

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

In the matter of an Appeal

Ulviti Gamage Dhanapala,  
No.32, Galhena Road  
Gangodawila,  
Nugegoda.

**Plaintiff**

SC Appeal 2/2017  
SC /HC/ CALA. No. 492/2014  
Civil Appellate High Court Case No.  
WP/HCCA/COL/134/2006 (F)  
D.C. Colombo Case No.11619/MR

Vs-

The Attorney General  
Attorney General's Department,  
Hulftsdorp, Colombo 12.

**Defendant**

AND THEN

The Attorney General  
Attorney General's Department,  
Hulftsdorp, Colombo 12.

**Defendant -Appellant**

Vs

Ulviti Gamage Dhanapala,  
No.32, Galhena Road  
Gangodawila,  
Nugegoda.

**Plaintiff-Respondent**

AND NOW

The Attorney General  
Attorney General's Department,  
Hulftsdorp, Colombo 12.

**Defendant-Appellant-**

**Petitioner-Appellant**

Vs

Ulviti Gamage Dhanapala,  
No.32, Galhena Road  
Gangodawila,  
Nugegoda.

**Plaintiff-Respondent-**

**Respondent-Respondent**

Before: Sisira J. de Abrew J  
Murdu N.B. Fernando PC J &  
A.L.S. Gooneratne J

Counsel: Anusha Jayatilake Senior State Counsel for the Defendant-Appellant-  
Petitioner-Appellant

Respondent-Appellants

Gamini Prematilake with Udaya Bandara for the Plaintiff-Respondent-

Respondent-Respondent

Argued on : 10.3.2021

Decided on: 26.3.2021

Sisira J. de Abrew, J

In this case the judgment was given by the learned District Judge in favour the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent). The judgment was delivered in open court on 28.4.2006. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) filed Notice of Appeal and Petition of Appeal in the District Court within time. At the hearing of the appeal before the Civil Appellate High Court, the Plaintiff-Respondent raised an objection that the Defendant-Appellant had not sent Notice of Appeal to the Plaintiff-Respondent or to the Registered Attorney-at-Law of the Plaintiff-Respondent in terms of Section 755(2) (b) of the Civil Procedure Code and moved to dismiss the appeal. Section 755(2) (b) of the Civil Procedure Code reads as follows.

*The notice of appeal shall be accompanied by -*

*(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.*

The learned Judges of the Civil Appellate High Court by their judgment dated 22.8.2014, upheld the objection and dismissed the appeal of the Defendant-Appellant. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has appealed to this court. This court by its order dated 10.1.2017, granted leave to appeal on questions of law set out in paragraphs 14(a), (b),(c) and (d) of the Petition of Appeal dated 2.10.2014 which are set out below.

1. Have their Lordships of the Civil Appellate High Court in making the order failed to take into consideration the provisions contained in section 759 of the Civil Procedure Code?
2. Have their Lordships of the Civil Appellate High Court failed to consider that no prejudice had been caused to the Plaintiff by serving the notice of appeal to the former Registered Attorney?
3. Have their Lordships of the Civil Appellate High Court failed to consider the fact that the notice of appeal had been filed by the Defendant within 14 days from the date of judgment?
4. Have their Lordships of the Civil Appellate High Court, having concluded that no prejudice had been caused to Plaintiff-Respondent, unjustly dismissed the Appeal of the Defendant-Appellant?

In this case the former Registered Attorney-at-Law of the Plaintiff-Respondent in the District Court was Mrs. Gowri Sangari Thavarasa. She revoked her proxy on 22.7.1996. Pushpa Nanayakkara Attorney-at-Law filed new proxy on 24.7.1996. The judgment in the District Court was delivered on 28.4.2006. The learned Senior State Counsel admitted at the hearing before us that the Defendant-Appellant, by mistake, had sent the Notice of Appeal to the previous Registered Attorney-at-Law

of the Plaintiff-Respondent Mrs. Gowri Sangari Thavarasa. The learned Senior State Counsel however contended that no material prejudice has been caused to the Plaintiff-Respondent since it was within the knowledge of the Registered Attorney-at-Law of the Plaintiff-Respondent (Pushpa Nanayakkara) that a Petition of Appeal had been filed in the District Court. She therefore contended that under Section 759(2) of the Civil Procedure Code, the Petition of Appeal of the Defendant-Appellant should have been accepted by the Civil Appellate High Court and should have been proceeded to hear the main appeal. I now advert to this contention. Section 759(2) of the Civil Procedure Code 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, 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.*

It is necessary to consider whether the Plaintiff-Respondent has been materially prejudiced by the mistake committed by the Defendant-Appellant (sending the Notice of Appeal to the previous Registered Attorney-at-Law of the Plaintiff-Respondent). It has to be noted here that after the judgment of the District Court was delivered in open court on 28.4.2006, the case was called in open court on 12.6.2006 in order to correct mistakes in the judgment. By this time the Petition of Appeal had been filed in the District Court. On 12.6.2006, the Registered Attorney-at-Law of the Plaintiff-Respondent was present in open court when the case was called and the learned District Judge, after correcting mistakes, made an order to send the case record to the Court of Appeal. This is evident by journal entry dated 12.6.2006. Thus when the learned District Judge made the above order, it was within the knowledge of the Registered Attorney-at-Law of the Plaintiff-Respondent (Pushpa Nanayakkara) that a Petition of Appeal had been filed. Thus,

can it be said that failure on the part of the Defendant-Appellant to send notice of appeal to the Registered Attorney-at-Law of the Plaintiff-Respondent has caused material prejudice to the Plaintiff-Respondent? Learned counsel for the Plaintiff-Respondent relied on the judgment of the Court of Appeal in the case of Sumanasekera Vs Yapa [2006] 3 SLR 183 at page 187 it was held as follows:

*‘The authorities make it mandatory that the Notice and Petition of Appeal have to be signed by the Registered Attorney, and actual notice sent to the registered Attorney, under section 755(2)(b). However the Appellant has not acted in conformity with section 755(2)(b) as the Actual Notice was sent to the counsel for the respondent and not on the Registered Attorney-at-Law. The Petitioner has not shown any good and sufficient ground in not complying with the provisions of section 755(2)(b) of the Civil Procedure Code, and as the Respondent has been materially prejudiced by such noncompliance, the Petitioner is not entitled to relief under section 759 of the Code.’*

But the Defendant-Appellant in the present case has admitted his mistake and took up the position that notice of appeal was sent to the previous Registered Attorney-at-Law of the Plaintiff-Respondent by mistake; and that it was within the knowledge of the Registered Attorney-at-Law of the Plaintiff-Respondent (Pushpa Nanayakkara) that a Petition of Appeal had been filed

In the case of Martin Vs Suduhamy [1991] 2 SLR279 at page 286 this court (His Lordship Justice Fernando) dealing with Section 759(2) of the Civil Procedure Code made the following observation.

*“If the Court of Appeal is of opinion that the respondent has not been materially prejudiced, by non-compliance with relevant provisions, it has jurisdiction to grant relief. In the present case, the Court of Appeal was*

*clearly in error in holding that "the very continuance of litigation would itself amount to material prejudice": if that be correct, that would be true of every case (including Sameen v. Abeyewickrema 64 NLR553) in which relief is sought under section 759(2), and every application for relief would have to be refused on that ground. Such an interpretation must be resisted, unless compelled by clear words. What is contemplated is prejudice caused by or in consequence of the non-compliance."*

At page 287 His Lordship Justice Fernando further made the following observation.

*"It then becomes necessary to consider whether the Court of Appeal ought to have exercised its discretion to grant relief. While relief will more readily be granted if the non-compliance is trivial, or where an excuse or explanation is offered, I am in respectful agreement with Lord Chancellor in Sameen v. Abeyewickrema that relief can be granted even in respect of total or substantial non-compliance, and even if no excuse is forthcoming. .... The discretion under section 759(3) is a judicial discretion; it was incumbent on the Appellant to place the necessary material before the Court and to invite the Court to exercise that discretion."*

In the case of Nanayakkara Vs Warnakulasuriya [1993] 2 SLR 289 this court at page 290 held that ‘the power of the Court to grant relief under s. 759 (2) of the 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. However, 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.’

The learned Judges of the Civil Appellate High Court have not considered Section 759(2) of the Civil Procedure Code.

The learned Judges of the Civil Appellate High Court have observed that there was no opportunity for the Plaintiff-Respondent to know that an appeal had been filed since the Plaintiff-Respondent or his Registered Attorney-at-Law had not received notice of appeal. Is this observation correct? The Registered Attorney-at-Law of the Plaintiff-Respondent who was present in court on 12.6.2006 should be aware that an appeal had been filed since the learned District Judge on 12.6.2006, made an order to send the case record to the Court of Appeal. Therefore, the above observation made by the learned Judges of the Civil Appellate High Court is not correct. Considering all the above matters, I hold that the noncompliance of Section 755(2)(b) of the Civil Procedure Code in the present case is trivial and it has not caused material prejudice to the Plaintiff-Respondent. In my view the learned Judges of the Civil Appellate High Court should have overruled the objection of the Plaintiff-Respondent and decided to hear the appeal of the Defendant-Appellant on its merit. Considering all the above matters, I hold that the learned Judges of the Civil Appellate High Court were in error when they dismissed the Petition of Appeal of the Defendant-Appellant. For the above reasons, I set aside the judgment of the learned Judges of the Civil Appellate High Court dated 22.8.2014 and direct them to hear the appeal of the Defendant-Appellant on its merit.

I would like to state here that this judgment is not a licence for appellants not to comply with Section 755(2)(b) of the Civil Procedure Code. Appellants should comply with Section 755(2)(b) of the Civil Procedure Code. But in a situation where the Appellant has failed to comply with Section 755(2)(b) of the Civil Procedure Code, the Appellate Court has, under Section 759(2) of the Civil



Procedure Code, the power to use its discretion to accept petition of appeal if no material prejudice has been caused to the Respondent as a result of any mistake, omission or defect on the part of the Appellant. An application to use the discretion of the Appellate Court under Section 759(2) of the Civil Procedure Code will be separately considered on the facts of each case.

In view of the conclusion reached above, I answer the 1<sup>st</sup> and 2<sup>nd</sup> questions of law in the affirmative. The 3<sup>rd</sup> question of law does not arise for consideration. I answer the 4<sup>th</sup> question of law as follows. The learned Judges of the Civil Appellate High Court were in error when they dismissed the appeal of the Defendant-Appellant.

*Appeal allowed.*

Judge of the Supreme Court.

Murdu N.B. Fernando PC J

I agree.

Judge of the Supreme Court.

A.L.S.Gooneratne J

I agree.

Judge of the Supreme Court.