JINADASA AND ANOTHER
v.
SAM SILVA AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J.
AMERASINGHE, J. AND
DHEERARATNE, J.
SC APPEAL NO. 41/91.
SC SPL. LA NO. 145/90
CA 1219/82.
DECEMBER 02ND AND 03RD, 1991.

Re-listing – Application for re-listing petition for certiorari dismissed for want of appearance – Is the giving of reasons for order of reinstatement of appeal necessary? – Inherent jurisdiction to order re-listing – Sufficient cause – Valid reason – The right to a hearing – Due notice – Right to legal representation (s. 24 Civil Procedure Code) – Death of Counsel – Belated reliance on excuses – Registered Attorney – Proxy in terms of Form 7 of the First Schedule to the Civil Procedure Code – Absence of registered Attorney without sufficient cause – Section 24 and 27 Civil Procedure Code – Rule 4 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 – Power to retain Counsel – Rule 8 of the Supreme Court (Senior Attorneys-at-Law) Rules – Junior Counsel – Retaining and instructing Junior Counsel.

A petition for a writ of certiorari to quash an order made by the Assistant Commissioner of Agrarian Services and Assistant Commissioner of Agrarian Services (Inquiries) was filed in the Court of Appeal on 16.09.82. The application for notice was supported in the Court of Appeal by Mr. Nimal Senanayake on 24.09.82. He died on 14.05.88. The matter came up for hearing on 03.05.89. There was no appearance for the petitioner. The Court noted that the "late Nimal

Senanayake had appeared for the petitioner" and ordered the matter to be listed "in due course". The case came up again on 16.05.89. The petitioners were absent and unrepresented and the Court dismissed the application. On 19.09.89 Mr. Saliya Mathew the registered Attorney for the petitioner tendered a petition with an affidavit from the second petitioner and moved that the case be re-listed. After hearing Counsel, the Court on 28.09.90 set aside the order of dismissal and directed that the case be re-listed. Special leave to appeal from this order was given by the Supreme Court.

Held:

1. An application for a writ of certiorari is not an appeal though it does partake in certain limited ways of the nature of an appeal. The order of the Court of Appeal was not a judgment pronounced at the termination of the hearing of an appeal but rather an order on an incidental question viz. an application for re-listing. There was therefore no duty, in terms of section 774 of Civil Procedure Code, which obliged the Court of Appeal to give reasons for its decision in this case.

2(a) A judge must ensure a prompt disposition of cases, emphasizing that dates given by the court, including dates set out in lists published by a court's registry, for hearing or other purposes, must be regarded by the parties and their counsel as definite court appointments. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for.

(b) In the instant case the matter was listed almost a year after the death of counsel. When it came on for hearing, the Court, finding that the petitioners were absent and unrepresented *suo motu* ordered the matter to be listed in due course. The fact that it was listed again in 13 days is not a legitimate cause for complaint.

3. Since there is no legislation governing the matter, the power to restore the application to re-list is in the exercise of the Court's inherent jurisdiction.

4. The burden of alleging and proving the existence of facts, on the basis of which a court may decide that there is good cause for absence, rests on the absent party who seeks reinstatement. This burden is not displaced by any presumption in his favour. A court will hold that there was sufficient cause if the facts and circumstances established as forming the grounds for absence are not absurd, ridiculous, trifling or irrational but sensible, sane, and without expecting too much, aggreable to reason. It cannot hold that, in its judgment, there is sufficient cause to reinstate the matter unless the grounds for coming to that

conclusion were reasonable. No distinction can be drawn between "sufficient cause" and "valid reason".

5. Where a party has established that he had acted *bona fide* and done his best, but was prevented by some emergency, which could not have been anticipated or avoided with reasonable diligence from being present at the hearing, his absence may be excused and the matter restored. The Court cannot prevent miscarriages of justice except within the framework of the law: it cannot order the reinstatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds. Inasmuch as it is a serious thing to deny a party his right of hearing, a court may, in evaluating the established facts, be more inclined to generosity rather than being severe, rigorous and unsparing.

6(a) The right to be heard has little or no value unless the party has been given a reasonable opportunity of being heard. He must have due notice. The mere fact that the registered Attorney had failed to give the party information of the date is no excuse. The due notice should be of where and when the case will be heard.

(b) "Due notice" for the purpose of the case under consideration, is making information available in the usual way, that is to say, in accordance with the prevailing law, rules, practices and usages of the Court. Where information of the appointed date for hearing is usually set out in a list prepared and published by the court's registry, and information of the hearing has been given that way, that is due notice to the parties and their counsel. The case before court had been listed in the usual way, and there was, in the circumstances, **due notice,** although the parties may or may not have been actually aware of the date of the hearing. Notice, in the sense of actual knowledge must be distinguished from imputed knowledge of the date of the hearing which "due notice" in the relevant sense, implies.

(c) The remoteness of the village in which the petitioner resided, the "disturbances in that area", the lack of "proper communication channels", due either to the remoteness of where the parties lived or the "disturbances", therefore, have no relevance to the question of "due notice". Even if the court was inclined to be somewhat indulgent towards the petitioner on this matter, on the basis that they were unfamiliar with the procedures of the court, there was no jurisdiction in **this case** for doing so, because they had a duly appointed registered Attorney-at-Law, Mr. Saliya Mathew who should have been aware of these things.

(d) In this case, there was due notice of where and when the matter was to be heard.

7. If there is an oral hearing, then a party is entitled to be legally represented unless the legislature expressly provides otherwise. And so, unless the legislature provides otherwise, a party can decide whether he will himself go into court or be legally represented in the exercise of his right, (s. 24 CPC).

8. The death of a party's counsel is a good and sufficient cause for the reinstatement of a matter, if it occurs during the hearing, or so near the date of hearing, that it is not feasible to retain a substitute attorney through whom the right to be heard is exercised. The death of Mr. Senanayake was neither **during** or **near** the date of hearing. In the circumstances of this case, the death of counsel was not a sufficient cause for reinstatement.

9. Belated reliance by the petitioners on inability to retain Counsel because (a) their movements were restricted (b) they lacked financial means, (c) terrorists might have punished them, is not relevant. Belated reflections on irrelevant side issues and matters which are not of decisive importance should be discouraged in the interests of the expeditious disposal of the work of the appellate courts. Here the excuses themselves were lame excuses.

10(a) Since the petitioner had duly appointed a registered attorney they were obliged to act through their registered attorney and not personally and, in general they were bound by the acts and omissions of their registered attorney. As far as the registered attorney in this case was concerned, the binding effect of his actions was based on the powers conferred by the terms of a standard, printed proxy in terms of Form 7 of the First Schedule to the Civil Procedure Code. It was neither extended expressly or impliedly, as it might have been, nor was it restricted.

(b) If the parties are required by law or by the court to be present, then they must be present. In the case before court they did not have to be present once the registered attorney had been duly appointed. In the circumstances, the petitioners were under no obligation to explain their absence. It was the default of the attorney that had to be considered. If the attorney, without sufficient excuse, was absent on the date appointed for hearing, the court, if it dismissed the application, is entitled to refuse to reinstate the matter. Where no sufficient cause is shown for the absence of the attorney who was under a duty to appear, there are no grounds for an application *ex debtor justitia* of any inherent power to reinstate the matter. As much the petitioners would enjoy the fruits of the success of their attorney's endeavours they must take the consequences of his defaults and failures.

(c) If the attorney entitled to appear for the party had reasonable grounds for his absence, the court would reinstate the matter on the basis that there was sufficient cause for his absence.

(d) Where an attorney-at-Law holding a proxy to appear for a client is of the view that he is unable for any reason to appear for his client at the hearing, he is empowered by the proxy to "appoint" one or more Attorneys-at-Law or counsel to represent him in court. He cannot appoint another registered attorney. There can be only one proxy on record at a time. Another registered attorney, however, may be appointed in appeal.

(e) Once Mr. Mathew the registered attorney had informed his clients that counsel had died, his duties were not at an end and it is not then for the clients to retain another counsel. The clients themselves may have chosen counsel. If he disagrees with his client's selection, the registered attorney must move to have his proxy revoked. But the right of retaining counsel remains that of the registered attorney.

(f) It would be a violation of Rule 4 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 (Gazette Extraordinary 537/7 of 07.12.1988) for any attorney who was not instructed by the registered attorney to appear in court.

(g) In terms of the Civil Procedure Code and the Rules of the Supreme Court made under the powers vested in the Supreme Court by Article 136(1) (g) of the Constitution, it is a registered attorney alone who can appear unless he has instructed counsel.

(h) When a **registered attorney** whose proxy is on record is present in court, but has no instructions, he nevertheless appears and there is no default of appearance. However there may be circumstances in which the presence of a registered attorney may not be an appearance.

(i) The only instance where a withdrawal by **counsel** is permissible, is where counsel has been retained only for the limited purpose of making an application for a postponement and such application is refused by court. In such a case if he pleads he has no instructions, except as a matter of courtesy there was no need to obtain permission of Court to withdraw. In this situation there is then a default in appearance, despite Counsel's physical presence. In order to appear counsel must be retained and instructed and not merely be physically present in court.

(j) By Rule 8 of the Supreme Court (Senior Attorneys-at-Law Rules it is a requirement in Sri Lanka that a silk must be assisted by junior counsel but the journal entries showed that Mr. Senanayake was not always so assisted. Junior Counsel must be retained and instructed. Retained means engaging the services of an attorney to give his services to a client and usually involves payment of a fee though there may be circumstances when no fee is required. There was

nothing in the case before court to show that junior counsel had been retained and instructed. Although juniors were present in court, there was nothing to show that they had been retained and instructed. If they were not retained and instructed, Samarasinghe, Guneratne and Dissanayake (whose names were noted in the record on occasion as juniors) were not junior counsel in the case. They could not have "appeared" and they were, therefore, under no obligation to explain their absence in the reinstatement matter.

11. It was the duty, in terms of the proxy, and the right, in terms of the law and usage, of the registered attorney to retain and instruct counsel since he was not going to exercise his right to personally appear. The registered attorney failed to do so. He has not explained why he did not appoint counsel.

12. If counsel retained and instructed by the registered attorney fails to appear on the appointed date, it is for counsel, and not the registered attorney to explain his absence in seeking reinstatement. Once the registered attorney has done his duty of appointing counsel i.e. retaining and instructing him, counsel assumes full control of the case, and becomes the "conductor and regulator" of the whole thing. If, as in the case before Court, the registered attorney had not retained and instructed another attorney as counsel, then it was the duty of the registered attorney to keep a track of the dates fixed, for then it was he, and he alone who was entitled in terms of the law, and obliged in terms of the proxy, to appear and conduct the case.

Cases referred to:

1. *Schrader v. Joseph* (1912) 15 NLR 111, 113, 117.
2. *K. Gianchand v. T. M. N. Hyder Ali and 3 Others* (1971) 74 NLR 300, 301.
3. *P. D. Shamdasani and Others v. Central Bank of India.* AIR 1938 Bombay 199, 202, 203, 204.
4. *Biswanath Dey V. Kishori M. Pal* AIR 1956 Calcutta p. 3, p. 4, para 14 p. 5 para 15.
5. *Abdul Aziz v. Punjab National Bank* AIR 1929 Lahore 96, 99, 100.
6. *Manilal Dhunji v. Gulam Husein Vazeer* (1888) 13 Bombay 12.
7. *Nanak Chand and Others v. Sajad Hussain and Others* AIR 1924 Lahore 189.
8. *Majidunnessa Bibi v. Amnessa* alias *Aslahenessa Bibi* AIR 1914 Calcutta 763, 764.
9. *Juggi Lal Kamla Pat v. Ram Janki Gupta and Another* AIR 1962 Allahabad 407, 411, 412.
10. *Saif Ali v. Chiragh Ali Sha and Others* AIR 1923 Lahore 97.
11. *Maung Po Kwe v. Maung Sein Nyun* AIR 1927 Rangoon 258.
12. *Khavaja Karamat Ali v. Hadwar Panade* AIR 1924 Oudh 405, 406.
13. *Issarsing v. Udhavdas and Others* AIR 1921 Sind 55, 57.
14. *A Arunachala Iyer v. C. Subbramiah* AIR 1923 Madras 63, 64.

15. *Rama Shankar v. Iqbal Hussain* AIR 1932 Allahabad 450.
16. *Irappa Aduriappa Kapparad v. Ningappa Rudrappa Kapparad and Others* AIR 1923 Bombay 480.
17. *Thakur Anrudh Singh v. Rupa Kunvar and Others* AIR 1925 Allahabad 601.
18. *Gargial et al v. Somasunderam Chetty* (1905) 9 NLR 26, 30.
19. *Kanshi Ram and Another v. Diwan Chand and Another* AIR 1933 Lahore 169.
20. *Baijnath v. Iqtidar Fatima and Another* AIR 1942 Qudh 75, 76.
21. *Premshankar Dave v. Rampparlal s/o Chedilal and Others* AIR 1944 Nagpur 317.
22. *Somayya v. Subama* AIR 1903 Madras 599.
23. *Lalta Prasad v. Ram Karam* AIR 1912 Allahabad 426.
24. *Charu Chandra Ghose v. Chandi Charan Roy Chowhury* AIR 1915 Calcutta 539, 541.
25. *Jane Nona v. Podisingho* (1925) 5 Times 151.
26. *Sarfaraz Khan v. Parbatia and Others* AIR 1917 Allahabad 290.
27. *Behari Lal v. Maqsood Ali* AIR 1923 Allahabad 189.
28. *Rai Sahab Krishna Dall v. Ram Ugrah Singh and Others* AIR 1923 Allahabad 549.
29. *Lachman Das v. Ranji Das* AIR 1926 Lahore 541.
30. *Kirpi and Another v. Chuni Lal* AIR 1928 Lahore 454.
31. *Man Singh and another v. Sanghi Dal Chand* AIR 1934 Allahabad 163.
32. *Bimbadhar Patra and Another v. Bhobani Behara* AIR 1935 Patna 119.
33. *Aktar Hossain and Other v. Husseni Begum and Others* AIR 1933 Calcutta 73.
34. *Gopala Row v. Maria Susaya Pillai* AIR 1911 Madras 274.
35. *Venkobar Royar and Another v. Khadriappa Gounder and Others* AIR 1915 Madras 16.
36. *Mrigendra Nath Bir and Others v. Dibakar Bir and Others* AIR 1926 Calcutta. 1231.
37. *Namperumal Naidu v. Alwar Naidu and Others* AIR 1928 Madras 831.
38. *Lachman v. Murarilal and Others* AIR 1932 Lahore 65.
39. *Motichand v. Ant Ram* AIR 1952 Bhopal 33.
40. *Jayasuriya v. Kotelawela et al* (1922) 23 NLR 511.
41. *Daropadi v. Atma Ram and Others* AIR 1933 Peshawar 59.
42. *Kunashi Muhammad and Others v. Barkat Bibi* AIR 1927 Lahore 622.
43. *Maung Than v. Zainat Bibi* AIR 1926 Rangoon 50.
44. *U Aung Gyi v. Government of Burma and Another* AIR 1940 Rangoon 162, 164, 166.
45. *Sohambal and Another v. Devchand* AIR 1957 Rajasthan 11, p. 15 – para 22-25, para 24, 25.
46. *Jarsman Das and Another v. Bishan Das* AIR 1917 Lahore 399.
47. *Mohomed Hussain and Another v. Mohomed Usman and Others* AIR 1919 Lahore 32.

48. *Maung Pway v. Saya Pe* AIR 1927 Rangoon 46.
49. *Wazir Chand v. Bharadwaza* AIR 1924 Rangoon 271.
50. *Muhammad Sharif and Another v. Din Muhammad* AIR 1927 Lahore 365.
51. *Ram Lal Gopi and Others v. Kali Prasad Sahu and Others* AIR 1929 Patna 609.
52. *Gul Mohammed v. Mul Chand and Others* AIR 1933 Lahore 797.
53. *Kanhaiya Lal v. Gobind Prasad* AIR 1933 Allahabad 276.
54. *Amna v. Ratan Lal* AIR 1935 Allahabad 660, 662.
55. *Seshaingar Rajagopalan v. Unique Assurance Co.* AIR 1940 Calcutta 373.
56. *Scharenguivel v. Orr* (1926) 28 NLR 302, 305.
57. *Ram Sukul Pathak and Others v. Kesho Prasad Singh and Others* AIR 1918 Patna 341.
58. *Isabli and Another v. Bhagaban Chandra Shaha* AIR 1919 Calcutta 1058.
59. *Radhey Shiam v. Bhattiya* AIR 1945 Allahabad 53.
60. *Premshanker Dave v. Rampparlal s/o Chedidal and Others* AIR 31 Nagpur 317.
61. *Maung Shwe Hla v. Soolay Naidu* AIR 1924 Rangoon 336.
62. *Dakshinamoorthy Pillai v. Municipal Council of Trichinapoly* 1907 Indian HC Reps Vol. III, 31 M 157.
63. *Qadar Bakshi v. Hakam* AIR 1933 Lahore 1043.
64. *Gangabai v. Ghansarmba* AIR 1921 Nagpur 3, 5.
65. *Pett v. Greyhound Racing Association Ltd. (No. 2)* [1969] 2 All ER 221.
66. *Ex Parte Evans* (1846) 9 QB 279.
67. *Rondel v. Worsley* [1967] 3 All ER 993, 1003, 1617.
68. *M. S. Mahomed v. Collector of Toungoo* AIR 1927 Rangoon 150, 153, 154.
69. *Krishnappa Chettiyar v. Jhanda and Another* AIR 1929 Rangoon 224.
70. *Hare Krishna Mahanti v. Bishnu Chand Mahanti* 1908 Ind. LR Vol. XXXV p. 799.
71. *Mohideen Ali v. Hassim* (1960) 62 NLR 457, 459.
72. *Kadirgamadas v. Suppiah* (1953) 56 NLR 172.
73. *Attorney-General v. M. W. Silva* (1959) 61 NLR 500.
74. *The Estate of Malachais* (1920) 21 NLR 332.
75. *In re the Appeal of J.P.A. v. Proctor* (1920) 1 C.L. Recorder 139.
76. *Silva v. Soopetamby* 1843 – 1845 Ramanathan 66.
77. *Perera v. Perera* 2 ACR 142.
78. *Silva v. Andiris* (1916) 3 CWR 310.
79. *Kandiah v. Vairamuttu* 60 NLR 01.
80. *Wijesinghe v. Council of Legal Education* 65 NLR 364.
81. *Perera v. Perera and Another* [1981] 2 Sri LR 41.
82. *Seelawathie and Another v. Jayasinghe* [1985] 2 Sri LR 266.
83. *Mohideen Ali v. Hassim* (1960) 62 NLR 457, 459, 460, 461.
84. *Kasinathan Chetty v. Sathasivam et al* 5 Times 82.
85. *Kanagasabai v. Kirpamoorthy* (1959) 62 NLR 54.
86. *Rahiman Levvai v. Negamany* (1916) 3 CWR 43.

87. *Porolis Silva v. Porolis Silva* (1922) 1 Times 20.
88. *Canon v. Telesinghe* (1929) 30 NLR 372.
89. *Andiappa Chettiyar v. Sanmugam* 33 NLR 217.
90. *Motha v. Fernando* (1941) XX CLW 109.
91. *Chelliah Pillai v. Mutuvelu* (1941) XXI CLW 82.
92. *Esmail Ebrahim v. Haji Jan Mohamed* AIR 1908 (10) Bombay 904.
93. *Mowar Raghubar Singh v. Gauri Charan Singh* AIR 1918 Patna 258.
94. *Ajai Verma v. Baldeo Prasad* AIR 1930 Allahabad 217.
95. *Rang Behari Lal and Others v. Racheya Lal* AIR 1916 Patna 388.
96. *Baji Lal and Others v. Nawal Singh* AIR 1917 Allahabd 216.
97. *Gangabhai v. Ghansarmba* AIR 1921 Nagpur 3.
98. *Bishnu Narian Bhargavua v. Abdul Manan and Others* AIR 1925 Qudh 682.
99. *Hari Das Faquir v. Praduman Nath and Another* AIR 1925 Qudh 234.
100. *Biru Ram v. Roda Mal and Others* AIR 1927 Lahore 224.
101. *Ma Sein v. Firm* AIR 1933 Rangoon 96.
102. *Pakr Moohideen v. Mohammadu Cassim* (1900) 4 NLR 299.
103. *Mulligan v. M'Donagh QC* (1860) 2 LT 136.
104. *Kalawane Dhammadassi Thero v. Mawella Dhammavisuddhi Thero* (1955) 57 NLR 400.
105. *Godhni v. Shamlal and Others* AIR 1921 Allahabad 264.
106. *Lachiram and Others v. Almi and Others* AIR 1927 Sind 228.
107. *Malhar Rao v. Jaganmathi* AIR 1928 Nagpur 75.
108. *Sardar Begum v. Muhammad Said* AIR 1930 Lahore 943.
109. *Bhagwan Das and Another v. Darkhan and Another* AIR 1932 Lahore 387.
110. *Arjan Singh and Another v. Bachan Singh and Another* AIR 1934 Lahore 416.
111. *Swannel v. Ellis* (1823) 1 Bing 347.
112. *Courtney v. Stock* (1842) 2 Dr. & War. 251.
113. *The Times of Ceylon v. Low* (1913) 1 SCD 58.
114. *Silva v. Cumaratunga (1938) 40 NLR 139.*
115. *Gunasekera v. de Zoysa* (1951) 52 NLR 357.
116. *In re Hawkins, White v. White* [1916] 1 Ch. 570, 579, 580
117. *De Roufigny v. Peale* (1811) 3 Taunt 484.
118. *Hawkins v. Harwood* (1849) 4 Exch. 503.
119. *Townley v. Jones (1860)* 8 CB (NS) 289.
120. *Mainz v. Charles and James Dodd* (1978) Sol. Jo. 645.
121. *In Re Harrisson* [1908] 1 Ch. 282.
122. *Ratwatta v. Nugawela* (1913) 5 Balasingham's Notes 34.
123. *Punchibanda v. E. M. Punchi Banda and Others* (1941) VI CLJ Reps. 25.
124. *Thornhill v. Evans* (1742) 2 Atk. 330, 332.
125. *Moonesinghe v. Pereira et al.* (1925) 27 NLR 76.
126. *Weerasuriya v. de Silva* (1917) 4 CWR 190.
127. *Karunaratne v. Velaiden* (1935) 4 CLW 73.
128. *Robertson v. Macdonough* (1880) LR Ir. 433 – Halsbury Vol. III para 1194, 1198.

129. *Doe d'Bennett v. Hale* (1850) 15 QB 171, 186.
130. *Senanayake v. Cooray* (1911) 15 NLR 36.
131. *Kandappa v. Marimuttu* (1911) 14 NLR 395.
132. *Perera v. Gunatilake* (1917) 4 CWR 6.
133. *Syadu Varusai v. Weerasekera* (1956) 58 NLR 89, 91, 92.
134. *Satish Chandra Mukherjee v. Apara Prasad Mukherjee* AIR 1907 (34) Calcutta 403.
135. *Hinga Bibie v. Munna Bibie* AIR 1904 (31) Calcutta 150.
136. *Rambhanjan Singh v. Pashupat Rai* AIR 1924 Patna 271.
137. *Manickam Pillai v. Mahudin Bathumal* AIR 1925 Madras 21.
138. *Baslingappa Kushappa v. Shidramappa Iyer* AIR 1943 Bombay 321, 322, 323.
139. *Soonderlal v. Goorprasad* AIR 1899 (23) Bombay 414.
140. *Habibu Lebbe v. Punchi Etana* (1894) 2 CLR 84.
141. *Ahitbol v. Bendetto* (1810) 3 Taunt 225.
142. *Doe d'Crake v. Brown* (1832) 5 C & P 315.
143. *Murphy v. Richardson* (1850) 131 LR 430.
144. *Allen v. Francis* (1914) 3 KB 1065.
145. *Cooke v. Turner* (1844) 12 Simmons 649, 69, ER 1282.
146. *Tillekeratne v. Keethiratne* 3 CLW 64.
147. *Matthews v. Munster* (1887) 20 QBD 141.
148. *Pickering v. Dawson* (1813) 4 Taunt 779.
149. *Fernando v. Singoris Appu* (1926) 26 NLR 469.
150. *Narayan Chetty v. Azeez* (1921) 23 NLR 477.
151. *Orr v. Gunatilake* (1922) 24 NLR 178.
152. *Cook v. S* [1967] 1 All ER 299.
153. *Lowry v. Guilford* (1832) 5 C & P234.

APPEAL from order of the Court of Appeal directing re-listing of appeal.

H. Withanachchi for appellant.
L. V. P. Wettasinghe for respondents.

Cur adv vult.

March 27th, 1992.
AMERASINGHE, J.

This is an appeal from an order of the Court of Appeal re-listing a petition it had dismissed when the petition was not supported on the date appointed for hearing. The appellant complains that the Court of Appeal erred in making its order of reinstatement.

A writ of *certiorari* to quash certain orders made on 4th May, 1982 by the Assistant Commissioner of Agrarian Services and the Assistant Commissioner of Agrarian Services (Inquiries) had been sought by way of a petition filed on 16th September, 1982, by the petitioners' duly appointed registered Attorney-at-Law, Mr. Saliya Mathew. The application for the issue of notice was supported in the Court of Appeal by Mr. Nimal Senanayake, Senior Attorney-at-Law, on 22nd September, 1982, and Mr. Senanayake continued to be counsel for the petitioners until he died on 14th May, 1988.

When the matter came up for hearing on 3rd May, 1989, there was no appearance for the petitioner. The court noted that the "late Mr. Nimal Senanayake had appeared for the petitioner" and ordered that the matter be listed "in due course". The matter came up on 16th May, 1989. The petitioners, however, were again absent and unrepresented. The court (Viknarajah and A. de Z. Gunawardana, JJ.) made order dismissing the application. On 19th September, 1989, the petitioners, by their registered Attorney-at-Law, Mr. Saliya Matthew, tendered a petition, supported by an affidavit of the second petitioner, and moved that the matter be re-listed. After hearing counsel for the parties, A. de Z. Gunawardana, J., on 28th September, 1990, set aside the order of the Court of Appeal dated 16th May, 1989 dismissing the application for an order of *certiorari*, and directed that the matter be re-listed on a date convenient to counsel. The Supreme Court on 18th June, 1991, granted the appellant special leave to appeal against the order of reinstatement made by the Court of Appeal on 28th September, 1990.

The Court of Appeal, in making its order dated 20th September, 1990, stated as follows:

> Counsel for the petitioner in this re-listing application urged that Mr. Nimal Senanayake died on 14th May 1988. The petitioners reside in a remote village in Southern Sri Lanka. There were disturbances in that area. In that district, there were no proper communication channels and the petitioners have not received any notice from this court about the listing of this application. This matter had been listed on 3.5.89 two years after the last date it had come up, viz. 25.5.87. He also

submitted that once a counsel is retained, it is the duty of the counsel to keep a track of the listing of the appeal or application and that the instructing attorney is not responsible in that regard.

"Counsel for the respondents submitted that it is the duty of the instructing attorney to keep a track of the listing of any application or appeal in which he has retained counsel. He submitted that the fact that a counsel is retained would not absolve the instructing attorney from that responsibility. He also submitted that when the counsel died, the instructing attorney should have informed the client and got the client to retain counsel. He pointed out that the petitioner does not state as to when the petitioners had come to know that Mr. Nimal Senanayake had died. Learned counsel for the respondent also pointed out that several junior counsel have appeared along with Mr. Nimal Senanayake when this application had come up on different occasions. On the last occasion when it came up before Mr. Nimal Senanayake died, one Mrs. Dissanayake had appeared. On the other hand, Mr. Wettasinghe for the petitioners pointed out that the fact that several junior counsel have appeared in this case shows that no particular junior seems to have been retained in this case.

There is no evidence to show that a particular junior had been retained in this case.

Having taken the above submissions into consideration, this Court is of the view that the Order made on 16.5.89 should be set aside, and the application of re-listing is allowed."

The appellant in paragraph 12 (a) of his application to this Court for special leave to appeal alleged that this order of the Court of Appeal was defective, in that it failed to give reasons. Appellant's counsel, both in his written and oral submissions, reiterated and gave renewed expression to the complaint that the Court of Appeal had failed to give reasons for the order of reinstatement it had made.

Section 774 (2) of the Civil Procedure Code requires that, in pronouncing its judgment on the termination of the hearing of an

appeal, the court should, *inter alia,* state the decision of the judges and the reasons which have led to the decision. An application for a writ of *certiorari,* being an entreaty to a higher authority for a decision in one's favour, therefore, does, partake, in certain, limited ways, of the nature of an appeal. Yet, it seems to me, that there are historical, conceptual, constitutional, legislative and procedural impediments in the way of accepting a suggestion that an application to grant relief or redress by way of a prerogative order, is an **appeal** within the meaning of Part VIII of the Civil Procedure Code. In any event, the order of the Court of Appeal was not a judgment pronounced at the termination of the hearing of an appeal, but rather an order on an incidental question, viz., an application for re-listing. There was, therefore, no duty, in terms of section 774 of the Civil Procedure, which obliged the Court of Appeal to give reasons for its decision in this case. It may have been an expectation. It was, perhaps, even a desirable expectation. But that is another matter. Although it is far from clear that it was in fact the case, I am prepared to accept Mr. Wettasinghe's suggestion, at page 3 of his additional written submissions dated 11th December, 1991, that all of the grounds urged by the applicant for reinstatement and set out in the judgment of the Court of Appeal had been accepted by the Court of Appeal and constituted the reasons for its decision.

The main ground of appeal related to another matter, viz., the question of default in appearance on the date appointed for the hearing of the petition for a prerogative order. Although, in *Schrader v. Joseph* [1] Wood Renton, J. observed that it was "one of the numerous cases that come up in appeal owing to the default of parties or their legal advisers to appear on the day and at the time fixed for the hearing of actions in which they are concerned", and although prerogative writs have been available in this country from the time of the Charter of Justice of 1801, there are, it seems no reported decisions on the question of default in appearance in applications for writs. Both Mr. Witanachchi and Mr. Wettasinghe stated that there are no express statutory provisions or rules prescribing the course to be followed by a court where an applicant for a prerogative writ is absent on the day fixed for the hearing of his application. In the circumstances, they proposed somewhat different approaches to the resolution of the matter before us. Many involved

submissions were made by learned counsel, rendering them intricate and difficult. It was not an easy matter to unravel them. Having disentangled them, it was necessary to consider the criteria for deciding the correctness of the submissions made. For this, there was very little assistance: the only decided case both learned counsel cited to us was *K. Gianchand v. T. M. N. Hyder Ali and 3 Others* [2]. I am conscious of the fact that Blackwell, J., in *P. D. Shamdasani and Others v. Central Bank of India,* [3], said that precedents were not of "much use in cases of this character". And that Mitter, J., in *Biswanath Dey v. Kishori M. Pal,* [4] said that "On this point reported decisions are not of much help and each case has to be decided on its own facts." Similar observations were made by Jai Lal, J. in *Abdul Aziz v. National Bank* [5]. No doubt each case has to be decided on its own facts. Yet, it would have been of assistance to us if decisions had been cited which would have indicated what views had been held by judges on similar facts, in comparable, analagous, cases. Indeed Blackwell, J. in *Shamdasani's case* ((ibid.) placed great reliance on what the judges had done in *Manilal Dhunji v. Gulam Husein Vazeer* [6]).

Mr. Wettasinghe, learned counsel for the respondents, submitted that an application for a writ of *certiorari,* should be treated as **appellate** in nature, the principles that should guide the court being those laid down in section 769 of the Civil Procedure Code. Mr Wettasinghe argued that, in terms of section 769 (2) of the Civil Procedure Code, the Court of Appeal was justified in dismissing the application only after it had **considered** the application. Dismissal, therefore, should have been on the **merits.** Since the court had dismissed the application without consideration, it had acted on wrong principles, and, therefore, the Court of Appeal was right in reviewing its earlier order and directing reinstatement.

The action of the petitioners in this case was one of requesting the Court of Appeal, by way of a writ of *certiorari,* in the exercise of its discretionary power and authority conferred by Article 140 of the Constitution, to quash the orders of the Assistant Commissioners of Agrarian services. It was not a supplication for relief or redress which the petitioners were making, as a matter of right, in terms of section 754 of the Civil Procedure Code, read with Article 138 of the

Constitution, to correct errors in fact or law committed by a civil court of first instance. Had it been such an entreaty, the court would have been obliged, in terms of section 769(2) of the Civil Procedure Code, to consider the matter before dismissing it. Dealing instead, in the matter before it, with a mere invocation for the assistance of the Court of Appeal in the exercise of its discretion, the court had an uncontrolled power of disposal, so long as that power was not exercised in transgression of the law and legal principles, and so long as it was not actuated by whim or caprice, and exercised in good faith. Indeed, this was the position even with regard to civil appeals, made as of right, prior to the enactment of section 339(3) of the Administration of Justice Law No. 44 of 1973, which, for the first time introduced the requirement of "consideration". That requirement was retained by subsequent legislation with regard to civil appeals from the judgments of courts. (See section 17 of Act No. 20 of 1977 and section 769(2) of the current Civil Procedure Code). However, it was not made applicable to other matters.

I am not inclined to accept Mr. Witanachchi's submission that the Court of Appeal, guided by section 87 of the Civil Procedure Code, as amended by Law 20 of 1977, should have dismissed the application as an obligatory penalty for default. I think the court had a discretion in the exercise of which it may have dismissed the application, or, as it had done on the earlier occasion when the matter came on for hearing on 16th May, 1989, adopted another course which in its opinion, was more likely to ensure substantial justice.

In the exercise of its discretion, as Chief Justice Beaumont said in *Shamdasani and Others v. Central Bank of India*[3], the court ought to have considered that, "it is, after all, a very serious matter to dismiss a man's suit or summons, or whatever it may be, without hearing it, and that course ought not to be adopted unless the court is really satisfied that justice so requires."

The petitioners suggested that the court was unreasonable in dismissing their application on the second occasion on which the matter was listed for hearing after their counsel's death, because it was listed "only thirteen days" after the first date when it had come on. Were the petitioners under the impression that the court should

have adjusted its programme of work to suit them because they had a right to be heard? If so, they were mistaken.

Although a party has a right to be heard, that is not an absolute right. In the circumstances of a case, justice may require that the matter be disposed of without hearing the absent party. The implications of its decision for the due administration of justice was an important consideration which, however, the Court of Appeal failed to take account of in reversing its earlier decision and ordering reinstatement.

One never ceases to hear of the laws delays, and it has been said, over and over again, perhaps *ad nauseam*, that justice delayed is justice denied. There are several sides in a contentious matter, and, it may well be the case, that someone may not be interested in the quick dispatch of the matter. It is a false assumption, albeit a popular one, that **all** litigants are disappointed with the slow progress of the work in the courts. The laws delays is not a general complaint of the litigating public. The litigants on the wrong side of the law – those who do not want justice to be done – are anxious that the resolution of their disputes may never take place. The abuse of their powers to obtain Stay Orders, combined with the problem of the laws delays, serve their contemptible ends. In this case, the appellant complained of the delay in the resolution of the dispute. He felt aggrieved by the fact that the petitioners had, on the strength of a Stay Order they had obtained from the Court of Appeal on 22nd September, 1982, in proceedings incidental to their application for the writ of *certiorari*, continued to remain for a long time in possession of the paddy lands called **Wakkala Kumbura** and **Kudahella Bediwela** and **Kongaha Bediwela,** although an order of eviction had been made against them by the Assistant Commissioner of Agrarian Services, if the prescribed rent had not been paid. The petitioners may have benefitted by the delay in the disposal of this matter. Yet, as I have pointed out elsewhere, the petitioners were not responsible for the delay. However, there is no doubt in my mind that, as a matter of fairness to the appellant, the matter should have been, as indeed it was on 16th May, 1989, disposed of without further delay. The other parties, had a legitimate expectation that the matter should be expeditiously determined. The Court of Appeal erred in failing to consider the rights of the other parties in ordering reinstatement.

Moreover, "the ends of justice," which Mr. Wettasinghe said must be served, in my view, go beyond the narrow interests of one or all of the litigants in a matter. The needs and expectations of the community as a whole in the due administration of justice must be considered. *Interest rei publicae ut sit finis litum.* A court is under a duty to see that its business is disposed of in an orderly, prompt and effective manner. Unnecessary postponements are wasteful, non-productive, time-consuming and result in the confusion and congestion of its programme of work. They provide fertile ground for public criticism of the whole system. Therefore, when a matter is listed for hearing, or for that matter, any other purpose determined by court, generally, it must be taken up and dealt with on the day appointed by the court. It is the duty of a judge, in the interests of the administration of justice, to ensure that the work of the court goes on without delay and, therefore, according to its programme. (See the observations of Abdul Raoof, J. in *Nanak Chand and Others v. Sajad Hussain and Others* [7]. A judge must ensure a prompt disposition of cases, emphasising that dates given by the court, including dates set out in "lists" published by a court's registry, for hearing or other purposes, must be regarded by the parties and their counsel as definite court appointments. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for. In this connection, it has been observed that, although "the usual good feeling prevailing between the Bench and the Bar leads the Bench, whenever possible, to make such concessions as to postponing the hearing of a case in order to enable the pleader to come and argue it", there is no "absolute right in that regard. (See per Fletcher, J. in *Majidunnessa Bibi v. Amnessa* alias *Aslahenessa Bibi* [8]. Counsel's convenience should not be assumed to be a compelling reason for postponing a matter. (See *Juggi Lal Kamla Pat v. Ram Janki Gupta and Another* [9], *Saif Ali v. Chiragh Ali Sha and Others* [10]. See also *Maung Po Kwe v. Maung Sein Nyun* [11] Admittedly, as Wazir Hasan, ACJ observed in *Khavaja Karamat Ali v. Hadwar Pande* [12], "a little spirit of compromise will go a long way towards doing justice and also towards the expedition of work", and although it is reasonable to consider counsel's exigencies of duties owed to other courts and clients, (see *Abdul Aziz v. Punjab National*

Bank Ltd[5], any latitude shown to the parties and their lawyers must, as the court observed in *Issarsing v. Udhavdas and Others*[13] be "consistent with the proper disposal of work." See also *Schrader v. Joseph* (*supra*) at 113 and 117. Essentially, it is a question of balance. In *Abdul Aziz v. Punjab National Bank Ltd.*[5] Jai Lal, J. examined several decisions and said:

> "In this connexion due regard must be had to the nature of duties of counsel towards his other clients and the other courts. At the same time the court cannot be expected to give unlimited or unreasonable latitude to counsel in this respect. Counsel is ordinarily expected to be ready in court when the case is called and it is no good excuse to say he was busy elsewhere. The matter, therefore, is one of the exercises of judicious discretion in each case. Too rigid an adherence to either view is likely to lead to inconvenience and injustice, on the one hand, and dislocation of court's work, on the other."

In the case before me, the matter was listed almost a year after the death of counsel, because the President of the Court of Appeal had ordered that the case of the late Mr. Senanayake's should not be listed "for a long period." When it came on for hearing, the court, finding that the petitioners were absent and unrepresented, *suo motu*, noting the fact that the late Mr. Senanayake had been the counsel in the case, ordered that the matter be listed "in due course." The fact that it was listed again for hearing "only thirteen days" after that, is not a legitimate cause for complaint. The court had been indulgent. Had it gone beyond that point, it might, I think, have been guilty of laxity and unreasonableness. The interests of justice, I think, required that the matter be disposed of, without further delay. The Court of Appeal, taking the requirements of the due administration of justice into account, was justified in ordering the dismissal of the application on 16th May, 1989. However, in making its order of reinstatement on 28th September, 1990, it seems to have overlooked this matter. Indeed, it seemed to have come round to the position of regarding the long delay in listing, not as a factor operating against reinstatement, but rather as a matter in favour of it. The delay, it seems to have been supposed, had made it difficult for the

petitioners to keep track of the date of hearing. The court overlooked the fact that the delay was meant to assist the petitioners. In my view, the application, having due regard for considerations relating to the due administration of justice, was properly dismissed, and the reinstatement was not warranted.

The next question is this: Since there is no legislation governing the matter, under what authority could the court have ordered the re-listing of the application? I think the court had the power to restore the application to the list in the exercise of its inherent jurisdiction. (Cf. *Issarsing v. Udhavdas and Others* [13]).

If it had the power to order re-listing, under what circumstances should the matter have been reinstated?

Some decisions seem to suggest that it is essentially a matter concerning the parties, and, therefore, an award of costs should conclude the matter. With great respect, I am unable to accept the view that has been expressed in some cases that the award of costs is, what Schwabe, CJ. in *A Arunachala Iyer v. C. Subbramiah* [14] described as an "universal panacea for healing all wounds": the party in default compensating the other for his absence, while paying a sufficiently deterrent penalty for his absence. (E.g. see the comments of Niamatullah, J. in *Rama Shankar v. Iqbal Husain* [15] See also *Irappa Aduriappa Kapparad v. Ningappa Rudrappa Kapparad and Others* [16], *Thakur Anrudh Singh v. Rupa Kunwar and Others* [17]. See also *Gargial et al v. Somasunderam Chetty* [18] where the court took an "indulgent" view). The court may have reinstated the matter upon such terms as to costs or otherwise as it thought fit, yet it could only do so if sufficient cause for reinstatement had been established. (Cf. the proviso to section 769(2) and section 87(3) of the Civil Procedure Code). The fact that the court was acting in the exercise of its inherent powers, rather than in the exercise of a power expressly conferred by the legislature, makes no difference. (See *Kanshi Ram and Another v. Diwan Chand and Another* [19]. In the matter before us, there was no attempt by the Court of Appeal to appease the other party by an award of costs. In any event, even if the other party agreed to reinstatement, the court should have been constrained to refuse it if sufficient cause for absence had not been shown. This was the position in *Gianchand* (*supra*).

Mr. Wettasinghe then advanced a somewhat strange proposition with regard to the way reinstatement should be considered: He argued that, in the case of civil appeals, a matter should be dismissed only after "consideration." This, he said, "would ensure that the ends of justice are met, particularly when the non-appearance is involuntary, and is a tacit recognition that a party, having gone through the procedures of filing an appeal, will not, in the generality of cases, wantonly and deliberately stay away from the hearing. Although the requirement of "consideration" "should normally serve the ends of justice", yet, he argued, "if parties persist in seeking reinstatement, then a high standard, namely that of sufficient cause, is imposed. In other words, the requirement of **sufficient cause** goes hand in hand with **consideration."** if there is no 'consideration', then, "sufficient cause cannot be insisted upon, and a standard less than 'sufficient cause', such as 'reasonable grounds' as laid down in section 87 of the Civil Procedure Code, should conclude the matter."

Mr. Wettasinghe's argument partly rested on his averment that it ought to be assumed that an applicant or appellant would not be absent without sufficient cause. The law makes no "tacit recognition" of any assumption that an appellant or petitioner would not be absent without good cause. The Court (Bennett and Agarwal, JJ.) observed in *Baijnath v. Iqtidar Fatima and Another* [20] as follows:

> "Learned counsel has argued that the appellant had no reason to absent himself, but we cannot infer from this that there was sufficient cause for his absence."

Whether there is sufficient cause, is an open question. A court has no preference for believing that a party's absence was either unpardonable or excusable. It has no predisposition or bias in favour of or against an absent party. And so, a court will neither proceed on the hypothesis that a person's absence was excusable, nor act on the assumption that a person's absence was unpardonable. As Bobde, J. observed in *Premshankar Dave v. Rampparlal s/o Chedilal and Others* [21], it may be so found ultimately or it may not be, but in deciding whether there was good cause for default in appearance ... the lower Court had to judicially consider that question alone, putting aside all predilections."

I have pointed out later on in my judgment that a court ought not to be too severe and rigorous in exercising its powers relating to reinstatement, but rather, that it should be generous. Yet, it is an entirely different matter to hold that a court must be prepossessed with a favourable opinion with regard to an absent party. The burden of alleging and proving the existence of facts, on the basis of which a court may decide that there is good cause for absence, rests on the absent party who seeks reinstatement. The burden of adducing evidence of sufficient cause is not displaced by any presumption in his favour. I have no hesitation in rejecting Mr. Wettasinghe's submission that sufficient cause should be inferred in favour of an absent party.

Mr. Wettasinghe submitted that, where a court is legally obliged to, but fails to consider the matter before dismissal, then restoration should be granted as if the matter had been dismissed for default under section 87 of the Civil Procedure Code. Section 87(3) of the Civil Procedure Code enables a court to set aside its order of dismissal for want of appearance of a plaintiff where it is "satisfied that there were reasonable grounds for the non-appearance of the plaintiff." According to Mr. Wettasinghe, the phrase "reasonable grounds", in section 87 of the Civil Procedure Code, imposes less exacting standards than "sufficient cause" required by the proviso to section 769(2) of the Civil Procedure Code. A court will hold that there was sufficient cause if the facts and circumstances established as forming the grounds for absence are not absurd, ridiculous, trifling or irrational, but sensible, sane, and, without expecting too much, agreeable to reason. It cannot hold that, in its judgment, there is sufficient cause to reinstate the matter unless the grounds for coming to that conclusion were reasonable. In that connection it might be pointed out that, although in *Somayya v. Subama* [22] and in *Lalta Prasad v. Ram Karam* [23] an attempt had been made to distinguish between "sufficient cause" and "valid reason", in *Chary Chandra Ghose v. Chandi Charan Roy Chowhury* [24] the court held that it was not "impressed" by the attempt. Nor am I impressed by Mr. Wettasinghe's submission.

Learned counsel for the appellant, Mr. Witanachchi, advanced somewhat different views on the question of what the absent party

had to establish and the way in which the burden of proof should have been discharged. He submitted that section 18 of the Agrarian Services Act No. 58 of 1979 permitted no "appeals". Although the correctness of a decision under the Agrarian Services Act might be called in question by way of a writ application, such a challenge, he said, was not an "appeal" and, therefore, the provisions of section 769 of the Civil Procedure Code, which relate to default in appearance on a date appointed for the hearing of an **appeal,** were inapplicable to this case. The reinstatement of a writ application dismissed for want of appearance, he submitted, could only be made by the court in the exercise of its inherent powers, which a court would exercise only if the defaulting party furnished the court with "a comprehensive and satisfactory disclosure of all the attendant circumstances." Since the power to reinstate was "discretionary", the applicant for relief, Mr. Witanachchi submitted, had to "come out with a full explanation so as to establish maximum good faith." While conceding that, whether in the exercise of its inherent powers or its powers under section 769 of the Civil Procedure Code, reinstatement could be considered only if the defaulting party showed "sufficient cause" for his absence, Mr. Witanachchi submitted that a "more stringent" standard should be applied to a defaulting party applying for a discretionary, prerogative order than to a defaulting appellant who had come to court in the exercise of a right of appeal under section 754 of the Civil Procedure Code. An applicant for a remedy by way of a writ, learned counsel said, was "under a heavy obligation to prosecute his application with due diligence." Learned counsel for the appellant referred us to rule 57 of the Rules of the Supreme Court of 1978 in support of this view.

Rule 57 of the Supreme Court Rules, 1978 (Gazette Extraordinary No. 9/10 of 8th November, 1978) states that "It shall be the duty of the petitioner, to take such steps as may be necessary to ensure the prompt service of notice, and to prosecute his application with due diligence." However, I can find nothing in that rule indicating that, when a party seeking relief, calls upon the Court of Appeal to exercise its writ jurisdiction under Article 140 of the Constitution, a more onerous duty is cast on him than when that court, in the exercise of its appellate jurisdiction under Article 138 of the Constitution, is asked to correct errors alleged to have been

committed by a court, tribunal or institution. It seems to me that in both instances, a party seeking relief must prosecute his application with due diligence. And in attempting to show sufficient cause for absence, I do not think that a defaulting appellant is under any lighter duty in providing the court with information relating to his absence than a defaulting applicant for a writ. They must, I think, both make, what Mr. Withanachchi called, "comprehensive and satisfactory" "disclosures of all the attendant circumstances"; they must both make "full explanations" to enable the court to decide whether there was sufficient cause for the absence.

Where a party has established that he had acted *bona fide* and done his best, but was prevented by some emergency, which could not have been anticipated or avoided with reasonable diligence, from being present at the hearing, his absence may be excused and the matter restored. (Cf. *Jane Nona v. Podisingho* [25]). For instance, see *Sarfaraz Khan v. Parbatia and Others* [26] (where the journey to court took longer than expected); *Behari Lal v. Maqsood Ali* [27] (where the party, being too timid or too foolish, did not enter the court when the case was called, but instead, went off to fetch his lawyer); *Rai Sahab Krishna Dall v. Ram Ugrah Singh and Others* [28] (where the party mistakenly believed the day was a Muhammadan holiday because of the different visibility of the moon in various districts); *Lachman Das v. Ranji Das* [29] (illness); *Kirpi and Another v. Chuni Lal* [30] (where one of the two parties who was blind did not go into court but remained outside while the other went to fetch the lawyer when the case was called); *Man Singh and Another v. Sanghi Dal Chand* [31], (illness – medical certificate unreasonably rejected); *Bimbadhar Patra and Another v. Bhobani Behara* [32] (operation); cf. *Aktar Hussain and Others v. Hosseni Begum and Others* [33] the case of a "wrong headed, muddle headed" but *bona fide* party endeavoring to bring his witnesses).

The petitioners, in paragraph 11 of their petition to the Court of Appeal dated 19th September, 1989, state that they are "poor paddy cultivators and irreparable loss will be caused to" them if their application were to be dismissed without hearing their counsel.

Inasmuch as it is a serious thing to deny a party his right of hearing, a court may, in evaluating the established facts, be more

inclined to generosity rather than being severe, rigorous and unsparing. Indeed, some decisions go so far as to suggest that only gross misconduct, or wilful default, and not mere negligence or carelessness, should prevent reinstatement. (E.g. see *Gopala Row v. Maria Susaya Pillai* [34], *Venkobar Royar and Another v. Khadriappa Gounder and Others* [35], *Sarfaraz Khan v. Parbatia and Others* [26], *Arunachala Iyer v. Subbaramiah* [14], *Thakur Anurudh Singh v. Rupa Kunwar and Others* [17], *Mrigendra Nath Bir and Others v. Dibakar Bir and Others* [36], *Namperumal Naidu v. Alwar Naidu and Others* [37], *Ram Shankar v. Iqbal Hussain* [15], *Lachman v. Murarilal and Others* [38], *Shamdasani and Others v. Central Bank of India* [3], *Motichana v. Ant Ram* [39], *Juggi Lal Pat v. Ram Janki Gupta and Another* [9].

Although a court should be generous in matters of this kind, it should not "in mercy" adopt a course which the law does not countenance". (See the observations of Mitter, J. in *Biswanath Dey v. Kisohori M. Pal* [4], on the decision of Chief Justice Rankin in *Aktar Hossain v. Husseni Begam* [33], but see *Gargial et al v. Somasunderam Chetty* (*supra*). The court cannot prevent miscarriages of justice except within the framework of the law: it cannot order the reinstatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. (E.g., see *Jayasuriya v. Kotelawela et al* [40] (where the absent party was deceived and therefore did not appear, the court held that there was insufficient cause for reinstatement); *Daropadi v. Atma Ram and Others* [41] where reinstatement was refused although the party was an old woman who was compelled to act through others and although a large amount was at stake. See also *Kunashi Muhammad and Others v. Barkat Bibi* [42], *Maung Than v. Zainat Bibi* [43], *Kanshi Ram and Another v. Diwan Chand and Another* [19], *U Aung Gyi v. Government of Burma and Another* [44], *Sohambal and Another v. Devchand* [45]. I cannot order the reinstatement of the matter on compassionate grounds. The law does not permit it. Indeed, if in fact what was at stake was so important to them because they were poor, the petitioners ought to have been more diligent than if they had been affluent persons to whom the loss might have been less significant.

The right to be heard has little or no value unless the party has been given a reasonable opportunity of being heard. He must have

due notice. In paragraph 9 of the petition to the Court of Appeal requesting a reinstatement of the matter, the petitioners stated that they had "no notice". In paragraph 7 of his affidavit of 19th September, 1989, the second petitioner states that "no notice or any information was received by us regarding the said application". Obviously, where the party has no due notice from the court of **when** the matter was to be heard, the matter ought to be reinstated. (E.g. see *Jarsman Das and Another v. Bishan Das* [46], *Mohomed Hussain and Another v. Mohomed Usman and Others* [47], *Maung Pway v. Saya Pe* [48], *Wazir Chand v. Bharadwaza* [49], *Muhammad Sharif and Another v. Din Muhammad* [50], *Ram Lal Gopi and Others v. Kali Prasad Sahu and Others* [51], *Gul Mohammed v. Mul Chand and Others* [52], *Kanhaiya Lal v. Gobind Prasad* [53], *Gul Mohammed v. Mul Chand and Others* [52], *Amna v. Ratan Lal* [54], *Seshaingar Rajagopalan v. Unique Assurance Co. Ltd.*,[55]. The mere fact that the registered attorney had failed to give the party information of the date is no excuse: *Scharenguivel v. Orr* [56]. Similarly, when the party had insufficient information as to **where,** in the sense of in which court and/or in which town it was to be heard, then his absence at the hearing must be excused, and the matter should be reinstated, so as to give him an opportunity of being heard. (E.g. see *Ram Sukul Pathak and Others v. Kesho Prasad Singh and Others*[57], *Isabli and Another v. Bhagaban Chandra Shaha*[58], *Amna v. Ratan Lal*[54]; *Radhey Shiam v. Bhattiya*[59]. (See also *Premshanker Dave v. Rampparelal s/o Chedilal and Others*[60] where the case was unexpectedly taken up in chambers, rather than in the courtroom and, therefore, the party was absent, the case was restored to the list).

In the case before us, although there is no clear statement with regard to why it was alleged that there was "no notice", there seems to have been no uncertainty with regard to **where** the matter was to be heard. The complaint was that there was no information with regard to **when** the matter was due to be heard. The learned judge of the Court of Appeal in his order of 28th September, 1990 referred to absence of notice to the parties in this way:

> "The petitioners reside in a remote village in Southern Sri Lanka. There were disturbances in that area. In that district there were no proper communication channels and the

petitioners have not received any notice from this Court about the listing of this application..."

If, upon the unrebutted oath of the absent party, the lack of due notice of time or place, had been alleged, I might have been inclined to agree that the decision of the Court of Appeal ordering a reinstatement of the hearing was justified. (Cf. *Maung Shwe Hla v. Soolay Naidu*)[61]. The appellant in the case before us, however, insists that the petitioners **did** have due notice. What is "due notice"? "Due notice", for the purpose of the sort of matter under consideration, is making information available in the usual way, that is to say, in accordance with the prevailing law, rules, practices and usages of the court. Where information of the appointed date for hearing is usually set out in a list prepared and published by the court's registry, and information of the hearing has been given in that way, that is **due notice** to the parties and their counsel.

In *Dakshinamoorthy Pillai v. Municipal Council of Trichinapoly* [62], the appeal list was posted on a notice board. When the matter was adjourned, the party's legal agent advised him that it was not likely to come up again for quite some time. However, it came on earlier than expected, and the party did not see the new date on a subsequently posted list. The matter was taken up and dismissed in the absence of the party. The absent party's application for reinstatement was refused, his ignorance of the date of hearing, in those circumstances, not being regarded as a sufficient excuse for his absence.

In *Qadar Baksh v. Hakam* [63] a case had been set down in the court's **weekly** cause list as coming up before the second Bench. Due to the indisposition of a judge on that Bench, the matter was listed before the first Bench in the **daily** list which was published on the day before the hearing. Counsel's clerk failed to check the daily list, and so he failed to inform counsel of the change. Counsel was, therefore, absent. The case was dismissed and reinstatement was refused on the ground that counsel should have ascertained what case he had in court that day and that his negligence was inexcusable.

The case before me had been listed in the usual way, and there was, in the circumstances, **due notice,** although the parties may or may not have been **actually** aware of the date of hearing. Mr. Wettasinghe, quite properly, did not press this matter. I do not think the absent parties were in law entitled to complain about the lack of due notice; and if, as Mr. Wettasinghe stated at page 3 of his written submissions dated 11th December, 1991, lack of notice was one of the matters that "entered into the mind of the learned Judge" in ordering the re-listing of the application, then, with great respect, the learned Judge was in error in failing to distinguish between "notice", in the sense of actual knowledge, and imputed knowledge of the date of the hearing which "due notice", in the relevant sense, implies. The remoteness of the village in which the parties resided, the "disturbances in that area", the lack of "proper communication channels", due either to the remoteness of where the parties lived or the "disturbances", therefore, have no relevance to the question of "due notice". Even if the court was inclined to be somewhat indulgent towards the petitioners in this matter, on the basis that they were unfamiliar with the procedures of the court, there was no justification in **this case** for doing so, because they had a duly appointed registered attorney-at-law, Mr. Saliya Matthew, who should have been aware of these things. As Drake-Brockman, J.C., observed in *Gangabai v. Ghansarmba* [64]. "...it is of course only reasonable that less leniency should be shown to pleaders than to parties, seeing that it is a pleader's business to attend the courts regularly and to provide suitably for meeting his daily engagements." Mr. Wettasinghe pointed out that Mr. Matthew was only an instructing attorney and, therefore, he was under no obligation to inform himself of the dates. I shall deal with that question later. For the present, on the question of less leniency to those who are expected to know the court's procedures, let me say this: Mr. Matthew was empowered by the proxy he had been given by the petitioners to do all that was necessary for them in the Court of Appeal. Presumably, having undertaken such an assignment, he ought at least to have been aware of the way in which cases were fixed for hearing in that court. Had it been required that notice should have been **personally served on the parties,** it would have been necessary to go into the question of disturbances and so on. In any event, the lack of communications, either, or both, on account of (a) the remoteness of

the area in which the absent parties resided and (b) the interruption of communications due to "disturbances in that area", as we shall see later on, has not been established.

I have accepted Mr. Wettasinghe's proposition that it is, both desirable and necessary, that a litigant be heard. I have accepted the fact that the right to be heard has little meaning, unless the party who had that right had due notice of where and when he will be heard. I have decided that there was, in this case, due notice of where and when the matter was to be heard and that the Court of Appeal erred with regard to that question. I must now consider the question whether the right to be heard was so impeded by other circumstances that the Court of Appeal was right in ordering that the matter should be reinstated.

While it has been suggested that **legal representation** is not essential to a fair disposition of justice (see *Pett v. Greyhound Racing Association Ltd. (No. 2)*[65], per Lyall, J.), yet, if there is an oral hearing in a court, then a party is **entitled** to be legally represented (*Ex parte Evans)*[66], unless the legislature expressly provides otherwise. And so, unless the legislature provides otherwise, a party can, decide whether he will himself go into court or be legally represented in the exercise of his right to be heard. (See section 24 of the Civil Procedure Code).

In this case, the parties on both sides had elected to be legally represented. In paragraph 3 of his affidavit dated 19th September, 1989, the second petitioner stated that he and the first petitioner "retained the late Mr. Nimal Senanayake and paid his fees in full". However, the petitioners were unable to effectively exercise their right to be heard through the counsel of their choice. The second petitioner, in paragraph 5 of his affidavit of 19th September, 1989, explained that their "counsel", Mr. Senanayake, died on 14th May, 1988. Mr. Wettasinghe submitted that the petitioners were not aware of the death of Mr. Senanayake and were, therefore, left in the lurch, without their expected legal representation when the matter came up for hearing, because, he said, there was a lack of "communication channels, since newspapers carrying English obituary notices were banned by insurgents and in any event the client is a Sinhala-

speaking villager." The petitioners, in their application for re-listing, did not complain that they were unaware of the death of their counsel, and therefore, could not have known that they would be unrepresented when the matter came on for hearing. And so, it was not a matter considered by the Court of Appeal. It is, therefore, not a matter I should consider. In any event, at page 4 of his written submissions, dated 11th December, 1991, Mr. Wettasinghe accepts the fact that information with regard to Mr. Senanayake's death was communicated to his clients by their registered Attorney, Mr. Saliya Matthew.

The petitioner said that they did not have the time and the opportunity to retain another counsel when Mr. Senanayake died. The death of a party's counsel is, I think, a good and sufficient cause for the reinstatement of a matter, if it occurs during the hearing, or so near the date of hearing, that it is not feasible to retain a substitute attorney through whom the right to be heard could be exercised. In this case, counsel, Mr. Senanayake, died on 14th May, 1988. In the circumstances, I have explained, the matter was listed for hearing on 3rd May, 1989 but postponed and listed again on 16th May, 1989. The death of Mr. Senanayake was neither **during** nor **near** the date of hearing. In the circumstances of this case, the death of counsel was not a sufficient cause for reinstatement.

In his affidavit, dated 22nd January, 1990, the third respondent stated that the petitioners had "ample time" to retain counsel. I agree. Indeed, as we have seen, the petitioners found fault with the court for being considerate and generous in allowing so much time to elapse between the dates of hearing before and after the death of their counsel. In terms of acting in competition with the passage of time between the death of their counsel, Mr. Senanayake, and the date of hearing, the petitioners could, I think, have retained a substitute, in normal circumstances.

However, it was suggested by the petitioners that the condition of things, during the available time, were unfavourable to the accomplishment of their object of retaining the services of another counsel. The petitioners alleged, in paragraph 5 of their petition to the Court of Appeal, that they were unable to retain another counsel

because of the "prevailing situation" in the country. This is also stated in paragraph 6 of the affidavit of the second petitioner dated 19th September, 1989. Mr. Wettasinghe, in paragraph 16 (c) of his written submissions of 24th July, 1991, stated that "the disturbed conditions in the country affecting free movement, loss of means of livelihood, fear of terrorist reprisals against litigating etc." were "relevant". At p. 3 of his additional written submissions of 11th December, 1991, Mr. Wettasinghe stated that "the petitioners reside in a remote village in the South, and that there were disturbances in the area" and that these were among the "factors that have a bearing on the question of rehearing"; that these were among the matters "itemized" in the judgment of the Court of Appeal dated 28th September, 1990, when it ordered reinstatement. They were, Mr. Wettasinghe, submitted, matters which had "entered into the mind of the learned judge", in making his order. In the judgment of the Court of Appeal dated 28th September, 1990, ordering reinstatement, the Court of Appeal notes that learned counsel had urged that the "petitioners resided in a remote village of southern Sri Lanka. There were disturbances in that area." However, the suggestion that the petitioners may have been unable to retain counsel because (A) their movements were restricted; (b) they lacked financial means to retain counsel because they had been deprived of their livelihood; and (c) that "terrorists" might have punished them if they took steps to continue their litigation, were not mentioned at all by the Court of Appeal; for they were embellishments learned counsel added after the matter had come up to the Supreme Court. If, as Mr. Wettasinghe says, they were "relevant", they should have been alleged and proved in the Court of Appeal at the stage when the re-listing application was before that court. Belated reflections on irrelevant side issues and matters which are not of decisive importance should be discouraged in the interests of the expeditious disposal of the work of the appellate courts. (See the observations of Lord Pearce in *Rondel v. Worsley*[67]). As far as the question of "disturbances in that area" were concerned, Mr. Witanachchi submitted that this was a vague explanation which sought "protection from the blanket cover of alleged subversive activities." He submitted that "the infirmity of that explanation becomes clear, when one thinks of the fact that the petitioner-respondent had made the application for relisting in September 1989 at the height of subversive activities."

If there were certain difficulties caused by the so-called "prevailing situation" and "disturbed conditions" which prevented the petitioners from retaining another attorney, these difficulties should have been specified and proved by sufficient evidence. As Niamatuallah, J. observed in *Amna v. Ratan Lal* [54]. It is not permissible to have recourse to speculation in matters of this kind." A court cannot act on conjecture. In *M. S. Mahomed v. Collector of Toungoo* [68] Heald, J. observed that, ordinarily, the reasons for absence must be alleged and proved by oral testimony or by affidavit, unless the material statement of facts made in the applicant's application is not traversed by the opposite party, or where, as in that case, judicial notice might be taken of the alleged facts. In the same case, Cunliffe, J. at p. 154, expressed the view that, even if a court had an inherent power to set aside an **ex parte** decree which had been entered upon the absence of a party, which he doubted, he was 'perfectly sure that no court is justified in exercising an inherent right without proper grounds or proper evidence."

The averment of the petitioners, and the submissions of learned counsel on their behalf, that substitute counsel could not be retained because of "the prevailing situation in the country" and "disturbances" in the area in which they lived, and, with great respect, the assumptions by the Court of Appeal in that regard, are vague and unsubstantiated surmises. How the "prevailing situation" and "disturbances" prevented the petitioners retaining counsel is obscure. The relevant circumstances had not been distinctly stated and proved. It would seem that all the Court of Appeal had before it were mere suppositions based on insufficiently established grounds. A party seeking reinstatement must do better than that. He must clearly, with sufficient particularity allege, and prove the facts alleged by him which might have inclined the court to take the view that there was sufficient cause for his absence.

With great respect, I am of the view that the Court of Appeal erred in failing to take account of the fact that the petitioners had not discharged the burden that lay upon them of clearly stating with sufficient particularity, and establishing by evidence, the facts upon which they based their allegation that they had no opportunity of retaining a substitute counsel in the time given to them by the court.

It is for the party seeking reinstatement to allege and prove the facts upon the basis of which the court is invited to decide whether the absence in question was excusable. He must fail if he does not establish the facts he alleges and depends upon. If the explanation for absence is false, as I think it is in this case, then the alleged reasons for absence have not been established, and the party seeking reinstatement must, therefore, fail. (See *Kanshi Ram and Another v. Divan Chand and Another* [19], *Baijnath v. Iqtidar Fatima* [20]. I am inclined to agree with learned counsel for the appellant that the alleged inability to retain another counsel on account of the "prevailing situation" and "disturbed conditions", threats to litigants, and so on, was, as he said "only a lame excuse" for the petitioners' lack of due diligence. It was, I think, a good example of what Walsh, J. in *Thakur Anrudh Singh v. Rupa Kunvar and Others* [17] described, perhaps with some asperity, as a "cock and bull" story which is sometimes put forward by parties asking for restoration of their dismissed suits. Mr. Wettasinghe submitted that the "ends of justice must be served". Yet, as it was observed in *Krishnappa Chettiyar v. Jhanda and Another* [69], a party "cannot expect to obtain justice on perjury."

The appellant endeavoured to explain **why** this "cock and bull" story was related to us. The appellant in paragraph 4(d) of his affidavit dated 22nd January, 1990, filed in the Court of Appeal, alleged that the petitioner had failed to pursue the matter "expeditiously" during the whole of the time it was pending before the Court of Appeal, and suggested, in paragraph 5 of his affidavit dated 22nd January, 1990, and in paragraph 1.9 (d) of the written submissions of his counsel dated 2nd July, 1991, that this was because, on the strength of a Stay Order obtained from the Court of Appeal in 1982, the petitioners had secured the possession of certain fields from which, in terms of the order of the Assistant Commissioner of Agrarian Services, they might have been evicted, had they failed to pay the prescribed rent. The petitioners did not send a substitute counsel into court because they did not want the dispute to be quickly resolved. They were quite happy as they were.

I agree with Mr. Wettasinghe that such an insinuation was unwarranted. The petitioners' absence cannot be attributed to a

deliberate plan on their part to delay the hearing and determination of the application before the court. The application for the writ had been filed on 16th September, 1982. Whenever the matter came up at the pre-hearing stage, viz., on 22nd September, 1982, 6th October, 1982, and on 28th June, 1983, the petitioners were represented by Mr. Senanayake. The matter first came on for hearing, after the preparatory steps had been taken, only on 15th July, 1983. The petitioners had nothing at all to do with that delay. On 15th July, 1983, however, as well as on 3rd October, 1983, 2nd December, 1983, 5th February, 1984 and 13th February, 1986, when the matter came on for hearing, Mr. Senanayake appeared for the petitioners, as he had done on every occasion when the matter came up in court at the pre-hearing stage. The hearing was postponed on these dates because the **court** found it necessary or convenient to do so. There were two dates on which the hearing was postponed at the request of counsel: The matter was postponed on 22nd November, 1985 because Mr. Senanayake had requested that his absence be excused to enable him to appear as a witness in another case. The only other occasion on which the matter had been postponed at the request of counsel for the petitioners was on 25th May, 1987, when Mr. Senanayake was out of the country. Neither the way in which the pre-hearing dates were fixed, nor the two postponements at the request of Mr. Senanayake had anything to do with the petitioners personally. Admittedly, there were several postponements since the matter first came on for hearing on 15th July, 1983. However, as we have seen, these were for the convenience of both court and counsel. In such circumstances, I cannot say with justification that lack of diligence, if at all, was so distinguished and characteristic a quality of the behaviour of the petitioners, that it might be inferred that the default in question was on account of the absence of due diligence, and that reinstatement must, therefore, be refused. *Hare Krishna Mahanti v. Bishnu Chand Mahanti* [70] , is an instructive example. In that case an appeal preferred on 29th April, 1905 was not heard till 8th March, 1906, and, in that time, the case had been postponed on sixteen occasions, twelve of which were to suit the convenience of court, two for the convenience of the appellant, and two for the benefit of the respondent. Reinstatement was granted upon proof that the party and his legal advisers had, *bona fide*, made every effort to be represented before the court.

Equally, the fact that the petitioners had on previous occasions acted diligently will not serve to excuse the default in appearance which was in question before the court. The mere fact that Mr. Senanayake had, before his death, appeared for them on each and every occasion, except two, will not help the petitioners. Thus in *Kanshi Ram and Another v. Diwan Chand and Another* [19], the fact that the party had been represented by counsel when it had come up earlier, was of no avail, when the averment of illness, adduced as an excuse for his absence, was proved to be false.

According to Mr. Wettasinghe, "the decision in this case hinges on two matters: (1) whether it can be said that there was a lapse on the part of the instructing attorney; and (2) whether the clients' inaction between 14.05.1988 and 16.05.1989 is inexcusable." Mr. Witanachchi pointed out that there was also the question of junior counsel. I have explained why the petitioners' failure to take steps to be represented by other counsel when the matter came on for hearing on 16th May, 1989, after the death of Mr. Senanayake on 14th May, 1988, was inexcusable. I might be expected now to turn to the questions of the "instructing attorney" and junior counsel.

Section 24 of the Civil Procedure Code provides, *inter alia*, that any appearance, (except such appearances only attorneys-at-law are authorized to make and except when the law provides otherwise), may be made by the party in person or by his recognized agent, or by an attorney-at-law "duly appointed" by the party or such agent to act on behalf of such party.

The due appointment of an attorney enabling him to make any appearance – the question of **counsel's** appearance will be considered later – must be in writing, signed by the client and filed in court. This is provided for in Section 27(1) of the Civil Procedure Code. The instrument of appointment is usually in terms of Form 7 of the First Schedule of the Civil Procedure Code. Basnayake, CJ. said in *Mohideen Ali v. Hassim* [71], that this document is "commonly known as a proxy". If a party has acted in contravention of the provisions regarding the need for the proper appointment of a registered attorney, this irregularity may be subsequently rectified (see *Kadirgamadas v. Suppiah* [72], but the fact remains that such an

appointment is generally necessary. See *Attorney-General v. M. W. Silva* [73]. There are it seems some exceptions. Thus where the litigant is an attorney, he may himself instruct counsel without appointing a registered attorney: *The Estate of Malachais* [74]. Another exception seems to be this: Where in a testamentary case incidental proceedings are taken to inquire into the conduct of a registered attorney for the administrator, that attorney has the right to be represented by counsel without making a proxy in favour of another attorney-at-law to instruct counsel: *In re the Appeal of J.P.A. v. Proctor* [75] following *Silva v. Soopetamby* [76] and *Perera v. Perera* [77]. In this case, a proxy was executed on 16th September, 1982, by the petitioners in favour of Mr. Saliya Matthew, authorizing him to act on their behalf in the matter of the application for the writ in the Court of Appeal. It was duly filed in court. Mr. Matthew, thereby became the petitioners' "registered attorney." Section 5 of the Civil Procedure Code defines "registered attorney", to mean an attorney-at-law appointed under Chapter V by a party or his recognized agent to act on his behalf. In terms of section 27(2) of the Civil Procedure Code, the proxy remained in full force during all of the proceedings in the Court of Appeal and so, at all material times, Mr. Matthew was the registered attorney in this case.

Since the petitioners had duly appointed a registered attorney, they were obliged, to act through their registered attorney and not personally (e.g. cf. *Silva v. Andiris* [78], *Kandiah v. Vairamuttu* [79], *Wijesinghe v. Council of Legal Education* [80], *Perera v. Perera and Another* [81], *Seelawathie and Another v. Jayasinghe* [82]), and, in general, they were bound by the acts and omissions of their registered attorney. As far as the registered attorney in this case was concerned, the binding effect of his actions was based on the powers conferred by the terms of a standard, printed proxy in terms of Form 7 of the First Schedule to the Civil Procedure Code. It was neither extended expressly or impliedly, as it might have been (Cf. per Basnayake, CJ in *Mohideen Ali v. Hassim* [83], nor was it restricted. If it was restricted, that fact should have been communicated to the other side. (See *Kasinathan Chetty v. Sathasivam et al* [84]). There is no evidence of that. And so, in this case, I shall determine the several issues based on the authority given to Mr. Matthew by the petitioners, in terms of the proxy given to him in the standard form.

If parties are required by law or by court to be present, then they must be present: (See the proviso to S. 24 of the Civil Procedure Code; see also *Kanagasabai v. Kirpamoorthy* [85]). Indeed, since there was no requirement in law calling for their presence, and since the court had not required the petitioners to be personally in attendance, they need not have been present once the registered attorney had been duly appointed (Cf. *Rahiman Levvai v. Negamany* [86], *Porolis Silva v. Porolis Silva* [87], *Canon v. Telesinghe* [88], *Andiappa Chettiyar v. Sanmugam* [89], *Motha v. Fernando* [90], *Chelliah Pillai v. Mutuvelu* [91]. Cf. also *Sohambal and Another v. Devchand* [45]). Even if the petitioners had been present when their duly appointed attorney was absent, the default of the attorney may have been held against them. (Cf. *Esmail Ebrahim v. Haji Jan Mohamed* [92], *Namperumal Naidu v. Alwar Naidu and Others* [37]). In the circumstances, the petitioners were under no obligation to explain their absence. (Cf. *Mowar Raghubar Singh v. Gauri Charan Singh* [93], *Ajai Verma v. Baldeo Prasad* [94], *Sohanlal v. Devachand* (*supra*) at p.15 para 25. It was the default of the attorney who was entitled to appear that had to be considered.

In general, if a party has an attorney (whether as a registered attorney or as counsel) who is entitled to represent him at a hearing, and that attorney, without sufficient excuse, was absent on the date appointed for hearing, the court, if it had dismissed the application, is entitled to refuse to reinstate the matter.[7], This is clear from the principles emerging from *Dhakshinamoorthy* and *Qadar Baksh*, which I have already cited, and as well from the decisions in numerous other cases, (E.g., cf. *Rang Behari Lal and Others v. Racheya Lal* [95], *Baji Lal and Others v. Nawal Singh* [96], *Gangabbai v. Ghansarmla* [97], *Saif Ali v. Chirag Ali Shah and Others* [10], *Nanak Chand and Others v. Sajad Hussain & Others* [7] *Bishau Narian Bhargavua v. Abdul Manan and Others* [98], *Hari Das Faquir v. Praduman Nath and Another* [99], *Maung Than v. Zainat Bibi* [43], *Kunashi Muhammad and Others v. Barkat Bibi* [42], *Biru Ram v. Roda Mal and Others* [100], *Ma Sein v. Firm* [101], *Daropadi v. Atma Ram and Others* [41]).

Once a party has a duly appointed attorney-at-law who was entitled to appear for him at a hearing, whether that attorney was the registered attorney or counsel, then, in general, it is of no avail for

that party to complain that he had no hearing because the attorney who ought to have appeared for him was absent and frustrated his expectations. The mere absence of the attorney who was entitled and obliged to appear, however disappointing it might have been to the client, does not constitute a sufficient cause to warrant the reinstatement of a matter. (See per Drake-Brockman, J.C. In *Gangabai v. Ghansaramba*[97]) in *Gangabai*, the party, who was paralysed and unable to attend the court, retained the services of a pleader. On the date of hearing, the pleader's train arrived late. He went to the home of another lawyer for some food, and arrived in court half an hour after it had been taken up and dismissed. The appellate court refused to set aside the order of the lower court dismissing the action, although it was observed that the "usual and proper practice", except in the case of an habitual offender who had been previously warned, would have been to have kept the matter down and taken up some other work). The view taken in some cases that a party who has engaged the services of a lawyer is within his legal rights in being personally absent and hence if that lawyer "fails and betrays him", he had sufficient cause to have the matter reinstated, was rejected by Drake-Brockman, JC in that case (p. 4).

Admittedly, it is the party who suffers when the attorney who was under a duty to have appeared for him fails to appear without sufficient cause. Yet, that is not a factor that would be relevant in deciding whether a matter should be reinstated. (See *Pakr Moohideen v. Mohammadu Cassim*[102], *Scharenguivel v. Orr* [56]) Unless there is sufficient cause for the absence of the attorney who was entitled to appear, the matter should stand dismissed. The party may have a remedy against his negligent registered attorney (unless, perhaps the registered attorney was also acting as counsel, in which event, for reasons of public policy, no remedy would be available; see *Rondel v. Worsley* (*supra*), *Mulligan v. M'Donagh, Q.C.*[103]. Cf. however, section 34(3) of the Administration of Justice Law No. 44 of 1973); but relief by way of reinstatement will not be granted because of the culpable failure of his attorney to appear, (*Baji Lal and Others v. Nawal Singh* [98]), unless, perhaps, the breach of his duty to appear amounted *crassa negligentia*, cf. *Rang Behari Lal and Others v. Racheya Lal*[95] or it was based on fraud (*Kalawane Dhammadassi Thero v. Mawella Dhammavisuddhi Thero* [104]).

I have already said that reinstatement on account of the absence of the parties cannot be considered on compassionate grounds. I must now say that where no sufficient cause is shown for the absence of the attorney who was under a duty to appear, there are no grounds for an application *ex debito justitia* of any inherent power to reinstate the matter. The petitioners were under no legal obligation to be heard through lawyers. Yet, no doubt after due consideration and deliberation, as a matter of conscious willing and resolution, they decided to place the matter in the hands of lawyers. The success that might have come from their lawyers' endeavours would have been enjoyed by them. They must, now, with evenness of mind, take the consequences of the defaults and failures of their lawyers. (Cf. *Biswanath Dey v. Kisohori M. Pal*, (*supra*); *Daropadi v. Atma and Others* (*supra*)) *Kunshi Muhammad and Others v. Barkat Bibi* (*supra*); *Maung Than v. Zainat Bibi* (*supra*); *Kanshi Ram and Another v. Diwan Chand and Another* (*supra*); *Sohambal and Another v. Dev Chand* (*supra*)). The decision of the Full bench in *U Aung Gyi v. Government of Burma and Another* [44] is instructive. In that case, the lawyer had gone to another court and was five minutes late. In refusing reinstatement, the court at p. 164 observed as follows:

> "He made no arrangement whatever to have the interests of his client safeguarded during his absence, and there was no evidence upon which the learned Subdivisional Judge could have found that sufficient cause for his non-attendance had been shown. Advocates who are engaged in cases which are fixed for hearing at a given time and place cannot be allowed to treat the Court before which the hearing is to take place with contumely or indifference, and then apply casually for reinstatement of a suit dismissed in their absence merely because they hoped or believed that they might attend the hearing. They must take reasonable precautions and the provisions of 0.9 R 9 become meaningless if it afterwards be urged that although none were taken and there was no sufficient cause for their non-attendance the suit can still be restored to the file because the litigant would suffer if it were not."

On the other hand if the attorney entitled to appear for the party had reasonable grounds for his absence, the court would reinstate

the matter on the basis that there was sufficient cause to do so. (E.g. cf. *Godhni v. Shamlal and Others*[105], *Mrigendra Nath Bir and Others v. Dibakar Bir and Others* [36], *Lachiram and Others v. Almi and Others*[106], *Malhar Rao v. Jaganmathi*[107], *Abdul Aziz v. Punjab National Bank Ltd.*[5], *Ajai Verma v. Baldeo Prasad* [94], *Sardar Begum v. Muhammad Said*[108], *Lachman v. Murarilal and Others* [38], *Bhagwan Das and Another v. Darkhan and Another* [109], *Arjan Singh and Another v. Bachan Singh and Another* [110], *Motichand v. Ant Ram* [39].

The registered attorney has made no explanation for his absence in this case. Mr. Wettasinghe seemed to suggest that there was no default on the part of the registered attorney in this case which he was obliged to explain. Mr. Wettasinghe, at page 5 of his written submissions dated 11th December, 1991, stated as follows:

> "In the case of *Gianchand v. Hyder Ali* [2], senior counsel was alive, and although he offered an explanation for the default that was acceptable to court, the appeal was not reinstated, since court held that there was an additional default which had not been purged. Court held that junior counsel had a duty to be present in court in the absence of the senior, and no duty was cast on the instructing attorney. The recent fusion of the two branches of the profession does not alter this situation, since the fusion while effecting a single nomenclature, "attorney-at-law", left the dichotomy of functions intact".

Admittedly, although all lawyers in Sri Lanka are now known as attorneys-at-law, the old distinction between advocates and proctors having been abolished (see sections 33, 34 and 36 of the Administration of Justice Law No. 44 of 1973), yet some of them choose to practise exclusively as counsel, while others choose to practise exclusively as instructing attorneys. And a third group engages in a mixed practice. However, that does not mean that a registered attorney can adduce, as a sufficient cause for his absence on the day appointed for the hearing of the matter in respect of which he has been appointed, the fact that he is an "instructing attorney" who does not usually appear in court. There are circumstances in which he might adduce the explanation that, although he was the

registered attorney in the case, yet, because he had appointed counsel, he, the registered attorney, should not be called upon to explain his absence. That is another matter which I shall deal with in due course. But for the present I must say this: Even where a formal, legal distinction between the two branches of the profession exists, if the lawyer concerned belonging to what is regarded as the "instructing" branch (solicitors/proctors), nevertheless has a right of audience before the court or tribunal concerned, he must appear. If he does not do so, without sufficient cause, he is guilty of negligence. (See *Swannel v. Ellis*[111]. Cf. *Courtney v. Stock* [112]). All attorneys-at-law in Sri Lanka, whether they **choose** to appear as counsel or not, have a **right** of audience in every court of law in the Republic. (Cf. section 34(1) of the Administration of Justice Law No. 44 of 1973). Mr. Matthew not only had the right to appear in terms of the law, he was expressly empowered by the proxy given to him by the petitioners to appear in the Court of Appeal on their behalf. He was also obliged by the Supreme Court (Conduct and Eliquette of Attorney-at-Law) Rules, 1988 (Gazette Extraordinary of 7th December 1988) to appear in the case; Rule 16 provides as follows:

> "Where the services of an Attorney-at-Law have been retained in any proceedings in any Court, Tribunal or other institution established for the Administration Justice, it shall be the duty of such Attorney-at-Law to appear at such proceeding, unless prevented by circumstances beyond his control".

Where, an attorney-at-law holding a proxy to appear for a client is of the view that he is unable for any reason to appear for his client at the hearing, he is empowered by the proxy to "appoint" one or more attorney or attorneys-at-law or counsel to represent him in court. (Although the prescribed form of the proxy (Form 7 of the First Schedule of the Civil Procedure Code) empowers him to appoint "one or more attorney or attorneys or counsel", this means that he may appoint one or more attorneys as **counsel.** He cannot appoint another registered attorney. Although the client may appoint several attorneys (e.g. partners or assistants) through the same proxy (e.g. see *The Times of Ceylon v. Low* [113], there can only be one proxy on record at a time. See *Silva v. Cumaratunga* [114]. Another registered attorney, however, may be appointed in appeal. (See *Gunasekera v.*

de Zoysa [115]). A registered attorney may want to exercise his power to appoint counsel for one or more reasons. It may be that other engagements prevent him from appearing. It may be that, being a case of some difficulty, he feels obliged, as a duty to court, to retain a leader at the Bar to assist the court. (See the observations of Sargant, J. in *In re Hawkins, White v. White* [116]). Or he may feel that the matter is beyond his capacity and his experience, and, therefore, acting as he is expected to do in the best interests of his client, it is necessary to retain another attorney. (Indeed, even in the case of counsel, if he receives instructions which he believes to be beyond his experience or capacity, he should so inform the registered attorney, indicating that in the client's interest the registered attorney might think it right to instruct another counsel. See Halsbury, Vol. III para, 1138). Whatever the reason may be that makes it impossible or undesirable for the registered attorney to appear personally, if he decides not to appear personally, then he is obliged to "appoint" another attorney to appear as counsel, for otherwise he would be failing in the duty undertaken by him when he accepted the proxy "to do and perform all such acts, matters and things as may be necessary". If he was not going to personally appear, it was "necessary" for him to appoint another attorney to do so, for otherwise, as it happened in this case, there would be no appearance for the clients whose right to be heard could not, therefore be exercised. If he was not going to appear personally, and neglected, without reasonable excuse, to appoint another attorney to appear, the registered attorney would be guilty of negligence. (Cf. *De Roufigny v. Peale* [117], *Hawkings v. Harwood* [118], cf. also *Townley v. Jones* [119], *Mainz v. Charles and James Dodd* [120] (1978) Sol. Jo. 645 – cases of failure to instruct counsel).

I am unable to accept Mr. Wettasinghe's submission that once Mr. Matthew, the registered attorney, had informed his clients that counsel had died, then his duties were at an end and that it was for the clients to regain another counsel. The clients may themselves have chosen counsel. Mr. Matthew may, of course, have consulted the petitioners as to who should be appointed. Being an attorney himself, and, therefore, acquainted with the available expertise in the profession, he might have advised his lay clients as to who might best serve their interests. (However, perhaps, **counsel** should not recommend another attorney as his leader or junior unless his

opinion has been sought. See Halsbury, Vol. III para 1129 at p. 613; But counsel may, I think, hand over a matter to a "devil", although it should, perhaps, be with the express or implied approval or ratification of the registered attorney. Cf. Halsbury, Vol. III para. 1138 note 12 at p. 621). However, it was Mr. Matthew's right to appoint counsel. I have already explained why it was his right: Once he was appointed, the clients must act through him in all matters except those they were required by the court or by law to do personally. The retention of counsel is not a matter required by law or by the court. It is, like all other matters not required by law or by the court to be done by the parties personally or by their agent, a matter for the registered attorney. The ultimate **choice** of who should be retained as counsel is with the client (*In Re Harrison* [121]). However, the formal right of retention belongs to the registered attorney. he may exercise that right by engaging the services of counsel himself or by acquiescing in a selection made by the client. If he disagrees with his client's selection, he must move to have the proxy revoked and drop out of the case if the difference of opinion leads to a loss of confidence. (Cf. Rule 20 of the Rules of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law). But the right of retaining counsel remains that of the registered attorney.

Rule 29 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) states as follows:

> A 'Retainer' is an engagement of an Attorney-at-Law by a client to appear for him in any litigation in which he may at that time be involved subject to the payment of his fees and subject to such conditions as the Attorney-at-Law may lay down.

The word "client" here does not necessarily mean litigant. A "lay client", as Basnayake, CJ in *Mohideen Ali (supra)* at 459 described the litigant, may retain a registered attorney. However when counsel is retained, he is engaged by counsel's professional client – the registered attorney. The word "client" in Rule 29, therefore, causes no difficulties in holding that counsel must be retained by a registered attorney.

Indeed, no counsel, even if one had been engaged by the parties, could have **appeared** for the petitioners, unless he had been

Instructed by the registered attorney. A party who has a duly appointed registered attorney on record may only appear through that attorney or by an attorney appointed by the registered to act as counsel. Where there is a registered attorney on record, the access of any other attorney to court to appear as counsel, in respect of the matter with regard to which the registered attorney has been appointed, can only be through the agency of the registered attorney. Section 24 of the Civil Procedure Code empowers the party or his agent or his duly appointed attorney to appear. In terms of his proxy the duly appointed attorney, viz., the registered attorney, may appoint counsel to appear. When counsel appears, in terms of the proviso to section 24, he "represents the registered attorney in court." This, in my view, is the effect, of section 24 read with section 27, section 5 (*s.v.* "counsel", "registered attorney"), and Form 7 of the First Schedule, of the Civil Procedure Code.

In *Mohideen Ali v. Hassim* (*supra*) Sansoni, J. (as he then was) at p. 460 stated as follows:

> "I cannot accept the interpretation which Mr. H. V. Perera seeks to give to section 24 of the Code, which says that an advocate instructed by a proctor "for this purpose" represents the proctor in court. I find it impossible to say what the words "for this purpose" mean in the context. I think this sentence in the section was only intended to say that the advocate and not the proctor should conduct the case of his client in Court. I do not accept the proposition that the advocate, by reason of this section is merely the agent of the proctor who has retained him. The limitation which Mr. Perera seeks to impose on an advocate's authority is something quite revolutionary, and it is opposed to a long line of decisions in which the powers of counsel have been considered and laid down".

I would respectfully agree that counsel would gain full control if he is retained and instructed. The "long line of decisions", some of which his Lordship cited, related to the powers of counsel who had been retained and instructed. Sansoni, J. at p. 461, accepted the position that the powers of counsel are derived from the fact that counsel has been "retained and briefed by a proctor". (Cf. also *Ratwatte v.*

Nugawela [122], *Punchibanda v. E. M. Punchi Banda and Others* [123]. I agree with his Lordship that counsel is not the "mouthpiece either of his client or of his proctor", but with great respect, counsel in a contentious civil matter may in court open his mouth at all only if the registered attorney has enabled him to do so by instructing him. That is what appointment in terms of the proxy entails.

As far as counsel, is concerned, his appointment, unlike that of the registered attorney, does not depend on a formal, document of appointment. Although in *Sohambal v. Devachand* [45] Modi, J said that

> ... a party when he has engaged counsel by a proper writing and has briefed him for the case, the latter is perfectly competent in law to represent the party in court and act and plead on his behalf and the personal appearance of the party is not necessary and cannot be insisted upon unless by virtue of a specific provision of law the court calls upon the party to appear personally ...

yet, according to our law, there is no document which counsel – senor or junior – is required to produce empowering him to act (see section 27(3) of the Civil Procedure Code). In reading the Indian decisions, therefore, the dicta in some cases referring to the need for counsel to withdraw from the proceedings in order to create a situation of default, must be understood in the light of the formal appointment of the counsel in those cases in writing.

Important consequences flow from the prescribed, and traditional way in which the services of counsel come to be engaged through the intervention of a registered attorney. To accept Mr. Wettasinghe's views on the question of who should retain and instruct counsel would disturb foundations upon which other principles rest. There are, for instance, questions relating to counsel's freedom from liability for negligence or breach of contract, as well as questions relating to the recovery of his fees that depend upon the way in which counsel"s services are engaged. The relation of counsel and client, brought about by the interposition of the registered attorney, renders them mutually incapable of making any contract of hiring and service concerning advocacy in litigation. (See Halsbury Vol III paras. 1199,

1138). There being no contractual obligation between counsel and either the registered attorney or lay client established by the appointment of counsel by the registered attorney, counsel cannot recover his fees from either the registered attorney or from the lay client by any legal process. (See Halsbury Vol. III paras. 1201, 1138 and 1198. In the case of *Thornhill v. Evans* [124], it was said that counsel's remuneration was an honorarium rather than **merces.** That is an additional reason. (See also *Moonesinghe v. Pereira et al.* [125], but cf. section 34(3) of the Administration of Justice Law No. 44 of 1973). The registered attorney, however, subject to his bringing the action in time, may sue the party for the fees contracted to be paid to him (See *Weerasuriya v. de Silva* [126], *Karunaratne v. Velaiden* [127]). Nor can the lay client proceed to recover damages for breach of contract if counsel failed to attend court or if he was negligent in the conduct of the case. (See Halsbury Vol. III paras 1194 and 1198; *Robertson v. Macdonough* [128], *Mulligan v. M'Donagh*[103]. But cf. section 34(3) of the Administration of Justice Law No. 44 of 1973).

Indeed, it would be in violation of Rule 4 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 (Gazette Extraordinary 535/7 of 7.12.1988) for any attorney who was not instructed by the registered attorney to appear in court. That Rule states as follows:

> "Where in any legal matter or proceeding the appearance of an Attorney-at-Law has been registered, no other Attorney-at-Law may appear in the said matter or proceedings unless he is so instructed by the said registered Attorney-at-Law. Provided, however, any Attorney-at-Law may be assigned to or appointed by court to appear in such legal matter or proceeding".

I take it that the phrase "where in any legal matter or proceeding the appearance of an Attorney-at-Law has been registered" means "where in any legal matter or proceeding the proxy of a registered attorney has been filed of record". What else can it possibly mean?

There are also ethical considerations: In England, although there is no rule preventing a litigant from instructing counsel directly, or preventing counsel so instructed from appearing on behalf of a

litigant, yet, as Lord Campbell CJ pointed out in *Doe d' Bennett v. Hale* [129], it is "the almost uniform usage" that has prevailed for a very long time in England, that it is clearly against the rules of the profession for counsel to accept a brief in a civil suit from anyone but a solicitor. To see or advise a client or accept a brief to appear as an advocate on behalf of a client in any contentious business without the intervention of a solicitor may result in disbarment. (See Halsbury, 1973 4 Ed. Vol. 3 para 1120. Even with regard to non-contentious business, generally, the intervention of a solicitor is considered desirable – Halsbury, op. cit. para. 1121).

In Sri Lanka, it is more than a matter of ethics: In terms of the Civil Procedure Code and the Rules of the Supreme Court made under the powers vested in the Court by Article 136(1) (g) of the Constitution, it is a registered attorney alone who can appear unless he has instructed counsel.

Whether, on the one hand, a person is a registered attorney appointed by the party, or on the other, he is counsel appointed by the registered attorney, also has a bearing on the determination of the question whether there was a default in appearance. When a registered attorney whose proxy is on record is present in court, but has no instructions, he nevertheless **appears** and there is no default in appearance. (See *Gargial v. Somasunderam Chetty* [18], *Scharenguivel v. Orr* [56] *Canon v. Telesinghe* [88], *Andiappa Chettiar v. Sanmugam Chettiar* [69], *Chelliah Pillai v. Mutuvelu* [91], *Motha v. Fernando* [90]). There may be circumstances in which the presence of a registered attorney may not be an appearance: see *Senanayake v. Cooray* [130], *Kandappa v. Marimuttu* [131], *Perera v. Gunatilake* [132]. See also the comments of Lyall Grant and Garvin JJ on these cases in *Scharenguivel* (*supra*) at p. 305). The practice of withdrawing from a case, alleging lack of instructions, was strongly condemned by Sansoni, J. in *Syadu Varusai v. Weerasekera* [133]. Sansoni J. said at p. 92 that the only instance where a withdrawal by counsel is permissible "and that too with the leave of the court" is where counsel has been retained only for the limited purpose of making an application for a postponement and such application is refused by court.

In the case before Sansoni, J. one of the parties, a material witness, was supposed to have been ill in India. There was every reason to suspect, Sansoni, J. said, at p. 90, that that party, despite the medical certificate produced, was not in fact ill. When a postponement was refused, counsel said he had no instructions and withdrew. It was a matter that had been decided after trial and the case had been sent back by the Supreme Court to enable each party to put in a specified document and to lead any fresh evidence if they wished to. The party who was absent had already given evidence at the first trial. No application was made that such evidence be considered. The document in question had not been tendered. Counsel did not cross-examine the witness of the other party who was called to give evidence. Sansoni J., deplored the practice of counsel and proctors withdrawing from actions. However, his Lordship, accepting that where there are no instructions, counsel cannot go on held that "withdrawal" should be with leave of court. At p. 92 his Lordship said that if the parties' proctor failed to instruct counsel adequately on the trial date in question, "he should have been prepared to conduct the case himself when the judge ordered that the trial should proceed. His failure to do so cannot place his clients in a better position as regards the plaintiffs."

When counsel pleaded he had "no instructions", I do not think that, except as a matter of courtesy, there was, with great respect, a need to obtain the permission of the court to withdraw. When counsel is without instructions, his existence as counsel comes to an end. Section 5 of the Civil Procedure Code defines counsel as "an attorney-at-law instructed by a registered attorney." His physical presence is not an appearance.

Section 24 of the Civil Procedure Code contemplates the appearance of counsel "instructed by a registered attorney". Unless counsel is instructed, he cannot appear as counsel in the case. (See *Satisch Chandra Mukherjee v. Apara Prasad Mukherjee* [134]. *Esmail Ebrahim v. Haji Jan Jan Mohomed* [92], *Hinga Bibie v. Munana Bibie* [135], *Charu Chandra Ghose v. Chandi Charu Roy Chowdhury* [24], *Rambhanjan Singh v. Pashupat Rai* [136], *Manickam Pillai v. Mahudun Bathummal* [137], *Maung Pway v. Saya Pe* [48], *Baslingappa Kushappa v.*

Shidramappa Iyer[138]. See also *Biswanath Dey v. Kishori M. Pal*[4], *Sohambal v. Devchand*[45].

If Mrs. Dissanayake had merely come into court to apply for a postponement, without any other instructions, she was not "appearing" for the petitioners. Had the court refused her application, being without instructions in the case, she might have been constrained to say that she had no further instructions. There would then have been a default in appearance, despite her physical presence. (E.g. see *Soonderlal v. Goorprasad*[139], *Esmail Ebrahim v. Haji Jan Mohamed*[92], *Hinga Bibie v. Munna Bibie*[135], *Satish Chandra Mukherjee v. Apara Pershad Mukherjee* (*supra*), *Maung Pway and Another v. Saya Pe* (*supra*), *Manikampillai v. Mahudum Bathummal and Other* (*supra*). See also *Biswanath Dey v. Kishori M. Pal*[4], *Habibu Lebbe v. Punchi Etana*[140]. In order to "appear" counsel must be retained and instructed and not merely be physically present in court. In *Satish Chand Mukherjee* (*supra*) at p. 336 Mukherjee, J. said:

> The principle applies quite as much to a plaintiff as to a defendant and when either party to litigation is represented by a pleader it is upon the assumption that the pleader is duly instructed and able to answer all questions relating to the suit.
>
> If therefore mere physical appointment of the pleader was treated as appointment within the meaning of the Code the policy of the law and the ends of justice would both be defeated.

In *Basalingappa v. Shidramappa* (*supra*) Divatia J. at p. 323 said that " ... it is difficult to regard the mere presence of a pleader in court as equivalent to his appearance." His Lordship, at p. 322 fin. 323 said:

> The question as to whether the defendant's pleader can be said to have appeared depends not upon his mere presence in court but whether he was duly instructed in the matter before the court ... if the pleader is present in court on any day of

hearing but has no instructions as to how to proceed with the case, there is no appearance of the defendant.

In *Sohambal v. Devachand* (*supra*) Modi, J. at p. 15 para 23 said as follows:

> In this state of the law, we are bound to hold that generally speaking the presence of counsel for a party is equivalent to that of the party himself according to the scheme envisaged in our Civil Procedure Code. This, to our mind, is subject to one limitation, namely, where counsel for a party pleads no instructions to court, his mere physical presence is of no avail and a default in appearance must be deemed to have been committed in such a situation.

Chief Justice Layard's dicta in ***Gargial's Case*** (*supra*) on the general inapplicability of the Indian decisions, with great respect, needs reconsideration. Having regard to the provisions of our own Civil Procedure Code, the decisions of our courts on the need for the instruction of counsel, the Rules of the Supreme Court on Conduct and Etiquette, ethical considerations and the implications for the principles regarding fees and contractual liability, one cannot but conclude that unless counsel is instructed, there can be no appearance. Whether a registered attorney appears although he has no instructions is, as we have seen, another matter.

The Court of Appeal, in the case before us, had, *inter alia*, it seems ordered reinstatement, because there was no evidence to show that a "particular junior" counsel had been appointed. With great respect, I do not think that it was the correct approach to the question whether the junior counsel in this case, were, as Mr. Withanachchi submitted, obliged to explain their absence. There may be a single counsel or several counsel in a case. The question in this case was not the number of junior counsel, but whether there were any duly appointed junior counsel at all. Had the registered attorney, in the exercise of the powers given in the proxy, taken steps to "appoint" anyone as counsel by retaining and instructing him? Had junior counsel been retained and instructed in this case?

"Retained" means engaging the services of an attorney to give his services to a client. Rule 29 of the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules states as follows:

> A "Retainer" is an engagement of an Attorney-at-Law by a client to appear for him in any litigation in which he may at that time be involved subject to the payment of his fees and subject to such conditions as the Attorney-at-Law may lay down.

Although retention usually involves the payment of a fee (indeed Halsbury Vol. III para. 1147 says that there can be no retainer without the payment of a fee), there may be circumstances when no fee is required. For instance Rule 27 of the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) states that,

> An Attorney-at-Law may in the best traditions of the profession, reduce or waive a fee on account of the poverty of, or hardship to the client or prospective client or where otherwise the client or prospective client would be effectively deprived of legal advice or representation.

Halsbury Vol. III para. 1198 note 5 says this:

> Thus a barrister may at his discretion waive his normal fee where he acts for a personal friend, a fellow barrister, a charity, or for a legally aided person ...; but a barrister should not accept a junior brief without a fee to gain experience or to assist another barrister who has asked him to appear as junior counsel without a fee.

Although the petitioners in this case stated that they paid Mr. Senanayake's fees, there is nothing to indicate that fees were paid to anyone else. If there were juniors, there was a duty on the part of the senior to ensure that they were remunerated. (See Halsbury, Vol. III paras. 1203 and 1204). There, is, however, nothing to suggest that any junior was engaged and remunerated or that the juniors had waived their fees.

Nor is there evidence to show that counsel were instructed. Sansoni, J., as he then was, in *Mohideen Ali v. Hassim* [83], referred to counsel being "retained and briefed" in order to pass on to him the control of a case in court. In England, counsel must be given a brief, prepared in a specified way, containing all the information and papers necessary for him to conduct the case. (See Halsbury Vol. III para. 1138 note 1 at p. 621). In England, merely giving a retainer to counsel confers no authority upon him. He must be given a brief. *Ahitbol v. Bendetto* [141], *Doe d Crake v. Brown* [142] , Halsbury, Vol. III para 1179). In addition, Counsel must be instructed. Halsbury (Vol. III para 1190 note 1) states as follows:

> But merely to hand a brief to counsel is not to instruct him. The solicitor himself or some competent clerk must explain the subject matter of the brief, be present in court and give any information that counsel may require. If a solicitor fails so to instruct counsel, then, though the brief has been delivered and counsel is present at the trial, the solicitor may be liable: *Hawkins v. Harwood* [118].

As Divatia, J. observed in *Basalingappa v. Shidramappa* [138], whether counsel was instructed in a case is "a question of fact". In general, counsel should be given the papers and necessary information to deal adequately with all the material questions: (See *Basalingappa, (supra)*; see also *Maung Pway v. Saya Pe* [48]). If this is done, I do not think a registered attorney is obliged to prepare a brief in any particular way or that he should ordinarily be in attendance. In any event, if counsel appears in court and states that he is instructed, the court will not inquire into his authority to appear. (See *Murphy v. Richardson* [143], *Allen v. Francis* [144], *Doe d' Bennett v. Hale* [129], Halsbury, Vol. III para. 1179).

I am of the view that there is nothing in this case to show that junior counsel had been retained and instructed.

Mr. Witanachchi submitted that it must, on the basis of *Gianchand v. Hyder Ali* (*supra*), be **assumed** that there were junior counsel because the leader, Mr. Senanayake, was a silk, and that the matter should not have been reinstated without junior counsel satisfactorily explaining their absence. In **Glanchand,** when the case was taken up for hearing in the Supreme Court, Counsel appeared for thedefendant-appellant, but, there was no appearence for the plaintiffs-respondents. After hearing the argument of counsel for the

appellant, the court reserved order, and made order allowing the appeal and dismissing the plaintiffs-respondents action with costs. Subsequently, an application was made to have the order of the court vacated and to have the matter relisted for argument. In support of the application, Queen's Counsel, who had been retained to appear for the plaintiffs-respondents, explained that his clerk had failed to notify the Registrar of the Court that he had been retained. The case had been, therefore, fixed on a date on which he was not free. Alles, J., (Weeramantry, J. agreeing), said at p. 301

> If the matter stood there, we might have been disposed to have the case listed anew for argument, particularly as Counsel for the appellant, who was the successful party at the appeal, had no objections to the appeal being re-argued. There is, however, no explanation before this Court why Junior Counsel, who must have been retained to assist learned Queen's Counsel, failed to be present in Court ... If we were to permit this application, in the absence of such an explanation, we would create an unhealthy precedent ... This is not a case in which the client's legal advisors had mistaken a date – an explanation which may amount to "sufficient cause" under section 771 of the Civil Procedure Code, but a case where Junior Counsel has not placed any explanation before Court for his failure to be present in Court on the relevant date ... There is no explanation before this Court why Counsel who has been retained as Junior to Queen's Counsel failed to appear on the due date. Consequently we hold that the plaintiffs-respondents have not satisfactorily explained to the Court why Counsel, who would have been retained as Junior to Queen's Counsel, was not present in Court on 6th June 1970 and we are, therefore, constrained to refuse this application."

It was assumed in *Gianchand* that, because the leader in the case was a silk, there would have been junior counsel. It was, with great respect, a reasonable assumption.

Ever since the first King's Counsel of the Ceylon Bar were appointed in 1903, silks had always appeared with juniors. The

English rule (e.g. see Halsbury, (1973 Ed. J., Vol. 3 para. 1129) that a silk ought not to appear as an advocate in any court of law without a junior had been consistently followed. At the time of the decision in ***Gianchand,*** it was, therefore, proper to infer that the leader in that case, a Queen's Counsel, would have had juniors. The last Queen's Counsel were appointed in 1968. Ceylon became the Republic of Sri Lanka in terms of a Constitution adopted and enacted on 22nd May, 1972, and so, there could be no Queen's Counsel after that, but we do have a division of the Bar into two ranks: those who wear silk gowns and sit "within the bar" at the ceremonial sittings of the Supreme Court wearing full-bottomed wigs, with bands on a wing collar and who are regarded as leading counsel; and other attorneys who are not of that rank who sit bare-headed outside the Bar at ceremonial sittings, wear stuff gowns, and black ties and are regarded as juniors. On 21st July 1977, the Constitution of the Democratic Socialist Republic of Sri Lanka was enacted, and in terms of the Supreme Court (Senior Attorneys-at-Law) Rules made by the Supreme Court under Article 136 (g) of the 1977 Constitution, published in Gazette Extraordinary No. 115/9 of November 19, 1980, eleven leaders, including Mr. Nimal Senanayake, were appointed Senior Attorneys-at-Law.

Rule 8 of the Supreme Court (Senior Attorneys-at-Law) Rules provided as follows:

> A Senior Attorney-at-Law shall not appear in a Court, give opinions or settle pleadings except with the assistance of an Attorney-at-Law who is not a Senior Attorney and in no circumstances act without the instructions of another Attorney.

Subsequently, in 1984, in terms of the Eighth Amendment to the Constitution, leaders of the Bar were designated as "President's Counsel. On 13th January, 1990, at a meeting of the general body of silks, it was decided as follows:

> "A President's Counsel should always appear in Civil cases with Junior Counsel and an instructing Attorney-at-Law in –
>
> (i) The Supreme Court

(ii) The Court of Appeal

.....

.....

....."

There are several good reasons why leaders must appear with juniors; but I would focus attention on one of them that transcends the interests of the profession. The legal profession is useful. It is much more than that. It is necessary. It is essential for the maintenance of the rule of law, and the maintenance of law and order. It is of paramount importance to the organized functioning of society. The community must, therefore, always have competent lawyers. The traditional, and it has always been regarded as the best, way of ensuring that succeeding generations of attorneys-at-law will continue to adequately serve the interests of the Republic and the community, is to insist that the leaders at the Bar should appear with juniors. In this connection, I should like to refer to an old case: *Cooke v. Turner* [145], which was decided on 23rd May, 1844. It is reported in 12 Simons 649 and at p. 1282 of Vol. LIX of the English Reports published in 1906. In that case, when the question of costs arose, the Taxing Master thought that the case was not of sufficient importance to employ two counsel to oppose it. The matter came up before the Vice-Chancellor. Mr. Bethell opposed the petition. The case is reported as follows:

> THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the fees paid to the junior counsel, my opinion is that there has been a miscarriage; and, though the sums are small, yet the principle is very important.
>
> I remember perfectly well, many years ago, observing Sir Anthony Hart refuse to take a brief merely because there was no junior with him.
>
> (Mr. Bethell. That is the rule in causes now; no one of us takes a brief in any case without a junior.]
>
> And I remember that Lord Eldon said in the House of Lords (when there was some objection made to the fact of two counsel appearing) that it was of extreme importance to the

> public at large that there should be a successive body of gentlemen brought up, who would understand their profession by knowing it from the beginning; and, in my opinion, it would be most injurious, not merely to the gentlemen who compose the Bar at the particular time, but to the public at large, if the supply of able men were to be cut off by preventing the younger branches from learning their profession. The consequence of which would be that it would be a matter of chance whether, when the gentlemen who are within the bar drop off, their places would be supplied by persons of sufficient learning and ability. I shall, therefore, refer it back to the Master to review his taxation...

Although it has always been, and is, understandably, a requirement in Sri Lanka that a silk must be assisted by junior counsel, the journal entries in this case show that Mr. Senanayake was not always so assisted. The **journal** entries also show that when junior counsel were supposed to have appeared, they were not the same persons who had appeared with Mr. Senanayake on other occasions. According to the **journal** in the case, when Mr. Senanayake appeared for the petitioners, there were no juniors with him on 22nd September, 1982, 6th October, 1982, 15th July, 1983. 3rd October, 1983, 2nd December, 1983, 15th February, 1983, and on 22nd November, 1985. However, L. A. Samarasinghe is supposed to have appeared with him on 28th June, 1983. Kitsiri Gunaratne is supposed to have appeared with him on 18th February, 1986. Although the **journal** records the appearance of Mr. Senanayake with Mrs. A. B. Dissanayake on 25th May, 1989, it seems that, since Mrs. Dissanayake successfully moved that the matter be postponed because Mr. Senanayake was out of the country, Mr. Senanayake did not appear, but that Mrs. Dissanayake appeared for the purpose of obtaining a postponement. Perhaps Garvin, J., in his great wisdom anticipated difficulties of this sort and, therefore, laid it down that appearances should be recorded by the judge himself and not by his clerk. (See *Tillekeratne v. Keethiratne* [146]).

Gianchand, I think, assumed, not only that there were junior counsel, but also that they had been retained and instructed. In the case before us, such an inference would be highly artificial, for, as we

have seen, Mr. Senanayake had more often than not appeared in this case without juniors, and when juniors were present in court, there was nothing to show that they had been retained and instructed. Mr. Wettasinghe stated that there were no "particular" junior counsel. I think he meant that there were no juniors who had been retained and instructed. I am reluctant to infer that there would have been junior counsel in the case. If they were not retained and instructed, Samarasinghe, Guneratne and Dissanayake were not junior counsel in this case, they could not have "appeared", and they were, therefore, under no obligation to explain their absence in the reinstatement matter.

Is it sufficient compliance with the rule requiring a silk to appear assisted by a junior, for a silk to appear with a junior who has not been retained and instructed? This is a question which the Bar Association might wish to consider.

I am of the view that it was the duty, in terms of the proxy, and the right, in terms of the law and usage, of the registered attorney to retain and instruct counsel since he was not going to exercise his right to personally appear. The registered attorney failed to do so. He has not explained why he did not appoint counsel. If, as Mr. Wettasinghe suggested in his written submissions dated 11th December, 1991, the Court of Appeal shared his view that it was the clients' duty to appoint counsel, then with great respect, I must say that the court was mistaken. And although Mr. Senanayake was a silk, I cannot in the circumstances of this case infer that there were juniors.

According to Mr. Wettasinghe, in his written submissions of 11th December, 1991, the Court of Appeal had ordered reinstatement, *inter alia*, because the court was of the view that in the Court of Appeal, an instructing attorney cannot, "in accordance with prevailing practice be held responsible for keeping a track of the listing of cases for hearing."

In supporting that view, Mr. Wettasinghe submitted that, although, in the case of courts of first instance, where "instructing attorneys" attend court, and cases are "fixed by date" which are "noted down",

"the responsibility can and must be cast and is exclusively cast on instructing attorneys", yet, in relation to appeals, where in "the majority", instructing attorneys-at-law are from "the outstations", the situation is different. There, he said, "cases come on the list at the convenience of counsel who give their free dates, and whose clerks attend the list meetings."

I am of the view that Mr. Wettasinghe misinterpreted the scene. Attorneys practising in, what he chose to describe as, the "outstations", as indeed, I think all over the Republic generally, choose to engage in a mixed practice, functioning both as advocates and as instructing attorneys. Since they function as counsel, whether as the registered attorney in a particular case or as counsel retained by a registered attorney, they attend court and note down the dates for appearance. It is a question of what they **do,** rather than in which city, town or village they practise that is relevant. There may be more attorneys in Colombo who choose to practice exclusively as counsel than at any other Bar. But that is another matter.

In arranging its programme of work it is only reasonable, as far as is consistent with the proper disposal of its work, that matters should be fixed for hearing by the court on dates suitable to counsel. I have already commented on this matter. However, that does not, in my opinion, discharge a registered attorney from his duty of ensuring that his client's case is heard, either personally through himself, the registered attorney, or through another attorney. (Cf. *Gangabhai v. Ghansamba*[64], *Saif Ali v. Chiragh Ali Shah*[10]). If he has, in the exercise of his powers, appointed another attorney to appear, then, I think such other attorney should appear at the hearing and conduct the case as counsel. (Cf. section 24 of the Civil Procedure Code; cf. also per Sansoni, J. in *Mohideen Ali v. Hassin* (*supra*) at p. 460). The responsibility of "keeping track" of the matter is then on the counsel retained, since it is the duty of that attorney to appear, and since the date of hearing would, ordinarily be fixed to suit **his** convenience. If counsel retained and instructed by the registered attorney fails to appear on the appointed date, it is for counsel, and not the registered attorney, to explain his absence in seeking reinstatement. Once the registered attorney has done his duty of appointing counsel, i.e., retaining and instructing him, counsel assumes full control of the

case, and becomes as Esher, MR. observed in *Mathews v. Munster*[147], followed with approval by Sansoni, J. (as he then was) in *Mohideen Ali* (*supra*) at p. 461, the "conductor and regulator of the whole thing", (Cf. also *Rondel v. Worsley* (*supra*) especially at p. 998 per Salmon, LJ., and *Punchibanda v. E. M. Punchibanda and Others*[123]. However, if there are several counsel, and there is no silk, it is the senior of the counsel briefed together, who is in that position, the juniors not being permitted to pursue a different argument from that taken by the leader (*Pickering v. Dawson* [148]. If there is no counsel, the registered attorney is in full control – cf. *Fernando v. Singoris Appu* [149], subject to his instructions of *Narayan Chetty v. Azeez* [150], *Orr v. Gunatilake* [151]. When the registered attorney has retained and instructed counsel, then he is, generally, (questions of prior negligence of the instructing attorney and so on apart – e.g. see *Cook v. S* [152] not liable to his client for the absence, neglect or want of attention of counsel whom he has appointed (*Lowry v. Guilford* [153], Halsbury, Vol III para. 12190). That is why in *Gianchand* (*supra*) counsel, but not the instructing lawyer, were required to explain their absence. It was not, as Mr. Wettasinghe supposed, because "instructing attorneys" had no responsibilities with regard to appearances in **all** circumstances.

Having said that, I must add this: Counsel accept their briefs on the understanding that they may be prevented from attending at court. If counsel accepts a brief in a cause and receives payment of his fees, but does not attend court, no action can be brought against him to recover either the fees or damages for non-attendance: (*Robertson v. Macdonough* [126], *Mulligan v. M'Donagh* [103], Halsbury, Vol. III para 1194). However, counsel who has been retained and instructed is under an obligation to show sufficient cause for his absence if the reinstatement of a matter is sought. If, counsel is unable to appear, he should return the brief and inform the registered attorney of that fact, giving sufficient time for the registered attorney to engage another counsel who could in that time master the brief. (Cf. Halsbury, Vol. III para. 1138).

If, as in this case, the registered attorney had not retained and instructed another attorney as counsel, then it was the duty of the

registered attorney to keep a track of the dates fixed, for then it was he, and he alone who was entitled in terms of the law, and obliged in terms of the proxy, to appear and conduct the case. (Cf. per Sansoni J. in *Syadu Varusai's* case (*supra*) at p. 92).

In the light of what I have said, the problem of appeals from what Mr. Wettasinghe referred to as "outstations" should cause no difficulty to registered attorneys who retain counsel but do not themselves practice in Colombo, for it is counsel's duty to keep a track of dates and appear. However, out of an abundance of caution, perhaps, following the example of solicitors in England, practising in the country, who do work in London, should an outstation attorney employ a metropolitan attorney as his agent when a matter is pending before the Court of Appeal (which ordinarily holds its sittings in Colombo – see Article 146(1) of the Constitution); or the Supreme Court (which ordinarily holds its sittings in Colombo – see Article 132 of the Constitution)? In this connection it is of interest to note that Rule 6 of the High Court (Admiralty) Jurisdiction Rules 1991, published in Gazette Extraordinary No. 672/7 of 24th July 1991, provides as follows:

> The writ of summons shall be indorsed with the name and address of the plaintiff, and with an address to be called an address for service, not more than five kilometres from the registry, at which it shall be sufficient to leave all documents required to be served upon him.

The address for service of the registered attorney, Mr. Mathew, given in the proxy dated 16th September, 1982, and filed in the Court of Appeal was a metropolitan one, viz. 58/2 Ward Place, Colombo 7. Even assuming, as Mr. Wettasinghe suggests, that this was the address, not of Mr. Saliya Mathew, but rather of counsel, Mr. Senanayake, Mr. Mathew appears to be an attorney-at-law practising in Colombo, and therefore, a gentleman who should have had no difficulty in attending the Court of Appeal. After emerging from the debris of the "collapsed" chambers of Mr. Senanayake, Mr. Mathew, it seems, continued to function in Colombo. The proxy given to him by the respondents on 5th June, 1991 for the purposes before us in the

Supreme Court, long after Mr. Senanayake's death and the alleged "collapse" of his chambers, gives 116/10, Rosmead Place, Colombo 7, as the address for service.

Mr. Wettasinghe in his written submissions to this Court, dated 11th December, 1991, offered the following explanation:

> [The] Registered Attorney's conduct in this case should also be viewed in the context of Senior Counsel to whose chambers he was attached. The instructing attorney's address given in the proxy is the address of senior counsel's chambers. This is not a case where the client came to the instructing attorney and the instructing attorney in turn retained Senior counsel. Although there is no affidavit evidence about the collapse of the chambers immediately following Mr. Senanayake's death, it would not be unreasonable for Court to draw an inference as to the extent of confusion that would have followed the death of a Senior Counsel as busy as Mr. Senanayake."

Although the petition praying for the writ of *certiorari* dated 16th September, 1982, was filled by the petitioners appearing by their duly registered attorney, Mr. Saliya Mathew, and all steps in the Court of Appeal, and in this Court (under the authority of another proxy executed by the petitioners in favour of Mr. Saliya Mathew on 16th June, 1991 authorizing him to act on their behalf in the Supreme Court) had been taken by Mr. Mathew, the petitioners made no reference to him in their application for relisting, or in the appeal to the Supreme Court or in any of their affidavits. In paragraph 2 of their petition to the Court of Appeal for reinstatement dated 19th September, 1989, the petitioners stated that **they** retained the services of Mr. Nimal Senanayake and "paid his fees in full."

Is it proper for counsel to have chambers in the office of an instructing attorney or to share chambers with an instructing attorney? can attorneys who choose to work exclusively as counsel practise in partnership or even in an arrangement resembling a partnership? (See Halsbury Vol. III para 1117). It is a long established practice in this country that a private residence may be used by a particular attorney who has chosen to work exclusively as counsel for

his professional work, and that juniors may regularly work there as "devils"; but could the private residence of an attorney, or a part of it, constitute **chambers,** in the sense of an office in which several attorneys practise? (Cf. Halsbury Vol. III para. 1119). Is it proper for counsel to nominate a registered attorney, so as to enable counsel to appear in terms of section 24 read with section 5 of the Civil Procedure Code? What are the implications, in the light of the wide authority given to the registered attorney in terms of the prescribed form of proxy in the Civil Procedure Code with regard to the right to appoint and change attorneys and counsel? If counsel may nominate his registered attorney to regularize matters, is it proper for counsel to nominate an attorney from his own chambers as a registered attorney? These, and others I have referred to elsewhere in my judgment, are issues of greater consequence than would seem apparent from the facts of this case from which they have emerged. They are matters, in the words of Lord Morris of Borth-Y-Gest in *Rondel v. Worsley* [67], that ought to be "decided without regard to the merits or demerits or the tensions of any particular case". The President of the Bar Association of Sri Lanka, Mr. Ranjith Abeysuriya, P.C., happened to be in court in connection with some other matter, when this case was being argued, and I availed myself of the opportunity to draw his attention to the need for the Association to consider and resolve, as soon as possible, these and other matters of importance to practitioners that were being directly or indirectly raised in the case before us.

Finally, both Mr. Witanachchi and Wettasinghe submitted that the question of reinstatement was a mater of discretion. I agree. I also agree with Mr. Wettasinghe that, in matters of this sort, the exercise of discretion by a lower court should not be interfered with, unless the decision was capricious or made in disregard of legal principles. (See *Shamdasani and Others v. Central Bank of India* [3], *Sohambal and Another v. Devchand* [45]). As I have said before, the reasons for the decision of the Court of Appeal, are far from clear.

I have assumed, as Mr. Wettasinghe suggested, that all the matters "itemized" by the Court of Appeal "entered into the mind of the learned judge" who decided this matter. If they **were** the matters that **did** enter into his Lordship's mind in ordering reinstatement, then,

for the reason I have explained, the Court of Appeal, with great respect, was in error in ordering reinstatement in its judgment dated 28th September, 1990.

Therefore, I allow the appeal and make order setting aside the order of the Court of Appeal dated 28th September 1990 and affirm the decision of the Court of Appeal dated 16th May, 1989. I further make order that the respondents shall pay costs fixed at Rs. 10,500.

BANDARANAYAKE, J. – I agree.

DHEERARATNE, J. – I agree.

Appeal allowed.