

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal where leave was granted on an application for Leave to appeal under and in terms of Article 127 (2) of the Constitution read with section 5(c) of the High Court of the Provinces (special Provisions) (Amendment) Act No.54/2006

SC/APP/02/2014

NWP/HCCA/KUR/84/2003F

NWP/HCCA/KUR/85/2003F

D.C. Kuliypitiya Case No.5726/P

D.C. Kurunegala Case No. 1318/P

20(a). Hetti Achchi Arachchilage Karunaratne
Pothuwatawana, Leehiriyagama.

31. A. M. Ekanayake

32. A. M. Lakshman

33. A. M. Dharmaratne

All of:

Hendiyagala, Sandalankawa

20(a), 31st, 32nd, 33rd

Defendant/ Appellant / Appellants

-Vs.-

Edirisinghe Muhandiram Appuhamilage
Amarasinghe Appuhamy (deceased)

Lalitha Edirisinghe
Hingurandamana
Hingurakgoda.

Substituted

Plaintiff/Respondent/Respondent

1. Hettiachchi Arachchilage Manchonona
Watakayawa, Gonawila.
2. Hettiachchi Arachchilage Simonsingho
Watakayawa, Gonawila.

3. Hettiachchi Arachchilage Jangeno
Watakayawa, Gonawila.
4. Hettiachchi Arachchilage Pubilis Singho
Watakayawa, Gonawila.
5. Hettiachchi Arachchilage William
Singho
Watakayawa, Gonawila.
6. Herath Pathirannahelage Punci Banda
(Deceased)
- 6(a) Herath Pathirannahelage Jayasiri
Herath Pathirana
Hendiyagala, Sandalankawa.
7. Herath Pathirannahelage Ukkubanda
(Deceased)
- 7(a). Herath Pathirannahelage Upali
Nandasiri
Watakayawa, Gonawila.
8. Herath Pathirannahelage Amarasiri
Hendiyagala, Mokelewatta,
Sandalankawa.
9. Herath Achchi Arachchilage Abraham
Singho
Hendiyagala, Sandalankawa
10. Herath Achchi Arachchilage
Karunaratne.
Pothuwatawana, Leehiriyagama.

Presently at
C/O. Deeptha Jayantha
157, Kahatawila, Pothuwatawana.

11. Loku Hettige Ensohamy
Madurugamuwa, Gonawila.

12. Loku Hettige Punci Nona alias
Ensohamy
Nadalagamuwa, Yakwila.
- Presently at
C/O. H.M.J.K.M. Damayanthi
Nadalagamuwa, Wadumunnegedara.
13. Loku Hettige Elisahamy
Watakayawa, Gonawila.
14. Loku Hettige Mai Nona
Singakkuliya, Sandalankawa.
15. Loku Hettige Podinona alias Babynona
Nadalagamuwa, Yakwila
- Presently at
C/O. W.A. Leela Damayanthi
Madurugamuwa, Gonawila.
16. Loku Hettige Premawathi
Watakayawa, Gonawila.
17. Loku Hettige Somawathie
Hamangalla, Narangoda, Giriulla
- Presently at
C/O. Champika Priyanthi Herath,
Watakayawa, Gonawila.
18. Singhe Prutuwi Attanayake
Mudiyanselage Gunawardane
(Deceased)
- 18(a). Loku Hettige Alashamy, Watakayawa
Gonawila.
19. Hetti Achchi Arachchilage Ebrahim
Singho
Watakayawa, Gonawila.

28 (c). M.A. Charlis Singho
Thulawala, Koswatta.

28(d). M.A. Podisingho
Thulawala, Koswatta.

Presently at,
C/O. M.A. Kusumawathie
Eriyagolla, Yakwila.

28(e). M.A. Haramanis Singho
Thulawala, Koswatta.

29. A.M. Amarasena
Thulawala, Koswatta.

Presently at,
Hendiyagala, Sandalankawa

30. A.M. Amarasena (Deceased)
Thulawala, Koswatta.

30(a). A.M. Danny Amaradasa,
Hendiyagala, Sandalankawa Post.

30(b). A.M. Amarasiri,
Kapuruwala, Alawwa Post

30 (c). A.M. Amarawathi
Saman Madura, Pannala Post

30(d). A.M. Rohini Chandralatha
Hendiyagala, Sandalankawa Post.

30(e). Suriya Mudiyansele Sadi Menike
Hendiyagala, Sandalankawa Post.

Defendant/Respondent/Respondents

Before : Hon. Buwaneka Aluwihare, PC., J.
Hon. Padman Surasena, J.
Hon. E.A.G.R. Amarasekara, J.

Counsel : W. Dayaratne PC. with Miss R. Jayawardena for the 20(a), 31(a) 32nd and 33rd
Defendant – Appellant – Appellants

Lakshman Perera, PC. with Shalini Fernando for the Plaintiff – Respondent
and 24(a) Defendant – Respondent – Respondent

M.C. Jayaratne, PC. with M.D.J. Bandara and Ms. H.A. Nishani H.
Hettiarachchi instructed by Sanjeewa Kaluarachchi for the 7(a) and 30(a)
Defendant-Respondent-Respondents.

Argued on : 15/09/2020

Decided on : 30/06/2023

E.A.G.R. Amarasekara J.

As per the amended petition dated 12.12.2011 filed on behalf of the 20(a), 31st to 33rd Defendant-Appellant-Appellants (hereinafter sometimes referred to as Defendant- Appellants), the first judgment dated 28/06/1995 delivered by the District Court of Kuliypitiya was set aside by the Court of Appeal and the Court of Appeal directed to take steps and hold a trial de novo. The case proceeded to trial for the second time and, after trial the learned trial judge delivered his judgement on 09/05/2003 to partition the subject matter of the District Court action. Being aggrieved by the said judgement the 31st to 33rd Defendant Appellants lodged an appeal to the Court of Appeal which was subsequently transferred to the Civil Appellate High Court of Kurunegala. Aforesaid Petition of Appeal to the Court of Appeal has been tendered along with the Petition marked as P1. It must be noted at the beginning, the Petition of Appeal to the Court of Appeal dated 07.07.2003 tendered along with the Petition to this court marked as P1, has been referred to as the petition of Appeal of the 20(a) Defendant-Appellant appeared by his Attorney-at-Law Mr. Sunil Jayakody and it has been signed at the end by the Attorney-at-law of the 20(a) Defendant-Appellant but the prayer in the said petition is made by the 31st, 32nd and 33rd Defendant- Appellants. Relevant caption of the said petition to the Court of Appeal named only the 20(a) Defendant-Appellant as the Appellant. However, paragraph 13 of the original petition as well as of the amended petition to this court refers to a petition of appeal made by 31st to 33rd Defendant Appellants. Thus, in the first instance I wonder whether there was a proper Petition of Appeal on behalf of the 20(a) Defendant-Appellant before the Civil Appellate High Court which contained a prayer for 20(a) Defendant Appellant. However, in the amended petition to this court at paragraph 21, the Appellants state that the Learned High Court Judges dismissed both the appeals upholding a preliminary objection, indicating that there was another appeal

which was subject to the same preliminary objection. It may be the one filed by the 31st-33rd Defendant-Appellants which is found among other documents in the Civil Appellate High Court brief. The observations I have made above does not relate to the matter in issue, but I think it is worthwhile to record those observations as this matter is pending before our courts for more than half a century and delayed further after the de novo trial on this type of applications.

The said appeals before the Civil Appellate High Court were dismissed as stated above after considering the preliminary objections taken up by the substituted Plaintiff-Respondent on the premise that the Notice of Appeal of each appeal was out of time. Being dissatisfied with the said dismissal of the appeals, the Defendant Appellants filed a leave to appeal application dated 18.01.2011 before this court and thereafter tendered an amended petition dated 12.12.2011. This court granted leave on 27.11.2013 on the following questions of law.

“a) Did their Lordships err in law when they held that the Notices of Appeal submitted by 31st, 32nd and 33rd and 20(a) Appellant/Petitioners along with documents were only on 02/06/2003 which is totally erroneous as it is very clear that all the other documents clearly carry the seals and also the signature of the Registrar and also the receipts issued by the postal department as 26/05/2003?

b) Did their Lordships fail to consider that in terms of Section 75(4) [Sic] of the Civil Procedure Code, filing of the Notice of Appeal is the 1st step of lodging an appeal and without the Notice of Appeal, there is no provision in the Civil Procedure Code to accept security bonds, cost of appeal and serving Notice of Appeal through courts?

c) Is the appellant entitled in law to contradict the record of the District Court in Appeal?”

The judgment, as said before, was delivered on 09/05/2003. Thus, as per the provisions of section 75(4) of the Civil Procedure Code Notice of Appeal had to be lodged on or before the 30/05/2003 as it has to be tendered within 14 days from the judgment exclusive of the day judgment /order was pronounced, and of the day on which the notice was presented and Sundays and public holidays.

Journal entry dated 02.06.2003 in the District Court record indicates that the Appellants tendered their Notices of Appeal of their respective appeals along with the other accompanying documents and it does not mention that the said notices were tendered to court on a date prior to that date, i.e., 02.06.2003. However, it clearly mentions the dates of some of the accompanying documents tendered along with the said notices such as Security Deposit Receipts Nos. K/20 557722 and K/20 557723 both dated 26.05.03. The said Journal entry among other things further indicates that postal article receipts Nos. 7230 to 7235 and 7236 to 7241 as proof that notices were posted to the registered attorneys of other parties, security bonds, stamps, stamped envelopes and secretary’s certificate pertaining to the appeal were also filed along with the said notices of appeal of respective appeals. The secretary’s certificate mentioned there in the journal entry seems to be the Registrar’s certificate that has to be sent by the Registrar when he sends the case record to the appellate court as per section 75(5) of the Civil Procedure Code after filling of the petition of appeal. As Registrar’s Certificate is meant to be sent by the Registrar after filing of the Petition of Appeal, the reference to the secretary’s certificate mentioned therein the journal entry must

be a form prepared by the Appellant's Attorney at Law which was to be perfected by the Registrar before sending it as the Registrar's Certificate after filing of the Petition of Appeal. The said Registrar's certificate dated 07/07/2003 perfected and signed by the Registrar is found in the brief along with written submissions tendered to High Court marked P2 with Petition to this court. In the said submissions made to the High Court (P2) to challenge the correctness of the journal entry dated 02/06/2003, the Appellants had contended that the said certificate dated 07/07/2003 could not have been handed over on 02/06/2003. The said certificate has been signed by the Registrar of District Court on 07/07/2003 deleting the word 'ᄁᄁ' which is there to indicate the month of May. This shows that this form was prepared in May. As said before, when looking at the said deletion in the Registrar's certificate along with the journal entry dated 02.06.2003, it is clear that the form which was to be perfected by the Registrar as his certificate was prepared in May and tendered on 02.06.2003 along with the other accompanying documents and, now the Appellants are trying to give a different interpretation to the contents in the journal entry using the date on which the Registrar signed the said Registrar's certificate. Registrar has to sign and prepare the certificate only when he sends the brief to the Appellate court. Thus, the mere fact that the date of the Registrar's Certificate being 07/07/2003 does not establish that the certificate as a draft form that has to be perfected by the Registrar as his certificate was not tendered along with other documents on 02/06/2003 and the said minute dated 02.06.2003 was erroneous.

It appears that the Defendant-Appellants heavily rely on the dates that appear on the accompanying documents that were to be tendered along with the Notice of Appeal. The accompanying documents and the notice of appeal of each appeal evinced following facts;

- a) The security bonds of the Defendant-Appellants have been signed on 26/05/2003 and the Registrar has placed his signature and written the date as 26/05/2003.
- b) The receipts bearing numbers K/20 557722, K/20557723 issued by the District Court for the payment of cash as security which was annexed to the Notices of Appeal were dated 26/05/2003.
- c) Notices of Appeal are dated as 26/05/2003
- d) The postal article receipts and the other documentary evidence tendered in proof of posting Notices of Appeal of the Defendant-Appellants indicate that they were done on 26/05/2003.

Since the accompanying documents have to be tendered to court with the Notice of Appeal of the relevant Defendant-Appellant or Appellants, they have to be prepared, signed or posted, as the case may be, prior to the tendering of Notice of Appeal of the relevant party or parties. Therefore, dates on those documents may be the dates that they were prepared, signed or posted and do not prove that the date of tendering the relevant Notice of Appeal is the same date or is a date other than the date the minute was made, namely 02/06/2003.

On the other hand, date stamp on the two Notices of Appeal of 20(a) Defendant-Appellant and 31st, 32nd and 33rd Defendant-Appellants clearly show that they were tendered to District Court only on 02/06/2003. Even the Registrar in his hand writing has made a note on those Notices of Appeal indicating that they

were tendered to the District Court on 02/06/2003 at 10.am. Thus, the facts indicate that the Notices of Appeal were tendered only on 02.06.2003 even though, the accompanying documents and the Notices of Appeal bore the date of 26/05/2003. As said before, since those accompanying documents have to be prepared, signed and posted, as the case may be, prior to the tendering of relevant Notice of Appeal so that they could be tendered with the Notice of Appeal to the Court of first instance, the dates of the accompanying documents could not be used to challenge the correctness of the Journal Entry dated 02/06/2003. Even the Notice of Appeal could bear a different date than the date it was tendered as it has to be prepared before tendering it to Court. What is important is the date it was tendered to court. If the date of the journal entry and the date stamp of the respective Notices of Appeal or Registrar's note on the Notice of Appeal were incorrect, the Appellants could have easily raised it in the original court, so that the learned District Judge could have held an inquiry and decided the correctness of the Journal Entry and the date stamps by questioning the Registrar, while perusing the motion register/book etc. The Judges hearing appeal have to be guided by the entries in the case record and cannot decide on extraneous facts, in the absence of sufficient material to contradict the entries in the record.

After making my observations relating to the facts revealed by the case record as above, now I would refer to the relevant legal provisions and the decided cases in this regard.

In terms of Section 754(4) of the Civil Procedure Code, Notice of Appeal shall be presented to the Court of first instance within a period of 14 days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays. Further, if such conditions are not fulfilled the court shall refuse to receive the Notice of Appeal. It is common ground that the date of judgment is 9/5/2003. 11th, 18th and 25th of the said month were Sundays and 14th, 15th and 16th were public holidays. Since the day on which the petition is presented can be excluded, the Notice of Appeal should have been presented on or before the 30th of May. As mentioned before, the minute dated 02.06.2003 in the case record, the Registrar's hand written note on the Notices of Appeal and the date stamps on the relevant Notices of Appeal evinced that they were presented to the District Court only on 02.06.2003. The Appellants attempted to create a doubt as to the date of presentation of the Notices of Appeal by referring to the dates found on the accompanying documents. As said before they had to be prepared prior to the moment of tendering the relevant Notice of Appeal so that they could be tendered along with the relevant Notice of Appeal.

As argued by the Defendant-Appellants, if the Notices of Appeal were tendered on 26/5/2003, namely the date on which the accompanying documents were made or posted etc. and the minutes dated 02/06/2003 and /or the date stamp and/or Registrar's hand written notes on the Notices of Appeal were incorrect, as said before, it was the duty and responsibility of the Defendant-Appellants' and their lawyers to bring it to the notice of the relevant District Judge who had the opportunity of holding an inquiry in that regard to come to a correct finding on the facts alleged while giving an opportunity for the opposite parties to cross examine the witnesses and place other evidence. If such a step was taken by the Appellants before the District Judge to rectify any alleged error, the High Court Judges or this Court sitting in appeal gets the benefit of such inquiry in evaluating the stance taken by the parties. Mere self-serving statements made during an appeal would not be appropriate to be used to contradict what is recorded

or found in the case record. After all, there is a presumption that all judicial and official acts have been regularly performed (See section 114 of the Evidence Ordinance).

The following judgments cited by the Plaintiff-Respondent-Respondents support the position mentioned above.

- a) In **Shell Gas Company V All Ceylon Commercial and Industrial Workers Union [1998], 1 Sri LR, 118**, the Court of Appeal held that it is not open to a petitioner to file a convenient and self-serving affidavit for the first time before the Court of Appeal and thereby seek to contradict a judicial or quasi-judicial record and that if a litigant wishes to contradict the record, he ought to file the necessary papers before the court or tribunal of first instance, initiate an inquiry before such authority, obtain an order from the deciding authority of first instance and thereafter raise the matter in appropriate proceedings before the Appeal Court so that the appellate court would be in a position on the material before it to make an appropriate adjudication with the benefit of the order of the deciding authority in the first instance. The decision in **Jayaweera v Asst. Commissioner of Agrarian Services Ratnapura and another [1996] 2 Sri LR, 70**, also expressed a similar view.
- b) In **King V. Jayawardena [1947] XLVIII NLR – 497** Dias J, in a criminal appeal, referring to decided cases pointed out that the record cannot be contradicted or impeached by affidavits and it would be improper to allow an affidavit to be filed on material point by a person who cannot be cross-examined by the opposite parties.
- c) In **Vannakar V Urhumalebbe [1996] 2 Sri LR 73 CA** states that if a party had taken such steps to file papers before the presiding officer of the Court of first instance, then an inquiry would be held by him and the self-serving statements and averments would be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the court of appeal would have the benefit of the recorded evidence which has been subjected to cross-examination and the benefit of the findings of the judge of the court of first instance. When such a procedure is not adopted, the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavit to contradict or vary the record.

At this point, I must reiterate the presumption that official and judicial acts have been regularly performed. Thus, this Court has to conclude that the Notices of Appeal were presented to the District Court only on 2/6/2003.

In **Nachchiduwa V Manzoor (1995) 2SLR 273** the Court of Appeal held that the act of the Registered Attorney in tendering the Petition of Appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the Petition of Appeal constitute the presentation of the Petition of Appeal.

No doubt the same principle applies to the presentation of Notice of Appeal. Thus, in my view, the date stamp and the note made by the Registrar on relevant Notices of Appeal are decisive and thus the Notices of Appeal were tendered to Court only on 02.06.2003 which was out of time.

Hence, we cannot find any reason to interfere with the impugned order dated 08.12.2010 by learned High Court Judges of the Civil Appellate High Court of Kurunegala. For the reasons given above, the questions of law (a) and (b) mentioned above are answered in the negative and the question of law (b) has been framed on a wrong premise since the case record confirms that the Notices of Appeal along with the accompanying documents were tendered only on 26.05.2003. Thus, question of law (b) also has to be answered in the negative.

This case seems to have been pending for more than a half a century in our courts. The partition action was filed in 1961 and the de novo trial was ordered in Nineteen Nineties and concluded in 2003. Due to the lack of diligence in filing the Notices of Appeal within time by the Defendant Appellants, the learned High court Judges have dismissed the appeals of the Defendant-Appellants. The fault that caused the dismissal by the High Court was of the Defendant Appellants and their lawyers.

I do not see any merit in this appeal. Therefore, I dismiss this appeal while giving the entitlement to the Plaintiff-Respondents to claim taxed costs with an additional Rs. 200000/- as costs of this appeal.

Appeal Dismissed.

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Judge of the Supreme Court

Buwaneka Aluwihare P.C., J

I agree.

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Judge of the Supreme Court

P. Padman Surasena, J

I agree.

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Judge of the Supreme Court