

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application under Section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990. [as later amended by amending acts including Act No.54 of 2006] for leave to appeal against judgment dated 09/01/2013 delivered by the High Court of the Western Province (Exercising civil appellate jurisdiction of Colombo in the appeal bearing number HCCA/Col/267/2003 (F) [A] D.C. Colombo Case No.14834/P.

IN THE DISTRICT COURT

SC Appeals 187 & 188/2015
SC/HCCA/LA/55/2013
WP/HCCA/COL/267/2003/
(F) (A) D. C. Colombo Case
No.14834/P

Naomi Leela Elizabeth Perera
No.17, Mendis Mawatha
Moratuwa.

Plaintiff

VS

1. J. W. P. E. Vernon Botejue of
No.183, Nawala Road,
Nugegoda
2. J.W.Thelma Maude Phylis Vitanage
nee Botejue of
No.31, Kotuwegoda, Rajagiriya.
- (deceased) 3. R. A. Edwin Sincho of
No.49, 5th Lane, Nawala
4. J. W. Aruna V. P. Botejue,
Agarapatana Now of No.183
Nawala Road, Nugegoda.
5. B. S. C. Cooray of
No.39, Kotuwegoda, Rajagiriya,

Defendants

IN THE HIGH COURT

4. J. W. Aruna V. P. Botejue,
Agarapatana Now of No.183
Nawala Road,
Nugegoda
4th Defendant-Appellant

Vs.

Naomi Leela Elizabeth Perera
No.17, Mendis Mawatha
Moratuwa.

Plaintiff-Respondent

3. J. W. P. E. Vernon Botejue of
No.183, Nawala Road,
Nugegoda.

4. J.W.Thelma Maude Phylis Vitanage
nee Botejue of
No.31, Kotuwegoda, Rajagiriya.

(deceased) 3. R. A. Edwin Singho of
No.49, 5th Lane, Nawala

5. B. S. C. Cooray of
No.39, Kotuwegoda, Rajagiriya,

Defendants-Respondents

NOW IN THE SUPREME COURT

4. J. W. Aruna V. P. Botejue,
Agarapatana Now of No.183
Nawala Road,
Nugegoda
4th Defendant-Appellant-Petitioner

Vs.

Naomi Leela Elizabeth Perera

No.17, Mendis Mawatha
Moratuwa.

Plaintiff-Respondent-Respondent

1. J. W. P. E. Vernon Botejue of
No.183, Nawala Road,
Nugegoda
2. J.W.Thelma Maude Phylis Vitanage
nee Botejue of
No.31, Kotuwegoda, Rajagiriya.
now of 1636/5, Kotte Road,
Rajagiriya
- (deceased) 3. R. A. Edwin Singho of
No. 49, 5th Lane, Nawala
5. B. S. C. Cooray of
No.39, Kotuwegoda, Rajagiriya,

Defendants-Respondents-Respondents

BEFORE: B.P.ALUWIHARE, PC, J
UPALY ABEYRATHNE, J &
ANIL GOONARATNE, J

COUNSEL: Dr. S. F. A. Cooray with Narmada Nayanakanthi for the 4th
Defendant-Appellant-Petitioner
Palitha Kumarasinghe, PC with Priyantha Alagiyawanne instructed
by Sandya Danthanarayana for the Plaintiff-Respondent-
Respondent
Vernon Botheju, 1st defendant Respondent Respondent, in person

ARGUED ON: 31.05.2016

DECIDED ON: 02.08.2017

ALUWIHARE, PC, J:

In this matter the court granted leave to appeal in S.C appeal Nos. 187/2015 and 188/2015 and the parties consented to abide by a single judgment in both cases.

This was an action for partition instituted by the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) to partition the land which is the subject matter of the action.

At the conclusion of the trial the learned District Judge came to a finding that the corpus was co-owned by the Plaintiff and the 1st Defendant and accordingly ordered the partition thereof. Aggrieved by the said judgment the 2nd Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 2nd Defendant) appealed against the said order to the Court of Appeal. The said appeal by virtue of the provisions of the High Court of the Provinces (Special Provisions) Act No.19 of 1990, stood transferred to the High Court of Civil Appeals.

Parallel to the appeal by the 2nd Defendant, the 4th Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 4th Defendant) also invoked the appellate jurisdiction of the Court of Appeal. The appeal filed by the 4th Defendant had also been transferred to the High Court of Civil Appeals.

When the two appeals were taken up for argument, a preliminary objection had been raised on behalf of the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) that, both the 2nd and the 4th Defendants had failed to comply with Section 754 and Section 755 of the Civil Procedure Code in lodging the two appeals. Compliance with the section in question being mandatory, the Plaintiff moved the High Court of Civil Appeals to have the two appeals rejected *in limine*.

The High Court of Civil Appeals delivered identical orders on both appeals, on 9th January, 2013 upholding the preliminary the objection raised on behalf of the Plaintiff and dismissing the appeals *in limine*.

The questions of law on which leave was granted by this court are as follows:

- (i) Had the 4th Defendant-Appellant complied sufficiently with the provision of Section 755 (2) (b) of the Civil Procedure Code when he proved service of a copy of the notice of appeal by registered post on the Plaintiff-Respondent herself instead of her registered Attorney-at-Law.
- (ii) Did the High Court err in holding that there had been insufficient compliance with the said Section 755 (2) (b) when the 4th Defendant-appellant furnished proof of service of a copy of the notice of appeal on the Plaintiff-Respondent herself.
- (iii) Had the High Court erred in not granting relief under Section 759 (2) of the Civil Procedure Code.

The questions of law referred to in paragraphs (a) and (c) of of paragraph 12 of the Petition of the Petitioner, on which leave was granted (referred to as (i) and (ii) above) appear to be the same question but paraphrased differently.

Thus the two issues this Court has to decide, based on the questions of law referred to above are:

- (1) Have the appellants sufficiently complied with Section 755 (2) (b) of the Civil Procedure Code
and assuming that the court holds that the appellants had not strictly complied with Section 755(2)(b) referred to above,
- (2) Whether court ought to have granted relief to the appellants under Section 759 (2) of the Civil Procedure Code.

Facts

The judgment of the District Court had been delivered by the learned District Judge on 27th August, 2003 and on the 9th September, 2003 both the 2nd and the 4th Defendants had filed Notices of Appeal. In proof of delivery of the said notices, the Registered Attorney for the **4th Respondent** had pasted the receipts of the Registered Postal Article. The said receipts are in the names of N. L. A. Perera, the Plaintiff and C. Cooray the 5th Defendant.

The journal entry Nos. 134 and 135 dated 15th October, 2003 reveals that both the 2nd and the 4th Defendants had filed Petitions of Appeal and in journal entry 134 the court had made an observation that the Notice of Appeal had not been given in the proper manner and court had made order staying further steps being taken until such time the matter is regularised.

Subsequently, on 7th November, 2003 in response to the journal entry referred to above, the Attorney-at-Law for the **2nd Defendant** by way of a motion had affirmed that notice of appeal had been accepted by the 1st Defendant and the Attorney on record of the 4th Defendant.

An even dated similar motion had been filed on behalf of the **4th Defendant** affirming that the notice of appeal had been accepted by the 1st Defendant and the Attorney on record for the 2nd Defendants. Ironically, in the said motion, the 4th Defendant does not claim that the notice of appeal had been sent to the registered Attorney of the Plaintiff.

In the case of the **4th Defendant**, he does not claim having given notice to the registered Attorneys of any of the parties other than the registered attorney for the 2nd Defendant, in the said motion. The court also had observed that of the two receipts of Registered Postal articles pasted on the motion filed on behalf of the 2nd Defendant, one such purported recipient is “W. M. D. Nanayakkara” who was not a party to this case.

Thus, what could be gleaned from the proceedings is that, notices of Appeal had neither been served on the Registered Attorneys for the Plaintiff nor the 5th Defendant. There is also no proof of service of such notice on the 5th Defendant by the 2nd Defendant.

The preliminary objection raised before the High Court Civil Appeals pivots on a solitary issue: would the serving the Notice of appeal, on the parties rather than on their registered attorneys be sufficient compliance, with Section 755 (2) (b) of the Civil procedure Code.

The contention of the Plaintiff before this court as well as before the High Court of Civil Appeals was that, compliance was insufficient. Plaintiff took up the position that the compliance with Section 755 (2) (b) of the Civil Procedure Code is mandatory and due to the non-compliance, the appeal must be rejected in limine.

Section 755 (2) (b) of the Civil Procedure reads thus:

“proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgement of the receipt of such notice or the registered postal receipt in proof of such service”

A plain reading of the Section is devoid of any ambiguity in that the requirement is to have the Notice of appeal filed within 14 days and the same to accompany with proof of service on the Respondent or on his registered Attorney.

The learned President’s Counsel for the Plaintiff argued that though the section is worded in that manner, when a respondent has the services of a registered Attorney, Notice of appeal has to be served on the registered Attorney and not on the

Respondent. The learned President's Counsel relied on the decision of this court in the case of Fernando Vs. Sybil Fernando and others 1997, 3 S.L.R pg1. In the said case His Lordship Justice Dr. Amarasinghe held:

“So long as such an instrument of the appointment of a registered Attorney-at-Law is in force, a litigant who has executed such an instrument must act through his registered attorney until all proceedings in the action are ended and the judgment satisfied so far as regards that litigant: While the proxy is in force, he cannot himself perform any act in court relating to the proceedings of the action”

It was argued on behalf of the Plaintiff, relying on the decision of his lordship Justice Dr. Amarasinghe in the case referred to, that while the proxy is in force he (the party) cannot himself perform any act in court relating to the proceedings of the action. It was further argued that the same principle applies when the law requires a party to give notice of its intention to appeal against a judgement, to other parties to that case, and that requirement can only be satisfied by giving notice to the registered Attorneys of such parties and not to the party itself.

It was the contention, on behalf of the Plaintiff, that when there is a Registered Attorney on record, all acts of the Action has to be done **through** the Registered Attorneys representing the parties and that requirement extends to service of process or notice as well, except in cases where personal service has been ordered.

It was argued, that the words “on the Respondent **or** his registered Attorney” that occurs in Section 759 (2) (b) ought to be interpreted to mean “**on the registered attorney**” when there is an Attorney-at-Law on record for the Respondent.

In the case of Fernando Vs Sybil Fernando 1997 (3) SLR page 1 his Lordship Justice Amarasinghe did consider the meaning that should be attached to the words “**signed**

by the Appellant or his registered attorney” as they occur in Section 755 (1) of Civil Procedure Code.

It would be pertinent to refer to the facts of the case of *Fernanado v. Sybil Fernando*, so that the rationale of their lordship's decision could be appreciated.

The issue in the case referred to was: who is entitled to sign the **Notice of appeal**

To start with, the Section 755 (1) requires that “ *Every Notice of Appeal.... shall be signed by the Appellant or his registered Attorney.....* .” It is to be noted that the operative words in Section 755 (1), are similar to the words that in Section 755 (2) (b) of Civil Procedure Code.

When the appeal came up for hearing before the Court of Appeal it was brought to the attention of the court that the notice of appeal had been personally signed by the appellant, and not by his duly appointed registered Attorney-at-Law.

The Court of Appeal rejected the notice of appeal and dismissed the petition of appeal on the ground that, at the date of the notice of appeal, there was a duly appointed registered attorney, the notice of appeal should have been signed by that attorney and not by the appellant personally.

In the case referred to, it had been submitted on behalf of the appellant that, upon a plain reading of section 755 (1) of the Civil Procedure Code, a Notice of appeal may be **signed either by the appellant or by his registered attorney.** (Emphasis is mine)

Having considered a long line of authorities his Lordship Justice Amarasinghe reasoned out that sections in the present Code should be interpreted firstly in relation to the principles set out by the long series of authorities, and secondly in a manner not to cause disorder in court proceedings. He then held that “permitting such a practice would lead to disorder and confusion in court proceedings. The words ‘shall be signed by the appellant or his registered attorney’ should be understood and interpreted to mean that the Notice of appeal can be signed by the appellant when **he has no registered attorney on record...**”

I am of the view that the judges of the High Court Of Civil Appeals were correct in giving a similar interpretation to the section 755 (2) (b)

In the present case it had also been pointed out on behalf of the Plaintiff that the Defendants had sent lists of witness and documents to the registered attorney for the plaintiff, Mr. Kannangara attorney-at-law. The defendants in return had received documents sent by the said registered Attorney for the Plaintiff and further right throughout, the name of Mr. Kannangara had been recorded as the attorney on record for the Plaintiff. Thus, it was contended that the Defendants were aware that the plaintiff had an Attorney on record.

Considering the Judgement referred to above and the long line of authorities on the same issue, that consistently held that it is the Attorney on record who has the right to act for and on behalf the parties with regard to a case, I cannot fault the learned judges of the High Court of Civil Appeals holding in the negative with regard to the questions of law (i) and (ii) referred to above and I hold that the 2nd and the 4th Defendants had not sufficiently complied with section 755(2) (b) of the Civil Procedure Code.

The Defendants further argued that, where the appellate court finds that there had been no compliance with Section 755(2)(b) with regard to proof of service of a copy of the Notice of Appeal, the appellate court has a duty to act under Section 759(2) of the Code.

Section 759 (2) reads thus.

“in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of foregoing section (other than the provision specifying the period within which any act or thing is to be done)the Court of Appeal may, if it should be of the opinion that the respondent has not been materially prejudiced, grant relief on such terms as may deem just”

It was held in the case of *Nanaykkara v. Warnakulasuriya 1994 2 SLR 289* “the power of the court to grant relief under Section 759(2) of the Code is wide and discretionary.... However relief cannot be granted if the Court is of the view that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

The two questions the court is required to consider is whether it is just and fair to grant relief at this stage in terms of Section 759(2) of the Code and if relief is granted whether the respondents would be materially prejudiced.

The District Court action had been instituted way back in 1989 and the parties have gone through a protracted trial which had reached a conclusion in 2003.

Aggrieved by the said judgment the 2nd and 4th Respondents had invoked the appellate jurisdiction of the High Court of Civil Appeals before which the preliminary objection was raised.

The Defendants in my view should have invited court to act under Section 759(2), instead chose to confine to Section 755 and attempted to justify that the Defendants were in compliance with Section 755(1) of the Code.

The High Court of Civil Appeals having considered the extensive written submissions filed by the parties delivered its order on 09-01-2013, rejecting the appeal filed by the 2nd and 4th Defendants and the said parties invoked the jurisdiction of this court .

If relief sought by the defendants is to be granted, then in effect this court has to get into the shoes of the High Court of Civil Appeals and exercise the discretion that was vested with that court in terms of Section 759(2). In that event , I am of the view, that this court is required to consider whether it would be just and fair by the Plaintiff and the other Defendants to exercise the discretion of court in terms of Section 759(2) in favour of parties who were remiss, namely the 2nd and the 4th Defendants. Although her Ladyship Justice Ekanayake, in the case of *Jayasekera V. Lakmini* (supra) did hold that it is incumbent upon the court to utilise the statutory provision embodied in

Section 759(2) of the Code, I am of the view that the 2nd and 4th Defendants had at least a duty to draw the attention of court to the said provision, which, the 2nd and 4th Defendants, failed to do.

As referred to above, already more than 27 years have lapsed since action was initiated before the District Court and I am of the opinion it would not be just and fair by the Plaintiff and the other parties, to grant relief, acting under Section 759 (2) of the Code, in the instant situation.

Thus, as to the third question of law, I hold, that the High Court of Civil Appeals cannot be faulted for not resorting to Section 759(2) for the grant of relief to the 2nd and 4th Defendants.

Accordingly, I dismiss the Appeal. I make no order as to costs.

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYRATHNE

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONARATNE

JUDGE OF THE SUPREME COURT

