

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

In the matter of an appeal in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 128(4) of the Constitution of the Republic of Sri Lanka.

SC Appeal No. 88/2015

SC/ HCCA/ LA No. 259/2014

WP/ HCCA/ AV/ 780/2008 (F)

D.C. Pugoda 968/P

1. Kariyawasam Arachchige Priyantha
Dayarathna.
Palapolkotuwa,
Millathe,
Kirindiwela.

2. Aserappulilage Costa alias Adikaramilage
Siripala Costa.
Ihalagama,
No. 37/c,
Meegahawatte,
Mahaloluwa,
Kirindiwela.

PLAINTIFFS

Vs.

1. Kadinappuliradage Nandapala
(Deceased).
Meegahawatte,
Mahaloluwa,
Kirindiwela.

1a. Galkessage Agnes Weelawathie.
No. 37,
Meegahawatte,

Mahaloluwa,
Kirindiwela.

2. Kadinappuliradage Mayurupala.

No. 04,
Beligollawatte,
Kirindiwela.

3. Kadinappuliradage Rejona
(Deceased).

3a. Jayani Vishaka Pathirage.

4. Patapilige Steven Pathirage
(Deceased).

4a. Jayani Vishaka Pathirage.

5. Kadinappuliradage Asline Fernando
alias Asilin Fernando (Deceased)

5a. Dewagirige Chithralatha.
Papolkotuwa,
Millathe,
Kirindiwela.

6. Kariyawasam Arachchige Muditha
Karunaseeli.
No. 130,
Beligollawatte,
Kirindiwela.

7. Rathnayakage Dharmadasa.
Aluth Gedarawatte,
Rathambale,

Urapola.

8. Rathnayake Jayathilake

Rathambale,

Urapola.

9. Rathnayakage Sunanda Silmatha.

Rathambale,

Urapola.

10. Kadinappuliradage Hemalatha

No. 37C,

Meegahawatee,

Mahaloluwa,

Kirindiwela.

11. Patapilige Roslin alias Roida

No. 123,

Rathambale,

Urapola.

12. Kariyawasam Arachchige Nimal

Ariyarathna.

No. 43,

Batanwattem,

Kirindiwela.

13. Rathnayake Mohottilage

Karunawathie.

No. 43,

Batanwattem,

Kirindiwela.

DEFENDANTS

AND THEN BETWEEN

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Dayarathna.
Palapolkotuwa,
Millathe,
Kirindiwela.

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PLAINTIFF-APPELLANTS

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DEFENDANT-RESPONDENTS

AND NOW BETWEEN

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PLAINTIFF-APPELLANT-APPELLANT

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DEFENDANT-RESPONDENT-
RESPONDENTS

Before_ : **P. Padman Surasena, J.**
E. A. G. R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel : Dr. Sunil Cooray for the Plaintiff-Appellant-Appellants.

S. A. D. S. Suraweera for the Defendant-Respondent-Respondents.

Argued on : 20-06-2024
Decided on : 06-03-2025

P. PADMAN SURASENA, J.

Plaintiff-Appellant-Appellants (hereinafter sometimes referred to as Plaintiffs or Plaintiff-Appellants) instituted the action relevant to this appeal against the Defendant-Respondent-Respondents (hereinafter sometimes referred to as the Defendants or Defendant-Respondents) seeking to partition the land referred to in the Plaintiff. The learned District Judge after conclusion of the trial by his judgment dated 28-09-2006, decided to dismiss the Plaintiffs' action on the basis that the identity of the corpus has not been established.

Being aggrieved by the judgment dated 28-09-2006 pronounced by the District Court, the plaintiff has preferred an appeal to the Provincial High Court of Civil Appeals. At the stage of the argument of the said Appeal, the learned Counsel for the 12th and 13th Defendant-Respondents has raised a preliminary objection on the validity and legitimacy of the Petition of Appeal filed by the Plaintiffs. The said preliminary objection was raised on the basis that it was not the Registered Attorney on record for the Plaintiff-Appellants who has signed the said Petition of Appeal. There is no dispute that it is the Plaintiff-Appellants themselves who have signed the said Petition of Appeal.

After conclusion of the argument, the Provincial High Court of Civil Appeals by its judgment dated 05-05-2014, has decided to uphold the aforesaid preliminary objection and dismiss the Appeal of the Plaintiff-Appellants.

Being aggrieved by the judgment dated 05-05-2014 pronounced by the Provincial High Court of Civil Appeals, the Plaintiff-Appellants have filed the Leave to Appeal Petition relevant to this Appeal. Upon the said Leave to Appeal Petition being supported, this Court by its Order, dated 22-05-2015, has granted Leave to Appeal in respect of the questions of law set out in paragraphs 12(a), 12(b), 12(c) and 12(d) of the Petition, dated 16-06-2014. The said questions of law are as follows:

- (a) *Was Mr. Chandrika Weerasuriya Bandara, the registered Attorney-at-law of the 1st and 2nd Plaintiff-Appellants from 09-10-2006, incapable of acting as such registered Attorney-at-law, from and after 14-11-2006, at least until 15-01-2007, due to his absence from Sri Lanka;*
- (b) *Did the Plaintiff Appellants have no registered Attorney-at-law in this case from 14-11-2006 until the period of 60 days allowed by law for filing the Petition of Appeal expired on or about 28-11-2006;*

(c) *As the registered Attorney-at-law of the Plaintiff-Appellants had left the country and had become incapable of acting as such for them, were the Plaintiff-Appellants entitled in law to act in person and to sign their Petition of Appeal:*

(d) *Did it become impossible for Mr. Chandrika Weerasuriya Bandara, to sign the Petition of Appeal of the 1st and 2nd Plaintiff-Appellants once he left Sri Lanka and so long as he remained away from Sri Lanka, and does the legal maxims, Lex non cogit ad Impossibilia and Impotentia excusat legem have operation in the facts and circumstances of this case;*

In the course of the hearing, it was brought to the attention of Court that it was the Registered Attorney for the Plaintiff-Appellants on record, Mr. Chandrika Weerasooriya Bandara who has signed the Notice of Appeal dated 09-10-2006. However, while the said Registered Attorney on record for the Plaintiff-Appellants has failed to sign the Petition of Appeal dated 24th November 2006, it is the Plaintiff-Appellants themselves who have signed the said Petition of Appeal. There is no dispute that it was Mr. Chandrika Weerasooriya Bandara who stood as the Registered Attorney for the Plaintiff-Appellants on record during the time the Plaintiff-Appellants had signed and filed the Petition of Appeal dated 24-11-2006.

The focus of the submissions of the counsel during the argument of this case, primarily revolved around two sections: Section 27(2) and Section 755(3) of the Civil Procedure Code. Let me at the outset reproduce them below.

S. 27(2) of the Civil Procedure Code is the section which deals with the duties of the instructing Attorneys on record for the parties.

S. 27 (2) When so filed, it shall be in force until revoked with the 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.

S. 755(3) of the Civil Procedure Code deals with presenting a petition of appeal.

S. 755(3) Every appellant shall within sixty days from the date of the judgment or decree appealed against present to the original court a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by

section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty.

The learned Counsel for the Defendant-Respondent has relied on three cases:¹ Perera vs. Perera and another,² Seelawathie and another vs. Jayasinghe,³ Manaperi Somawathie vs. Buwaneswari.⁴

In Perera vs. Perera and another,⁵ the defendant being aggrieved by the final judgment of the District Court, filed Notice of Appeal and subsequently the petition of appeal. After the learned District Judge had accepted the petition of appeal the plaintiffs filed a motion giving reasons why the petition of appeal should not have been accepted. The learned District Judge inquired into this matter and made order rejecting the petition of appeal. One of the grounds for the rejection of the petition of appeal was that it had been signed by an Attorney who was not the Registered Attorney for the appellant in that case. Thus, the question in that case before Court was whether an Attorney other than the Registered Attorney can sign the petition of appeal. Soza J in that case relied on his previously pronounced judgment in Wickremasinghe vs. Magilin Nona de Silva,⁶ which held as follows:

"Subsection (3) of section 755 of the Civil Procedure Code which requires the appellant to present to the original court a petition of appeal within sixty days is couched in imperative terms. This is a new provision and is clearly mandatory. The filing of the petition of appeal is an essential concomitant of the filing of the notice of appeal. Both steps are mandatory and imperative steps in lodging an appeal. Until these steps are taken as directed by the Civil Procedure Code the Judge cannot comply with subsection (4) of section 755. The learned District Judge was therefore right in rejecting the petition of appeal. The notice of appeal too lapses for want of compliance with the subsequent requirements and should now be rejected".⁷

¹ Paragraph 22 of the written submissions filed with the Motion dated 01-02-2021.

² [1981] 2 Sri LR 41.

³ [1985] 2 Sri LR 266.

⁴ [1990] 1 Sri LR 223.

⁵ [1981] 2 Sri LR 41.

⁶ [1978 -79] 2 Sri LR 65.

⁷ At page 70.

However, it must be noted here that the issue whether the party itself can sign the Petition of Appeal when there is a Registered Attorney for that party on record, did not arise in that case for decision.

Let me now consider the second case relied on by the learned Counsel for the Defendant-Respondent. i.e., the case of Seelawathie and another vs. Jayasinghe.⁸ The argument in that case was that the Notice of Appeal was bad in law as it has been signed by the 4th and 6th Defendant-Appellants in that case in person, despite the fact that there was a Registered Attorney on record for them. The applicable provision in that case was section 323 (1) of the Administration of Justice Law No. 44 of 1978 which is as follows:

"Every notice of appeal shall contain the particulars prescribed by rules of Court, shall be signed by the appellant or his registered attorney....".

The learned Counsel who appeared for the appellant in Seelawathie's case, sought to argue that the plain meaning of the above phrase, particularly in view of the use of the word "or", must be understood as either the appellant or his registered attorney can file the petition of appeal. He further argued that the appellant in that case can sign and file a Petition of Appeal even though he had a Registered Attorney in view of the above provision (i.e., Section 323 (1) of the Administration of Justice Law), and as such the Court should accept the Notice of Appeal.

Seneviratne J (President Court of Appeal) (with Jameel J agreeing) having stated that the provision in then existed Civil Procedure Code was similar to Section 323 (1) of the Administration of Justice Law, proceeded to hold as follows:

There is an abundance of authority, I should say from time immemorial (1881) up to day, which authorities have been referred to by learned President's Counsel for the respondent which set out the principle that two attorneys (at the time these cases were decided two proctors) cannot act for a party. This principle has been reiterated in the case Silva v Cumaratunga. In this case the petition of appeal was not signed by the proctor who was the proctor on the record on the day the appeal was filed, on November 12th 1937. The facts show that the proctor on record earlier had revoked his proxy on 15th November,

⁸ [1985] 2 Sri LR 266.

1937, so that at the time the petition of appeal was filed the said proctor was the proctor on record. As the petition of appeal was not signed by the proctor on record on 12.11.37, the date on which the appeal was filed, the Supreme Court rejected the petition of appeal. Maartensz, J. summed up the principle decided in the previous cases as follows :

"The ratio decidendi in old cases, with which I respectfully agree was that this Court cannot recognize two proctors appearing for the same party in the same cause".

The learned President's Counsel for the respondent relying on the principle set out above submitted that in the same manner a party and his attorney-at-law on record cannot appear at the same time. The President's Counsel for the appellant submitted that to introduce after the words "shall be signed by the appellant", the words 'who has no attorney-at-law on record' would be contrary to the plain understanding of the section.

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. Permitting either the appellant or the attorney-at-law to sign the petition of appeal would mean that two parties are acting at the same time in the course of the proceedings of a case. 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. Under the Administration of Justice Law such a situation would have arisen under section 378 (3) of the Administration of Justice (Amendment) Law No. 25 of 1975, if any one of the instances set out in section 378 (3) (c) arose between the day of the judgment and the last day of the lodging of an appeal. In the present Code of Civil Procedure section 27 (2) is the like section.

Let me now turn to the judgment of H. W. Senanayake J in the case of Manaperi Somawathie vs. Buwaneswari.⁹ The first Defendant-Appellant in that case being aggrieved by the judgment of the District Judge who held in favour of the Plaintiff in that case, had tendered the Notice

⁹ [1990] 1 Sri LR 223.

of Appeal on 28-05-1982 personally and also filed the Petition of Appeal dated 15-07-1982 signed by the first Defendant-Appellant in that case herself in spite of the fact that there was a Registered Attorney for the first Defendant on record. In the course of the argument of the appeal in that case, the learned Counsel for the Plaintiff-Respondent advanced the argument that the Notice of Appeal and the Petition of Appeal filed by the Defendant-Appellant in that case should be rejected on the basis that there was a Registered Attorney on record for the Defendant-Appellant as at that date. Having considered the respective positions put forward by the parties, H. W. Senanayake J in that case proceeded to hold as follows:

"In terms of the provisions of sections 754 (3) and 754 (4) of the Civil Procedure Code, every Appeal to the Court of Appeal shall be lodged by giving notice of appeal to the original Court and such notice of appeal shall be presented to the Court of First Instance for this purpose by the party appellant or his registered attorney.

Thereafter in terms of section 755(3) of the Civil Procedure Code every appellant shall within 60 days present to the original Court a petition of Appeal which shall be signed by the appellant or his registered - Attorney.

A superficial reading of the section may give one the impression that the notice of appeal could be presented and signed by the party - appellant or his registered Attorney. But a correct analysis of these sections shows that a party appellant could present only a notice of appeal personally but he can sign the petition of appeal only when there is no registered attorney of his on record at the relevant time.

Registered attorney is defined in section 5 of the Civil Procedure Code, to mean an attorney-at-law appointed by a party or his recognized agent to act on his behalf.

A consideration of section 27 (1) shows that the appointment of a registered attorney to make any appearance or application or to do any act as aforesaid shall be in writing signed by the client and shall be filed in Court; when filed it shall be in force until revoked with leave of the Court, after notice to the registered attorney by a writing signed by the party and filed in Court. The proxy

so filed is binding on the party until the party dies or until all proceedings in the action are ended and judgment satisfied so far as regards the party.

The inactive position of the party is finally demonstrated by section 28 of the Code which states that if any such registered attorney dies or becomes incapable to act any time before judgment no further proceedings shall be taken in the action against the party for whom he appeared until 30 days after notice to appoint another registered attorney has been given to the party either personally or in such other manner as the Court directs. It is therefore clear from these provisions of the Code, that once a registered attorney is on record the party could necessarily act only through the registered attorney".

Let me now refer to the judgment relied upon by the learned Counsel for the Defendant-Respondent. That is the Court of Appeal judgment in CA Appeal No: 627/84.¹⁰ In that case, a preliminary objection was taken up before the Court of Appeal that the Petition of Appeal has not been signed by the Registered Attorney but by the Appellant herself. Edussuriya J (Ananda Coomaraswamy J agreeing) in that case, held as follows:

"This is an appeal from a judgement of the District Judge of Mount Lavinia dated 01.11.84 dismissing the plaintiff's action and holding the defendant to be a tenant. Preliminary objection was taken on 08.7.92 before us that the petition of appeal has not been signed by the registered Attorney-at-Law but by the appellant herself. The appellant has filed an affidavit stating that she could not get the signature of the registered Attorney-at-Law as he was seriously ill. She has also filed an affidavit of the present registered Attorney-at-Law who is in fact the son of the former registered Attorney-at-Law who was ill and died subsequently, and also an affidavit of one Attorney-at-Law Mr. Soysa stating that when the appellant sought his advice, he advised her to sign the petition of appeal as it was not possible to get the signature of the registered attorney-at-Law, who was seriously ill and who died subsequently.

¹⁰ Decided on: 15-10-1992.

In view of these circumstances we see nothing wrong in the appellant herself signing the petition of appeal in terms of section 755 of the Civil Procedure Code.

For these reasons we dismiss the preliminary objection".

Thus, having regard to the facts of that case, it appears to me that Their Lordships had gone on the basis that the Registered Attorney in that case at the relevant time had become incapable to act as he was seriously ill. Their Lordships in that case appear to have taken the view that the subsequent passing away of the said Registered Attorney had confirmed the incapability of the relevant Registered Attorney to act on behalf of the relevant party in that case. Be that as it may, it would suffice, for me to state here that Their Lordships had taken that decision on the facts relevant to that case.

Having regard to the several authorities cited above, I too take the view that it would not be in the best interest of the system of administration of justice in this country to permit two parties to act at the same time in the course of the proceedings of a case as such a practice would lead to disorder and confusion in Court proceedings. Thus, I am also of the view that the phrase "shall be signed by the appellant or his registered attorney" in Section 755(3) of the Civil Procedure Code should be understood and interpreted to mean that the Petition of Appeal can be signed by the Appellant only when he has no Registered Attorney on record within the meaning of Section 27(2) of the Civil Procedure Code.

In the instant case, as I have mentioned at the commencement of this judgment, Mr. Chandrika Weerasooriya Bandara stood as the Registered Attorney for the Plaintiff-Appellants on record during the time the Plaintiff-Appellants had signed and filed the Petition of Appeal dated 24-11-2006. It appears that the affidavit dated 22-04-2014 affirmed by Mr. Chandrika Weerasooriya Bandara who stood as the Registered Attorney for the Plaintiff-Appellants has been produced with the written submissions dated 24-04-2014 which was filed by the Plaintiff-Appellants on the preliminary objection raised against the maintainability of the Appeal before the Provincial High Court of Civil Appeals. Therefore, it is clear that Mr. Chandrika Weerasooriya Bandara who stood as the Registered Attorney for the Plaintiff-Appellants had chosen to submit his affidavit dated 22-04-2014 after the Defendant-Respondent had raised the afore-said preliminary objection. Thus, it was at a very late stage that the Registered Attorney for the Plaintiff-Appellants had taken up some position claiming that he was incapable

of acting as the Registered Attorney as he was overseas at the time the Plaintiff-Appellants had signed and filed the Petition of Appeal dated 24-11-2006.

The Registered Attorney for the Plaintiff-Appellants had chosen to go overseas few days before the final date for filing the Petition of Appeal. Yet, if he was still interested and vigilant, there was nothing to prevent him taking all available steps to ensure the filing of the Petition of Appeal within the parameters provided by law. Travelling overseas temporarily, is not similar to situations such as death, removal or suspension from practice. Hence, I am unable to accept that the said Registered Attorney had become incapable of acting as the Registered Attorney for the Plaintiff-Appellants by the mere fact that he was temporarily overseas. Thus, I am unable to hold that the Registered Attorney for the 1st and 2nd Plaintiff-Appellants had become incapable of acting during the period relevant to the issue in this case. For the foregoing reasons, I answer all four questions of law in respect of which this Court has granted Leave to Appeal in the negative. I therefore proceed to dismiss this Appeal with costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT