

1971 *Present*: H. N. G. Fernando, C.J., Silva, S.P.J., and Weeramantry, J.

U. W. JANDI and 2 others, Petitioners, *and* D. S. PINIDIYA and 16 others, Respondents.

*S. C. 715/68—Application in Revision in D. C. Matara, 5279/P*

*Legal practitioners—Proctor and client—Rule that negligence of Proctor is in law negligence of client—Scope—Partition action.*

For a long period a court officer (the Interpreter Mudaliyar) of the District Court of Matara customarily gave information, in advance of the roll, to Proctors as to the dates fixed for steps in an action. The specified date was seldom altered by the Judge when the case was subsequently called before him at the roll. The three parties in the present application in revision were added as parties in a partition action when their Proctor filed a proxy on behalf of them. The court officer gave 7th April 1968 as the date when their statements of claim should be presented. In this instance, however, the date was subsequently altered by the Judge to 2nd February 1968. In consequence of this alteration the trial was fixed for 1st March 1968 and Interlocutory decree was signed by the Judge on 23rd March 1968. The Proctor for the petitioners was not aware of the alteration of date and the subsequent proceedings. There was also another circumstance which might lend support to the criticism that the conduct of practitioners and court officers deprived the petitioners of their right to be heard in the partition action.

*Held*, by FERNANDO, C.J., and SILVA, S.P.J. (WEERAMANTRY, J., dissenting), that, although the general rule is that the client must suffer for his proctor's negligence in consequence of which some necessary step is not taken in an action, the petitioners in the present application in revision should be granted relief conditionally.

*Per* FERNANDO, C.J.—“Practitioners are warned that this Court, having now condemned an improper practice, will not in future be inclined to grant relief when practitioners fail to carry out their responsibilities.”

**A**PPPLICATION to revise an order of the District Court, Matara.

*D. R. P. Goonetilleke*, with *B. A. R. Candappa*, for the 1st, 2nd and 3rd intervenient-petitioners.

*H. W. Jayewardene*, Q.C., with *W. D. Gunasekera* and *G. M. S. Sameraweera*, for the plaintiff-respondent.

*E. S. Amerasinghe*, with *M. D. K. Kulatunga*, for the 4th, 6th, 7th-10th, 16th and 17th defendants-respondents.

*Cur. adv. vult.*

June 20, 1971. H. N. G. FERNANDO, C.J.—

This was an action for partition in the District Court of Matara. On 11th December 1967 a Proctor filed a proxy on behalf of the three petitioners in the present application. They were then added as parties, and their proctor informed them that their statements of claim were due to be filed on 7th April 1968. The proctor also informed them that he would be unable to appear for them in the action and handed to them a form for the revocation of his proxy, but this was not then signed by the petitioners.

On 25th March 1968, the petitioners came to the same Proctor and stated that they wished him to appear for them; they also stated that the form for the revocation of the proxy had been misplaced. The Proctor thereupon inspected the record of the action and found that the case had been called on 2nd February 1968, and that the District Judge had then made a minute "statements not filed" and fixed the trial for 1st March 1968. On this date of trial evidence had been recorded and judgment entered. Furthermore on 23rd March 1968 the Interlocutory decree had been signed by the District Judge.

The petitioners thereafter revoked the original proxy and applied to the District Court to set aside the judgment and Interlocutory decree, in order that their statements of claims might be entertained and proceedings taken afresh. Upon the refusal by the District Judge of that application, the petitioners applied to this Court in revision.

The proctor who had originally been retained by the petitioners gave evidence at the Inquiry in the District Court. That evidence which the learned Judge accepted as correct is summarised as follows :—

"The evidence of Mr. Wijetunga shows that there has been a practice in this Court for lawyers to file their papers, including statements or proxies, before the cases are called in Court on the roll. These documents are handed to the Interpreter Mudaliyar who thereupon minutes them. Where a proxy is filed and a date is required for the filing of a statement the Mudaliyar gives the date taking into consideration the normal dates in the trial roll. It would appear that on 11.12.67 Mr. Wijetunga had tendered the proxy of these intervenients and had been given the date for filing statement as 7.4.68. It is clear that this date has subsequently been altered by the Judge to 2.2.68. Mr. Wijetunga states that he was unaware of this alteration and he states that alterations of this nature are seldom made by Court."

We were in this connection referred to other records of actions which were at the relevant time proceeding in the District Court of Matara. It is undoubtedly correct that when the Court has to fix a date for some step in an action, some officer of the Court enters a minute in the journal and specifies in the minute the date for the step. At that stage the officer

furnishes to the Proctor that specified date. For a long period apparently, it had been customary for the Judge to sign the minute thus submitted without changing the date specified by the officer.

At the same time, we have noted that during 1967 the then District Judge of Matara had occasionally altered the date suggested in the draft minute, and fixed for the requisite step a date earlier than that suggested in the draft minute. This was certainly a proper exercise of the functions of the District Judge to regulate the proceedings in his Court. But the Proctor who appeared originally for the petitioners, perhaps relying on his very long experience, had not become aware that the Judge did sometimes alter a suggested date.

I must observe with regret that the practice of proctors, to note dates mentioned by some officer of the Court, instead of noting the dates actually fixed by the Judge, involves a neglect of the interests of their clients. A proctor being the agent of his client has a duty to be present in Court whenever any order affecting his client's interests is due to be made by the Judge; at the least, he must ensure that his clerk or some other proctor performs that duty on his behalf. Had this proper course been followed, the proctor in this case would undoubtedly have become aware that the Judge fixed 2nd February 1968 for the filing of his client's statement of claims.

In cases such as *Pakir Mohideen v. Mohamadu Casim*<sup>1</sup> and in *Scharenquivel v. Orr*<sup>2</sup> this Court has ruled that when there is negligence on the part of a proctor, in consequence of which some necessary step is not taken in an action, the client must suffer for his proctor's negligence. The obvious ground for this ruling is that because a proctor is the recognized agent of his client, the fault of the agent has to be attributed to the client.

The true justification for this principle does not however appear to be well understood by practitioners. It is that under the common law a client has a right of action against his proctor for damages which he may sustain as a result of the negligence of the proctor.

If the rulings to which I have referred are strictly applied in the present case, the present application of the petitioners will have to be dismissed. Nevertheless I find it possible to distinguish the present case from others in which questions of this nature have been decided. If for a long period officers of the District Court have customarily given information to proctors as to the dates fixed for steps in an action, a proctor may perhaps have some excuse for thinking that the information thus furnished is correct. If Court officers lent themselves to this improper practice, it seems to me that they had a duty to inform the proctors when on any occasion a date so furnished became altered by order of the Judge. The detriment to the interest of the petitioners may have been avoided if the Interpreter Mudaliyar had, as I think he should, corrected the information which he had previously furnished.

<sup>1</sup> (1900) 4 N. L. R. 299.

<sup>2</sup> (1926) 28 N. L. R. 302.

I note also that the reason why the proctor for the petitioners desired to cancel the proxy given to him by the petitioners was that another proctor was personally interested in the Partition action. There are thus in this case circumstances which might lend support to the criticism that the conduct of practitioners and Court officers has deprived the petitioners of their right to be heard in the Partition action.

Upon these considerations, I feel able to apply in this instance the principle that "justice must not only be done but must also appear to be done." But practitioners are warned that this Court, having now condemned an improper practice, will not in future be inclined to grant relief when practitioners fail to carry out their responsibilities.

For these reasons I am of opinion that the powers in revision of this Court may properly be exercised in this case, upon compliance by the petitioners with the condition set out below.

If the petitioners deposit in this Court a sum of Rs. 500 as costs on or before 1st September 1971, the Interlocutory and final decree entered in the District Court will be set aside, and the case remitted to the District Court to entertain the statements of claim of the petitioners and to take proceedings afresh. Of the sum so deposited, Rs. 250 will be paid out to the plaintiff as costs of this application, and Rs. 250 equally to the 4th, 6th, 7th-10th, 16th and 17th defendants as their costs of this application. The petitioners will also be liable to pay the taxed costs of the previous date of trial in the District Court.

I have no doubt that the proctor who was originally retained by the petitioners will consider whether he should assist the petitioners to pay these costs.

If the sum of Rs. 500 is not deposited as aforesaid, this application will be dismissed with costs.

SILVA, S.P.J.—I agree.

WEERAMANTRY, J.—

Having had the advantage of perusing the judgment of my Lord the Chief Justice I would wish to add a few words of my own.

It seems to admit of no argument that the date of any step in a case is the date given by the judge when the case is called before him at the roll. If a proctor proceeds on the assumption that the date which had been indicated to him in advance of the roll by an official of the court would be the date eventually accepted by the judge, and he neither attends the roll nor verifies the judge's confirmation of the date, he does so at his peril.

The minute entered upon the file by the office is no more than a respectful suggestion by the office to the judge of a suitable date for the step in question and it is not open to anyone—not to a litigant and least of all to a lawyer—to state that he proceeded upon the basis that the date given to him in advance of the roll would be the date eventually accepted by the judge.

It is known that judges exercise their independent discretion and judgment in fixing the date most suitable, as they are best aware of the pressure of work in their court and of the most convenient dates to be assigned for any given step in a case pending before them. It can scarcely be said by any practitioner that in his experience the date suggested by the office is always accepted by the judge. Even if such had been the experience of a practitioner in a particular court for some duration of time, still such practice cannot exempt a proctor of the court from his clear and necessary duty of verifying the date after the judge has made his order in respect thereof.

I do fear, with much respect, that however great the hardship in a particular case, much disorganisation of court work may ensue from an exemption given by this court even in one instance from the clear duty of every practitioner to verify the date which has been given by the judge.

Even if for some compelling reason such as ill-health a proctor is obliged to leave the court prior to the approval of the date by the judge, it is his clear duty to verify the date that has been given to him on the first possible date thereafter. He certainly should not proceed upon the basis that the date that had been given to him by the court official was correct.

Indeed many a prudent proctor not only attends the roll himself or through an assistant but thereafter goes to the trouble of re-checking the correctness of the date noted in his file, for the reason that the possibility always exists of the date eventually approved of being misheard by the proctor concerned.

I believe, and I say so with the greatest respect, that the grant of exemption from these clear rules of professional duty in any single instance may well result in a number of similar applications based upon events that have occurred prior to the date of this judgment. Much though I am in sympathy with the client concerned in regard to the difficulties that ensue to him in consequence of this view, I would prefer to take the usual course in a case such as this and follow the principle that the negligence of the proctor is in law the negligence of the client. The client is of course not without remedy, for means of redress are available at law to clients who have suffered in this manner.

With much respect therefore to the views expressed by the other members of the Bench I would dismiss this application with costs.

*Order set aside conditionally.*