

**WANIGARATNA
v.
DISSANAYAKE**

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 302/99 (F)
DC GAMPAHA NO. 41983/D
JANUARY 31, 2001
MARCH 03, 2001
MAY 05, 2001 AND
AUGUST 20, 2001

Civil Procedure Code – s. 27 and s. 755 (1) – Revocation of proxy – Revocation to be effected with leave of Court after notice to registered Attorney – Does s. 27 invest the Court with a real discretion as to whether or not the revocation of proxy should be allowed.

On 17. 06. 1999, the registered Attorney of the petitioner had filed a motion seeking to have certain corrections effected, and to have the case called on 15. 06. 1999. The District Court had made order to call the case on 15. 06. 1999. On 15. 06. 1999 without corrections being effected order has been made to call the case on 22. 06. 1999. A notice of Appeal, signed by the respondent himself on 24. 05. 1999, has been tendered. A new proxy dated 24. 05. 1999 journalised on 27. 05. 1999 (JE8) had been tendered. On 17. 06. 1999 the new registered Attorney of the respondent had tendered the petition of Appeal. No motion had been tendered on 20. 05. 1999 corresponding to the entry dated 20. 05. 1999 made on the margin under JE7, that the proxy had been revoked.

Held:

- (1) A party dissatisfied with his registered Attorney is at liberty to revoke the proxy, and appoint another Attorney. But, in revoking the proxy, a party has to follow the procedure prescribed in s. 27 (2).
- (2) Revocation must be effected with the leave of court and after notice to the registered Attorney.
- (3) The code does not prescribe the grounds on which leave for revoke a proxy could be given or withheld.

- (4) The position of an Attorney-at-Law and a client is merely that of an agent and principal, and therefore an Attorney-at-Law cannot insist on acting for the client against his wishes.

Per Weerasuriya, J.

"It is not open or anyone to state that the District Judge has not seen the marginal entry, under JE7 that an officer working at the Registry had made entry that the proxy has been revoked. JE8 dated 27. 05. 1999 signed by the District Judge would reveal that a new proxy was tendered. Thereafter, the DJ has accepted the new proxy dated 24. 05. 1999 along with the Notice of Appeal signed on 21. 05. 1999 by the appellant and the receipt in respect of security.

AN APPLICATION for leave to appeal.

Case referred to:

1. *Fernando v. Mathew* – 15 NLR 88.

S. C. B. Walgampaya with *Mahinda Nanayakkara* for defendant-respondent-petitioner.

M. S. A. Saheed for plaintiff-appellant-respondent.

Cur. adv. vult.

August 20, 2001.

WEERASURIYA, J.

By this application the defendant-respondent-petitioner (hereinafter referred to as the petitioner) is seeking to set aside the order made by this Court on 09. 11. 1999, on the basis that factual position on which the order was rested, is incorrect.

The order dated 09. 11. 1999 was made following an application by way of a motion by the petitioner, praying for an order to reject the notice of appeal on the ground that it was signed by the plaintiff-appellant-respondent (hereinafter referred to as the respondent) himself when there was an Attorney-at-Law on record.

This Court came to a finding that the respondent had signed the notice of appeal after revocation of the proxy on 17. 05. 1999, given to Lalith Jayasuriya, Attorney-at-Law.¹⁰

The present application has been based solely on the observations by the Additional District Judge that, the respondent had failed to tender a motion on 20. 05. 1999 in respect of his application to revoke the proxy. Based on this observation learned Counsel for the petitioner contended that no revocation papers had been filed by the respondent on 20. 05. 1999 and that it had been surreptitiously introduced into the record at some point after tendering the notice of appeal.

In examining the above allegation, it is useful to recall that this was not the position of the petitioner when the application by way of a motion was filed in this Court seeking an order to reject the notice of appeal. On that occasion the sole ground relied on by the petitioner, as evident from the motion was that, the respondent had signed the notice of appeal when the proxy given to Lalith Jayasuriya was in force. The relevant portion of the motion reads as follows:²⁰

"...the said appeal does not comply with the imperative requirements of section 755 (1) of the Civil Procedure Code in that notice of appeal has been signed by the plaintiff-appellant when the proxy given by him to Lalith Jayasuriya, Attorney-at-Law, was still on record and not revoked."³⁰

In this regard the question may be posed initially as to why the Attorney-at-Law on record for the petitioner, failed to bring this matter to the notice of the District Judge and initiate an inquiry to ascertain the truth or otherwise of this allegation.

On 07. 06. 1999, the registered Attorney-at-Law of the petitioner had filed a motion seeking to have corrections effected in the proceedings held on 05. 12. 1999, and to have this case called on 15. 06. 1999,

whereupon the District Judge made order to call this case on 15. 06. 1999. But, however, on 15. 06. 1999, without corrections being effected in terms of the said application, order had been made to call this case on 22. 06. 1999. ⁴⁰

Meanwhile, on 17. 06. 1999, new registered Attorney-at-Law of the respondent had tendered the petition of appeal.

Therefore, it would be manifest that after the tender of the notice of appeal on 24. 05. 1999, (which had been signed by the respondent himself on 21. 05. 1999) up to 17. 06. 1999, the petitioner had sufficient time to ascertain whether the application for revocation of the proxy had been surreptitiously introduced into the case record. The application for revocation of the proxy bears the date stamp of 20. 05. 1999. ⁵⁰ In the circumstances, the allegation that the revocation papers had been surreptitiously introduced into the case record is clearly a belated one, and could be justifiably be described as an after thought.

As observed earlier, learned Counsel for the petitioner has based his allegation from the observation by the Additional District Judge that no motion had been tendered on 20. 05. 1999 corresponding to the entry dated 20. 05. 1999 made on the margin under journal entry No. 7 that the proxy has been revoked. As observed in the order dated 09. 11. 1999 this marginal note presumably would have been made by the subject clerk. If one really cares to identify this officer, one would be able to do so by reference to a later marginal note dated 03. 01. 2001 under journal entry No. 12. ⁶⁰

On a close examination, it would be apparent that signatures appearing under both entries are similar. It would be vital to note that Additional District Judge has observed beside the absence of an entry relating to the application to revoke the proxy, the motion relating to the new proxy and the motion relating to the deposit of security have not been entered in the motions register.

One basic feature that has to be borne in mind is that, with the revocation of the proxy given to Lalith Jayasuriya, the respondent had no legal assistance till a new Attorney-at-Law was appointed as evident from the new proxy dated 24. 05. 1999 and journalised on 27. 05. 1999 under journal entry No. 8. In the circumstances, the question arises whether it is legally permissible to expect from the respondent, to file a written motion and have it entered in the motions register when the application for revocation was presented to Court which bears on its face the date stamp of 20. 05. 1999. 70

The absence of an accompanying written motion and the failure to enter the application for revocation of the proxy in the motions register, in my view, would not vitiate what would otherwise be a valid application, in circumstances where a party had no assistance from an Attorney-at-Law. A party dissatisfied with his registered Attorney, is at liberty to revoke the proxy filed in Court and appoint another Attorney to act for himself. However, in revoking the proxy, a party has to follow the procedure prescribed by section 27 (2) of the Civil Procedure Code. 80

Section 27 (2) stipulates that revocation must be effected with the leave of Court and after notice to the registered Attorney. In the case of *Fernando v. Mathew* it was held that section 27 of the Civil Procedure Code invests the Court with a real discretion as to whether or not the revocation of a proxy should be allowed. 90

It must be noted that, in that case all four executors concurred in the first proxy given to Messers Prins and Swan at the commencement of the proceedings, but subsequently two executors sought to revoke the proxy given to Messers Prins and Swan. This application was resisted by the other two executors and District Judge having taken into consideration, the possible deadlock that might result from separate representation refused the application for revocation of the proxy.

The facts of the instant case are different, in that there was no objection to the application by the Attorney. Therefore, the Court would 100

have granted leave on the request of the respondent. The Civil Procedure Code does not prescribe the grounds on which leave to revoke a proxy could be given or withheld. The position of an Attorney and a client is merely that of an agent and principal and therefore an Attorney cannot insist on acting for the client against his wishes.

In view of the above material, there would have been no difficulty for the respondent to get leave from Court for the said revocation. But, going by the marginal note dated 20. 05. 1999 under journal entry No. 7 an officer working at the registry had made the entry that proxy has been revoked.

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It is not open for anyone to state that District Judge has not seen this marginal note. The journal entry No. 8 dated 27. 05. 1999 signed by the District Judge would reveal that a new proxy was tendered. Therefore, the District Judge had accepted a new proxy dated 24. 05. 1999 along with the notice of appeal signed by the respondent on 21. 05. 1999 and the receipt in respect of furnishing security.

There was no material to suggest that the District Judge has withheld his discretion to grant leave for the said revocation. This would be a clear manifestation that the District Judge had impliedly given leave for the revocation of the earlier proxy.

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In the light of the above circumstances, it is not possible to accept the proposition that order delivered on 09. 11. 1999 was rested on incorrect facts.

For the foregoing reasons, I am of the view that, there is no merit in this application. I dismiss this application with costs fixed at Rs. 2,000.

DISSANAYAKE, J. – I agree.

Appeal dismissed.