DISSANAYAKE
VS
HEMANTHA

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND.
WIMALACHANDRA, J.
CALA 404/2004.
DC GALLE 427/RE.
JULY 6, 2005.

Civil Procedure Code, section 5, 24, 27(2), 29, 763, 763(1) - Notice of application for writ of execution served on the Registered Attorney and not on the defendant - Is it sufficient ?–Rule of Audi Alteram Partem.

HELD:

(1) Section 5 of the Civil Procedure Code is defined to mean an Attorney-at-Law appointed by a party or his recognized agent to act on his behalf. Section 27(2) provides that once an appointment of a registered attorney to make any appearance/application or to do any act as provided in section 24 has been made and is duly filed in Court, it shall be in force until all proceedings in the action are ended and judgment satisfied and once a proxy is given to a registered attorney by a party, the party himself cannot without revoking the proxy perform in person any act in Court.

(2) Notice of application for writ of execution on the registered attorney shall be effectual as if the same had been served on the defendant in person.

APPLICATION for leave to appeal from an order of the District Court of Galle.

Cases referred to :

1. *Seelawathie vs. Jayasinghe 1985 2 Sri LR 266*
2. *Manamperi Somaratne vs. Buwaneswari 1990 Sri LR 223*
3. *Kandiah vs. Vairamuttu-6 NLR 1*
4. *Rasiah vs. Ran Hamy and Other 1978-79 2 Sri LR 88*

Ikram Mohamed, PC with *H. M. Aththidiya* for defendant judgment-debtor-respondent-appellant.

Harsha Soza, PC with *Srihan Samaranayake* for plaintiff-judgment-creditor-petitioner-respondent.

Cur. adv. vult.

May 5, 2006.

WIMALACHANDRA, J.

This is an application for leave to appeal filed by the defendant-judgment-debtor-respondent-appellant (defendant) from the order of the learned Additional District Judge of Galle dated 28.10.2004. However it appears from the prayer to the petition that the defendant is also seeking to have the order dated 30.08.2004 set aside.

The defendant has filed this leave to appeal application on 01.11.2004. The question arises therefore whether the aforesaid order dated 30.08.2004 could be set aside by these proceedings. In terms of section 757(1) of the Civil Procedure Code, a leave to appeal application shall be presented to the Court of Appeal by the party appellant or his registered Attorney within a period of fourteen days from the date when the order appealed against was pronounced, exclusive of the day of that date itself, and Sundays and public holidays. In these circumstances the leave to appeal application cannot be maintained against the order dated 30.08.2004. Accordingly, the said order dated 30.08.2004 cannot be set aside in these proceedings. Hence, this application for leave to appeal can only be maintained against the order of the learned Additional District Judge dated 28.10.2004.

Briefly, the facts as set out in the petition are as follows :

The plaintiff-judgment-creditor-petitioner-respondent (plaintiff) instituted this action bearing No. RE/427 in the District Court of Galle to eject the defendant from the premises in suit. After trial, judgment was entered in favour of the plaintiff on 03.08.2004 for the ejectment of the defendant and for damages at Rs. 5000 per month from 01.05.1997. The defendant appealed against the judgment to the Court of Appeal. Pending the appeal the plaintiff filed an application for the execution of the decree with a motion moving that the case be called on 30.08.2004, to support the said application,

and posted a copy of the said motion with a set of copies of the documents to the registered Attorney-at-Law of the defendant-appellant. On 30.08.2004 when the case was called for the plaintiff to support the said application for the execution of the decree pending appeal, the learned judge made order allowing the plaintiff's application to issue a writ of execution of the decree, observing that the defendant was absent even though notice had been issued on him. On 13.09.2004 the case was called on an application made by the Attorney-at-Law for the defendant to explain to Court that the writ of execution of the decree had been issued without issuing notice to the defendant to show cause against the application made for the execution of the decree pending appeal. The learned District Judge, after considering the submissions made by both parties made order on 28.10.2004 rejecting the application made by the defendant to vacate the stay order holding that on the facts and circumstances of the case the plaintiff is entitled to execute the decree pending appeal.

The questions for determination before this Court are as follows :

(1) Has notice of the plaintiff's application for writ of execution of the decree pending appeal been served on the defendant ?

(2) If not, can writ be issued against the defendant ?

It is common ground that notice of the application for writ of execution was served on the registered Attorney-at-Law of the defendant and there is no proof that notice was served on the defendant. Admittedly, the defendant nor his Attorney-at-Law was present in Court on 30.08.2004 and as there was no opposition to the plaintiff's application, the learned District Judge correctly made order allowing the plaintiff's application and issued the writ.

The President's Counsel for the plaintiff submitted that the notice served on the defendant's registered Attorney-at-Law was sufficient notice to the defendant. According to the marginal notes to section 763 an application for execution of decree pending appeal must be on notice to the judgment-debtor. When the judgement-creditor makes an application for execution of a decree which is appealed against, the judgment-debtor must be made the respondent. Section 763 merely requires that the judgment-debtor be made a respondent. However the necessity to give notice arises in view of

the requirement in section 763(1) that the judgment-debtor must be made the respondent.

This is mainly to observe the principle of *audi alteram partem*. In the instant case it is not in dispute that the plaintiff had given notice to the defendant's registered Attorney-at-Law and the notice had been received by the defendant's registered Attorney-at-Law. The question that arises is whether the notice served on the defendant's registered Attorney-at-Law is for all purposes sufficient and valid as if the notice has been served on the defendant.

Section 24 of the Civil Procedure Code states that any appearance, application or act in or to, any Court, required or authorized by law to be made or done by a party to an action or appeal in such Court may be made by an Attorney-at-Law duly appointed by the party or his recognized agent to act on behalf of such party.

In the case of *Seelawathie vs. Jayasinghe*[1] the Court of Appeal made the following observations :

> **"It is a recognized 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."**

In the case of *Manamperi Somawathie Vs. Buwaneswari*[2] Senanayake, J. held the registered Attorney-at-Law 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.

Section 27(2) provides that once an appointment of a registered Attorney to make any appearance or application or to do any act as provided in section 24 has been made and is duly filed in Court, it shall be in force until all proceedings in the action are ended and judgment satisfied so far as regards the client.

It was held in the case of *Kandiah Vs. Vairamuttu*[3] once a proxy is given to a proctor by a party, the party himself cannot without revoking the proxy perform in person any act in Court.

In the case of *Manamperi Somawathie vs. Buwaneshwari (supra)* it was held that when a party gives a proxy to an Attorney-at-Law it remains in force until revoked with leave of Court after written notice to such registered attorney. 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. Once a registered Attorney is on record the party could necessarily act only through the registered Attorney.

Section 29 of the Civil Procedure Code has clearly stated that service on the registered Attorney shall be as effectual for all purposes in relation to the action or appeal as if the same had been given to, or served on the party in person.

The effect of section 29 of the Civil Procedure Code is discussed in *Rasiah vs. Ranhamy and Others*[4].

> **"The Supreme Court (as formerly constituted) made order that a certain sum of money be deposited by the appellant within six weeks. The Registrar of the court issued notice both on the appellant and on his attorney-at-law but only the notice on the attorney-at-law was served. The order to deposit the said sum was not complied with and the appeal was accordingly abated. In making an application to have the appeal reinstated it was submitted on behalf of the appellant that notice should have been served on the appellant.**
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> **It was held in this case, that in terms of section 29 of the Civil Procedure Code, a notice served on the attorney-at-law for the appellant was sufficient notice to the Appellant and accordingly the appeal was rightly abated."**

In the instant case, admittedly the notice had been served on the registered Attorney-at-Law of the defendant with regard to the application made by the plaintiff for writ of execution of the decree pending appeal and that it was to be supported in Court on 30.08.2004. However, neither the defendant nor his registered Attorney-at-Law made any appearance in Court on 30.08.2004.

All that the registered Attorney-at-Law of the defendant had to do on 30.08.2004 was to appear in Court and move for a date to file objections or inform Court that he had no instructions from his client and move Court to issue notice on the defendant himself. In the circumstances the defendant cannot now challenge that the order made by the Court on 30.08.2004 was wrongly made. Accordingly, the order made by the learned District Judge is correct.

For these reasons, I am of the view that the notice served on the defendant's Attorney-at-Law shall be as effectual as if the same had been served on the defendant in person. I further hold that the order made by the learned judge on 28.10.2004 is correct and the defendant is not entitled to file an application for leave to appeal against the said order dated 28.10.2004. Accordingly, I dismiss the defendant's application for leave to appeal with costs fixed at Rs. 10,500.

SOMAWANSA, J. (P/CA) – *I agree.*

Application dismissed.