

**NATIONAL INSURANCE CORPORATION LTD.****v.****VIOLET**

COURT OF APPEAL  
DISSANAYAKE, J. AND  
SOMAWANSA, J.  
CA NO. 691/97 (F)  
DC COLOMBO NO. 96421/M  
JANUARY 29, AND  
MAY 04, 1999 AND  
SEPTEMBER 27, 2001

*Civil Procedure Code, sections 27 (2), 754 (1) and 754 (2) – Who could lodge an appeal – Locus standi – Petition of appeal not signed by attorney on record – Duty of appellant to support his application and obtain permission to revoke proxy and file new proxy.*

The substituted plaintiff-respondent's husband instituted action against two defendants, who are not parties to the appeal, claiming damages, caused as a result of a road accident. *Ex parte* judgment was entered, a writ of execution was sought against the party noticed – the National Insurance Corporation, the appellant, which was granted by court.

The National Insurance Corporation appealed against this order. The trial court holding that it was an appealable order directed the case record to be forwarded to the Court of Appeal.

The substituted plaintiff contended that, the appellant has no *locus standi*, the petition of appeal has not been signed by the attorney on record and the order appealed against is not a final order.

**Held:**

- (1) The appellant was never a party to the District Court case and therefore could not invoke the provisions of section 754 of the Civil Procedure Code.
- (2) Further, to invoke the provisions of section 754 (2) one must first obtain leave of the Court of Appeal, which the appellant in the instant case has failed to do.

- (3) It is a recognised principle that any application to court must be supported and that mere filing of papers alone would not be sufficient. The position that where necessary papers are submitted to court it is the duty of court to make relevant formal entries is untenable and unsound.
- (4) It is the duty of the party to support his application and obtain permission to revoke the former proxy and file a new proxy which the appellant has failed to do.
- (5) When there is an attorney-at-law on record it is such attorney-at-law who could lodge an appeal.

**APPEAL** from the judgment of the District Court of Colombo.

**Case referred to:**

1. *Seelawathie and Others v. Jayasinghe* – (1985) 2 Sri LR 266.

*Murdu Fernando*, Senior State Counsel, with *M. R. Ameen*, State Counsel, for appellant.

*Manohara R. de Silva* for respondent.

*Cur. adv. vult.*

December 03, 2001

**SOMAWANSA, J.**

The substituted plaintiff-respondent's husband (now deceased) filed <sup>01</sup> case No. 96421/M in the District Court of Colombo against two defendants who are not parties to this appeal, claiming damages in a sum of Rs. 150,000 caused as a result of a road accident.

On 01. 06. 1988 an *ex parte* judgment was entered against the defendants but of consent was set aside. Thereafter, on 01. 06. 1992 after a fresh *ex parte* trial, judgment was once again entered against the defendants. However, the defendants did not take any steps to vacate this *ex parte* judgment. It appears that thereafter by way of

a motion dated 07. 03. 1995 a writ of execution was sought not against the two defendants but against the party noticed appellant, the National Insurance Corporation, hereinafter referred to as the appellant. The appellant filed objections and after an inquiry the learned Additional District Judge by her order dated 06. 01. 1997 rejected the objections of the appellant and held in favour of the plaintiff-respondent hereinafter referred to as the respondent. On 07. 03. 1997 appellant filed papers to appeal against this order of the District Court to which the substituted-plaintiff-respondent objected to, on the ground that there was no appealable order. However, the learned District Judge by her order dated 25. 11. 1997 held that it was an appealable order having the effect of a final judgment and directed the case record to be forwarded to the Court of Appeal.

Thereafter, the substituted-plaintiff-respondent by way of a motion dated 06. 03. 1998 raised 3 preliminary objections and moved to have the appeal dismissed. In this regard oral submissions as well as written submissions have been tendered by both parties.

The preliminary objections raised by the learned counsel for the substituted-plaintiff-respondents are as follows:

- (1) the appellant has no *locus standi* to make his appeal.
- (2) In any event the appeal is defective as the petition of appeal has not been signed by the attorney on record.
- (3) the order appealed against is not a final order and therefore there is no direct right of appeal against the order challenged.

With regard to the 1st ground of objection it is submitted by the learned counsel for the appellant that as the appeal filed by the appellant is a final appeal, and that as the appellant, the National Insurance Corporation is not a party to the District Court, Colombo case No. 96421/M, the appellant could not prefer an appeal against

a judgment or any order made in the said District Court case without the leave of the Court of Appeal first had and obtained. 40

I find that in the oral submissions as well as in the written submissions tendered on behalf of the appellant, it is admitted that the appellant is not a party to the District Court case No. 96421/M. On page 5 paragraph 5 of the appellant's written submissions it is stated "that the appellant was not the judgment debtor in this case. He was only an insurer. However, the respondent has thought it fit to bring the appellant into the shoes of the judgment debtor".

In the light of the above admission one could safely arrive at the conclusion that the petitioner was never a party to the District Court case and therefore the next question that has to be considered is 50 whether the appellant who is not a party to the District Court case No. 96421/M could invoke the provisions of section 754 of the Civil Procedure Code.

Section 754 of the Civil Procedure Code deals with the mode of preferring an appeal:

Section 754 (1) – Any person who shall be dissatisfied with any judgment pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any 60 error in fact or in law.

Section 754 (2) – Any person who shall be dissatisfied with any order made by any original court in the course of a civil action, proceeding or matter to which he is or seeks to be a party may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law with the leave of the Court of Appeal first had and obtained.

It is clear from the wording of the section to invoke the provisions of section 754 (1) of the Civil Procedure Code in preferring an appeal,

one has to be a party to the action. The appellant not being a party 70  
to this action therefore cannot invoke the provisions of section 754  
(1). It is also clear from the wording of the section that to invoke  
the provisions of section 754 (2) of the Civil Procedure Code one  
must first obtain leave of the Court of Appeal, which the appellant  
in the instant case has failed to do.

In the light of the above reasoning, I am inclined to accept the  
contention of the counsel for the added plaintiff-respondent that the  
appellant has no *locus standi* to make this appeal under section 754  
(1) as he is not a party to the District Court case No. 96421/M and  
even under section 754 (2) as he has failed to obtain leave of this 80  
court. It may be stated that in the submissions made on behalf of  
the appellant, merits of the case were discussed at length but failed  
to meet the legal objections of *locus standi* raised by the added  
plaintiff-respondent. On this objection alone the appeal has to be  
rejected.

As regards the second objection raised by the added plaintiff-  
respondent that the appeal is defective as the petition of appeal has  
not been signed by the attorney on record it appears from the  
documents filed by the appellant that on 09. 06. 1995 the appellant  
filed proxy of Mr. Milinda Pathirana, attorney-at-law. The said proxy 90  
is annexed marked 'A'. Thereafter, on 19. 07. 1996 the said proxy  
of Milinda Pathirana was revoked and new proxy of P. Abeysekara  
and Shyamalie Rajapakse, attorneys-at-law, was filed of record to-  
gether with the formal revocation papers. The new proxy of P.  
Abeysekara and Shyamalie Rajapakse is annexed marked 'B' and  
formal revocation papers as 'C'. The consent of former proxy holder  
to revoke his proxy as 'D'. A letter from the attorney-at-law who was  
present in court to look after the interest of the appellant on  
19. 07. 1995 as 'F' and journal entries of case No. 96421/M as 'G'.  
In the journal entries marked 'G' journal entry 56 dated 19. 07. 1996 100  
it is stated that party noticed, the National Insurance Corporation files  
revocation papers together with new proxy of P. Abeysekara and S.  
Rajapakse. Written submissions for 15. 08. 1996. It is a recognized

principle that any application to court must be supported and that filing of papers alone would not be sufficient. Therefore, the argument put forward by the attorney-at-law for appellant that where necessary papers are submitted to court it is the duty of the court to make the relevant formal entries are untenable and unsound. It is the duty of the appellant to support his application and obtain permission to revoke the former proxy and file new proxy which the appellant has failed to do. Therefore, in view of provision contained in section 27 (2) of the Civil Procedure Code, in the absence of such leave from court, the proxy of Milinda Pathirana continues to be in force. It is admitted by appellant in his written submissions that the petition of appeal was filed by the legal officers of National Insurance Corporation, namely Preethi Abeysekera, Mangalika Shyamali Rajapakse and Sorays Renuka Dullewa and not by Milinda Pathirana. Therefore, it is apparent that the petition of appeal is not signed by the attorney on record. 110

In the case cited by counsel for the added plaintiff-respondent *Seelawathie and Others v. Jayasinghe*<sup>(1)</sup> it was held that where a party to a case has an attorney-at-law on record, it is the attorney-at-law on record alone not the party who can lodge an appeal and take steps. Seneviratne, J. President of the Court of Appeal (as he was then) observed 'it is a recognized principle in court proceedings that when there is an attorney-at-law appointed by a party, such party must take all steps in the case through such attorney-at-law. Applying the provision of section 27 (2) and the principle laid down in the case cited above it is apparent that the objections raised is well-founded and that the appeal is defective, in that the petition of appeal has not been signed by the attorney on record. 120 130

In view of the above reasons I am inclined to accept the objections raised by the added plaintiff-respondent and reject the appeal with costs.

**DISSANAYAKE, J.** – I agree.

*Appeal rejected.*