

**SUMANASEKERA  
VS  
YAPA**

COURT OF APPEAL.  
IMAM, J.  
SRISKANDARAJAH. J.  
CALA 362/2002 (LG).  
DC KANDY 26432/MR.  
JULY 13, 2005.

*Civil Procedure Code, Sections 754 (4), 755(2), 755(3), 755 (4), 759-Could the notice of appeal be sent to the Counsel and not to the Registered Attorney? - Respondent materially prejudiced ?*

Judgment was given in favour of the plaintiff-respondent. The defendant-petitioner filed notice of appeal and petition of appeal within time. The plaintiff-respondent took up a preliminary objection before the District Court that, the notice of appeal had been given to the Counsel of the plaintiff-respondent and not to the Registered Attorney. The District Judge upheld the objection.

On leave being granted -

**HELD:**

- (1) The authorities make it mandatory that the notice of appeal and petition of appeal have to be signed by the Registered Attorney and actual notice sent to the Registered Attorney-section 755 (2) (b). These provisions are imperative.
- (2) The petitioner has not shown any good and sufficient ground for not complying with section 755(2)(b) and as the respondent has been materially prejudiced by such non compliance the petitioner is not entitled to relief under section 759.

**APPLICATION** for leave to appeal from an order of the District Court of Kandy, with leave being granted.

**Cases referred to :-**

- (1) *Martin vs Suduhamy* 1991 1 Sri LR 281
- (2) *Fernando vs Sybil Fernando* 1997 3 Sri LR 1
- (3) *Agiris Appu vs David Appu* 6 NLR 223
- (4) *Silva vs Cumaratunga* 40 NLR 139

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- (5) *Perera vs Perera* 1981 2 Sri LR 44
  - (6) *Mahatun Mudalali alias Paranatota vs N. A. Naposingho* 1986 3 CALR 318
  - (7) *Manamperi Somawathie vs Buwaniswari* 1996 1 Sri LR 293
  - (8) *Keerthiratne vs Udeni Jayasekera* 1990 2 Sri LR 346
  - (9) *Municipal Council vs Piyasena* 1980 2 Sri LR 39

*Wasantha Wijewardane* for defendant - petitioner.

*D. M. G. Dissanayake* for plaintiff - respondent.

*Cur. adv. vult.*

February 8, 2006

**IMAM, J.**

This is an application by the Defendant - Petitioner (hereinafter referred to as the 'Petitioner') to set aside the order dated 29.08.2002 made by the District Judge of Kandy in Case No. 26432 MR, for costs, and inter-alia for other reliefs as prayed for in the Petition. Leave to Appeal was granted on 13.09.2004 to the Petitioner with regard to the question whether the Petitioner was entitled to relief under the provisions of section 759 of the Civil Procedure Code.

The facts of the case are briefly as follows. The Plaintiff-Respondent (hereinafter referred to as the 'Respondent' filed action in the District Court of Kandy and sought damages from the Petitioner for malicious prosecution. After trial the learned District Judge gave Judgment in favour of the Plaintiff-Respondent and awarded damages in a sum of Rupees one hundred thousand (Rs. 100,000) on 22.01.2002. The petitioner filed notice of appeal dated 31.01.2002 and petition of Appeal on 21.03.2002. Meanwhile the respondent took up a Preliminary Objection that Notice had been given to the counsel for the Respondent and not to the instructing Attorney as required in accordance with the provisions of the Civil Procedure Code. On 29.08.2002 the learned District Judge upheld the objection and made order dismissing the appeal. This application arises from this order (P3).

It is averred by the Petitioner that the learned District Judge has confused himself as to the requirements of section 24 of the Civil Procedure Code pertaining to the due appointment of an Attorney-at-Law and the requirement under section 755(2) as to the service of copy of the Notice of Appeal on the Respondent or his registered

Attorney-at-law. The Petitioner referred to *Martin Vs Suduhamy*<sup>(1)</sup> where it was held by His Lordship Kulatunga, J that the rejection of a Notice of Appeal signed by an Attorney-at-Law other than the Registered Attorney at Law is a result of non compliance with section 24 of the Civil Procedure Code. The Petitioner points out that His Lordship Kulatunga, J further observed that the power vested with the Court of Appeal to grant relief under section 759 (2) envisages even the preparation and signing of the Notice of Appeal. The Petitioner contends that on a plain reading of section 754(4) and 755(3), the Court could refuse to accept the Notice of Appeal and the Petition of Appeal respectively for failure to comply with the requirements of these two sections. The Petitioner however avers that the cumulative effect is that the District Court can refuse to receive a Notice of Appeal or a Petition of Appeal only when the Appellant fails to adhere to time limits. The Petitioner further submits that nevertheless if the failure is not deliberate and no prejudice is caused to the Respondent, even if no plausible explanation is forthcoming relief could be granted. The Petitioner further contends that in this case although Notice of Appeal had been sent to the counsel and not to the registered Attorney-at-Law of the Respondent, the Respondent had been informed possibly by the Counsel, and hence no material prejudice had been caused to the Respondent.

It is the contention of the Plaintiff-Respondent that the matter for adjudication in this application is whether the provisions of section 755(2)(b) of the Civil Procedure Code are imperative and whether an Appellant should comply with the same. Section 755(2)(b) states that, "The Notice of Appeal shall be accompanied by proof of service, on the Respondent or on the Registered Attorney, of a copy of the Notice of Appeal in the form of a written acknowledgement of the receipt of such Notice....." Thus the Appellant is compelled to serve a copy of the Notice of Appeal on the Respondent or on the Registered Attorney of the Respondent. The Respondent avers that although the Registered Attorney of the Respondent was Mr. Wimalawan, Attorney at-law, the Notice of was sent to Mr. Dhammika Hettihewage who was the counsel instructed by Mr. Wimalawan at the trial. The Respondent submits that this is in absolute disregard to the provisions of section 755(2) (b) to which the Appellant has not offered any explanation as to why he did not comply with the imperative provisions of Law. Hence the Respondent submits that the order of refusal by the learned District

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Judge to entertain the Appeal is correct. The Respondent referred to *Fernando Vs Sybil Fernando*<sup>(2)</sup> where the Supreme Court held that "The concept of the Laws of Civil Procedure being a mere vehicle in which parties should be safely conveyed on the road to Justice is misleading, for it leads to the incorrect notion that the Laws of Civil Procedure are of relatively minor importance, and may, therefore be disobeyed and disregarded with impunity."

On a perusal of the Notice of Appeal Postal receipt and proxy it is manifestly clear that although the registered Attorney of the Respondent was Mr. Wimalawan Attorney-at-law, the notice and Petition of Appeal was sent to Mr. Dhammika Hettihewage who was the counsel instructed by Mr. Wimalawan at the trial. Thus the Appellant has not acted in conformity with section 755(2)(b) of the Civil Procedure Code, nor has he offered any explanation for his lapse. It was held in *Agiris Appu Vs David Appu*<sup>(3)</sup> that a Proctor who has filed a proxy for a client cannot delegate his Authority to another proctor, and a Petition of Appeal signed by another proctor on behalf of the Registered proctor is invalid.

In *Silva Vs Cumarathunga*<sup>(4)</sup> it was decided that a petition of Appeal must be signed by the proctor whose proxy is on record at the date on which the Petition is filed, and that when the petition is not so signed the Appeal should be rejected and that the Supreme Court has no power to give relief.

In *Perera vs Perera*<sup>(5)</sup> it was held that under the provisions of section 755(3) of the Civil Procedure Code the Petition of Appeal shall be signed by the Appellant or his Registered Attorney and so long as there is a Proxy on record it is only the Registered Attorney who has the authority to sign the Petition of Appeal.

It was decided in *Mahatun Mudalali alias Parantota Vs N. A. Naposingho*<sup>(6)</sup> that by 'Notice' is meant actual notice and not some constructive Notice and that mere compliance with section 755(1) may at the most constitute constructive notice. Actual notice means compliance with section 755(1), (2) and section 754(4) regarding the time within which the Notice of Appeal must be presented. These requirements it was held are Mandatory to constitute a proper Notice

of Appeal, and if not fulfilled, the Court has the power to refuse to receive the Notice of Appeal.

In *Manamperi Somawathie vs Buwaneswari*<sup>(7)</sup> it was decided that a party appellant could present a Notice of Appeal personally and sign the Petition of Appeal only when there is no Registered Attorney of his on record at the relevant time. It was held in *Keerthiratne Vs Udena Jayasekera*<sup>(8)</sup> that the filing of a Notice of Appeal must be followed by presentation of the Petition of Appeal within 60 days, both steps being imperative and mandatory, the responsibility of which is cast on the Attorney-at-Law on record and not on the Petitioner.

In *Municipal Council of Colombo Vs Piyasena*<sup>(9)</sup> it was concluded that the Defendant-appellant's application to be given relief under section 759(2) of the Civil Procedure Code was not entitled to succeed as no good and sufficient ground had been established for the granting of such relief.

In the present case the copy of the Notice and Petition of Appeal had been served on Mr. Dhammika Hettihewage the counsel, and not on Mr. Wimalawan the registered Attorney of the Respondent. The authorities referred to earlier make it mandatory that the Notice and Petition of Appeal have to be signed by the Registered Attorney, and actual notice sent to the registered Attorney, under section 755(2)(b). However the Appellant has not acted in conformity with section 755(2)(b) as the Actual Notice was sent to the counsel for the respondent Mr. Hettihewage, and not on the Registered Attorney-at-Law Mr. Wimalawan. As it is my view that the provisions of section 755(2)(b) of the Civil Procedure Code are imperative, I see no reason to interfere with the aforesaid order of the Learned District Judge dated 29.08.2002(P3). The Petitioner has not shown any good and sufficient ground in not complying with the provisions of section 755(2)(b) of the Civil Procedure Code, and as the Respondent has been materially prejudiced by such non compliance the Petitioner is not entitled to relief under section 759 of the Code. For the aforesaid reasons I dismiss the Appeal of the Petitioner without costs.

**SRISKANDARAJAH, J.** - I agree.

*Appeal dismissed.*