ground that an application for revision constituted an entirely independent proceeding in which the party could not be represented by a pleader other than an advocate duly instructed by a proctor whose proxy or letter of appointment had to be filed in the **Supreme Court.**

Kadirgamanadas et al v. K. Suppiah et al.[12] is also distinguishable from the other cases. In that case the proctor who presented the petition of appeal had not been appointed in writing by some of the appellants, as required by section 27 of the Civil Procedure Code, at the date of the filing of the petition of appeal. He was so appointed after the appealable time had expired. The proctor, however, had, without any objection from any of the parties represented all the appellants at various stages of the proceedings earlier. The Court was satisfied that the proctor had been authorized by the appellants to file the appeal on their behalf although they had omitted to appoint him in writing as required by section 27 of the Code. That requirement, the Court held, following *Tilekeratne v. Wijesinghe*[13],

was merely directory and the irregularity in the appointment was cured by the subsequent filing of a written proxy. The decisions in *Reginahamy (supra)* and *Silva v. Kumaratunga (supra)* were, therefore, inapplicable.

In *Tilekeratne (supra)* the plaintiff granted a proxy to a proctor, which by oversight, was not signed by the plaintiff. The proctor acted on the proxy without any objection in the lower court. When the case was taken up in appeal, the defendant's counsel objected to the status of the proctor in the case. The court held that the mistake in the proxy could be rectified at that stage by the plaintiff signing it, and that such signature would be a ratification of all acts done by the proctor in the action.

In Assauw v. Billimoria[14], the petition of appeal of a defendant commencing "The petition of appeal of the defendant by his proctor" who was named, was signed "for" that proctor by another and was also countersigned by an advocate. Burnside, CJ. (Lawrie and Withers, JJ agreeing) said: "Now, we have held that the proctor who signs the petition must be the proctor on the record authorized to do every act in the cause until his authority has been revoked in a regular way and a new appointment made, and I pause here for myself to say I repudiate any suggestion or authority which would give countenance to the position that one proctor may sign another proctor's name for him, and that his right to do so should not rest on his bare assertion one way or the other of the parties themselves. I cannot conceive anything more calculated to prejudice and endanger the interests of suitors or to jeopardize the fair fame of honourable members of the profession and subject it to the acts of others less scrupulous." However, since the petition had been endorsed by an advocate, the requirement of section 755 – that petitions of appeal shall be drawn and signed by some advocate or proctor – was held to be satisfied. Burnside CJ said: "The apparent object of the law is to guard against frivolous or vexatious or insufficient appeals, and I think that it is sufficiently secured under our interpretation of the section in question."

That object ceased to exist in 1973, although the protective element alluded to by Burnside, CJ. remained. The Administration of

Justice Law No. 44 of 1973 stated in section 318 that "An appeal against any judgment may be lodged by giving notice of appeal to the original court within such time and in the form and manner prescribed herein. Section 323 (1) of that Law stated that "Every notice of appeal shall contain the particulars prescribed by rules of the court, **shall be signed by the appellant or his registered attorney** and shall bear a stamp of the prescribed denomination." In *Seelawathie v. Jayasinghe*, (supra) the notice of appeal had been signed by some of the parties and not by their attorney on record. The appeal proceedings had been taken under the provisions of the Administration of Justice Law. The President of the Court of Appeal, Seneviratne, J. at pp. 268-269 said:

> "Learned Counsel for the appellant submitted that the plain meaning of these phrases is quite clear, particularly in view of the use of the word "or"; on the plain meaning and understanding of the section either the appellant or his registered attorney can file the petition of appeal. Learned counsel for the appellant goes further and submits that the appellant can sign and file a petition of appeal even though he has a registered attorney in view of the provision – section 323 (1) of the Administration of Justice Law, and as such the notice of appeal was a valid one and should be accepted ... I am of the view that section 323 (1) and the like sections in the present Code should be interpreted **firstly** in relation to the principles set out by the long series of authorities, and **secondly** in a manner not to cause disorder in court proceedings. Further, permitting such a practice would lead to disorder and confusion in court proceedings. The words "shall be signed by the appellant or his registered attorney" should be understood and interpreted to mean that the petition of appeal can be signed by the appellant when he has no registered attorney on record ..."

Admittedly, in *Perera v. Perera and Another*[15], Soza, J. did say: "It is only the registered attorney who has the authority, can sign it so long as his proxy is there on record. **The appellant himself can sign it, but no one else.** However, as pointed out by Seneviratne, J. in *Seelawathie*, (*supra*) at p. 271, Soza, J. was not deciding whether when there was a registered attorney on record, the party himself

could sign a petition of appeal: His Lordship was deciding whether an attorney who was not the registered attorney could sign the petition of appeal. And as regards that matter, it has long been established that a court cannot recognize two registered lawyers on record appearing for the same party in the same cause: See *Silva v. Cumaratunga*[16].

The Civil Procedure Code No. 2 of 1889 which was repealed by the Administration of Justice (Amendment) Law No. 25 of 1975 with effect from the 1st of January 1976, was revived by section 2 of the Civil Courts Procedure (Special Provisions) Law No. 19 of 1977 with effect from the 15th of December 1977. The present Civil Procedure Code amends and consolidates the law from 1889. The appeal in the matter before me was lodged under the provisions of that Code which in section 755 (1) provides, *inter alia*, that every notice of appeal "shall be signed by the appellant or his registered attorney".

In *Seelawathie*, Seneviratne, J. had before him the provisions of the present Code, and although the matter before the Court related to the provisions of the Administration of Justice Law, His Lordship nevertheless did say that the principles enunciated in relation to the provisions of the Administration of Justice Law were applicable to "the like sections in the present Code." And that has been the way in which the phrase "shall be signed by the appellant or registered attorney" has been construed and applied. In *Arulampalam v. Daisy Fernando*[17] the notice of appeal was signed by an attorney who was not the attorney on record. The Court of Appeal, following *Silva v. Kumaratunga* (*supra*) held that "the mistake is fatal to its validity or to its being entertained" and that the Court in the circumstances had no power to grant relief. In *Hameed v. Deen and Others* (*supra*) the notice and petition of appeal were signed by the appellant although he had a registered attorney on record. The Court rejected the submission that the earlier decisions should be re-considered on the ground that they dealt with situations in which there were in those cases two proctors purporting to act for the appellant. It held that the phrase "shall be signed by the appellant or his registered attorney" had to be construed with reference to the context and other clauses of the Act. It said at p.5: "Indeed, in a law dealing with procedure it is imperative that phrases such as the one at issue, be interpreted bearing in mind the scheme of the Code, and having as the objective

the avoidance of disorder and confusion in the procedure." The appeal was dismissed. In *Manamperi Somawathie v. Buwanesiri*[18], the Court of Appeal rejected a notice of appeal and petition of appeal signed by the appellant, since the proxy of the appellant's attorney was in force. It stated at pp. 225-226 that once a registered attorney is on record the, party should "necessarily act through the registered attorney. Any other interpretation would cause confusion in the original courts and in the administration of justice. If a party is permitted to file legal documents and motions when the registered attorney was on record, that would disrupt the smooth working in courts."

Learned counsel for the appellant submitted that the right to appeal from a decision of a lower court with which a party is dissatisfied is a basic and valuable right that should not be denied on technical grounds. A person who is dissatisfied with a decision of a Court should be able to sign his own notice of appeal and not be compelled to have it signed by his registered Attorney-at-Law. To reject an appeal on the ground that the notice was signed by the aggrieved party was unjust. Reliance for that view was placed on the following observations:

(1) *Per* Bonser, J. in *Read v. Samsudin*[19] at p. 294 quoting the following observations of Jessel, Mr. in *James v. Chenneld*[20]:

> "It is not the duty of a Judge to draw technical conditions in the way of administration of justice but where he sees that he is prevented from receiving material or available evidence merely by reason of technical objections, he ought to remove the technical objections out of the way upon proper terms as to costs and otherwise."

(2) *Per* Abrahams, CJ. in *Velupillai v. The Chairman U.D.C.*[21]: at p. 465.

> "I for one refuse to be a party to such an outrage upon justice. This is a Court of Justice, it is not an academy of law."

(3) *Per* Abrahams, CJ. in *Dulfa Umma et al. v. U.D.C. Matale*[22]: at p. 478

> "Civil procedure should be a vehicle which conveys a litigant safely, expeditiously and cheaply along the road which leads to

justice and not a juggernaut car which throws him out and then runs over him leaving him maimed and broken on the road."

What practitioners seek for their clients when they resort to the courts is to use the machinery of justice to obtain a just result, and what the clients seek to avoid is unnecessary and prejudicial expense, delay and technicality in the process of attaining that just result: Halsbury, 4th Ed. Vol. 37 paragraph 3.

According to some people, substantive law creates rights and obligations and determines the ends of justice embodied in the law, whereas procedural law is an adjunct or an accessory to substantive law. The submissions of learned counsel for the appellant are, I suppose, meant to make us turn in that direction. The classic expression of that view is stated by Collins MR in *Re Coles and Ravenshear*[23] at p. 4. "Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and help by rules, which after all are only intended as general rules of procedure, so and to be compelled to do what will cause injustice in the particular case." See also per Lord Denning in *Nothman v. Barnet London Borough Council*[24] at p. 228. *Re Vanderwall's Trusts*[25] at p. 213. The Changing Law, 1953, p. 106; The Family Story, 1981, p. 174.

Admittedly, courts of law are concerned with ensuring justice according to law; however, in my view, civil procedure law cannot be consigned to a place of inferiority as being 'merely technical and therefore relatively unimportant' or as serving no other purpose than conveying a particular litigant in a safe, expeditious and economical manner on his way to the fair resolution of his dispute by a court of law. To consign civil procedural law to a place of inferiority and to regard it as something unimportant, or antithetical to the substantive law is erroneous: Such a relegation is unwarranted. It was no exaggeration for Sir Maurice Amos (**A Day in Court at Home and Abroad,** (1926) Cambrigde Law Journal 340) to claim that "Procedure lies at the heart of the law". The Evershed Committee in its final report on Supreme Court Practice and Procedure (1953) Cmd. 8878 para. 1 observed that "the shape and development of the

substantive law of England have always been, and, we think, always will be, strongly influenced by matters of procedure." The Committee cited the celebrated aphorism of Sir Henry Maine that "substantive law has at first the look of being gradually secreted in the interstices of procedure."

There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim *ubi ius, ibi remedium* reflects the complementary character of civil procedure law. The two branches are also interdependent. Halsbury (*ibid.*) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives its remedy and effectiveness and brings it into being.

The concept of the laws of civil procedure being a mere vehicle in which parties should be safely conveyed on the road to justice is misleading, for it leads to the incorrect notion that the laws of civil procedure are of relatively minor importance, and may, therefore be disobeyed or disregarded with impunity. The expression of a concern that the laws of civil procedure must not be a juggernaut car that throws its passengers out to be run over by it, I suppose, was figuratively meant to say that with greater force. However, with great respect, all that the dictum does is to obscure the role of the laws of civil procedure: The English word "juggernaut" is derived from the Hindi word "Jagganath" and the Sanskrit word "Jaganatha" meaning the lord or protector of the world. It was a title of Krishna, the eighth avatar of Vishnu. There had been for a long time, especially at Puri in Orissa, an annual pageant in which an image of this deity was dragged in procession on an enormous car under which devotees threw themselves to be crushed.

Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly. On the contrary, as the indispensable vehicle for the attainment of justice, civil procedural law has a protective character. In its protective character, civil procedural law represents the orderly, regular and public functioning

of the legal machinery and the operation of the due process of law. In this sense, the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure: Halsbury, *Ibid.*

The protective character of the civil procedure laws, **as such,** was neither referred to by learned counsel for the respondents nor by any of the authorities cited by learned counsel for the appellant or the respondents. However, learned counsel for the respondents did strongly submit that, in the interests of the administration of justice, there must be order, and therefore there must be compliance with the provisions of section 755 (1) of the Civil Procedure Code which prescribes the requirements of a notice of appeal should be strictly observed. *Seelawathie* (*supra*) at p. 269; *Hameed* (*supra*) at p. 5; and *Manamperi* (*supra*) at pp. 225-226, expressly support that view. See also per Burnside, CJ. in *Assauw,* (*supra*). And, no doubt, that was the fundamental reason, although unstated, for the other decisions which held that where there is a registered attorney on record the party who appointed him must act through him and not personally or through some other attorney. I find myself in agreement with that principle and the reasoned exposition of that principle in the decisions in *Assauw, Seelawathie, Hameed* and *Manamperi.*

In deciding which of the two opposing constructions given to the words "shall be signed by the appellant or his registered attorney" in section 755 (1) of the Civil Procedure Code, should be adopted, I cannot overlook the fact that the courts, having been left to do so by the legislature, have worked out the details for themselves. While I am not bound by the decisions of the Supreme Court, when it was not the apex judicial body, nor by the decisions of the present Court of Appeal, I do regard the opinions expressed by those courts on the issues before me with the greatest respect: they are of very great persuasive value, for those courts have, for cogent reasons, held that so long as there is a proxy in force, the party who gave that proxy is bound to act through his attorney: and therefore, where there is registered attorney, a notice of appeal must be signed by his attorney: A notice of appeal signed by a party himself is invalid if

there is an attorney on record. I find no reason to depart from such a view.

I find no difficulty in understanding why a litigant who has freely elected to act through an Attorney-at-Law, should be bound to act through that person and not through any other Attorney-at-Law nor personally. The protective character of the laws of civil procedure, among other things, requires orderliness so that there might be clarity and certainty and no confusion. If a party is dissatisfied with his registered attorney, he is at liberty to revoke the proxy filed in court and either appoint some other attorney or act for himself. If the registered attorney dies, or is removed or suspended or otherwise becomes incapable, he may either appoint some other attorney or act for himself. However, that must be done in the manner prescribed by sections 27 and 28 of the Civil Procedure Code, for justice, in my view, requires that the work of a court must be conformable to laws, including civil procedure laws.

Learned counsel for the appellant submitted that the rejection of the notice of appeal was unjust. It is a principle of legal policy that law should be just and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of a case before it, which of the opposing constructions of the enactment would give effect to the legislative intention, would presume that the legislator intended to observe this principle. The court would therefore strive to avoid adopting a construction which leads to injustice. However, in the exercise of his or her constitutional duties, a judge – whatever freedom others, including, perhaps, those in academies of law may have – cannot be guided by his or her subjective, private notions of what justice requires. The people expect that their judicial power shall be exercised by judges in accordance with the law of Article 4 (c) of the Constitution. In *Dupprt Steels Ltd. v. Sirs*[26] Lord Scarman said:

> "In the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and unmakes, the law: the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. When one is considering law in the hands of the

judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of the discretionary power granted to judges; but in developed societies limits are invariable set, beyond which judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

If people and Parliament come to think that the judicial power is confined to nothing other than the judge's sense of what is right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application."

Reference might also be made to the observations of Lord Justice Scrutton in his lecture "The Work of the Commercial Courts", (1921-23) 1 Cambridge Law Journal 6 at pp. 8-9:

"Now the second thing that you want in a judicial system is what I may call accuracy in results of fact, settled principles of law which you proceed. You will observe that I have said nothing about the results being just, because justice is not what we strive after in the Courts, paradoxical as it may seem ... We are not trying to do justice, if you mean by justice some moral standard which is not the law of England. The oath which every Judge takes is: I will do right to all manner of people without fear or favour or prejudice, according to the laws and customs of this realm. And it is the laws and customs of the realm that the Judges have to administer. Sometimes hard cases make bad law. If once you allow the laws and customs which you have to administer to be diverted by the particular view you take of the particular case, another Judge may think otherwise on the same facts, and there ceases to be any certainty in the law. If the laws and customs you have to administer are wrong, it is for Parliament to put them right – not for the Judges. It is important that the Judges should interpret the settled laws without altering them according to their views of right or wrong in the particular cases. And that is why I have not used the word 'Justice'."

The observations of Bonser J. and Abrahms CJ. ought to be read in the context of the specific circumstances of the cases before the courts in which they were stated. The circumstances of those cases

do not have any resemblance to the matter before us. Moreover, the attractive view presented by learned counsel for the appellant, based though it is on the dicta of two of the most eminent judges who graced the judiciary, is not as simple, plain, or straight forward as it may seem to be, for civil procedure law fulfils many legal and social functions and has several objectives which may be conveniently, although not exhaustively, grouped according to the character which it assumes as the indispensable instrument for the attainment of justice Halsbury, 4th Ed., Vol. 37 paragraph 3. I have referred to the complementary and protective character of civil procedure law. I must turn now to another aspect that is relevant to the matter before me.

In its remedial or practical character, civil procedure law deals with the actual litigation process itself in accordance with the practice and procedure of the courts; and in this sense it enhances the importance and application of the rules, practices and procedural modes and methods for the conduct of the judicial process Halsbury *ibid.*

Learned counsel for the appellant submitted that the Court of Appeal erred in refusing to permit the rectification of the notice of appeal by accepting the new notice tendered to court signed by an attorney whose proxy had been filed. Section 759(2) of the Civil Procedure Code states that "In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just." It was argued that the requirement relating to the signing of the notice was directory and not mandatory, and since such a failure did not materially prejudice the respondent, the Court of Appeal ought to have exercised its discretion and accepted the new notice. Learned counsel cited *Kiriwanthe and Another v. Navaratne and Another*[27] in support of his submissions.

Kiriwanthe was concerned with the failure to comply with Rule 46 of the Rules of the Supreme Court. The Court was of the view that, in the light of the object and purpose of the rule, strict compliance was not necessary and that substantial compliance was sufficient. There

should, in its view, have been a determination whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, followed by an exercise of judicial discretion either to excuse the non-compliance or to impose a sanction. Dismissal was not the only sanction. A failure to comply with the rule was curable by subsequent compliance where the court holds that initial compliance was impossible by reason of circumstances which are beyond the control of the applicant.

Where a court is given in terms of a power to exercise a certain jurisdiction, this may be construed as imposing a duty to act. This will arise where there is no justification for failing to exercise the power. In such cases, as it is often put, 'may' is held to mean shall: e.g. see *Macdugall v. Paterson*[28] at p. 773; *Morisse v. Royal British Bank*[29] at pp. 84-85. *Re Eyre and Leicester Corporation*[30]; *Sheffield Corporation v. Luxford*[31]; *Re Shuter*[32]; *Annison v. District Auditor for the Metropolitan Borough of St. Pancras*[33]. In the matter before the Court of Appeal, however, there was ample justification for not exercising its power to grant relief and for rejecting the petition of appeal and the notice upon which such petition was founded. As we have seen, the defect was not of a purely formal or technical nature: A notice of appeal is a crucial step in the proceedings and such a step could, for the reasons explained, only have been taken by the attorney on record. In *Hameed* (*supra*) at p. 7 the Court of Appeal, quite correctly in my view, said: "Counsel for the Appellant did not invite this Court to act in terms of section 759(2) of the Civil Procedure Code. In any event the lapse referred to above (that the appellants instead of their attorney on record had signed the notice of appeal) goes to the basic validity of the notice and petition of appeal and, as such it is not curable in terms of the provisions of section 759(2)."

Discretion is to be exercised, as Lord Halsbury puts it in *Sharp v. Wakefield*[34] at p. 179, according to the rules of reason and justice and not according to private opinion, according to law, and not humour." See also per Lord Atkinson in *Frome United Breweries v. Bath Justices*[35] at p. 605.

The notice of appeal had to be presented to the court of first instance within a period of fourteen days from the date when the judgment was pronounced. The notice of appeal was filed on the

28th of February 1989 within the stipulated time, but the defect was sought to be cured by the filling of a new notice only on the 13th of March 1996. There was no question of impossibility of compliance, nor was there any explanation as to why the notice of appeal was not signed by the attorney on record. In the circumstances, the decision in *Kiriwanthe* had no application to this case and the Court of Appeal was justified in holding that it should not entertain the new notice of appeal. There was in the circumstances of the case no obligation on the Court of Appeal to exercise the power vested in it by section 759(2) of the Civil Procedure Code.

In *Silva v. Cumaratunga* (*supra*) it was held that when the petition of appeal was not signed by the proctor whose proxy was on record at the date on which the petition was filed the petition should be rejected and the court has no power to give relief. The court noted that in *Fernando v. Perera and Other*[36], the Supreme Court had remitted the petition of appeal to the District Court to be signed by the proctor on record but added that "the authority for this procedure is not stated in the judgment and I do not think it should be followed. Besides in this case the proxy of the proctor on record when the appeal was filed has been revoked and he cannot now be asked to sign the petition of appeal." In the matter before me too, the proxy of the attorney on record when the appeal was filed had been revoked and could not be signed by him later when the defect was discovered.

For the reasons stated in my judgment, I dismiss the appeal. Each party shall bear his own costs.

PERERA, J. – I agree.

DR. SHIRANI BANDARANAYAKE, J. – I agree.

Appeal dismissed.