

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

In the matter of an Appeal under and in terms of
the High Court of the Provinces (Special Provisions)
Act No. 19 of 1990.

Meegoda Gamage Nadeeka Dilrukshi,

Co-operative Development Commissioner and
Registrar,

North Central Provincial Co-operative
Development Department,

352, Maithreepala Senanayake Mawatha,

Anuradhapura.

Case No. CA(PHC) 121/2008

Respondent – Appellant

H.C. Polonnaruwa Case No. 09/2007(Writ) Vs.

K.B.P. Saman Tilakasiri,

No. 80, Yaya 3,

Stage II, New Town,

Medirigiriya.

Petitioner-Respondent

01. P.H. Karunaratne,
Arbitrator,
No. 16/6, Ping para,
Kaudulla.

02. Medirigiriya Multi-Purpose Co-operative
Society (Ltd.)
Medirigiriya.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Nuwan Pieris S.C. for Respondent-Appellant

Asanka Dissanayake for the Petitioner-Respondent

Written Submissions tendered on:

Respondent-Appellant on 11.07.2018

Petitioner-Respondent on 11.07.2018

Argued on: 06.09.2018

Decided on: 19.10.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the North Central Province holden in Polonnaruwa dated 28.05.2008.

The learned counsel for the Petitioner-Respondent (Respondent) raised the following two preliminary objections when this matter was taken up for argument:

- (1) The appeal has not been properly constituted as neither the notice of appeal nor the petition of appeal have been signed by the Appellant or his registered attorney as provided in terms of Rule 12(1) and 12(2) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988.

(2) The appeal is out of time as the petition of appeal has not been presented to the High Court within sixty days from the order appealed against.

Failure to sign the notice of appeal/petition of appeal

Rules 12(1) and 12(2) of the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) Rules, 1988 (1988 Rules) requires every notice of appeal and petition of appeal to be signed by the appellant or his registered attorney. In this case both the notice of appeal and petition of appeal have been signed by Mrs. Nirmala C. Yatigamma, Attorney-at-Law. The learned counsel for the Respondent submitted that there is no proxy filed of record on behalf of the Respondent-Appellant (Appellant).

The learned counsel for the Appellant submitted that the Appellant had retained Mrs. Nirmala C. Yatigamma, Attorney-at-Law and that she had filed her proxy before the Provincial High Court of the North Central Province and that the said proxy is found at page 292 of the Appeal Brief. However, that proxy has been filed on behalf of the 1st Respondent-Respondent (1st Respondent). There is no proxy to be found in the appeal brief filed on behalf of the Appellant. This raises the question of the validity of the notice of appeal and petition of appeal in view of the requirement contained in Rules 12(1) and 12(2) of the 1988 Rules.

In *Perera v. Perera and another* [(1981) 2 Sri.L.R. 41] it was argued that the Attorney who signed the petition of appeal had been acting along with the registered Attorney right through the case and that he does have the capacity to sign a petition. Soza J. (at page 44) held that:

“the question is not whether the Attorney who signed the petition of appeal has the capacity to sign it but whether he has the authority to sign it. It is only the registered Attorney who has the authority that can sign it so long as his proxy is there on the record. The appellant himself can also sign it but no one else. Section 755 (3) states that the petition of appeal "shall be signed by the appellant or his registered attorney". So in the case before us there has been no compliance with an express provision of section 755 (3). Therefore this is another ground on which the petition of appeal should be rejected.”(emphasis added)

An act done for another person though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and established rule of law. The irregularity occasioned by the absence of a proper proxy in favour of an Attorney-at-law is curable. However, a complete omission to file the act of appointment/proxy cannot subsequently be supplied [*Dias v. Karawita* (1999) 1 Sri.L.R. 98].

Accordingly, I am of the view that the Appellant has failed to comply with Rules 12(1) and 12(2) of the 1988 Rules and as such there is no duly constituted appeal. This appeal must be dismissed on this ground alone.

Appeal is out of Time

In terms of Rule 12(2) of the 1988 Rules the petition of appeal must be presented to the High Court within sixty days from the order appealed against.

Although the petition of appeal is dated 25.05.2008 the endorsement of the Registrar in accepting the petition of appeal is dated 28.05.2008. 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 [*Nachchiduwa v. Mansoor* (1995) 2 Sri.L.R. 273].

Hence the impugned order was made on 28.05.2008 and the petition of appeal has been presented to the High Court on 28.07.2008 at 12.20 p.m. which is on the 61st or 62nd day from the order.

The learned counsel for the Respondent submitted that a consideration of the 1988 Rules shows that whereas Rule 3(2) contains a particular provision to the effect that if the time for preferring a petition of appeal expires on a day on which the office of the court is closed the appeal shall be deemed in time if the petition of appeal is preferred on the first day next thereafter on which such office is open no such provision exists with regard to a petition of appeal presented under Rule 12(2). He therefore submitted that their Lordships of the Supreme Court in making the 1988 Rules deliberately omitted a similar provision in Rule 12(2) and specifically provided that

if such petition of appeal is not presented within sixty days from the order appealed against, the court shall refuse to receive it.

There is some merit in this submission. The time limit given by Rule 2(1) is fourteen days whereas in Rule 12(2) it is sixty days. Rule 3(2) appears to consider the short time frame under Rule 2(1) and seeks to give an extended time where the time for preferring a petition of appeal expires on a day on which the office of the court is closed. Such a consideration is not there under Rule 12(2) as the period within which the petition of appeal must be presented is sixty days from the order appealed against.

However, the learned State Counsel for the Appellant responded by submitting that in counting the days between 28.05.2008 and 28.07.2008, the date of the judgment has to be excluded so that the 60th day falls on 27.07.2008 which is a Sunday and appeal papers cannot be filed in the Court registry. He further submitted that if the day of the judgment is counted then the 60th day falls on 26.07.2008 which is a Saturday on which day Courts do not function. Therefore, he submitted that the Appellant can utilise 28.07.2008 a Monday as the 60th day. The learned State Counsel submitted that any other interpretation would result in the Appellant being deprived of two working days which he is entitled pursuant to Rule 12(2) of the 1988 Rules read with Section 8(1) of the Interpretation Ordinance which reads:

“Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open.”

In *Silva v. Sankaram and others* [(2002) 2 Sri.L.R. 209] the appellant lodged the petition of appeal on Monday, the 61st day, as the 60th day fell on Sunday, a public holiday. It was contended that, the appeal is out of time. It was held that the provisions of s. 8 (1) Interpretation Ordinance do not apply. Dissanayake J. (at page 217) stated that "*there is no need for the appellant to wait*

until the 60th day which fell on a Sunday and then complain that he should be allowed to file his petition of appeal on the 1st working day after such Sunday."

However, the 1988 Rules have been made by the Supreme Court in terms of the powers vested in it under Article 136(1) of the Constitution which states that it is "*Subject to the provisions of the Constitution and of any law*". The Interpretation Ordinance is law within this meaning. In *Migultenne v. The Attorney General* [(1996) 1 Sri.L.R. 408] the Supreme Court held that *Rules made under section 106(3) are subordinate legislation, and cannot be regarded as legislation within the meaning of section 107(1). Subordinate legislation, even where authorised by the Constitution, cannot prevail over (and thereby amend) the Constitution, unless the Constitution clearly authorises such a result.* Similarly, Rules made under Article 136(1) of the Constitution cannot override the provisions of the Interpretation Ordinance. Hence section 8(1) of the Interpretation Ordinance will apply in the instant case where the last day of filing the petition of appeal was a day on which the court or office is closed and therefore the petition of appeal was validly filed on the next day thereafter on which the court or office was open.

Accordingly, I reject the second preliminary objection raised by the learned counsel for the Respondent.

For the foregoing reasons I uphold the first preliminary objection raised by the learned counsel for the Respondent and dismiss the appeal with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal