

JEEVANI INVESTMENTS (PVT) LTD.
v
WIJESENA PERERA

SUPREME COURT
JAYASINGHE, J.
AMARATUNGA, J.
MARSOOF, PC, J.
SC 108/2006
SC SPL LA 240/2005
CA 886/94 (F)
DC COLOMBO 15513/L
JULY 19, 2008

Civil Procedure Code – section 24, section 27(1), section 27(2) – Administration of Justice Law 44 of 1973 – section 326(1) – Who could file a relisting application? – Is it only the registered attorney who has authority?

Held:

- (1) In applications commenced in the Court of Appeal such as Relisting applications, applications for Leave to appeal notwithstanding lapse of time, Leave to appeal applications, Revision applications, a party is entitled to appoint a registered attorney other than the registered attorney in the original court – on record.

Held further:

- (2) A final appeal commences with the filing of a notice of appeal and the petition of appeal in the original court by the registered attorney on record, appeal proceedings in the Court of Appeal are a continuation of the proceeding commenced in the original court.

APPEAL from a judgment of the Court of Appeal.

Cases referred to:

- (1) *Letchemanan v Christian* 4 NLR 323.
- (2) *Seelawathie v Jayasinghe* 1985 2 Sri LR 286.
- (3) *Romanis v Revena* (1881) 4 SCC 61.
- (4) *Wasu v Helanahamy* (1881) 4 SCC 48.
- (5) *Fernando v Fernando* 1997 3 SLR 1.
- (6) *Saravanapavan v Kandasamydurai* 1984 1 Sri LR 268.
- (7) *Bank of Ceylon v Ramasamy* CALA 79/80 DC Chavakachcheri 5447 CAM 24.3.81.
- (8) *Gunasekera v Zoysa* 52 NLR 357.

Asoka Fernando with *Manik Gamage* for appellant.
Sanath Jayatilake for respondent.

February 28, 2008

NIHAL JAYASINGHE, J.

Jeewani Investments Ltd. of Alawwa, which was the 3rd defendant in DC Colombo case No. 15513/L, being dissatisfied with the judgment of the District Court of Colombo – filed appeal No. CA 886/94(f) in the Court of Appeal. This appeal was pending in the Court of Appeal from 1994 and subsequently the 3rd defendant-appellant (hereinafter called the appellant) came to know that the Court of Appeal, on 18.11.1996 without notice to the appellant, had rejected the said appeal in terms of the Supreme Court (Court of Appeal – Appellate Procedure Copies of Records) Rules of 1978 for the appellants failure to deposit fees for the preparation of the copies of the record. The appellant thereafter filed an application dated 19.11.2003 in the Court of Appeal moving to have the order of 18.11.1996 set aside and for an order for re-listing the appeal for hearing.

The 2nd defendant-respondent objected to the appellant's re-listing application on the ground that the application has been filed by an attorney-at-law other than the registered attorney-at-law on record for the appellant's appeal. The appellant's registered attorney-at-law in D.C. Colombo case No. 15513/L was Wijesinghe Associates. The relisting application dated 19.11.2003 has been filed by attorney-at-law K.D. Epiawela, upto the that time, the proxy granted by the appellant to Wijesinghe Associates remained unrevoked in the District Court record. This is the undisputed factual situation.

In the Court of Appeal, the position of the appellant with regard to the preliminary objection that the re-listing application has been filed by an attorney other than the registered attorney for the appellant and as such the application was not properly constituted and bad in law, was that the re-listing application was a distinct and a separate application from the appeal of the appellant. The Court of Appeal having considered the submissions of both parties and the provisions of section 27(1) and (2) of the Civil Procedure Code and the cases of *Letchemanan v Christian*⁽¹⁾ and *Seelawathie v Jayasinghe*⁽²⁾, held that the objection taken up by the respondent that the filing of the relisting application through an attorney-at-law other than the registered attorney-at-law on record in the original court is not permissible in law and that such an application is not a proper application on which a court could act is a

valid legal objection. Accordingly the Court of Appeal rejected the appellant's relisting application.

This Court has granted special leave to appeal against the judgment of the Court of Appeal. The question to be decided in this appeal is whether an attorney-at-law who is not the registered attorney-at-law on record in the original court can file a relisting application in the Court of Appeal and whether such an application filed in that manner is a valid application in law. Both parties have made oral submissions on this question of law and also have filed written submissions.

Section 24 of the Civil Procedure Code enacts that, "Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party to the action or appeal in such court, may be made or done by the party in person or by his recognised agent or by a registered attorney duly appointed by the party or such agent to act on behalf of such party."

Section 27(1) of the Code provides that the appointment of a registered attorney to make an appearance or application, or to do any act as aforesaid, shall be in writing signed by the client and shall be filed in Court. Section 27(2) provides that such written instrument when so filed -

"shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court, or until the client dies, or until the registered attorney dies, is removed, or suspended or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client."

It is a well settled rule, as far back as from 1881 (even before the present Civil Procedure Code was enacted in 1889) that a proctor, other than the proctor on record for a party, cannot act on behalf of the party and the acts done by a proctor other than the proctor on record are invalid.

Romanis v Revena⁽³⁾, *Wasu v Helanahamy*⁽⁴⁾. Even after the enactment of the Civil Procedure Code, this rule has been consistently followed. When there is a registered attorney on record, even the party himself cannot act on his own behalf and that he must act through his registered attorney. See *Fernando v Fernando*⁽⁵⁾, and the cases cited

therein. The learned counsel for the respondent, relying on the long line of decisions referred to in his written submissions, argued that it is not open for an attorney-at-law other than the registered attorney on record to file a relisting application and that an application filed in that manner is invalid.

On the other hand, the learned counsel for the appellant argued that a relisting application is separate and distinct from an appeal which is a continuation of the action or proceedings commenced in the original court. The learned counsel contended that with the rejection of the appeal the proceedings of the case came to an end and what was left was the execution of the decree, which is a matter to be pursued in the original court. He contended that a relisting application is an incidental application, commenced in the Court of Appeal seeking the indulgence of the Court of Appeal and as such it is permissible for an attorney-at-law who is not the registered attorney on record in the original court to file such an application. In support of his contention he cited the judgment of a Divisional Bench of the Court of Appeal in *Saravanapavan v Kandasamydurai*⁽⁶⁾.

In that case, the question of law referred for the decision of the Divisional Bench was whether in a leave to appeal application filed in the Court of Appeal in terms of section 754(2) read with section 756(2) of the Civil Procedure Code, a proxy filed by an attorney-at-law who is not the petitioner appellant's attorney in the original court can be a valid proxy and as such constitute a valid leave to appeal application.

Seneviratna, J. (P/CA), (who later graced the Bench of this Court), with the agreement of the other two judges held that in a leave to appeal application which originates in the Court of Appeal the proxy can be filed either by the registered attorney in the original court or by any other attorney-at-law. The reasoning of Seneviratna, J. was that unlike a final appeal, the proceedings in a leave to appeal application originate in the Court of Appeal and as such a party can appoint a registered attorney other than the registered attorney in the original court for the purpose of a leave to appeal application made in the Court of Appeal.

In the course of his judgment, Seneviratna, J. referred to the decision of the Court of Appeal in *Bank of Ceylon v Ramasamy*⁽⁷⁾, where the Court of Appeal came to a similar conclusion upon an interpretation of the relevant parts of sections 24 and 27(1) of the Civil Procedure Code.

Section 24 of the Civil Procedure Code enacts that "**Any appearance, application, or act in or to any court**, may be made or done by the party in person, or by a registered attorney duly appointed by the party" (emphasis mine).

Section 27(1) of the Civil Procedure Code provides that,

"The appointment of a registered attorney to make any appearance or application, or do any act as aforesaid shall be in writing signed by the client and shall be filed in Court."

When the relevant parts of the two provisions quoted above are read together, it is clear that any application to any Court may be made by a registered attorney duly appointed by the party in writing and that such writing shall be filed in Court. A leave to appeal application, though it is connected to proceedings pending in an original court, is not an application commenced in the original Court but commenced in the Court of Appeal and sections 24 and 27(1) of the Civil Procedure Code enable a party to appoint a registered attorney for the purpose of such application. There is no requirement that the registered attorney so appointed shall be the same registered attorney on record for the proceedings in the original court. Unlike a leave to appeal application a final appeal commences with the filing of the notice of appeal and the petition of appeal in the original court by the registered attorney on record and the original court thereafter transmits the record to the Court of Appeal and appeal proceedings in the Court of Appeal are a continuation of the proceedings commenced in the original court.

In support of his view that in a leave to appeal application which originates in the Court of Appeal a party may appoint a registered attorney who is not the registered attorney in the original court, Seneviratna, J. referred also to the practice of the Court of Appeal commencing from the date i.e. 1.1.1974 on which date the Administration of Justice Law No. 44 of 1973 came into operation. Section 326(1) of the AJL brought in a new provision relating to leave to appeal applications. The Civil Procedure Code of 1889 did not have provision similar to section 326(1) of the AJL. Section 754(2) of the Civil Procedure Code presently in force is similar to section 326(1) of the AJL (with a slight modification) Seneviratna, J. held that from 1.1.1974 on which date the AJL came into operation it has become a usual and inveterate practice for the Court of Appeal to permit another attorney-at-

law to file proxy in a leave to appeal application and this practice has become a *cursus curiae* of the Court of Appeal.

The test adopted by Seneviratna, J. to examine the validity of the proxy (the court in which the proceedings commence) is a good guide which does not involve any breach of the law – that is a breach of the provisions of the Civil Procedure Code. Although this Court is not bound by a decision of the Court of Appeal I treat Seneviratna, J.'s decision with utmost respect and am persuaded to adopt it with agreement.

Some applications though they have a connection with proceedings in an original court, commence in the Court of Appeal. The former Supreme Court in *Gunasekera v de Zoysa*⁽⁸⁾ has held that a revision application in a civil case can be initiated by a proctor other than the proctor whose proxy was filed in the original court. For the reasons set out above I hold that in other applications commenced in the Court of Appeal such as relisting applications and applications for leave to appeal notwithstanding lapse of time, which have a bearing on the proceedings taken in an original court, a party is entitled to appoint a registered attorney other than the registered attorney in the original court. I therefore answer the question of law submitted to this Court in the affirmative and accordingly set aside the judgment of the Court of Appeal dated 20.9.2005 rejecting the appellant's relisting application.

Having considered the material placed before this Court, I am of the view that it would be in the interest of justice to set aside and vacate the order made by the Court of Appeal on 18.11.1996 rejecting the 3rd defendant appellant's appeal. The order of the Court of Appeal dated 18.11.1996 is hereby set aside and the relisting application is allowed. The Court of Appeal is hereby directed to hear and decide the 3rd defendant-appellant's appeal on the merits.

AMARATUNGA, J. – I agree.

MARSOOF, (P/C) J. – I agree.

Appeal allowed.

Relisting application allowed.