

SHAFEER  
v.  
DHARMAPALA

COURT OF APPEAL.  
WEERASEKERA, J.,  
GRERO, J.  
C. A. 21/85 (F)  
D. S. KANDY 1682/RE  
SEPTEMBER 15, 1994.

*Proxy – Appearance on Summons Returnable date – S. 24, 27 Civil Procedure Code – Authority given to an Attorney-at-Law – What constitutes an appearance.*

On the summons returnable date 12.5.82, an Attorney-at-Law, 'N' had appeared for the 2nd Defendant-Appellant and moved for a date to file proxy and answer. The 2nd Defendant-Appellant was absent. The Attorney-at-Law for the plaintiff objected to this application and moved Court to fix the matter for *ex parte* trial. Court made order to call the case to be fixed for *ex parte* trial. Thereafter the case was heard *ex parte*.

**Held:**

(i) An Attorney-at-Law has no authority under S. 24, S. 27 of the Civil Procedure Code to move Court for time to file Proxy and Answer.

(ii) Filing of proxy is the only manifestation that could confer authority for the appointment of a person on behalf of another. Where that person is absent that anterior authority has to be there by way of a proxy in order to confer authority. Where there has been no such anterior authority, if the client afterwards rectifies what has been done one could expect such authority to flow to 'N'. In this instance there is no subsequent proxy given to 'N' that could rectify what had taken place on 12.5.82.

**An appeal** from a judgment of the District Court of Kandy.

**Case referred to:**

1. *Tillakaratna v. Wijesinghe* – 11 NLR 270

*Faiz Musthapha, P. C.*, with *H. Withanachchi* for Defendant-Appellant.

*T. B. Dillimuni* for Plaintiff-Respondent

September 15, 1994.

**WEERASEKERA, J.**

This is an appeal from the order of the learned District Judge of Kandy dated 28.2.85 refusing to set aside the Judgment entered *ex parte* against the 2nd defendant-appellant.

Counsel for the 2nd defendant-appellant argued that the order of the learned District Judge cannot stand for the reason that what had been evaluated by the Judge was whether there was appearance in fact, or not and whether the Attorney-at-Law who is alleged to have appeared, had the authority to do so? The question therefore that would have to be examined is whether as a matter of law there was in fact an appearance on 12.5.82, the date on which the summon was returnable. On that date according to the Journal Entry an Attorney-at-Law by the name of Nagappapillai had appeared for the 2nd defendant-appellant and moved for a date to file a proxy and answer. The 2nd defendant-appellant was absent. The Attorney-at-Law for the plaintiff had objected to this application of Mr. Nagappapillai as the defendant was absent and moved that the case be fixed for *ex parte* trial. Learned District Judge had for an undisclosed reason, made order to call the case to be fixed for *ex parte* trial.

We have examined very carefully the submissions of President's Counsel. We have also examined the Journal Entry of 12.5.82. We have also examined very carefully the affidavit of the 2nd defendant dated 25.5.82. to which the learned Counsel for the appellant adverted to. We have also examined the reasoning of the learned District Judge and the case of *Tillakaratna v. Wijesinghe*<sup>(1)</sup>.

Learned Counsel for the appellant does not base his case and is not relying on the question of subsequent ratification inasmuch as the proxy which was filed on 26.5.82 was not that of Attorney-at-Law Nagappapillai but of another. Attorney-at-Law, Nagappapillai appeared on 12.5.82 and moved to file his proxy and answer. Clearly he had no authority to do so as envisaged by sections 24 and 27 of the Civil Procedure Code and we see no provision in the Civil Procedure Code for the Judge to permit this procedure. The question now that has to be determined is, did the affidavit filed on 25.5.82

prior to the case being fixed for *ex parte* trial on 7.7.82 for 14.7.82 give Nagappapillai Attorney-at-Law the authority to appear for the 2nd defendant? The affidavit itself, in our view, does not specifically state that Nagappapillai has been given the authority. It contains a general statement to say that authority has been given to the Attorney-at-Law. The Attorney-at-Law on record from the 26th May is not Nagappapillai but another. In any event the filing of proxy is the only manifestation that could confer authority for the appointment of a person on behalf of another. Where that person is absent that anterior authority has to be there by way of a proxy in order to confer such authority. Where there has been no such anterior authority as it was decided in the case of *Tillakaratna v. Wijesinghe (supra)*<sup>(1)</sup> if the client afterwards rectifies what has been done one could have expected such authority to flow to Nagappapillai. In this instance there is no subsequent proxy to Nagappapillai that could rectify what had taken place on 12.5.82. We are therefore of the view that learned District Judge had not misdirected his mind when he held that there is no appearance of the 2nd defendant on 12.5.82. In any event there are no reasonable grounds to satisfy the Court of the default of the appearance of the 2nd defendant-appellant. In these circumstances the appeal is dismissed with costs fixed at Rs. 325/-.

**DR. ANANDA GRERO, J.** – I agree.

*Appeal dismissed.*