

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

**In the matter of an Appeal made under Article
154 P (4) of the Constitution of the Democratic
Socialist Republic of Sri Lanka read with Rule 11 (1)
of the Court of Appeal (Procedure for Appeals from
High Courts) Rules 1988**

Kalpitiya Multi Purpose Co-operative Society Ltd,

Main Street,

Kalpitiya.

PETITIONER-APPELLANT

C.A. (PHC) 262/2005

H/C 10/ 2004

Vs,

1. Co-operative Employees Commission
(North Western Province),
94, Negombo Road,
Kurunegala.

2. Vineetha Lakshmi Balasooriya,
Gal- Amuna,
Kudawewa.

RESPONDENTS-RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA) &

H.C.J. Madawala J

Counsel: Nizam Kiriapper with M.C.M. Nawaz, M.I.M. Iynullah, M.S.S. Sanfara and M.S.F. Irfiya
for the Petitioner-Appellant
H.Withanachchi with Shantha Karunadhara for the 2nd Respondent- Respondent

Argued On: 28.05.2015

Written Submissions On: 01.09.2015, 18.01.2016

Order On: 27.05.2016

Order

Vijith K. Malalgoda PC J

Petitioner- Appellant Kalpitiya Multi Purpose Co-operative Society Ltd has filed the present appeal before this court against an order made by the Provincial High Court of Kurunegala dated 23rd September 2014. The said matter was a Writ application filed by the Petitioner-Appellant seeking a mandate in the nature of *Writ of Certiorari* to quash a decision of the 1st Respondent-Respondent directing the Petitioner-Appellant to re-instate the 2nd Respondent –Respondent.

The Learned High Court Judge by his order dated 23.09.2005 dismissed the said application. Being dissatisfied by the said order the Petitioner-Appellant had tendered the Notice of Appeal and thereafter the Petition of Appeal had been tendered to the High Court on 23.11.2005.

When this matter was taken up before us for Argument Counsel for the 2nd Respondent-Respondent had raised a preliminary objection to the effect that the Petition of Appeal was out of time.

The application before the High Court being an Writ application filed under the jurisdiction conferred upon the High Court in terms of Article 154 (P) (4) of the constitution, the applicable Appellate procedure is set out in part II of the Court of Appeal (Procedure for Appeal from High Courts) Rules 1988.

Sections 11 (1), (2), (3) and 12 (2) of the said rules which deals with “Appeals from orders made by a High Court in the exercise of its jurisdictions under Article 154 P (4) of the Constitution” read thus,

- 11 (1) any person who shall be dissatisfied with any order made by the High Court, **in the exercise of the jurisdiction vested in it by Article 154 P (4) of the constitution**, on an application to which he is a party, may prefer an appeal to the Court of Appeal against such order for any error in fact or law.
- (2) every appeal to the Court of Appeal from any order made by a High Court made in the exercise of the jurisdiction vested in it by Article 154 P (4) of the constitution shall be lodged **by giving notice of appeal to the High Court** within such time and in the form and manner here in after provided.
- (3) **The notice of appeal shall be presented** to the High Court for this purpose by 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 at 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 here in after provided. If such conditions are not fulfilled, the court shall refuse to receive it.
- 12 (2) **Every appellant shall within sixty days from the date of the order appealed against present to the High Court a petition of appeal** setting

out the circumstances out of which the appeal arises and the grounds of objection to the order appealed against, and containing the particulars required by Rule 22 which shall be signed by the appellant or his registered attorney such petition of appeal shall be exempted from stamp duty.

Provided that if such petition is not presented to the High Court within sixty days from the order appealed against, the court shall refuse to receive it (emphasis added)

In their preliminary objection filed before this court the 2nd Respondent had calculated the time taken by the Petitioner to present the petition of appeal as follows;

Date the impugned order delivered: -	23 rd September 2005
Date the Petition of Appeal tendered to High Court: -	23 rd November 2005
24 th September – 30 th September	– 7 days
1 st October -31 st October	- 31 days
1 st November -23 rd November	- <u>23 days</u>
	<u>61 days</u>

When considering the above provisions of the Court of Appeal (Procedure for Appeal from High Courts) Rules 1988 this court observes that the said rules are very specific on calculating the 14 days in giving notice of appeal to the High Court. In Rule 11 (3) it is specifically stated that when calculating 14 days, from the date when the impugned order pronounced, exclusive of,

- (i) The day of that date itself**
- (ii) At the day when the petition is presented and**
- (iii) Public Holidays**

However with regard to the presenting the petition of appeal the time limit has been given as 60 days but no specific explanation is given with regard to the calculation.

This identical position we observe in Section 754 (4) and 755 (3) of the Civil Procedure Code (as amended) with regard to appeals from the District Court and section 754 (4) which deals with notice of appeal reads thus,

754 (4) The notice of appeal shall be presented to the court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen 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.....

However with regard to the presenting the petition of appeal the Civil Procedure Code is also silent with regard to the calculation. Section 755 (3) of the Civil Procedure Code reads thus,

755 (3) Every appellant shall within sixty days from the date of the Judgment or decree appealed against, present to the original court, a petition of appeal.....

Provided, that if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against, the court shall refuse to receive the appeal.

When considering the above provisions it is clear that the Court of Appeal (Procedure for Appeal from High Court) Rules 1988 are formulated with the guidance of the similar provisions of the Civil Procedure Code.

Question of calculating the period as referred to in section 754 (4) and 755 (3) was discussed in several cases before the Supreme Court as well as by the Court of Appeal.

In the case of *Abeyrathne Wickramasinghe V. Magilin Nona De. Silva 1978- 79 (2) Sri LR 65* it was held that both provisions of law are imperative and that not only must the notice of appeal be tendered within the time specified in section 754 (4) of the said code, but also the petition of appeal must be presented within the period of sixty days specified in section 755 (3) of the said code.

In the case of *the Municipal Council of Colombo V. Piyasena 1980 (2) Sri LR 39* the specified time limits given in section 754 (4) of the CPC as against the provision in section 755 (3) was discussed by Ranasinghe J (as he was then) as follows;

“It has to be noted, that whilst provisions of section 754 (4) of the said code specifically states that in the computation of the period of 14 days set out therein, the day on which the order or decree appealed from was pronounced, the day on which the petition is presented to court, and all intervening Sundays and Public Holidays should be excluded from such conclusion, no such exclusions are permitted in the computation of the period of sixty days set out in subsection (3) of section 755 of the said code.

Having regard to the foregoing matters, I am of the opinion that, in the computation of the period of sixty days set out in section 755 (3) of the said code, Sundays and Public Holidays are not to be excluded and should be included in the calculation of the said period of sixty day”

This court is in total agreement with the above finding by their Lordships and of the view that the same principle is applicable to the case in hand.

As submitted by the 2nd Respondent, the petition of appeal was filed on the 61st days and thereby the Petitioner is late from one day in filing the petition of appeal.

Petitioner has further submitted that it is not the Court of Appeal which should reject this case but under the rules that has to be done by the High Court itself.

If the appeal is out of time, even if the High Court had failed to act under the proviso to Rule 12 (2) and refuse to receive the appeal, this court is not empowered to hear and determine the case since the appeal is out of time.

For the above reason I upheld the preliminary objection raised by the 2nd Respondent and make order refusing to receive the petition of appeal presented to the High Court by the Petitioner-Appellant.

Preliminary objection upheld. No order for cost is made.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL