

**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA.**

**In the matter of an application  
for the re-instatement and/or  
re-listing of the appeal No  
790/99(F).**

CA 790/99 (F)

DC Colombo 17964/MR

Leader Publication PVT, Ltd.

C/o. Com-Sec Management  
Services Pvt Ltd.

41, Alfred House Gardens,  
Colombo 03.

Defendant-Appellant-Petitioner.

Vs.

Ronnie Peirs,

155, Notting Hill Gate London,  
W 113LF, United Kingdom.

Plaintiff-Respondent-Respondent.

Before : A.W.A. Salam, J. &

Malini Gunaratna J

Counsel : Faiz Musthapha PC with W. Withanaachchi for the Defendant-Appellant-Petitioner and Romesh de Silva PC with N.R. Sivendran for the Plaintiff-Respondent-Respondent.

Argued on: 11.03.2014

Decided on : 18.03.2014

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A.W.A. Salam, J.

This is a re-listing application of an appeal preferred by the defendant-appellant-petitioner (hereinafter referred to as the “petitioner”). The appeal has been rejected on 30 January 2012, for non-payment of brief fees.

The events that preceded the application need to be set out in some detail. The plaintiff-respondent-respondent (hereinafter referred to as the “respondent”) sued the petitioner for damages under actio injuriarum and the trial having been taken up *ex parte* judgment was entered in favour of the respondent as prayed for in the plaint.

Later, an application was made to have the judgment and decree entered for default vacated, on the ground that summons had not been served on the petitioner. The learned

district judge after inquiry dismissed the application, as the petitioner was unable to establish the allegation that the trial had been taken up *exparte* without due service of summons. Being aggrieved by the order of the learned district judge refusing to vacate the judgment and decree entered upon default, the petitioner preferred an appeal to this Court as permitted under Section 88(2) of the Civil Procedure Code.

Having filed the appeal, the petitioner made no application within a period of two weeks of the presentation of the petition of appeal to the registrar of this Court for the such number of copies as are necessary for the decision of the appeal, as required under rule 4 of "Court of Appeal-appellate procedure-copies of record-rules 1978.

Rule 4 of "Court of Appeal-appellate procedure-copies of record-rules 1978, provides that within two weeks of the presentation of the petition of appeal the appellant shall apply in writing to the registrar of the Court of Appeal for the number of copies of the record stating in such application whether copies of the whole or portions only, and if so of what portions of the record are necessary for the decision of appeal. The appellant shall within three days of his so filing his application serve copy of the same on the respondent who shall within seven days of receipt of the said copy file in the said Court a memorandum of any further portions of the

record which he considers necessary together with an application specifying the number of copies required by him.

As the petitioner had not availed of the benefit of Rule 4 aforesaid, notices were issued on both parties and their registered Attorneys-at-Law requiring their presence on 4 October 2011 in Court No 108. The notices thus despatched to the parties and their registered Attorneys by registered mail to the addresses furnished, contained information that the appeal No 790/99 (F) has been listed and due to be mentioned on 4 October 2011 in Court No 108 and that the petitioner, respondent and their Attorneys-at-Law are required to be present on that date.

The notice thus sent out on the petitioner was addressed to Leader publication, C/O Com-Sec Management Private Limited, 41, Alfred House Gardens, Colombo 3 which is the address furnished by the petitioner and the copy of it has been forwarded to the registered Attorneys-at-Law of the petitioner to No 810, 2<sup>nd</sup> floor, Maradana Road, Colombo 10.

As far as the registry of this Court is concerned, the only addresses furnished to Court and available for service of notices and other process on the petitioner and the registered Attorney were the above address. Hence, there was no alternative but to direct every notice intended to be served on the petitioner and the Attorney to be directed the address

furnished to Court. Even though it was submitted that the petitioner's address had changed, no steps have been taken by the petitioner to keep the registry informed of the change of address. If any change of address had occurred subsequent to the filing of an appeal and before its disposal, it is the duty of the party concerned, to keep the registry informed of such a change. Unless such changes are intimated the address available in the record has to be considered as the address of the party concerned, for purposes of serving the process. As such, the petitioner has to blame itself for the lapse on its part in not keeping the registry updated with the change of address, if any. Therefore, the notice issued on the petitioner requiring its presence on 4 October 2011 should be deemed as having been properly addressed and delivered. Even as regards the notice sent to the Attorney-at Law, there is no dispute that it had not reached him. Despite such notices having been dispatched by registered post the petitioner was neither present nor was it represented on 4.10.2011. Had the petitioner appeared in Court on 4 October 2011, it may not have suffered the order applied to be vacated.

Quite regrettably, the Attorney-at-Law whose presence on the 4 October 2011 was required had shown no interest at all to appear in deference to Court. This shows the callous disregard to the notice and a certain degree of the dereliction of duty by the registered Attorney-at-Law of the petitioner.

Had the registered Attorney-at-Law appeared in Court in response to the notice or made some arrangement for appearance the order made adverse to the interest of his client may not have come to pass.

Be that as it may, upon the failure on the part of the petitioner and his Attorney-at-Law to appear in Court in response to the notice sent out, yet the Court had not made any adverse orders on the petition of appeal presented for adjudication. As the petitioner is required to be given more details as to the progress of the appeal preferred by it, the Court then directed that a notice be issued on the petitioner with copy to the registered attorney-at-law. The relevant minute directing the registrar to send out a second notice, reads thus....

04.10. 2011

Before: A.W.A.Salam J

Appellant is absent and unrepresented.

Registrar is directed to notify the appellant to pay the brief fees on or before 31 December 2011 in terms of Rule 13 (b) with copy to the registered attorney and notice the parties to appear on 30 January 2012.

Accordingly, a notice has been issued by registered post, on the petitioner with copy to the registered Attorney-at-Law. Following is the reproduction of the notice that was sent out

to the petitioner (appellant) with copy to the registered Attorney-at-Law ....

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There is no controversy that the said notice has been properly addressed. However, the copy of the notice addressed to the registered Attorney-at-Law has been inaccurately addressed to No 108 instead of 810. Therefore,

as has been submitted by the learned President's Counsel for the petitioner, it cannot be presumed that the notice on the registered Attorney-at-Law has been duly served and therefore the finding of this Court as to the delivery of the second notice ( namely the copy) which has been sent to the Attornet-at-Law as matter of courtesy should stand corrected to the extent that no presumption applies to the said notice having reached the addressee.

Even if the Attorney-at-Law of the petitioner has not been served with such a notice, it due compliance of the rule to cause it to be served on the appellant. Rule 13 of the preparation of appeal briefs-Court of Appeal-1978 provides that "where the appellant fails to make application for copies in accordance with the requirements of these rules or the appellant fails to pay the fees due under these rules, **the Court of Appeal made direct the appellant to comply with such directions as the Court may think fit to give, and may reject such appeal if the appellant fails to comply with such directions**". (Emphasis added)

As far as the present case is concerned, admittedly the appellant has failed to make any application for copies in accordance with rule 4 of the Court of Appeal-appallate procedure-copies of records-rules 1978. Besides, the



petitioner has failed to appear in Court on 4 October 2011 or caused to enter an appearance on its behalf, so as to take notice of the steps do for the prosecution of its appeal.

Despite such default, yet the Court has issued notice on the petitioner informing the exact amount that has to be paid by way of brief fees and the last date on or before which the payment has to be made. Further, the Court has appointed a date approximately one month after the date on which the appeal is due to be mentioned in open Court. The petitioner has been given sufficient notice that in the event of its failure to deposit brief fee, the appeal will be referred for an order of Court.

Accordingly, as the petitioner has not applied for copies in accordance with the code 4 and not taken steps to the pay the brief fees as specifically notified by court, the appeal has been rejected on 30 January 2012. The operative part of the judgment rejecting the appeal of the petitioner reads thus..

“Appellant absent and unrepresented. Notice directed to be served on the appellant has been returned with the endorsement that the appellant is no more at the given address. No change of address has been intimated to the registry by the appellant. The only address at which notice on be issued is the one that this provided in the caption. Notice issued

on Samararatna Associates (registered attorney of the petitioner) is presumed to have been served as the same had not been returned undelivered.

For failure on the part of the appellant to deposit the brief fees in terms of rule 13 (b) of the preparation of appeal briefs-Court of Appeal-1978, this appeal stands dismissed.

Judge of the Court of Appeal

The learned President,s Counsel for the petitioner adverted us to the judgement of Kamal Siriwardena Vs Leonard Perera SC appeal 25/88 - Sc minute dated 6.1.1990 where it was held that the word appearing in Rule 13(B) should be construed as imperative.

As it is evident from the second notice reproduced above, it is quite clear that the court has considered rule 13(B) in its proper perspective before entering the order rejecting the appeal.

Eventhough the learned Presiden's Counsel submitted that the petitioner has been subjected to an injustice by not ensuring that the second notice reached the registered Attorney, I see no merit in the argument as the registry has

strictly complied with the rules by sending out the second notice to the appellant.

In the circumstances, I see no reason to issue notice on the application for re-listing. Application refused.

Judge of the Court of Appeal

Malini Gunaratna, J

I agree

Judge of the Court of Appeal

NR/-