

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

**C.A. (PHC) 158/2005**

PHC Matara Case No: 160/2004

Mohomad Abdul Raul  
No. 17,  
Bathutha Road.  
Matara.

**Petitioner - Appellant**

**Vs.**

Urban Development Authority  
Battaramulla.

W.C. Susantha  
Weherahena,  
Matara.

**Respondents - Respondents**

C.A. (PHC) 158/2005

PHC Matara Case No: 160/2004

Before : K.T. Chitrasiri, J. &  
W.M.M. Malinie Gunaratne, J.

Counsel : Chandana Premathilake for the Petitioner-  
Appellant.  
Vicum de Abrew DSG. for the 1<sup>st</sup> Respondent.  
Samantha Fernando for the 2<sup>nd</sup> Respondent.

Argued &  
Decided on : 20.10.2014

K.T. Chitrasiri, J.

At this stage, learned Deputy Solicitor General informs Court that the appellant has failed to follow the procedure laid down in Rule 11 (3) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988. <sup>Since</sup> he has not filed a notice of appeal as required by the said Court of Appeal Rules 1988. Accordingly, he moved that this appeal be dismissed since the adherence to the requirements referred to in the aforesaid Rules are considered as imperative and mandatory.

Learned Counsel for the appellant having perused the original record conceded that no notice of appeal had been filed by the appellant in this instance.

Journal entry dated 06.07.2005 found at page 31 in the appeal brief shows that the learned High Court Judge having refused to issue notice on the respondents at the very outset has dismissed the writ application filed in the High Court of Matara making it the final decision of the said writ application. Thereafter, on 25.07.2005 the appellant has filed a petition of appeal which is dated 22.07.2005 without a notice of appeal being filed. Therefore, it is clear that the appellant has failed to file a notice of appeal as required by the aforesaid Rule 11 (3) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988.

In Part II of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988, stipulates the procedure applicable when canvassing the final decisions made by the High Court, in the exercise of its jurisdiction under Article 154 P (6) of the Constitution.

Rule 11(3) of the aforesaid Rules states thus:

*“(3) The notice of appeal shall be presented to the High Court for this purpose by the party appellant or his Registered attorney within a period of fourteen days from the date when the order appealed against was pronounced, exclusive of the day of that date itself and the day when the petition is presented 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”.*

Having looked at the aforesaid Rule which requires to file a notice of appeal, the learned Counsel for the appellant submitted that Article 154 P (6) permits a person aggrieved by a final order, to file an application, as of a right subject to the provisions of the Constitution and in law. Accordingly, he contended that it is a right given to an aggrieved party which is enshrined in the Constitution. He further submitted that the word “law” found therein is defined in the Constitution itself and that definition does not cover the rules upon which the learned Deputy Solicitor General relies upon to have this appeal dismissed. Accordingly, Counsel for the appellant argued that the aforesaid Rule 11(3)

cannot be made applicable to the issue at hand and then he moved that the application of the learned Deputy Solicitor General be rejected.

Article 154 P (6) gives the right to file an appeal. Such right cannot be undermined at any cost. However, it does not in any way refer to the procedure of filing an appeal. Therefore, when the word “law” found in Article 154 P (6) is to be defined, necessarily it has to be interpreted in conjunction with the rules that are applicable in filing and proceeding with appeals. Those Rules are meant to describe the procedure whilst the Article 154 P (6) of the Constitution refers, as to a right of a party aggrieved by a decision in a writ application filed in the High Court. In the circumstances, this Court is not in a position to disregard the procedure laid down in the Rules applicable when filing an appeal though the right referred to in Article 154 P (6) is a right that cannot be undermined. Hence, we are not inclined to accept the contention of the learned Counsel for the appellant.

Mr.Prematillake also submitted that it is the High Court that has the power to refuse the appeal when no notice of appeal had

been filed. Accordingly, he contended that failure to file the notice of appeal cannot be considered by this Court at this stage. Accordingly, he contended that this Court does not have jurisdiction to consider the failure to file a notice of appeal and to make an order accordingly.

Learned Deputy Solicitor General submitted that in the case of ***Divisional Forest Officer v. Sirisena [1990] 1 S.L.R. at page 44***, it had been held that such a defect should not be considered as an omission to negate the procedure laid down in law. In that decision, the Court of Appeal rejected a plaint filed in the District Court which decision should have been made by that District Court. Relying upon the aforesaid decision, we are not inclined to accept the contention of the learned Counsel for the appellant and decide that inaction of the learned High Court Judge is not a reason to disregard matters referred to in the said Rule 11(3) and make an order accordingly by this Court.

It is necessary to note that maxim *non pro-tunc* also is applicable in this instance. At that point of time, learned High Court Judge has not made an order that he should have made in

accordance with the law. However, the above maxim permits this Court to make an appropriate order at this stage when it comes to an issue of law. Therefore, it is our view that this Court is empowered to consider the issue as to the non-filing of notice of appeal at this stage and to make an order according to law which the learned High Court Judge has failed to do.

In the circumstances, we decide that the failure to file a notice of appeal shall be a reason to dismiss this appeal in terms of the Rule 11 (3) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988.

For the aforesaid reasons, this appeal is dismissed.

*Appeal dismissed.*

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL

Jmr/-