

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

Kankanamge Chandana Geethapriya
No.92, MDH Pura, Pelawatta,
Battaramulla

**10A Substituted Defendant-Appellant-
Petitioner**

Kankanamge Gunadasa
Weligampitiya,
Pokunuwita.

Deceased 10A Defendant-Appellant

C.A.NO.965/98 (F)
D.C.HORANA CASE NO.3438/P Vs

Don Matin Edirisinghe
And another

Plaintiff-Respondent-Respondents

Aluthkoralage Jayanthi
Weligampitiya,
Pokunuwatta.
And others

Defendant-Respondent-Respondents

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Sulari Gamage with K.N.Wijesinghe for the 10A Defendant-Appellant-Petitioner

ARGUED ON : 25.05.2014

WRITTEN SUBMISSIONS FILED ON : 04.06.2014 by the 10A substituted Defendant-Appellant-Petitioner

DECIDED ON : 2ND JULY 2014

CHITRASIRI, J.

Being aggrieved by the judgment dated 22.06.1998 of the learned District Judge of Horana, three appeals have been preferred to this Court and one of which is by the 10th defendant. Having taken steps to list those appeals, Registrar of this Court issued notices on the parties directing them to pay the brief fees in order to have the briefs prepared. No party responded to those notices and accordingly, this Court rejected the appeals on 15.02.2012. Thereafter, substituted 10A defendant-appellant-petitioner filed the petition dated 25.07.2013 and sought to have the appeal filed by the 10th defendant which bears the No.CA 965/98 (F), re-listed vacating the aforesaid order dated 15.02.2012 delivered by this Court. The order so delivered included the dismissal of the appeal of the 10th defendant as well. The decision for the dismissal of the appeal was made in terms of the Rule 13(b) read with Rule 34 of the Supreme Court Rules formulated on 11.02.1988.

Aforesaid Rule 13(b) of the Supreme Court Rules read thus:

“Where the appellant fails to pay the fees under these rules, the Court of appeal may 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”.

Admittedly, the 10th defendant-appellant namely Kankanamge Gunadasa has not paid the brief fees despite the notices sent to him on several occasions directing him to pay the brief fees. Upon perusal of the journal entries in the docket maintained by the Registry, the 10th defendant-appellant had been noticed for the first time by the notice dated 10.08.2011 directing him to appear in this Court having listed the appeals for 29.08.2011. On the same date a copy of the said

notice had been sent to the registered attorney of the 10th defendant-appellant as well. The case had been mentioned on 29.08.2011 and the 10th defendant was absent and unrepresented on that date. Thereafter, Court has directed the Registrar once again to re-issue notices to the appellants as well as to the respondents. Accordingly, the notice dated 28.05.2011 had been sent again to the 10th defendant-appellant directing him to be present in this Court on 12.10.2011. Since he was absent on that date too, (12.10.2011) Court has directed the Registrar to issue notice to the appellants once again informing them of the consequences of an order, if it is made in terms of Rule 13(b) of the Supreme Court Rules. Accordingly, the Registrar of this Court, having referred to the Rule 13(b) of the Supreme Court Rules, has sent notices to the 10th defendant-appellant and to his Attorney, S.Weerasinghe directing to pay Rs.6,200/- as brief fees before 22.11.2011. The said notice sent to the 10th defendant had been returned with the endorsement that the addressee had left the premises but the notice sent to the registered attorney had not been returned. Accordingly, this Court has made order rejecting the appeal since the 10th defendant-appellant has failed to pay the brief fees despite the several notices sent to him and to his registered attorney. This application is to have the said order of this Court vacated and to have the appeal re-listed for hearing.

Substituted 10th defendant-appellant-petitioner, in the affidavit he has filed with his petition dated 25.07.2013, has stated that the 10th defendant was admitted to the hospital on 19.05.2011 and was discharged two days thereafter on 21.05.2011. Once again, he had been admitted to the hospital on 27.07.2011 and was discharged on 5.08.2011. Subsequently, he had died on 28.11/2011 at the Cancer Hospital, Maharagama. In that application for re-listing, petitioner has also stated that the 10th defendant had failed to pay the brief fees basically due to his ill health. In that same petition, it is also stated that the 10th defendant was not living at the

address given in the petition of appeal after he was discharged from the hospital and the 10th defendant, therefore was not in a position to receive the notices sent by this Court.

10th defendant-appellant was alive when all the three notices were sent. He was not an inmate of the hospital either, when those notices were sent. He had died only on 28.11.2011 and it was a date after all those notices were dispatched by this Court. The first two notices have not been returned though those had been sent under registered cover. No evidence is forthcoming to show that the two notices were not received by the 10th defendant. No material is found to establish that there was nobody at the house where the 10th defendant was living when those two notices were sent. Therefore, this Court will have to presume that the 10th defendant has received those first two notices.

Moreover, this Court is not in a position to accept the evidence contained in the affidavit of the petitioner as to the non-receipt of the notices by the 10th defendant because it is a matter beyond the personal knowledge of the deponent. Such a fact can only be said by the person in whose name those notices were sent. Accordingly, this Court is not inclined to decide that due notice was not given to the 10th defendant-appellant, of the listing of this appeal for the purpose of making the payment of the brief fees.

In the petition and also in the submissions filed on behalf of the 10A Substituted defendant-petitioner, he has stated that the application for re-listing is basically on the basis of ill-health of the 10th defendant. In this regard Amarasinghe,J, in **Jinadasa and another v. Sam Silva and others [1994 (1) N.L.R.at 234]** has held thus:

“It cannot order the re-instatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds”.

In the light of the above authority of the Supreme Court, this Court is not inclined to consider the ill-health of the 10th defendant in making an order as to the application for re-listing. More importantly, it must be noted that the circumstances of the case show that three notices have been sent by the Registrar of this Court to the Registered Attorney of the 10th defendant-appellant as well, informing him of the listing of this appeal. He, being the Registered Attorney of the 10th defendant-appellant owed a duty to inform this Court of the situation prevailed enabling this Court to take necessary steps as to the payment of brief fees.

Duty cast upon the registered attorneys when they take the responsibility as a proxy holder on behalf of a party to an action also had been highlighted in the aforesaid decision by Dr. Amarasinghe J. In that decision it was held as follows;

“10(a) since the petitioner had duly appointed a registered attorney they were obliged to act through their registered attorney and not personally and, in general they were bound by the act and omissions of their registered attorney. As far as the registered attorney in this case was concerned, the binding effect of his actions was based on the powers conferred by the terms of a standard, printed proxy in terms of Form 7 of the First Schedule to the Civil Procedure Code. It was neither extended expressly or impliedly, as it might have been, nor was it restricted”.

.....

“ (b) If the parties are required by law or by the court to be present, then they must be present. In the case before court they did not have to be present once the registered attorney had been duly appointed. In the circumstances, the petitioners were under no obligation to explain their absence. It was the default of the attorney that had to be considered. If the attorney, without sufficient excuse, was absent on the date appointed for hearing, the court, if it dismissed the application, is entitled to refuse to reinstate the matter”.

As held by Amarasinghe,J, it is my view that the failure on the part of the registered attorney in this instance to inform Court as to the situation prevailed at all material times cannot be ignored and excused. Under those circumstances, it is my opinion that the matters brought

before Court do not warrant allowing the application for re-listing of the appeal filed by the 10th defendant.

For the aforesaid reasons, the application to have the appeal filed by the 10th defendant re-listed that was filed by the 10A defendant-Appellant-Petitioner in his petition dated 21.07.2013 is refused.

Application refused

JUDGE OF THE COURT OF APPEAL