

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an appeal pursuant to an application for Special Leave to Appeal to the Supreme Court against the order of the Court of Appeal dated 23rd February, 2011.

SC. Appeal 199/2011

SC. (Spl) LA. No. 60/11
CA. No. 1099/98(F)
D.C.Kalmunai No.1590/L

1. Meerasaibo Mahamed Haniffa
of Division No. 15, Ninthavur.
2. Meerasaibo Ummul Hair
of Division No. 16, Ninthavur.
3. Meerasaibo Ummu Sellam
of Division No. 16, Ninthavur.
4. Meerasaibo Jamal Mohamed
of Division No. 14, Ninthavur.
5. Meerasaibo Atham
of Division 2, Ninthavur.
6. Meerasaibo Sithy Faiza
of Division No. 3, Ninthavur.
7. Meerasaibo Sara
of Division No. 3, Ninthavur.

**2nd to 8th Substituted-Defendants-
Appellants-Petitioners-Petitioners**

Vs.

Athambawa Mohamed Idroos
of Division No. 3, Ninthavur.

**Substituted-Plaintiff-Respondent-
Respondent-Respondent**

SC. Appeal 199/2011

Previously

In the matter of an application in terms of Section 769(2) of the Civil Procedure Code and also in terms of Rules of the Supreme Court to reinstate the appeal.

1. Mohamed Ibrahim Kathisaumma
Division No. 5, Ninthavur (presently dead)
2. Meerasaibo Mahamed Haniffa
of Division No. 15, Ninthavur.
3. Meerasaibo Ummul Hair
of Division No. 16, Ninthavur.
4. Meerasaibo Ummu Sellam
of Division No. 16, Ninthavur.
5. Meerasaibo Jamal Mohamed
of Division No. 14, Ninthavur.
6. Meerasaibo Atham
of Division 2, Ninthavur.
7. Meerasaibo Sithy Faiza
of Division No. 3, Ninthavur.
8. Meerasaibo Sara
of Division No. 3, Ninthavur.

**2nd to 8th Substituted-Defendants-
Appellants-Petitioners**

Vs.

Athambawa Mohamed Idroos
of Division No. 3, Ninthavur.

**Substituted-Plaintiff-Respondent-
Respondent-Respondent**

SC. Appeal 199/2011

Before : **Mohan Pieris, PC.CJ.**
Sathya Hettige PC. J. &
Eva Wanasundera, PC,J.

Counsel : M. Nizam Kariapper with M.I.M. Iynullah for 2nd to 8th Substituted Defendants-Appellants-Petitioners, instructed by M.C.M. Navas.

Faiz Musthapa, PC. with U.L.A. Majeed for Substituted Plaintiff-Respondent-Respondent instructed by K.R.M. Abdul Raheem.

Argued On : **07-02-2014**

Decided On : **31- 03-2014**

* * * *

Eva Wanasundera, PC.J.

This Court granted Special Leave to Appeal to the Substituted Defendants-Appellants-Petitioners-Appellants (hereinafter referred to as the “Appellant”) on the following question of law:-

“Did the Court of Appeal err in law when it decided that a re-listing application of a final appeal could only be made by the Registered Attorney in the District Court”?

Written submissions were filed by both parties according to the Supreme Court Rules and it was argued and concluded on the 7th of February 2014.

The subject matter of this case in the District Court was “land”. When judgment was pronounced in the District Court on 18.11.1998 in favour of the Plaintiff, the Defendant appealed to the Court of Appeal. The Court of Appeal, on 15.10.2009, affirmed the

judgment of the District Court. The Fiscal of the District Court of Akkaraipattu executed writ on 29.04.2010 and the Plaintiff took possession of the land after 28 years of litigation which commenced in the District Court on 29.09.1982. The Court of Appeal heard the case on 15.10.2009 on the merits even though the Defendant-Appellant was absent and unrepresented on the date of hearing and made order dismissing the appeal. Thereafter, judgment of the Court of Appeal had been read over to both parties in open Court in the District of Kalmunai on 26.02.2010. Then, about six months after the date of the judgment of the Court of Appeal the Defendant-Appellant filed a re-listing application in the Court of Appeal to have the appeal re heard by the Court of Appeal. That re-listing application was dismissed by the Court of Appeal on 23.02.2011 on the ground that “an application to Court has to be made by the registered Attorney on record and such application cannot be made by a different Attorney-at-Law.” This appeal in the Supreme Court is against the said order of the Court of Appeal dated 23.02.2011 dismissing the re-listing application. Special Leave to Appeal has been granted on the question of law as aforementioned.

The argument of the 2nd-8th Substituted Defendants-Appellants- Petitioners-Petitioners (hereinafter referred to as “Petitioners”) was based on the Supreme Court judgment in the case of ***Jeevani Investments(Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 207.*** The Substituted Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the “Respondent”) argued that the Petitioners cannot maintain this appeal on the basis that the proxy of the original registered Attorney was still in force and not revoked and as such the new Attorney-at-Law who was different from the original registered Attorney cannot represent the Appellant in the application for re-listing. The Respondent’s argument is based on the case of ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268*** and ***Jeevani Investments (Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 207.***

In ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268***, Seneviratne, J. being a member of a Bench of three Judges who were specially appointed to hear this case in the Court of Appeal drew a distinction between the proceedings originating in the

original Court and those originating in the Court of Appeal. He held that an application for Leave to Appeal originates in the Court of Appeal and not in the original Court and as such an application for Leave to Appeal can be lodged by a new Attorney other than the registered Attorney in the original Court on record. As against a Leave to Appeal application, an Appeal originates in the District Court and not in the Court of Appeal. Therefore, an Appeal has to be signed and tendered by the registered Attorney of the original case record. A Leave to Appeal application can be filed by either the registered Attorney of the original case record or by a different Attorney-at-Law, who is new to the case, because a Leave to Appeal application originates in the Court of Appeal.

In the present case, it is to be noted that the application concerned is not a Leave to Appeal application. It is a re-listing application after the conclusion of the Final Appeal. It is directly related to the Appeal originating from the District Court judgment, because the District Court judgment was affirmed by the Court of Appeal in the first instance. When the Appellant moved the Court of Appeal to hear it once again, giving reasons for seeking a re-listing, it is a relisting or a continuation of the same case. It originates from the main Appeal. An application for re-listing cannot be recognized as a separate mechanism from the main Appeal. In fact, re-listing is connected with and ancillary to the main Appeal.

In ***Jeevani Investments (Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 207***, Justice Jayasinghe has commended Justice Seneviratne in ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268*** in drawing a distinction between proceedings originated in the District Court and those originated in the Court of Appeal but, respectfully failed to appreciate that a re-listing application is different from a Leave to Appeal application. I observe that Justice Jayasinghe has placed an Application for Leave to Appeal and an Application for Re-listing on par with each other contrary to the rationale expounded by Justice Seneviratne. Seneviratne, J. in the case of ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268***, held that,

“A Leave to Appeal application is a step in the proceedings of the original Court but according to Section 756(4) of the Civil Procedure code, 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.”

He further added:

“This is a long standing and reasonable practice which has grown up since 1974 when the Administration of Just 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 *cursus curiae*.”

I am of the opinion that in the instant case the original registered Attorney M.N. Kariapper remains as the Attorney-at-Law on record up to date because his proxy has not been revoked by the Appellant until up to the final disposal of the appeal on 15.10.2009. M N. Kariapper was the Attorney-at-Law in the proceedings of the District Court. He filed the notice of appeal under his signature. Then he continued to be the registered Attorney in the proceedings of the Court of Appeal until the date it was heard and disposed of on 15.10.2009. It was only thereafter that an application for re-listing was filed by a new Attorney M.C.M. Nawaz after 6 months from the delivery of the final appeal judgment. There is no provision in the Civil Procedure Code for re-listing. It's only a procedure that finds accommodation in Judge made Law. The re-listing application is an application which is directly related to the final appeal which originated in the District Court of Kalmunai. It cannot be treated as a distinctly separate set of proceedings. In the instant case the re-listing application was filed by a different Attorney M.C.M. Nawaz whose proxy cannot be accepted while the proxy of the original registered Attorney M.N. Kariapper was still in record.

It is settled law that the registered Attorney in the original Court should be the Attorney at all times to act such as signing settlements and signing the Petitions of Appeal etc., and that a party cannot change his Instructing Attorney without leave of Court, Vide **Wace vs. Angage Helena Hami & others, 1881 4 SCC 48** and **Romanis Baas Vs. Revenna Kader Mohideen & another, 1881 4 SCC 61.**

In the case of **Gunasekera Vs. De Zoysa 52 NLR 357**, an exception to this rule was laid down. The rule was that the Proctor on record in the original Court should sign all the papers at all times. As an exception, it was held by Gratiaen,J. that “an application made to the Supreme Court to exercise its revisionary powers in a civil case can be initiated by a Proctor other than the Proctor whose proxy was filed in the lower Court”. In the same case Dias SPJ. Agreeing with Gratiaen J. further said, “I wish to state that when I suggested that this case should be dealt with by a fuller Bench, it was not fully appreciated that an application in revision to the Supreme Court in a civil case is not a continuation of the proceedings in the lower Court and which needed the filing of a fresh proxy. This fact distinguishes this case from all the cases where it has been held that there cannot be two proxies on the record of a civil case at the same time”.

I would like to place a Revision Application as one which commences in the Appellate Court and that is why it can be initiated by a new Attorney other than the Attorney in the lower Court.

I would return to Justice Jayasinghe’s rationale in **Jeevani Investments (Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 20** His Lordship analyses a relisting application and an application for Leave to Appeal notwithstanding lapse of time, to have a bearing on the proceedings in the original Court. It is my considered view that if applications of this nature have a bearing on the original Court, it should be signed by the registered Attorney of record in the original Court. In a reasoning unsupported by authority Justice Jayasinghe says that “a party is entitled to appoint a new Attorney other than the registered Attorney in the original Court.” I am most respectfully unable to agree with this rationale. This line of reasoning does not find accommodation with the line of

analysis. If an application for relisting originates from a matter in the original Court then it should be signed by the registered Attorney in the original Court.

Having regard to the case law and reasoning I have set out above, I hold that applications such as Revision in civil cases and Leave to Appeal application could be initiated by any other new Attorney other than the registered Attorney of record in the original Court, on the basis that the said applications originate in the Appellate Courts and they do not have a bearing on the lower Court. I am also of the view that an application for "relisting" has a definite bearing on the original Court as it distinctly relates to the appeal originating from the lower Court unlike a Leave to Appeal application or a Revision application which do not form a step in the proceedings of the original Court. 'Re listing', is an application that a distinct bearing on the case in the original Court unlike a Leave to Appeal Application or a Revision Application.

Therefore I proceed to answer the question of law in the negative and affirm the order of the Court of Appeal that a Re-listing Application of a Final Appeal could only be made by the registered Attorney on record in the District Court who has been on record up to the time of disposal of the final appeal.

I dismiss this appeal with costs fixed at Rs.10,000/- to be paid by the Petitioners to the Respondent.

Judge of the Supreme Court

Mohan Pieris, PC.CJ.

I agree.

Chief Justice

Sathyaa Hettige, PC. J.

I agree

Judge of the Supreme Court

