

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

Walimunidewage Indrasena

No. 23, Radawana Road,

Kirindiwela.

PLAINTIFF

C.A. Case No.765/2000 (F)

D.C. Pugoda Case No. 31777/L

-Vs-

1. Walimuni Dewage Wijewardena

Raddalana, Welpalla.

2. Ganegodage Wijeratne

No. 23, Radawana Road,

Kirindiwela.

DEFENDANTS

AND

1. Walimuni Dewage Wijewardena (Deceased)

Raddalana, Welpalla.

1a.(1) Piyadasa Dissanayake (Deceased)

No. 739, Sudarshana Mawatha,

Kelaniya.

1a.(1)1 Thalagala Thilaka

No. 739, Sudarshana Mawatha,

Kelaniya.

1a.(1)2 Thalagala Thilaka

No. 739, Sudarshana Mawatha,
Kelaniya.

1a.(1)3 Shamith Nirashan

No. 739, Sudarshana Mawatha,
Kelaniya.

1a.(1)4 Chandima Subashini Kanchana Dissanayake

No. 739, Sudarshana Mawatha,
Kelaniya.

1a.(2) Abeyratne Dissanayake

No. 2/B, Hiswella,
Kirindiwela.

2. Ganegodage Wijeratne

No. 23, Radawana Road,
Kirindiwela.

DEFENDANT-APPELLANTS

-Vs-

Walimunidewage Indrasena

No. 23, Radawana Road,
Kirindiwela.

PLAINTIFF-RESPONDENT

BEFORE :

A.H.M.D. Nawaz, J.

COUNSEL :

**M.D.J. Bandara with Jayantha Bandaranayake for
the 1(a)1 to 1(a)4 Substituted-Defendants and 2nd
Defendant-Appellant**

Chula Bandara with Gayathri Kodagoda for the
Plaintiff-Respondent

Written Submissions on: 13.12.2017 (for the Plaintiff-Respondent)
14.12.2017 (for the 1(a)1 to 1(a)4 Substituted-
Defendants and 2nd Defendant-Appellant)

Decided on : 30.05.2018

A.H.M.D. Nawaz, J.

The Counsel for the Plaintiff-Respondent has raised a preliminary objection to the maintainability of this appeal namely the notice of appeal is out of time and contrary to the time limit set down in Section 754(4) of the civil procedure code (CPC).

Section 754(3) of the CPC

Section 754(3) provides that, “every appeal to the Court of Appeal from any judgment or order of any original Court shall be lodged by giving notice of appeal to the original Court *within such time and in the form and manner hereinafter provided*”.

Section 754(4) of the CPC

The time period within which such notice of appeal should be lodged is provided for in the subsequent Section 754(4) of the CPC which goes as follows:

“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, 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.”

Thus it is clear that the notice of appeal shall be presented to the Court of first instance which made the decree or order within 14 days from the date when the decree or order appealed against was pronounced.

Whilst yet on this overly frequent preliminary objections that are raised day in day out, it is useful to recall some of the case law that underlie time limits pertaining to notice of appeals.

It needs no reiteration that according to Section 754(4) of the Code, when computing the period of 14 days, the following days are excluded.

- (i) The day on which the decree or order appealed against was pronounced.
- (ii) The day when the notice of appeal was presented.
- (iii) Intervening Sundays and public holidays.

In *Mohideen Natchia v. Ismail Marikar*,¹ where the question was whether Saturdays must be included or excluded in computing the fourteen days prescribed by Section 754(4) of the Civil Procedure Code, it was held that, “in computing fourteen days in terms of section 754(4) of the Civil Procedure Code, Saturdays should be included”. In this case it was also held that “the case of *Dharmadasa v. Kumarasinghe*² was not correctly decided and should not be followed; the view of Ratwatta, J. expressed in *Muthusamy v. Leathen Tea Estates Association Ltd.*,³ on the question in issue represents the correct view”. Accordingly, in computing 14 days Saturdays are included.

In the case of *Sri Lanka State Trading Corporation v. Dharmadasa*,⁴ Shavananda C.J., observed at page 239 and 240 that, “It is to be noted that section 754(4) excluded Sundays and public holidays only in the computation of the fourteen days and not Saturdays even though they are non-working days or *dies non*. Section 8(1) of the Interpretation Ordinance will not avail the Appellant since the last date for presenting

¹ 1982 (2) Sri L.R. 714

² 1981 (2) Sri L.R. 113

³ C.A. Minutes 6.9.1979

⁴ 1987 (2) Sri L. R 235

the notice of appeal to Court was 16th June, a Friday-a day on which the Court was not closed. Had the last date been a Saturday, the 17th June, then the notice of appeal could validly have been filed on Monday the 19th, when the Court was open” and held that, “Notice of appeal was not filed within the time limit of fourteen days permitted by section 754(4) of the Civil Procedure Code, because allowing for the fact that the date of judgment and date of filing of notice are not counted and the two Sundays had to be excluded, there was time to file the notice of appeal only until 16th June (Friday).

When the 14th day falls on a Saturday or on a public holiday on which day the courts are closed, whether an appellant can file the notice of appeal on the next following Monday?

This matter was favourably answered in the case of *Selenchina v. Mohamed Marikar and Others*,⁵ where the notice of appeal was presented on 20.10.1986. If that day is excluded, the period of 14 days excluding the date of judgment pronounced (i.e. 30.09.1986) and intervening Sundays and public holidays would end on 17.10.1986 which was a public holiday. The next day on which the notice should have been presented was the 18th, being a Saturday, on which the office of the court was closed. The next day, the 19th was a Sunday which too had to be excluded in terms of the section.

Thus it was held that the notice filed on 20.10.1986 was within the period of 14 days as provided for in the Section 754(4) of the Civil Procedure Code.

U.L.A. Majeed in his “*A Commentary on Civil Procedure Code and Civil Law in Sri Lanka*” observes as follows⁶:-

“Upon a summing up of the above decisions, two matters are clear. One is that Saturdays are not excluded in counting the 14 days period within which the notice of appeal should be filed and the other is, if the 14th day (last of the 14 days period) falls on a Saturday or Sunday or a public

⁵ 2000 (3) Sri L.R. 100

⁶ Volume Two Revised Second Edition (2018) at p 1669

holiday, on which days the office of the court is closed, the notice of appeal can be filed on the next working day immediately following the said non-working day. (*Dies non*).”

The judgement in this case was delivered by the learned District Judge of *Pugoda* on 17.08.2000. If one computes the time period of 14 days within the parameters of Section 754(4), there were two Sundays namely 20th and 27th August 2000 and the 14th day ended on the 2nd of September 2000-a Saturday on which the Courts were closed. The following day 3rd September 2000 was a Sunday and allowing for these non working days (*dies non*) to be excluded, the notice of appeal had to be tendered on 4th September 2000-a Monday. But the date stamp on the notice of appeal is 7th September 2000-a Wednesday. Thus one is driven to the conclusion that the notice of appeal has been tendered on 7th September 2000 which is virtually 17 days after the judgment was pronounced. That forms the genesis of the argument to reject this appeal as a mandatory step in the process of appeal had not been timeously taken. But Mr. M.D.J. Bandara Attorney-at-Law who appears for the Appellants has drawn the attention of this Court to Journal Entry 82 which is dated 8th September 2000 wherein an important minute of a court official appears. The minute is to the effect that the notice of appeal has been tendered within the stipulated time- “අභියාචනා දැනටමත් නියමිත කාලය තුළ භාර දී ඇත”. This confirms the possibility that the date stamp was put on the notice later. This is a frequent occurrence in original Courts and the case of *Nachchiduwa v. Mansoor*⁷ bears testimony to such occurrences.

In *Nachchiduwa v. Mansoor* (*supra*) the Petition of Appeal was handed over to the Registrar by the Registered Attorney on 02.12.1994. The Registrar placed his initials and entered the time. According to the practice in the Registry, the petition of appeal had to be thereafter taken to the record room where it would be entered in the Motion Book and filed in the record. These steps were not taken on 02.12.1994. The relevant entries were made only on 09.12.1994 after the period of 60 days within which the petition of appeal should be presented had lapsed.

⁷ (1995) 2 Sri L.R. 273

The Plaintiff made an application for execution of decree in terms of Section 763 on the basis that there was an appeal filed and the Defendants were noticed. The learned District Judge rejected the petition of appeal as being out of time on the basis that there was no entry in the Motion Book that the petition of appeal was filed on 02.12.1994, and allowed the application for writ. On appeal, the Court of Appeal held:-

- (1) In terms of Section 755(3), the Appellant has to 'present' to the original court a petition of appeal within 60 days of the judgment.
- (2) The act of the Registered Attorney in tendering the petition of appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the petition of appeal constitute presentation of the petition of appeal.
- (3) When the petition of appeal is presented by the Appellant and received by Court under Section 755(3), Section 755(4) provides that the petition should be filed and the record be forwarded to the Court of Appeal.
- (4) The act of filing the petition and that of forwarding the record to the Court of Appeal are official acts of the District Court. Any delay in filing a petition in the record cannot be attributed to the appellant.

In the case before me the date stamp was placed 17 days after the date of the judgment for one reason or the other but the Journal Entry 82 which appears at page 57 of appeal brief indicates that the notice of appeal had been tendered within time.

Judicial and Official Acts have been regularly performed-Illustration (d) to Section 114 of the Evidence Ordinance

The rule embodied in the illustration flows from the maxim *omnia proesumuntur rite et solemniter esse acta*, i.e., all acts are presumed to have been rightly and regularly done.

In my view the minute in Journal Entry 82 raises the presumption in Illustration (d) to Section 114(d) of the Evidence Ordinance. The presumption under Illustration (d) of the Evidence Ordinance is that judicial and official acts have been regularly performed. "Regularly performed" can only mean performed in accordance with form and

procedure. It cannot imply that the officer or the Judge had authority to perform an act which is not ordinarily within his competence. I had occasion to deal with this presumption (with E.A.G.R. Amarasekara, J. concurring) in CA 477/2000(F)-see CA minutes of 12.09.2017. In that order I alluded to the rebuttable character and nature of the presumption in Section 114(d) of the Evidence Ordinance as exemplified below.

“Although there is a presumption that official acts have been regularly performed, and that they have been performed in accordance with rules and regulations bearing on the subject, yet this is a rebuttable presumption. In fact, it is left to the Court to raise that presumption or not, having regard to the peculiar facts and circumstances of each case”⁸

“A presumption that an act was regularly done arises only on proof that the act was in fact done, as the presumption is limited to the regularity of the act done and does not extend to the doing of the Act itself”⁹

“In other words, the presumption that may be raised is that the act if proved to have been done was done in a regular manner. There is no presumption that an act was done, of which there is no evidence and the proof of which is essential to the case raised”¹⁰

Regularity of Journal Entries

It has been laid down that the Court is entitled to presume that the journal entries, made in a case in compliance with the requirements of Section 92 of the Civil Procedure Code, set out the sequence correctly-see *Seebert Silva v. Aronona Silva*.¹¹ Section 114 of the Evidence Ordinance creates rebuttable presumptions as the provision uses the words “the Court may presume....” and there is nothing proffered in this case to rebut this presumption being drawn. No argument was raised that the minute was an introduction. In fact His Lordship Justice F.N.D. Jayasuriya drew attention to the

⁸ Woodroffe and Ameer Ali, *Law of Evidence*, 13th ed. Vol. 3, page 2602

⁹ Monir, *Principles and Digest of the Law of Evidence*, 4th ed. Vol. 2, page 676.

¹⁰ Monir, *Principles and Digest of the Law of Evidence*, 4th ed. Vol. 2, page 676, at footnote 24.

¹¹ (1957) 60 N.L.R 272

long line of cases collated by Justice Dias in *King v. Jayawardena*¹² and made the following observations in *Jayaweera v. Asst. Commissioner of Agrarian Services, Ratnapura and Another*.¹³

“It is not open to the petitioner to file a convenient and self serving affidavit for the first time before the Court of Appeal and thereby seek to contradict either a quasi judicial act or a judicial act.

If a litigant wishes to contradict the record he must file necessary papers before the Court of first instance, initiate an inquiry before the Court and thereafter raise the matter before the Appellate Court so that the Appellate Court would be in a position on the materials to make an adjudication on the issues with the benefit of the order of that Court.”

In the case before me there is no such effort or attempt to contradict the journal entry and therefore I am irresistibly drawn to the conclusion that the notice of appeal was filed in time.

In the circumstances I overrule the preliminary objection raised in the case and proceed to fix this matter for argument.

JUDGE OF THE COURT OF APPEAL

¹² 48 N.L.R 497 at p 503

¹³ 1996 (2) Sri L.R. 70