

**KEERTHIRATNE
V.
UDENA JAYASEKERA**

COURT OF APPEAL,
D. P. S. GUNASEKERA, J. AND
H. W. SENANAYAKE J.,
C. A. APPLICATION No. 435/90
D.C. MATARA NO. 4942/M,
NOVEMBER 09, 1990.

Appeal – Compliance with provisions of Section 755 (3) Of the Civil Procedure Code.

Notice of appeal was given in time in terms of S. 755 (1) of the Civil Procedure Code. The Attorney-at-Law on record failed to file the petition of appeal as required by S. 755 (3) of the Civil Procedure Code. The excuse given was that the appellants were kept in detention and as a result their mental and physical condition deteriorated and after their release they had to obtain treatment for their condition and therefore could not give instructions.

The filing of a notice of appeal must be followed by presentation of the petition of appeal within 60 days. Both steps are imperative and mandatory. The responsibility is on the Attorney-at-Law on record and not on the petitioner.

The provisions of S. 759 (2) of the Civil Procedure Code cannot be invoked to condone the negligence and carelessness of the Attorney-at-Law on record.

Cases referred to :

- (1) *Abeyratne Wickremasinghe v. Magilin Nona de Silva* (1979) 2 Sri LR 63.
- (2) *Municipal Council of Colombo v. Piyasena* (1980) 2 Sri LR 39.
- (3) *Vithane v. Weerasinghe and Another* (1981) 1 Sri LR 52.

Application for leave to appeal notwithstanding lapse of time under Section 759 (2) of the Civil Procedure Code.

J. W. Salvatura for petitioner.

W. Dayaratne with Priyantha Nawinne for respondent.

Cur. Adv. Vult.

December 12, 1990.

H. W. SENANAYAKE, J.

The petitioner is seeking relief in terms of the Provisions of Section 759 (2) of the Civil Procedure Code.

The Respondent instituted the action in the District Court of Matara. The Learned District Judge after trial, delivered Judgment on 22.02.1990 in favour of the Respondent. The Petitioner being

dissatisfied with the Judgment filed the notice of Appeal in terms of the Provisions of Section 755 (1) of the Civil Procedure Code. The Petitioner however failed to tender the Petition of Appeal within 60 days from the date of the Judgement in compliance with Section 755 (3) of the Civil Procedure Code. The Petition of Appeal was filed only on 18.05.1990.

The Petitioner averred in his petition that he was taken into custody by the Police and was kept in detention as a result his mental and physical condition deteriorated and after his release he had to obtain treatment for his condition. The Petition is silent as to when he was taken into custody. The Learned Counsel for the Petitioner submitted that owing to the exceptional circumstances the Petitioner was unable to give instructions to his Attorney-at-Law to file the Petition of Appeal within the prescribed time.

I am unable to agree with the submission. The Petitioner had an Attorney-at-Law on record who had a proxy, therefore the Attorney-at-Law should have filed the Petition of Appeal in time. The Petition of Appeal should set out the circumstances in which the Appeal arises and the grounds of objection and also contain the particulars required by Section 758 (1) of the Civil Procedure Code. This is a matter within the power of the Attorney-at-Law on record and not the Petitioner.

The Provisions of Section 755 (3) of the Civil Procedure Code requires the Appellant to present to the original Court a Petition of Appeal within 60 days. This is mandatory. The filing of a notice of Appeal must be followed, with the Petition of Appeal both steps are mandatory and imperative steps in lodging an appeal. These two provisions were considered in the case of *Abeyratne Wickremasinghe v. Maglin Nona de Silva*⁽¹⁾. This was followed in the *Municipal Council of Colombo v. Piyasena*⁽²⁾.

The Learned Counsel for the Petitioner relied on the authority *Vithane v. Weerasinghe and another*⁽³⁾. In this case the appellant had complied with the Provisions of Section 754 of the Civil Procedure Code by giving notice of Appeal within the prescribed period of 14 days but failed to file the Petition of Appeal within 60 days. His Petition of Appeal was late by one day and his Attorney-at-Law filed an affidavit to show that the omission was due to his own illness and was a cause beyond the control of his client. Justice Wanasundara observed at page 57 "I find that Section 759 (2) is adequate to deal with an application of this kind and it is precisely to these provisions that a person such as the present appellant must look for relief".

In my view the facts of that case has no bearing to the instant case. It is my view that the presence of the Petitioner was not essential to present the Petition of Appeal. The Attorney-at-Law on record had the full authority to file the Petition of Appeal. It is the Attorney-at-Law on record who has to prepare the Petition of Appeal and specify the grounds of objection to the Judgment. The absence or the presence of the Petitioner in person is immaterial to the filing of the Petition of Appeal. It is my view that the Provisions of Section 759 (2) cannot be invoked to condone the negligence and carelessness of the Attorney-at-Law on record.

In the circumstances I dismiss the Petitioner's application with costs fixed at Rs. 325.

D. P. S. GUNASEKERA, J. – I agree.

Application dismissed.
