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

SC Appeal No. 07/2012

SC HC(CA) LA 431/11

SP/HCCA/KAG/680/2010(F)

DC/Mawanella No.676/L

1. Mulachari Gedera Pinchi
   Amma (Deceased)
   Warakapana, Udamulla

2a. Don Asoka Dayarathne
   Kahawandala, Udamulla

3. Chandawathie Devasurendra
   Dayarathne
   Kahawandala, Udamulla

Plaintiffs

Vs

1. A.G. Wijerathna,
   Arachchige Watte,
   Kahawandala, Udamulla

2. T.G. Panditharathne
   Arachchige Watte,
   Kahawandela, Udamulla

3. T.G. Wilson
   Arachchige Watte,
   Kahawandela, Udamulla

Defendants

And

2a. Don Asoka Dayarathne

Kahawandala, Udamulla

Plaintiff – Appellant

Vs

1. A.G. Wijerathna,
   Arachchige Watte,
   Kahawandala, Udamulla

2. T.G. Panditharathne
   Arachchige Watte,
   Kahawandela, Udamulla

3. T.G. Wilson
   Arachchige Watte,
   Kahawandela, Udamulla

Defendants - Respondents

And Now Between

2a. Don Asoka Dayarathne

Kahawandala, Udamulla

Plaintiff – Appellant –
Petitioner - Appellant

Vs

1. A.G. Wijerathna,
   Arachchige Watte,
   Kahawandala, Udamulla

2. T.G. Panditharathne
   Arachchige Watte,
   Kahawandela, Udamulla

3. T.G. Wilson
   Arachchige Watte,
   Kahawandela, Udamulla

Defendants – Respondents –
Respondents – Respondents

Before: Ratnayake, PC, J.
Suresh Chandra J.
Sathyaa Hettige PC, J

Counsel:

Sunil Abeyrathne for the Plaintiff – Appellant – Petitioner - Appellant

D.M.G Dissanayake for Defendants – Respondents – Respondents - Respondents

Argued on : 28.03.2012

Decided on : 15.06.2012

Suresh Chandra, J

This is an appeal against the judgment of the Civil Appellate High Court of Kegalle rejecting the Notice of Appeal and the Petition of Appeal filed by the Appellant against the judgment of the District Court of Mawanella.

The Appellant had instituted action in the District Court of Mawanella seeking a declaration of title in respect of the land described in the second Schedule to the plaint. The Respondents filed answer denying the averments in the plaint. The District Court entered judgment in favour of the Respondents. Thereafter the Appellant being aggrieved by the said judgment of the District Court preferred an appeal to the Civil Appellate High Court of Kegalle. Both parties were required to file written submissions after they had made their oral submissions and consequently the Civil Appellate High Court delivered judgment dismissing the appeal of the Appellant on the ground that the Notice of Appeal was not valid as it had not been addressed to the original Court and rejected both the notice of appeal as well as the petition of appeal and ordered costs in a sum of Rs.10,000/- to each of the Respondents.

Being aggrieved by the said judgment of the Civil Appellate High Court, the Appellant filed an application for leave to appeal and this Court on the said application being supported on 10th January 2012 granted leave on the questions of law set out in paragraph 8 (a) – (e) of the petition, which are as follows:

> 8 (a) Whether the learned Judges of the Civil Appellate High Court of Kegalle had failed to consider the fact that the notice of appeal had not been addressed to the Civil Appellate High Court of Kegalle?
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> 8 (b) Whether the learned Judges of the Civil Appellate High Court of Kegalle have failed to consider the intention of filing notice of appeal against the judgment in a civil case?
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> 8 (c) Whether the learned judges of the Civil Appellate High Court of Kegalle have failed to consider that the Appellant had complied with the requirements

under s.754(1) of the Civil Procedure Code and the same learned Judges have misinterpreted s.754(3) and (4) of the same Code?

8 (d) Have the learned Judges of the Civil Appellate High Court of Kegalle completely ignored the remedy available under s.759(2) of the Civil Procedure Code even if there was an effect in the notice of appeal.

8 (e) Whether the learned Judges of the Civil Appellate High Court of Kegalle erred in facts and law in this case?

The appeal involves a consideration of the provisions regarding filing of an appeal from the judgment of a District Court to the Civil Appellate High Court. Section 754(1) of the Civil Procedure Code grants the right of appeal and provides as follows:

754(1) " Any person who shall be dissatisfied with any judgment, pronounced by any original court in any civil action, proceedings or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law."

Section 754(3) provides the manner in which such notice of appeal should be lodged.

S.754(3)- " Every appeal to the Court of Appeal from any judgment or decree of any original court shall be lodged by giving notice of appeal to the original Court within such time and in the form and manner hereinafter provided."

S.754(4) provides the period within which the notice of appeal must be lodged to the Original Court.

S.754(4) The notice of appeal shall be presented to the court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of the date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the court shall refuse to receive it.

S.755(1) provides for the contents to be included in the notice of appeal.

S.755 (1) 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;

S.755(2) 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 proof of such service.

S.755(3) states the time period in which the Petition of Appeal must be lodged to the Original Court

S.755(3) Every appellant shall within sixty days from the date of the judgment or decree appealed against present to the original court a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty. Provided that, if such petition is not presented

to the original court within sixty days from the date of the judgment or decree appealed against, the court shall refuse to receive the appeal.

S.755(4) Upon the petition of appeal being filed, the court shall forward the petition of appeal together with all the papers and proceedings in the case relevant to the judgment or decree appealed against as speedily as possible, to the Court of Appeal, retaining however an office copy of the judgment or decree appealed against for the purposes of execution, if necessary. Such proceedings shall be accompanied by a certificate from the Registrar of the court stating the dates of the institution and decision of the case, in whose favour it was decided and the dates on which the notice and the petition of appeal were filed and the opinion of the Judge as to whether or not there is a right of appeal against the judgment or decree appealed against.

For the purpose of completion regarding the papers to be filed when lodging an appeal and for purposes of comparison between the notice of appeal and the petition of appeal, it would be relevant to consider the provisions of S.758 of the Civil Procedure Code which sets out the form of the petition of appeal.

S.758(1) The petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars.

(a) the name of the court in which the case is pending;

(b) the names of the parties to the action;

(c) the names of the appellant and of the respondent;

(d) the address to the Court of Appeal;

(e) a plain and concise statement of the grounds of objection to the judgment, decree or order appealed against such statement to be set forth in duly numbered paragraphs;

(f) a demand of the form of relief claimed.

S.755(1) and (2) very precisely sets out the requirements that need to be fulfilled for a proper Notice of Appeal to be lodged in the Original Court. These are the only

mandatory requirements that need to be fulfilled by any party who prefers an appeal to the Court of Appeal by way of presenting the Notice of Appeal to the Original Court.

In Mahatun Mudali Alias Parantota v N. A. Naposingho and another (1986) CALR Vol III pg 318 where it was held that the effect of the filing 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.

Bandaranayake J further states in Mahatun Mudali that

“The requirements of a Notice of Appeal are spelt out in S.755 (1) and (2) …In my view all of the above requirements which are mandatory requirements must be satisfied in order to constitute a proper Notice of Appeal. This is the notice that is presented to Court in terms of Section 754(4); and if such conditions are not fulfilled the Court shall refuse to receive it.”

However in the said Mahatun Mudali’s case the deficiency was the failure to provide security when filing the notice of appeal which was in direct contravention of the requirements laid down in s.755 of the Civil Procedure Code, which resulted in the objection being taken. In the present case the question at issue was **whether the notice contemplated by S.754(3) should be given to the Original Court by addressing the Notice of Appeal to the Original Court and not to the Court of Appeal.**

The provisions of S.754 and S.755 as set out above does not make reference to the mode of addressing the notice of appeal. In fact s.755(1) which sets out the form the notice of appeal requires the naming of the Court from which the appeal is preferred to be stated in such notice, and the nature of the relief claimed. It would therefore be illogical to state that the notice of appeal should be addressed to the original court and also to state therein under the relief claimed in such notice that the judgment of the original court should be set aside. Further s.754(1) states that a party aggrieved by the judgment of the original court “may prefer an appeal to the Court of Appeal” which again would mean that the notice of appeal though filed in the original court is in fact a manifestation of the intention of the party seeking to appeal against the judgment of the

original court. The original Court is in fact the medium through which an aggrieved party has to lodge an appeal to the Court of Appeal. The procedure laid down in s.755(3) and (4) regarding the further steps to be taken after the Petition of Appeal has been filed by forwarding the same to the Court of Appeal is again an indication that the original court is the medium through which an appeal can be preferred to the Court of Appeal.

Referring to the effect of procedural law on substantive law Amerasinghe J in Fernando v Sybil Fernando and Others 1997 3 SLR 1 stated thus

"There is substantive law and there is the procedural law. Procedural law is not secondary: The maxim ubi ius ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action"

In actions before Court each party is entitled to the remedies available to them under the law and in that light a litigant who is aggrieved by the decision of a lower court is entitled to challenge such decisions through the provisions available under the law in relation to appeals and revisions. The appellate provisions in civil cases are regulated by procedure as seen in the above provisions of the Civil Procedure Code.

In the present case the appellant in exercising his right of appeal has clearly manifested an intention to invoke the Appellate powers of the Court of Appeal by filing the Notice of Appeal which the Learned Civil Appellate High Court Judges have held to be invalid which has deprived the Appellant from prosecuting his appeal on the basis that it had not been properly addressed. The learned High Court Judge in the course of his judgment has stated that

> “During the course of preparing the judgment I noticed that the “Notice of Appeal” submitted or given by the substituted Plaintiff Appellant had been addressed to the Provincial High Court of Civil Appeals instead of District Court of Mawanella, which is the Court of first instance which pronounced the impugned judgment, as contemplated by the provisions of s.754(3) and (4) of the Civil Procedure Code.”

> "Accordingly the question this Court has to decide is whether it is a mandatory requirement as per the provisions of s.754(3), (4) and s.755(1) of the Civil Procedure Code for a party Appellant to present the notice of appeal to the "Court of first instance". Because the filling of the Notice of Appeal is an integral step towards presenting the Petition of Appeal."

Thereafter the learned High Court Judge proceeded to cite cases to support his view. A consideration of those cases shows that they have no relevance to the question at issue. Wickremesinghe v De Silva 1978-79 SLLR Vol 2 pg 65 is a decision relating to the requirement of filing a Petition of Appeal within 60 days. Perera v Perera 1981 SLLR Vol 2 pg 41 was a decision which followed Wickremesinghe's case on the same point. Ranin Kumar v Union Assurance Ltd Co 2003 SLR Vol 2 pg 92 dealt with a case where a Notice of Appeal had been signed by the Appellant and not by his registered Attorney-at-Law.

It is further observed that on a perusal of the Appeal brief that was available before the Civil Appellate High Court that the notice of appeal filed by the Appellant was not addressed to any court and it merely had the heading "Notice of Appeal". However the learned High Court Judge in his judgment has stated that the said notice of appeal had been addressed to the Civil Appellate High Court. This would indicate that the learned High Court Judge has not properly examined the said notice of appeal in dealing with same and had in fact assumed it to be a notice of appeal addressed to the Civil Appellate High Court when it was in fact not so and used that to dismiss the appeal, a practice which should not be encouraged to be adopted in Court. As Francis Bacon said

"Judges must beware of hard constructions and strained inferences, for there is no worse torture than that of laws"

As shown above the provisions of the Civil Procedure Code specially s.754(3) and s.755(1) does not specifically state the manner in which such notice has to be addressed. Therefore it would become necessary to consider the practice adopted in

the District Courts of Sri Lanka in relation to the filing of notice of appeal. On a consideration of several cases throughout the country where appeals have been lodged in the District Courts, it is seen that there has been no consistent pattern in addressing the Court when filing a notice of appeal.

Three types of notices of appeal have been made use of in several District Courts in the country :

1. Where there is no address at all but merely with the caption “Notice of Appeal”
2. Where it is addressed to the “Original Court”
3. And where it is addressed to the “Appellate Court”

These practices have been prevalent for well over two centuries and can be said to have hardened into a rule. The maxim *CURSUS CURIAE EST LEX CURIAE* which means “The practice of the Court is the law of the Court would be most appropriate in a situation as has been presented in the case before this Court. Broom’s’ Legal Maxims – 10th Edition – at page 82 sets out the application of the maxim in England.

“Every court is the guardian of its own records and master of its own practice” and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience.”

In Halsbury’s Laws of England 4th Edition Vol 10 at para 703, it is stated that

“A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or **adopted by ancient usage”**

In the Sri Lankan case of Boyagoda v Mendis 30 NLR 321 it was stated that

“where an enactment concerning procedure has received a certain interpretation – which has been recognized by the Courts for a very long period of years, the practice based upon such interpretation should be followed.”

It would appear that there is no reported case which has dealt with this issue relating to the naming of the Court in the Notice of Appeal. It has to be stated that a practice that has been prevalent for over two centuries cannot be just brushed aside in the dispensation of justice.

In the present case, the Court had also considered the effect of S.759(2) of the Civil Procedure Code and ruled that the facts do not warrant the granting of relief to the Appellant in terms of the said section.

S.759(2) states that

“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, it if should be of the opinion that the respondent has not been materially prejudiced, grant relief on such terms as may deem just.”

Justice Chandra Ekanayake in the Supreme Court decision in Jayasekara v Lakmini and others discussed the effect of this section and held that the power of the Court to grant relief under S.759(2) of the Civil Procedure Code 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 – 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. Ekanayake J states that “What is required to bar relief under S.759(2) is not any prejudice but material prejudice”

The question at issue in the present case is at most a highly technical issue as the intention of the party seeking to appeal in the exercise of a right of appeal is abundantly clear from the notice of appeal that has been filed. To deprive such a party the benefit of invoking the Appellate Powers of the Appellate Court would not be keeping with the interests of justice, as it is the aspiration of a litigant to exercise the right of appeal and to invoke the powers of the Appellate Court when aggrieved by a decision of the original Court.

It has been observed by this Court in Elias v Cader and another SC Appeal No 50/2008 judgment dated 28th June 2011 that

"For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law."

It is to be observed that in the quest for justice the rigors of procedural law specially regarding strict adherence to formats should be viewed with a certain degree of flexibility.

This court is of the view that the situation in the present case did not necessitate the application of 759(2) although the High Court had made reference to it. Therefore the view taken by the High Court that even under S.759(2) the defect as stated by the High Court could not be cured is erroneous. In any event even if the Court considered it as a defect s.759(2) could be used to cure such a defect as no material prejudice was caused to the Respondents.

It may also be relevant to state that s.4 of the Civil Procedure Code has a provision, where the Code does not provide for a matter of procedure or practice that a Court can refer the matter to the Supreme Court for a special order in relation to same.

S.4 of the Civil Procedure Code states that

“In every case in which no provision is made by this Ordinance, the procedure and practice hitherto in force shall be followed, and if any matter of procedure or practice for which no provision is made by this Ordinance or by any law for the time being in force shall after this Ordinance comes into operation arise before any Court, such Court shall thereupon make application to the Supreme Court for and the Supreme Court shall and is hereby required to give, such special orders and directions thereupon as the justice of the case shall require.”

“Provided always that nothing in this Ordinance contained shall be held in anyway affect or modify any special rules of procedure which, under or by virtue provisions of any enactment now in force, may have from time to time been laid down or prescribed to be followed by any civil court in Sri Lanka in the conduct of any action, matter or thing of which any such court can lawfully take cognizance except in so far as any such provisions are by this Ordinance expressly repealed or modified.”

However, in keeping with the maxim “Cursus curiae est lex curiae” as stated above the practice of the Court should be given effect to and the use of any of the three forms in the notice of appeal spelt out in this judgment should be considered as a valid notice of appeal.

In view of the above reasoning the questions of law on which leave was granted are answered as follows:

(a) The learned Judges of the Civil Appellate High Court had failed to consider the fact that the notice of appeal in this case had not been addressed to the Civil Appellate High Court of Kegalle.
(b) The High Court failed to consider the intent and purpose of filling a notice of appeal against a judgment.

(c) The learned Judges of the Civil Appellate High Court have arrived at an erroneous conclusion in relation to the notice of appeal by holding that the said notice of appeal was invalid on the basis that it should have been addressed to the original Court. S.754(3) does not have any provision regarding 'addressing a court' it only refers to lodging of the notice in the original Court. The High Court has misinterpreted s.754(3) and s.755(1) and thereby erred in law by reading into it the requirement of inserting the original Court.

(d) The High Court arrived at an erroneous decision in holding that s.759(2) of the Civil Procedure Code could not cure a defect in the notice of appeal even if there was such a defect.

(e) The High Court had not decided the appeal on the facts and the law relating to the merits of the case.

The Appeal of the Appellant is allowed and the Civil Appellate High Court is directed to accept the notice of appeal and the petition of appeal filed of record and proceed with the appeal. There will be no costs as Counsel for the Respondent intimated to Court that the question at issue was an important issue relating to appeals and should be resolved in the interests of justice.

JUDGE OF THE SUPREME COURT

RATNAYAKE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

SATHYAA HETTIGE PC, J.

I agree.

JUDGE OF THE SUPREME COURT