

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

**In the matter of an Appeal from the  
Civil Appellate High Court.**

Mohamed Ghouse Mohamed  
Sulaiman Zurfick, No. 142/4,  
W.A.de Silva Mawatha,  
Colombo 6.

**Plaintiff**

Vs

**SC APPEAL 96/17**

SC/HCCA/LA/630/16

WP/HCCA/COL/120/11

D.C.Colombo 4415/09

M.N.Naufer, No. 43, Hulftsdorp  
Street, Colombo 10.

And currently at,  
Bogambara Prison, Kandy.

**Defendant**

**AND THEN BETWEEN**

Mohamed Ghouse Mohamed  
Sulaiman Zurfick, No. 142/4,  
W.A.de Silva Mawatha,  
Colombo 6.

Plaintiff Petitioner

Vs

M.N.Naufer, No. 43, Hulftsdorp  
Street, Colombo 10.

And currently at,  
Bogambara Prison, Kandy.

Defendant Respondent

**AND THEREAFTER BETWEEN**

Mohamed Ghouse Mohamed  
Sulaiman Zurfick, No. 142/4,  
W.A.de Silva Mawatha,  
Colombo 6.

Plaintiff Petitioner Appellant

Vs

M.N.Naufer, No. 43, Hulftsdorp  
Street, Colombo 10.  
And currently at,  
Bogambara Prison, Kandy.

Defendant Respondent

Respondent

**AND NOW BETWEEN**

M.N.Naufer, No. 43, Hulftsdorp  
Street, Colombo 10.  
And currently at,  
Bogambara Prison, Kandy.

**Defendant Respondent**

**Respondent Appellant**

Vs

Mohamed Ghouse Mohamed  
Sulaiman Zurfick, No. 142/4,  
W.A.de Silva Mawatha,  
Colombo 6.

**Plaintiff Petitioner Appellant**

**Respondent**

**BEFORE**

**: S. EVA WANASUNDERA PCJ.  
SISIRA J DE ABREW J. &  
H.N.J. PERERA J.**

**COUNSEL**

: Harith de Mel for the Defendant  
Respondent Respondent Appellant.  
Instructed by Ms. Alanka Dias  
Kamran Aziz with Krishantha  
Premasiri for the Plaintiff Petitioner  
Appellant Respondent instructed by  
S.D.Seneviratne.

**ARGUED ON**

: 19.01.2018.

**DECIDED ON**

: 06.03.2018.

**S. EVA WANASUNDERA PCJ.**

In this matter, this Court granted leave to Appeal on 23.05.2017 on the questions of law contained in paragraph 15 (a) to (g) of the Petition of Appeal filed by the Defendant Respondent Respondent Appellant (hereinafter referred to as the Appellant) dated 15.12.2016 and on two more questions raised by the counsel for the Plaintiff Petitioner Appellant Respondent (hereinafter referred to as the Respondent). The said questions of law are as follows:-

1. Have the learned High Court Judges erred in coming to the finding that the non compliance of Sec. 755(2)(b), by not providing Notice of Appeal to the Registered Attorney is a curable defect?
2. Have the learned High Court Judges erred in holding that the non provision of Notice of Appeal to the Registered Attorney of the Respondent makes the Notice of Appeal void ab initio?
3. Have the learned High Court Judges gravely erred in not duly considering the authorities of Mahatun Mudalali alias Paranatota Vs Naposingo and others 1986, 3 CALR 318 , Sumanasekara Vs Yapa 2006, 3 SLR 183 and Francis Vs Premawathy 2005, 3 SLR 87?

4. Have the learned High Court Judges gravely erred in misapplying the Ratio of Jayasekera Vs. Lakmini 2010, 1 SLR 41 and Wilson Vs Kusumawathie 2015 BLR 49 to this facts of this case?
5. Have the learned High Court Judges erred in coming to the finding that Sec. 759(2) of the Civil Procedure Code can be made applicable to the want of compliance under Sec. 755(2)(b), in the circumstances of this case?
6. In any event have the learned High Court Judges erred in coming to the finding that the Petitioner in the circumstances of this case is not materially prejudiced by the non compliance of Sec. 755(2)(b) by the Respondent?
7. In any event have the learned High Court judges erred in the interpretation of material prejudice for the purpose of Sec. 759(2) of the Civil Procedure Code?

And ( questions of law raised by the counsel for the Respondent )

8. Even if the notice of Appeal sent is contrary to Sec. 755(2)(b) , has it caused material prejudicial to the Petitioner?
9. In any event, does Sec. 770 of the Civil Procedure Code provide authority for notice of Appeal to be re-sent to a party?

The facts of the case in brief can be narrated as follows. The Plaintiff Zurfick had instituted action against the Defendant Naufer in the District Court of Colombo in Case No. DMR 4415/2009, by plaint dated 25.06.2009 seeking relief in granting;

- i. A declaration that the Defendant had unlawfully ejected the Plaintiff from premises bearing assessment No. 188 ½ , Second Cross Street, Colombo 11.
- ii. Judgment and Decree in favour of the Plaintiff against the Defendant in a sum of Rs. 50 Million as damages in respect of the said unlawful ejection of the Plaintiff by the Defendant.

On 05.07.2010, the Plaintiff's registered Attorney had sought for a postponement of the case on personal grounds of the counsel who was due to appear in the case on behalf of the Plaintiff. The Additional District Judge had found that the Plaintiff also was absent and informed the registered attorney of the Plaintiff that he would take up the case in a little while and then at 10.20 a.m. the ADJ had made order dismissing the Plaint. The Plaintiff had presented himself soon after the case was dismissed on the same day and got himself represented

by counsel and made an application to set aside the dismissal of the Plaintiff. His explanation for not being present at the time of the case when it was firstly called amounted to the fact that ‘ the police escort provided for the Plaintiff by the Police to come to Court, since he had death threats from the Defendant had not arrived in time to take him.’ However, the ADJ had not changed his order of dismissal. The Plaintiff had made an Application under **Sec. 87(3) of the CPC , to purge his default in appearance, but at the said inquiry also the ADJ had dismissed the said Application on 29.07.2011.**

Thereafter, being aggrieved by the said order dated 29.07.2011 of the ADJ who dismissed the application on purging the default inquiry, the Plaintiff then preferred a Final Appeal to the Civil Appellate High Court by a Petition of Appeal dated 30.08.2011. **Both parties were represented before the Civil Appellate High Court.** It is **on the notice sent by the Plaintiff Zurfick to the Defendant Naufer by registered post, that the Defendant was represented in the High Court by counsel,** although the notice was not served on the registered attorney of the Defendant.

However, thereafter, in the Civil Appellate High Court, **after 5 years** from the date of the Petition of Appeal having been filed, the counsel for the **Defendant Naufer** who was the Respondent in the said Appeal, by way of a **motion** dated 26.08.2016, **moved court to consider a dismissal of the Appeal** on the ground of **“not duly complying with the mandatory provisions of Sec.755(2)(b) of the Civil Procedure Code”**. It was considered as a **preliminary objection**. The parties had to file written submissions on **this preliminary objection**.

The Civil Appellate High Court by its order dated **09.11.2016 overruled the preliminary objection** and had set down the Appeal before the High Court for hearing on merits. Then **the Defendant Respondent Respondent Appellant** has come before this Court in Appeal from that order and this Court has granted leave to appeal on the aforementioned questions of law.

The position taken up by the Appellant is that , a copy of the Notice of Appeal regarding the case before the Civil Appellant High Court , was not served on the Registered Attorney of Naufer who was the Defendant Respondent Respondent in that case, as required by Section 755(2)(b) of the Civil Procedure Code and that it is a mandatory provision.

However it is a **fact** that such a Notice of Appeal was sent to the Defendant Respondent Respondent Naufer in the case before the Civil Appellate High Court. **It is accepted that a Notice of Appeal was not sent to the registered attorney of the Defendant Respondent Respondent in that case but was sent to the Defendant Respondent Respondent himself.**

The submission of the counsel of Plaintiff Zurfick who was the Appellant in the Civil Appellate High Court is that there has been **substantive compliance** with the requirements set out in terms of Section 755(2)(b) and **in any event, even if** the Notice of Appeal was required to be served on the Registered Attorney of the Defendant Respondent before the Civil Appellate High Court, that such would not render a **reason for the dismissal of the Appeal** before the said Court.

The submission of the counsel for the Defendant Respondent Respondent Appellant Naufer is that in the circumstances of this case where it is admitted that no notice of appeal was sent to his registered attorney, the Civil Appellate High Court should have dismissed the Appeal in limine.

Section 755 of the Civil Procedure Code provides for 'filing of an appeal'.

**Section 755(1)** reads as follows:

Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the **Appellant or his registered attorney** and shall be duly stamped. Such notice shall also contain the following particulars:-

- (a) The name of the court from which the appeal is preferred
- (b) The number of the action
- (c) The names and addresses of the parties to the action
- (d) The names of the appellant and respondent
- (e) The nature of the relief claimed.

Provided that where the appeal is lodged by the Attorney General, no such stamps shall be necessary.

**Section 755(2)** reads as follows:-

The notice of appeal shall be accompanied by-

- (a) Except as provided herein, security for the Respondent's costs of appeal in such amount and nature as is prescribed in the rules made by the Supreme Court under Article 136 of the Constitution, or acknowledgment or waiver of security signed by the respondent or his registered attorney; and
- (b) 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 acknowledgment of the receipt of such notice or the **registered postal receipt** in receipt in proof of such service.

**Section 759(2)** reads as follows:-

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

**Section 770** reads as follows:-

If at the hearing of the Appeal, the respondent is not present and the **court is not satisfied upon the material in the record** or upon other evidence that the notice of appeal was duly served upon other evidence **that** the notice of appeal was duly served upon him *or* his registered attorney as herein before provided, or if it appears to the Court at such hearing that any person who was a party to the action in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, **the court may issue the requisite notice of appeal for service**.

The Civil Procedure Code has made provision as to how an Appeal should be lodged in an Appellate Court from a final order/judgment of a lower court when one party is aggrieved by a decision of that court. The provisions direct the litigant what should be done step by step. The legislature at its wisdom has very intently drafted the provisions to facilitate the person who is aggrieved to go to a higher court in appeal. Section 755 narrates the steps to be taken at the inception. Section 770 narrates the step which may be taken by any appellate court at the hearing of the appeal if the respondent is not present in court and the court is

not satisfied that the notice of appeal was duly served **upon him or his registered attorney.** By Section 770, the appellate court is empowered to issue the requisite notice of appeal for service.

I find that, all the provisions with regard to appeals stand for 'hearing of the appeals of the aggrieved parties on the merits' and 'not to throw away the appeals without hearing them on merits'. That is the very reason for having placed Section 770 in the Civil Procedure Code, paving the way for the Appellate Judge or Judges to take over the task of issuing the requisite notice or notices for service on the respondent or respondents in the Appeal which is set down for the Appellate Court to hear and determine. The legislature has stressed on the fact that the respondent should be noticed.

Sec. 755(2)(b) specifically provides for the Appellant to serve notice on the Respondent **or** his Registered Attorney. It is an accepted fact in the case in hand that the notice of appeal was served on Naufer, the Respondent in that case, at his home address and at the Bogambara Prison where he was personally present at the time of the Appeal being filed. The registered article receipts have been filed and accepted in the pleadings by the Respondent and having received the said Notice of Appeal, the said Respondent Naufer had got himself represented in that case before court with an Attorney at Law, having filed proxy on his behalf and having a counsel being retained on his behalf. The preliminary objection against the appeal being heard by court was **the mere allegation** that having failed to send the notice to the registered attorney, the appeal should be dismissed.

When the wording of the Section is clear and notice has been sent to the Respondent, how could he allege non-compliance of the provision and seek a dismissal of the Appeal? There is no prejudice caused to the Respondent at all. The Respondent was served with notice and he was represented before court by his lawyers. Strict compliance of Sec.755(2)(b) has taken place.

In the case of ***Jayasekera Vs Lakmini 2000 1 SLR 41***, the ratio decidendi can be drawn to the effect that ;

- i. When the issue at hand falls within the purview of a mistake, omission or defect on the part of the appellant in complying with the provisions of Section 755, in such a situation, if the Court of Appeal is of the

- opinion that the respondent has not been materially prejudiced, the appellate court is empowered to grant relief to the appellant on such terms as it deemed just.
- ii. The power of the court to grant relief under Section 759(2) is wide and discretionary and is subject to such terms as the court may deem just. Relief may be granted **even if** no excuse for non - compliance is forthcoming.
  - iii. Relief cannot be granted if the court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

In the case of ***Heenmenike Vs Mangala Malkanthi , Bar Association Law Journal 2016 Vol XXII pg. 110,*** it was held that the failure to comply with Section 755(1) by not citing the 2<sup>nd</sup> substituted plaintiff as a respondent in the notice of appeal and in the petition of appeal is a curable defect under Section 759(2) and Section 770 of the Civil Procedure Code.

In the case of ***Wilson Vs Kusumawathie 2015 BLR 49,*** it was held that it is undoubtedly incumbent upon the court to utilize the statutory provisions and grant the relief embodied therein if it appears to court that it is just and fair to do so.

In the case of ***Francis and another Vs. Premawathy 2005 3 SLR 87 ,*** it was held that Sec.755(2)(b) lays down that the notice of appeal shall be accompanied by 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 acknowledgment of the receipt of such notice or the registered postal receipt in proof of such service.

In the case in hand the notice of appeal was sent to the respondent by registered post to his house and the prisons and the registered article receipts were produced as evidence and as a result the respondent was represented in court by lawyers. I find that no prejudice has been caused to the Defendant Respondent.

The counsel for the Appellant in the case in hand complained that the Civil Appellate High Court has not considered the case of ***Sumanasekera Vs Yapa***

**2006, 3 SLR 183 and Mahatun Mudalali alias Paranatota Vs Naposingho and another 1986, 3 CALR 318.**

The case of **Sumanasekera Vs Yapa (supra)** is a judgment of the Court of Appeal. The District Court had given judgment in favour of the Plaintiff. The Defendant had filed notice of appeal and the petition of appeal within time. The Plaintiff Respondent before the Court of Appeal 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, it was held by the Court of Appeal, that;

- (i) The authorities make it mandatory that the notice of appeal and petition of appeal have to be signed by the Registered Attorney and
- (ii) 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.

I find that this case is with regard to the notice being served on the Counsel without sending the same to the Registered Attorney. It is **not** a case where the notice was sent to the Respondent without sending the same to the Registered Attorney. The Civil Appellate High Court in the case in hand must have considered the decision in **Sumanasekera Vs Yapa** and concluded that the ratio in that case does not apply to the case in hand. In the case in hand the notice had been sent to the Respondent; he had received it; he had come before court and participated in the case and it is with a motion that he had taken up the position that the notice should have been sent to the Registered Attorney after many years. But it is clear in the wording of the Section 755(2)(b) that the notice has to be sent to **the Respondent or the Registered Attorney** on record for the Respondent.

In the case of **Mahatun Mudalali alias Paranatota Vs Napasingho and another 1986 3 CALR 318**, which again is a Court of Appeal decision, a document purporting to be a notice of appeal was tendered by the Petitioner

to the court of first instance within the time stipulated by Sec. 754(4) of the Civil Procedure Code. The Petition of Appeal was filed within 60 days. Petitioner failed to deposit security for the Respondents costs within 14 days. Upon objection being

taken, in that regard, the District Judge refused the purported notice of appeal. The Petitioner sought leave to appeal from that order.

It was held that the effect of the notice of appeal is to inform the respondent that the jurisdiction of the lower court will be suspended, once the appeal is taken and also to deprive the respondent temporarily of the fruits of his victory. By notice is meant actual notice and not some constructive notice. Mere compliance with section 755(1) may at most constitute constructive notice. Actual notice means compliance with Section 755(1) , (2) and Section 754(4) regarding the time within which the notice must be presented and also Section 755(1) and (5) . These requirements are mandatory to constitute a proper notice of appeal. If these conditions are not fulfilled, the court has the power to refuse to receive the notice of appeal.

I do not find that in the case in hand the Plaintiff Petitioner has defaulted in complying with any of the sections as mentioned in the reported case of ***Mahatun Mudalali alias Paranatota Vs Naposingho and another (supra)***. This case must have been considered by the appellate court even though the Appellant complains that it has not been considered.

I find that the Civil Appellate High Court has considered the provisions of the Civil Procedure Code quite correctly and in addition considered the authorities on the pertinent sections and overruled the preliminary objection “that there was no proper notice because the ‘notice of appeal has not been served on the registered attorney’ of the respondent.” I hold that the Plaintiff Petitioner Appellant Respondent has complied with Section 755(2)(b) of the Civil Procedure Code. The order of the Civil Appellate High Court is a well considered order and I affirm the same.

The Appeal is hereby dismissed with costs. The Civil Appellate High Court is directed to hear the Appeal on its merits.

Judge of the Supreme Court.

Sisira J De Abrew J.  
I agree.

Judge of the Supreme Court.

H.N.J.Perera J.  
I agree.

Judge of the Supreme Court.