
SAMARANAYAKE
V.
MEDDEGEWATTE

SUPREME COURT.

BANDARANAYAKE, J., AMERASINGHE, J. AND KULATUNGA, J.

S. C. APPEAL NO. 5/89.

JULY 21, 1991.

Appeal - Registered attorney-at-law incapacitated from signing - Name of registered attorney-at-law signed with his consent - Civil Procedure Code, s. 755 (3).

Where the registered attorney-at-law was incapacitated from signing by illness and his name was signed on the petition of appeal by another with his consent there is sufficient compliance with the requirements of s. 755(3) of the Civil Procedure Code. The fact that the appellant also signed the petition does not invalidate the petition.

Cases referred to:

1. *Seelawathie v. Jayasinghe* [1985] 2 Sri LR 266
2. *Perera v. Perera* [1981] 2 Sri LR 41.
3. *Medananda Therunnanse v. Dhammandanda Thero* 46 NLR 117
4. *Nelson Silva v. Casinadar* 65 NLR 121

APPEAL from a judgment of the Court of Appeal.

H. L. de Silva P.C. with *W. P. Gunatillaka, I. A. G. Udawatte* and *C. R. Samaranayake* for Respondent

Bimal Rajapaksa for Appellant.

Cur. adv. vult.

August 29, 1991.

BANDARANAYAKE, J.

Special leave to appeal to the Supreme Court was granted on the following question of law:

Whether the petition of appeal signed by a party to the case at a time when there is a registered Attorney-at-Law on record can be entertained by the Court of Appeal

As the written submissions on behalf of the appellant had been filed out of time, order was made that Counsel for the appellant cannot be heard at the hearing of the appeal. Only Counsel for the respondent was heard.

This case arises from a dispute between two sisters over the width of a roadway. The case was settled on 30.8.76 and terms of settlement entered. Consequently a Commission was issued to have the roadway surveyed in terms of the settlement. Survey Plan No. 706 dated 8.9.77 was presented to the District Court. Objections were filed by the plaintiff-respondent to the said plan No. 706 on the ground that the Surveyor had materially gone outside the terms of settlement. Upon inquiry the District Judge made an order on 20.7.78. The defendant appealed from that order to the Court of Appeal. When the appeal before the Court of Appeal was finally taken up on 26.9.88 preliminary objections were raised by Counsel for the plaintiff-respondent that the appeal was not in order in that —

- (i) *the petition of appeal had not been signed by the Attorney-at-Law on record, and,*
- (ii) *that, instead, the party-appellant herself had signed the petition of appeal although the petition says it is in the name of the Attorney-at-Law on record.*

The Court of Appeal held that these objections must fail for the reason that (i) there is no requirement in the Civil Procedure Code that a petition of appeal should be in the name of an Attorney-at-Law for the appellant as the law only requires that the petition should be signed by either the party or his registered Attorney, and , (ii) in any event, S.759 (ii) of the Civil Procedure Code permits the acceptance of a petition of appeal which carries an omission or defect or mistake if the respondent had not been materially prejudiced.

The Court held that in the absence of any averment of material prejudice the objections must fail. The Court also held that the appeal not being from the settlement effected on 30.8.76 but from the order of 20.7.78 there was no merit in the appellant's objection that one cannot appeal from a settlement. The Court ordered that the appeal be listed for argument. The plaintiff-respondent appeals from that order.

When the Supreme Court granted leave to appeal, the Court also made order that the petition of appeal be forwarded to the Examiner of Questioned Documents for examination and report as to whether the name "T. Coomarasamy" appearing on the petition at the place where the signature of the Attorney-at-Law on record should appear differed from the signatures on the other papers filed by Mr. Coomarasamy, the Attorney-at-Law on record, for example, the answer and the notice of appeal. The Supreme Court also permitted the parties to file submissions or objections after the opinion of the Examiner of Questioned Documents was known.

The report of the Examiner of Questioned Documents contained the opinion that the signature of T. Coomarasamy on XI which was the petition of appeal differed from the signatures of T. Coomarasamy on X3, X4, and X5 which were the answer, notice of appeal, etc. and also expressed the opinion

that the signatures of T. Coomarasamy on X3, X4 and X5 had been written by one and the same person and that the person who wrote the signatures of "T. Coomarasamy" on X3 X4 and X5 did not write the signature "T. Coomarasamy" on XI. Consequent to this report learned Counsel for the appellant in written submissions took up the position that this report was clear evidence of a fraud having been committed and that the signature on the petition of appeal XI was a forgery and that in the circumstances, the defendant cannot succeed in this appeal. Appellant's Counsel in his written submissions also contended that once there is an Attorney-at-Law on record and his proxy has not been cancelled or revoked but remains valid the party cannot sign the petition of appeal in place of the Attorney-at-Law on record. When there is a registered Attorney-at-Law he must sign all papers including the petition of appeal because his client has no status whilst the proxy remains unrevoked. Learned Counsel cited the cases reported in *Seelawathie v. Jayasinghe* (1) and *Perera v. Perera* (12).

Again, consequent to the report of the Examiner of Questioned Documents the plaintiff-respondent filed affidavits showing:—

(i) that the Attorney-at-Law T. Coomarasamy had suffered a stroke in 1978 and was paralyzed and could not sign, and,

(ii) Attorney-at-Law Nathanielsz who consequently came into the case appeared for the defendant at the inquiry before the District Judge on the instructions of Mr. T. Coomarasamy and that he also advised Mr. Nathanielsz to appeal against the order of the District Judge and that Nathanielsz settled the petition of appeal and visited Mr. Coomarasamy and showed him the typed petition of appeal. Mr. Coomarasamy suffered a stroke and was unable to write or use his hand. Nathanielsz showed the petition of appeal to Mr. Coomarasamy who read

it and instructed him to write his name "T. Coomarasamy" on page 5 of the petition above the typewritten words "Attorney-at-Law for the defendant". Mr. Nathanielsz says he did so in the presence of Mr. Coomarasamy and Mrs. Coomarasamy and Mr. Kandiah and that on the direction of Mr. Coomarasamy the defendant-appellant also placed her signature on the petition of appeal. A few months after this Mr. Coomarasamy died. On 18th September, 1978 the petition of appeal was filed before the Registrar of the District Court by Mr. Nathanielsz.

The matters referred to in these affidavits by Mr. Nathanielsz, Mrs. Coomarasamy, the defendant-appellant and by a neighbour Mr. Kandiah who was also present at the time when Mr. Coomarasamy directed his name to be written on the petition of appeal had not been controverted in any way. We accepted the contents of the affidavits as true.

Mr. H. L. de Silva, P.C., for the plaintiff-respondent referred this Court to the provisions of S.24 of the Civil Procedure Code. He submitted that there was no proposition in law that once the party gives a proxy he cannot himself take any further part in it. Counsel referred us to two cases reported in *Medananda Therunnanse v. Dhammandanda Thero* (3) and *Nelson Silva v. Casinadar* (4).

In this case we accept the affidavit evidence that the Attorney-at-Law on record Mr. T. Coomarasamy was incapacitated by reason of illness and was unable to sign the petition of appeal but that he instructed Mr. Nathanielsz to write his name in place of his signature. This event is confirmed by the party appellant and by her witness. In these circumstances there is no question of a fraud because Mr. Coomarasamy's name came on the document with his consent and on his direction. We, therefore, do not have to approach this case as one

where there has been a forgery in the document in issue. In point of fact there is no mistake or omission or defect in the petition of appeal that needs to be cured. The name of T. Coomarasamy appearing as it does on the petition of appeal is tantamount to his having placed his signature on the document in the circumstances of this case.

In the view we have taken that the provisions of S.755 (3) of the Code have been thus satisfied, the fact that in addition, the party to the case has also signed the petition does not make the petition bad in law. The appeal is dismissed with costs. The Court of Appeal is directed to take the next step in this action.

Amerasinghe, J., — I agree.

Kulatunga, J., — I agree.

Appeal dismissed.