

## SARAVANAPAVAN

v.

## KANDASAMYDURAI

COURT OF APPEAL,

SENEVIRATNE, J., ABEYWARDANE, J. AND MOONEMALLE, J.

C.A. APPLICATION No. L.A. 72/81 – D. C. JAFFNA No. 2181/MISC.; S.C. No. 2/78 – D.C. JAFFNA No. L/673.

FEBRUARY 7, 1984.

*Civil Procedure Code, sections 754 (2), 756 (2) and (4) – Leave to appeal – Validity of proxy filed in Court of Appeal by Attorney-at-law who was not the registered Attorney-at-law in the District Court proceedings – Cursus curiae.*

Where the questions were whether in an application for leave to appeal filed under section 754 (2) read with section 756 (2) in the Court of Appeal, the proxy of the Attorney-at-law who was not the registered Attorney-at-law who appeared for the party in the District Court is valid and whether such new Attorney-at-law will fall within the description of "registered attorney" referred to in section 756 (4) of the Civil Procedure Code and accordingly whether the leave to appeal applications were properly before Court.

**Held—**

A leave to appeal application is a step in the proceedings of the original court but according to section 756 (4) it originates in the Court of Appeal. Hence the proxy in an application for leave to appeal can be filed either by the registered attorney who filed proxy in the lower court or by any other attorney. Further, there is a long standing practice for an attorney not necessarily the registered attorney in the lower court to file proxy in the Court of Appeal.

This is a long standing and reasonable practice which has grown up since 1974 when the Administration of Justice Law, No. 44 of 1973, came into force, in the interests of the diligent and expeditious conduct of proceedings. The practice causes no prejudice and involves no breach of the provisions of the Civil Procedure Code and it has now become a *cursus curiae*.

**Cases referred to**

- (1) *Gunasekera v. de Zoysa* (1951) 52 N.L.R. 357.
- (2) *Bank of Ceylon v. Ramasamy* C.A. L.A. 79/80 (D.C. Chavakachcheri 5447) ; C.A. Minutes of 24.3.1981
- (3) *Silva v. Kavanihamy*, (1948) 50 N.L.R. 52, 56, 57.

APPLICATION for leave to appeal referred to Bench of three Judges by the President of the Court of Appeal.

*K. Kanaga Iswaran* for plaintiff-petitioner-appellant in C.A. Application L.A. 72/81.

*N. Sinnathamby* for defendant-respondent in C.A. Application L.A. 72/81.

*P. Naguleswaran* for 2nd, 3rd and 4th plaintiff-petitioner-appellants in C.A. L.A. 2/78.

No appearances for intervenient—respondent in C.A.L.A 2/78

*Cur. adv. vult.*

March 28, 1984.

### SENEVIRATNE, J.

The President, Court of Appeal, has referred to this Bench the consideration of the following matter : Whether in a Leave to Appeal Application filed in this Court under section 754 (2), read with section 756 (2) of the Civil Procedure Code, a proxy filed by an Attorney-at-law, who is not the petitioner-appellant's Attorney in the original Court can be a valid proxy and as such constitute a valid Leave to Appeal Application. The consideration of this issue has arisen as follows :— In D.C. Jaffna M/2181 the Attorney for the plaintiff was Mr. S. Kanagasabapathy. In L.A.72/81 Leave to Appeal Application the Attorney for the plaintiff-appellant is D. M. Swaminathan. In D.C. Jaffna Case No. L/673 the Attorney for the plaintiff was T. Sangarapillai. In the Leave to Appeal Application filed in this Court the Attorneys-at-law for the plaintiff-petitioner-appellant are C. M. Chinnaiya and Tavalaxmy Chinniah. In both these applications, objections have been taken that the Leave to Appeal Applications are not properly constituted. The Attorneys, who had filed these applications are not the Attorneys for the respective parties in the original Court.

Section 756 (2) is as follows :—

“Every application for Leave to Appeal against an order of Court made in the course of any civil action, proceeding or matter, shall be made by petition duly stamped addressed to the Supreme Court and signed by the party aggrieved or his registered attorney. . . .”

The answer to the question posed to this Court depends on the interpretation this Court will place on the words “his registered attorney”.

As regards section 756 (2), Mr. Kanaga Iswaran submitted that the term “registered attorney” can be the registered attorney in the original Court or an attorney who filed proxy for a party in this Court, in which the Leave to Appeal proceedings originate. Mr. Kanaga Iswaran based this latter submission on the decision in the case of *Gunasekera*

*v. de Zoysa* (1) which laid down the principle that an application in revision to the Supreme Court in a civil case can be initiated by a proctor other than the proctor whose proxy was filed in the lower court. Mr. Kanaga Iswaran also relied on the decision pertaining to this matter made by the Court of Appeal in *Bank of Ceylon v. Ramasamy* (2) In that Leave to Appeal Application the same objection as in these applications have been taken up to the proxy filed by the registered attorney in this Court, and the Court had to decide whether it was a valid proxy. The decision in this case was based on the interpretation of the phrases "In or to any Court. . . . by a party to an action or appeal in such Court . . . ." – in section 24 of the Civil Procedure Code, read with section 27 of the Civil Procedure Code. Having considered the manner of operation of these two sections, it was decided in this judgment that the words "registered attorney" in section 756 (4) in the Civil Procedure Code do not mean the registered attorney appearing in the District Court for a party seeking Leave to Appeal. They refer to the Attorney who is duly appointed by a party to appear in this Court for the purpose of making an application for Leave to Appeal to this Court". Mr. Kanaga Iswaran did not strictly rely on this judgment and also on the several dicta in this judgment. Mr. Kanaga Iswaran based his submission firmly on the ground that unlike in a final appeal, in a Leave to Appeal Application the proceedings originate in this Court. As such a party can appoint a registered attorney other than the registered attorney in the original Court for the purpose of a Leave to Appeal Application made in this Court. Mr. Naguleswaran appearing in the connected Application C.A.L.A. 2/78 entirely agreed with the submissions made by Mr. Kanaga Iswaran.

Mr. Sinnathamby for the respondents submitted that a Leave to Appeal Application was really a continuation of the proceedings in the original Court, and when the Leave to Appeal Application is allowed the proceedings in the original Court will continue. As such the proxy in a Leave to Appeal Application under section 756 (2) has to be signed and filed by the registered attorney in the original Court as there cannot be two registered attorneys in the same case. The registered attorney of a party in the original Court is his authorised agent for the proceedings, and if another attorney filed a proxy for that party in this Court then the proxy in the original Court has to be cancelled. There was no parallel between a Leave to Appeal Application and a Revision Application. They are two different species and cannot be considered as of one kind.

I shall first deal with the last submission of Mr. Sinnathamby as regards the difference in kind in a Leave to Appeal Application and an application in revision. No doubt both, an application in revision and an application for Leave to Appeal originate in this Court, but there is a distinction as pointed out by Gratiaen, J. In *Gunasekera's* case relied on by Mr. Kanaga Iswaran. Gratiaen, J. states as follows :—"The reasons for my decision are as follows .-

- (1) The present application inviting the Court to exercise its revisionary powers under Section 753 of the Civil Procedure Code is in no sense a step in the proceedings in the Court of Requests of Balapitiya, in which Mr. H. S. de Silva was the duly authorised proctor representing the petitioner ; on the contrary, the present application 'by way of revision' - if I may employ that phrase-constitutes an entirely independent proceeding in a different Court of competent jurisdiction in which the petitioner 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 this Court*".

The other grounds (2) and (3) set out by Gratiaen, J. for the decision in that case with which Dias, S.P.J. - "entirely" agreed depends on the reason No. (1) above. I agree with Mr. Sinnathamby that an application in revision cannot be considered in the same light as an Application for Leave to Appeal. But still the fine distinction drawn by Mr. Kanaga Iswaran is valid, i.e. that a Leave to Appeal Application is a step in the proceedings of the original Court, but unlike a final appeal, is a proceeding which originates in this court. I must add that if a Leave to Appeal Application is refused the proceedings end in this Court. Only if the Leave to Appeal Application is granted does section 756 (7) operate and the proceedings in the original Court will be stayed and the record in the original Court will be forwarded to this Court. If only ultimately the Leave to Appeal Application is allowed, and the relief sought is granted, will the Leave to Appeal Application become related to the proceedings of the original Court.

Thus, a Leave to Appeal Application has to be considered :-

- (1) unlike in an "application in revision" a step in the proceedings of the original court ;
- (2) a step which according to section 756 (4) originate in this Court ;

This is the distinction between an application in revision and a Leave to Appeal Application. I hold that an Application for Leave to Appeal is

a step which originates in this Court as in an "application in revision" and that the proxy in such an application can be filed either by the registered attorney in the original Court or by any other attorney. It cannot be said that this will result in there being two registered attorneys and two proxies in the case.

Another ground urged by Mr. Kanaga Iswaran who has a wide and long experience in this Court to support his contention, is that there was a long standing practice in this Court for another attorney to file proxy in this Court in a Leave to Appeal Application ; and that this long standing practice should be approved of as a *cursus curiae*. Mr. Sinnathamby submitted that there was no such long standing practice as the provisions of the Civil Procedure Code providing for Leave to Appeal were of recent origin. To meet this argument the Court has to consider the history of the provisions for Leave to Appeal. The old Civil Procedure Code, Ceylon Legislative Enactments, Volume IV, Cap : 101, section 754 (1) provided for an appeal "from any order of any original Court". This provision resulted in the interlocutory appeals which were filed under that Code. Such appeals were filed in the District Court and then forwarded to the Supreme Court. For the first time in our Civil Procedure, the Administration of Justice Law, No. 44 of 1973 (Chap : IV)—Appeals Procedure, section 347 (2) provided for the procedure of "Leave to Appeal". This law came into force from 1.1.1974. It can be assumed that the practice of another attorney at law filing a proxy in this Court must have originated from that time. In any case experience in this Court now shows that it has become the usual and inveterate practice for a different attorney-at-law, practising in Colombo to file a proxy in this Court, in a Leave to Appeal Application from an outstation Court, and objection to this procedure has often been taken. The judgment cited by me above *Bank of Ceylon v. Ramasamy* is a 1980 appeal. The two applications now being considered are, one a 1978 application and the other a 1981 application. In Application C.A./L.A./18/79 and 19/79 District Court, Kandy 7/2708 filed in this Court on 15.3.1979, objection to the proxy was taken up before a Bench of which I was a member by Mr. H. W. Jayewardene, Q.C., on the ground that an attorney-at-law in Colombo has filed the proxy. The late Mr. C. Ranganathan, Q.C., supported this procedure.

One of the grounds on which Leave to Appeal was granted was whether the proxies filed were valid proxies. I think that in the interests

of justice I should record this fact. Leave to Appeal Applications are submitted to me in terms of section 756 (5) of the Civil Procedure Code, i.e. in the case of applications for Leave to Appeal :—

- (a) to fix a date for hearing of the application ; or
- (b) to require the application to be supported in open Court.

I have been examining records of the applications submitted to me for orders since a long time, and discovered that the inveterate and usual practice is for an attorney-at-law practising in Colombo to file proxy in Leave to Appeal Applications from outstation Courts. This practice seems to have grown up due to practical reasons and for sake of expedition. A registered attorney in a case in the District Court of Batticaloa, who files a Leave to Appeal Application in this Court will find it extremely difficult to pursue the application and take necessary steps. I hold for the above reasons that the filing of the proxy by another attorney in a Leave to Appeal Application has now become a *cursum curiae* of this Court.

In the case of *Silva v. Kavanihamy – Canekeratne, J. with whom Dias, J. agreed* held as follows :

"The view taken in these two cases. . . . . that a Court ought not to interfere where the party had shown no prejudice appears very reasonable. This view had stood unchallenged for a period of little over fifty years. It is especially important for the proper and expeditious conduct of judicial business that the rules of procedure should be stable".

There seems to be no prejudice caused to any person by a registered attorney other than the registered attorney in the original Court filing a proxy in this Court in a Leave to Appeal Application. Further, it is a very reasonable practice as the application can be diligently and expeditiously attended to. This practice does not involve any breach of the law—that is a breach of any provisions of the Civil Procedure Code.

In my view the objections to the proxies filed in the two applications before me are mere technical objections, and this Court should not be fettered by such technical objections. I hold that the proxies filed in the above two applications before this Court are valid proxies and dismiss the objections. Objections dismissed with costs fixed at Rs. 250 for each.

**ABEYWARDENE, J.**—I agree.

**MOONEMALLE, J.**—I agree.

*Objections in both applications dismissed.*