HAMEED
V.
DEEN AND OTHERS

COURT OF APPEAL
WIJETUNGA J. & S.N. SILVA J.
C.A. NO. 215/87 (Final)
D.C.COLOMBO No. 29797/T.
MARCH 01, 1988.

Registered attorney — Civil Procedure Code, Ss. 24, 27(2), 28 — Notice and petition of appeal signed by appellant against order granting Probate of Last Will — Ss. 755 (1) and (3) 759 (2) C.P.C. — Reservation of right to move in revision.

When there is an attorney-at-law appointed by a party such party must take all steps in the case through such attorney-at-law. The appointment under S. 24 C.P.C. of the attorney-at-law remains valid in terms of s. 27(2) until all proceedings in the action are ended or until death or incapacity of the attorney and in such latter event the party represented by such attorney should be given 30 days notice under S. 28 C P.C. to appoint another attorney. The registered attorney or counsel instructed by him alone can act for such party except where the law expressly provides that any particular act should be done by any party in person.

The provisions of law stating that the notice and petition of appeal "shall be signed by the appellant or his registered attorney" enable the party himself to sign only when there is no registered attorney. The defect caused by the party signing when there was his registered attorney holding his proxy goes to the basic validity of the notice and petition of appeal and as such it is not curable in terms of the provisions of section 759(2) CPC.

The right to obtain review by revision on the question whether the order of court rejecting the appellants application objecting to the grant of probate and granting probate of the Last Will was a final judgment or only an order requiring leave to appeal was reserved in view of the fact that the dispute was regarding the validity of a Last Will raised by a child of the testator and no issues were framed or evidence led on the question.

Cases referred to:

1. *Seelawathie and another v. Jayasinghe (1985) 2 Sri L.R 266*
2. *Silva v. Cumaratunga 40 NLR 139*
3. *Anthonisz v. Derolis 6 NLR 161*
4. *Emmanuel v. Ratnasingham 34 NLR 126*

APPEAL from order of the District Judge of Colombo
Lalanath de Silva for the appellant
S. Mahenthiran with *S. K. Nageswaran* for respondents.

Cur. adv. vult.

March 25, 1988

S. N. SILVA, J:

At the commencement of the hearing of this appeal, Counsel for the Respondents raised two preliminary objections and urged that the appeal be rejected. It was decided to hear the parties in limine on the two objections. The objections are:—

(i) that the Appellant has a registered Attorney whose appointment was valid at the time the appeal was presented and that the notice of appeal and the petition of appeal should be signed by such Attorney. The said notice and the petition had been signed by the Appellant. in contravention of the provisions of Section 755(1) and (3) of the Civil Procedure Code;

(ii) that the order dated 10.2.1987 of the District Court from which the appeal was preferred is not a judgment within the meaning of Section 754(1) of the Civil Procedure Code, and that the Appellant should have made an application for Leave to Appeal to this Court instead of presenting the appeal to the District Court. That in any event the Appellant did not have a locus standi to appeal against the said order.

I will briefly set out the facts as are relevant to the two objections.

On 18.10.1984 the Respondents made an application to the District Court to prove the Last Will of S. M. Mohideen Hadjiar. They moved for an Order Absolute in the first instance, granting them Probate. The Respondents being sons of the deceased are named as joint Executors of the Last Will. The Respondents and Fousul Fathima, being the 5th daughter of the deceased, take property under the Last Will to the exclusion of the other children. The appellant is the eldest daughter of the deceased and she is not a beneficiary under the said Last will.

On 26.10.1984, the District Judge refused to make order absolute in the first instance, and directed that the other beneficiary named above be made a Respondent.

On 4.12.1984 the Appellant filed Petition supported by an Affidavit disputing the Last Will and objecting to the grant of Probate. She also moved to be added as a Respondent. On the same day the Respondents filed amended Petition pursuant to the said direction of the District Judge.

On 28.1.1985 the District Judge entered decree nisi and directed that it be published, which was done on 14.2.1985. Subsequently the matter was fixed for inquiry on several dates but no issues were framed and no evidence was recorded. Counsel tendered written submissions and the Court by its order dated 2.10.1987 refused the Petition of the Petitioner with costs and entered Order Absolute granting Probate to the Respondents.

Notice and Petition of Appeal were presented to the District Court within the prescribed time. Both documents have been signed by the Petitioner herself. It is to be noted that her original Petition to the District Court, referred to above, was signed by an Attorney-at-Law, with a proxy from her. Hence that Attorney-at-Law is considered the registered Attorney in terms of Section 5 of the Civil Procedure Code. That proxy continues in force and Counsel for the Petitioner appeared in this Court on instructions received from the registered Attorney.

The first objection is based on the provisions of Section 755(1) (3), that read as follows:

755 (1) "Every Notice of Appeal shall be distinctly written on good and suitable paper and shall be signed by the Appellant or his registered Attorney and shall be duly stamped . . . . .".

(3) "Every Appellant shall within 60 days from the date of the judgment or decree appealed against present to the original Court a Petition of Appeal setting out . . . . . the,

particulars required by Section 758, shall be signed by the Appellant or his registered Attorney . . . . . ".

Learned Counsel for the Respondents argued that the Appellant should sign the Notice and the Petition of Appeal as required only if that Appellant did not have a registered Attorney. If the Appellant has a registered Attorney the Notice and the Petition must be signed by that Attorney and no one else. Counsel based the argument on a decision of this Court in the case of *Seelawathie and another vs. Jayasinghe (1)*. In that case, Section 323 (1) of the Administration of Justice Law which contained an identical provision with regard to the signature on a Notice of Appeal was interpreted in the manner contended for by Counsel.

Counsel for the Appellant invited us to re-consider the decision in the said case because that interpretation places an unwarranted restriction on the plain meaning of the provision. He also contended that the previous decisions of the former Supreme Court dealt with situations where the Petition of Appeal was signed by a Proctor when there was another's proxy on record, and as such do not constitute authority for the said decision.

The contention of the Counsel for the Appellant would be correct if the words, "shall be signed by the Appellant or his registered Attorney" are taken in isolation and given a literal construction. However, it is a well accepted principle of interpretation that the statute has to be read as a whole and that every clause should be construed with reference to the context and the other clauses of the Act. Maxwell has stated this principle with reference to a case decided as far back as 1505, as follows:

> "It was resolved in the case of **Lincoln College** that the good expositor of an Act of Parliament should "make construction on all the parts together, and not of one part only by itself." Every clause of a statute is to "be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute." [Maxwell on Interpretation of Statutes 12th Edition page 47].

Indeed, in a law dealing with procedure it is imperative that phrases such as the one at issue, be interpreted bearing in mind the scheme of the Code, and having as the objective the avoidance of disorder and confusion in the procedure.

Section 24 of the Civil Procedure Code provides for a party to appoint a Proctor (Attorney-at-Law) "to act on behalf of such party" in making or doing "any appearance, application or act in or to any Court required or authorised to be made or done by such party." The proxy which constitutes the appointment is in writing signed by the party and filed in Court. In terms of Section 27(2) it remains valid until all proceedings in the action are ended. The situations in which a proxy ceases to be in force at any previous state are specified in Section 27(2). These situations relate to the death or other incapacity to act on the part of the Attorney. In such event, Section 28 provides that no further proceedings shall be taken against the party represented by such Attorney until he has been given 30 days notice to appoint another Attorney. The necessary inference to be drawn from these provisions is that when a party gives a proxy to an Attorney all acts required to be done by that party will be done on his behalf by the Attorney, except where the law expressly provides that any particular act should be done by the party in person.

The proxy of the Appellant which is filed of record is in the usual form and authorises the Attorney to take all necessary steps is connection with the case. In particular it authorises the Attorney to, if he considers it appropriate to appeal against any order and to take necessary steps in connection with such appeal including the provision of security by hypothecation or by bond and so on. Therefore, as long as this proxy remains valid, it is only the registered Attorney who is authorised to act on behalf of the party in presenting and prosecuting the appeal. The authority flows from the appointment given by the Appellant herself. If she intended to act on her own it was incumbent on her, in the first instance, to revoke the proxy in the manner provided for in Section 27(2) of the Civil Procedure Code.

Several sections of the Civil Procedure Code provide that certain acts will be done by the party or his Proctor (Attorney-at-Law). These formulations being similar to what is contained in section 755(1) and (3) are found, for instance, in section 91 (filing motions). Section 101(2) (admitting the genuineness of documents,) section 151 (stating the case at the beginning of trial and calling witnesses) and section 224 (signing an application for a Writ of Execution). It is unthinkable that in all those situations, a party who has a registered Attorney could himself attend to the particular act. Therefore phrases such as "by that applicant in person or his Advocate or Proctor" (Section 91), "by the other party or his Proctor" (Section 101), "in person or by his proctor or Counsel" (Section 151), "signed by the applicant or his Proctor" (Section 224), "signed by the party or his registered Attorney" (Section 755(1) and (3) have to be construed on the basis that the party will perform the act required or permitted by the respective provisions only if he has no registerd Attorney. If the party has a registered Attorney that act has to be done by such registered Attorney or by Counsel duly instructed in that behalf.

Instances where the Petition of Appeal is signed by a Proctor, at a time when another subsisting proxy is in record have been considered in a series of cases that date back prior to the turn of the century. In the case of *Silva vs. Cumaratunga* (2) Maartensz J. summed up these decisions as follows:—

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

In the case of *Seelawathie and another vs. Jayasinghe (Supra)* Seneviratne, J. considered the provisions of Section 323(1) of the Administration of Justice Law which required the notice of appeal to be signed "by the Appellant or his registered Attorney". On the application of the principle enunciated in the old cases

and on the basis that the provision should be interpreted in a manner not to cause disorder in Court proceedings, it was held that the party could sign the notice of appeal, only when he has no registered Attorney. Seneviratne, J., at page 270 further observes as follows:—

> "When a party to a case has an Attorney-at-Law on record, it is the Attorney-at-Law on record alone, who must take steps, and also whom the Court permits to take steps. It is a recognised principle in Court proceedings that when there is an Attorney-at-Law appointed by a party, such party must take all steps in the case through such Attorney-at-Law. Further, the principle established in court is that if a party is represented by an Attorney-at-Law such a party himself is not permitted to address court. All the submissions of the party must be made through the Attorney-at-Law who represents such party."

We are in respectful agreement with the said decision and observations.

Counsel for the Appellant did not invite this Court to act in terms of Section 759(2) of the Civil Procedure Code. In any event the lapse referred to above goes to the basic validity of the Notice and Petition of Appeal and, as such it is not curable in terms of the provisions of Section 759(2).

For the reasons stated above we uphold the first preliminary objection. In view of the finding with regard to this objection it would not be necessary to consider the second preliminary objection raised by the Respondents. Accordingly the notice of appeal dated 12.2.1987 and the petition of appeal dated 12.3.1987 are rejected and the appeal is dismissed without costs.

Counsel for the Appellant at the conclusion of his submissions made an application that in the event of the first preliminary objection being upheld this Court should reserve the right to the Appellant to move in Revision. In the case of *Anthonisz vs. Derolis* (3) and *Emmanuel vs. Ratnasingham*(4)

the petitions of appeal were rejected but the Supreme Court thought it fit to reserve to the Appellant to move in Revision. In the case of *Seelawathie and another vs. Jayasinghe (Supra),* the Court did not reserve such a right because on a perusal of the proceedings it was found that the Appellants are not entitled to relief. This is a testamentary case in which the validity of the Last Will is being disputed by one of the children of the deceased. As noted above several children of the deceased did not take property under this Last Will.

Further, the proceedings reveal that no issues were framed and no evidence was recorded in the District Court. In the circumstances we think it fit to reserve to the Appellant the right to move in revision if so advised.

Wijetunga, J. I agree.
Appeal dismissed.
Right to move in revision reserved.