

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

C. A. 295/99 (F)

D. C. Negambo Case No.
4154/L

D. R. Ananda Jinasena,
No. 92/4, Karawalapitiya,
Hendela.

PLAINTIFF

VS

P. Ivan Sidney Wijesekara,
No. 92/4, Kerawalapitiya
Road,
Hendela.

DEFENDANT

AND

P. Ivan Sidney Wijesekara,
No. 92/4, Kerawalapitiya
Road,
Hendela (*Deceased*)

1(a) P. Nirusha Roshini
Wijesekara,
No. 92/2, Kerawalapitiya
Road, Hendala.

1(b) P. Shamikka Shivanthi
Wijesekara,
No. 92/2, Kerawalapitita
Road, Hendala.

SUBSTITUTED PLAINTIFF
APPELLANT

VS

D. R. Ananda Jinasena,
No. 92/4, Karawalapitiya,
Hendela.

PLAINTIFF-RESPONDENT

BEFORE : **M. M. A. GAFFOOR, J.**
COUNSEL : M. Yoosuff Nasar for the Substituted Defendant-Appellant
S. N. Vijithsingh for the Plaintiff-Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 29.11.2018 (by the Substituted Defendant-Appellant)

02.08.2018 (by the Plaintiff-Respondent)

ARGUED ON : 22.03.2018

DECIDED ON : **03.12.2018**

M. M. A. GAFFOOR, J.

This is an appeal against the judgment of the learned Additional District Judge of Negombo in respect of a land action, bearing case No. 4154/L.

The Plaintiff-Respondent (hereinafter referred to as the "Respondent") instituted this action for ejectment of the Defendant-Appellant (hereinafter referred to as the "Appellant") and all the holding under him and for a Declaration of title to the portion of land encroached upon depicted in Plan "X1" in Lot 6B.

The Appellant filed his answer dated 22nd of February 1991 has moved for dismissal of the Respondent's action and pleaded that he had prescribed to the disputed land.

The case went to trial on 15 issues, 01 to 07 on behalf of the Respondent and 08 to 15 on behalf of the Appellant. Due to the objection taken by the Respondent issue No. 14 was not allowed. At the end of the trial the learned Additional District Judge delivered her judgment on 22.01.1999 in favour of the Respondent.

Being aggrieved by the said judgment, the Appellant preferred this appeal and seeking this Court to:

- Set aside the judgment dated 22.01.1999
- Dismiss the Respondent's action.

It is important to note that when the matter was taken up for arguments on 22.03.2018, Counsel for the Respondent has raised a Preliminary Objection stating that the Notice of Appeal appears at page (1) does not contain the signature of the Attorney-at-Law of the Appellant. Further, the counsel for the Respondent added that, it is not only signed but no space also was kept for the signature of the Attorney (*vide CA Journal entry dated 22.03.2018*).

It is an accustomed practice and necessary for this Court to consider this Preliminary Objection.

Section 755(1) of the Civil Procedure Code Stipulates that,

“Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Such notice shall also contain the following particulars.

- (a) the name of the Court from which the appeal is preferred*
- (b) the number of the action,*
- (c) the names and addresses of the parties to the action*
- (d) the names and of the appellant and respondent,*
- (e) the nature of the relief claimed:*

Provided that where the appeal is lodged by the Attorney-General, no such stamps shall be necessary.”

Considering Section 755(1) of the Civil Procedure Code, it is clear that every Notice of Appeal shall be directly distinctly written on good and suitable paper and shall be signed by the Appellant or his Registered Attorney.

But in the present appeal the Attorney at Law has been failed to comply with the condition set out in sec 755 (1) of the Civil Procedure Code.

In **MAHATUN MUDALI ALIAS PARANTOTA vs. N. A. NAPOSINGHE AND ANOTHER** [(1986) CALR Vol. III 318], where it was held that the effect of filing of Notice of Appeal is to inform the Respondent that jurisdiction of the lower court will be suspended once the appeal is taken and also to deprive the Respondent temporarily of the fruits of his victory.

In the above case Bandaranayake, J. further stated that,

“The requirements of a Notice of Appeal are spelt out in S.755 (1) and (2) ...In my view all of the above requirements which are mandatory requirements must be satisfied in order to constitute a proper Notice of Appeal. This is the notice that is presented to Court in terms of Section 754(4); and if such conditions are not fulfilled the Court shall refuse to receive it.”

And also in the case of **FERNANDO vs. SYBIL FERNANDO** [1997 3 SLR 01] it was held that,

“Procedural rules are mandatory and signature of the Attorney on record is a must on the Notice of Appeal.”

In **SILVA vs. CUMARATHUNGA** [40 NLR 139], Maartensz, J. held that,

“A petition of appeal must be signed by the proctor, whose proxy is on the record at the date on which the petition is filed.”

“Where the petition is not so signed the Appeal should be rejected and the Supreme Court had no power to give relief.”

In **RANINKUMAR vs. UNION ASSURANCE LIMITED** [(2003) 2 SLR 92]

His Lordship Justice Edussuriya held that,

“The lapse by the appellant's failure to present the notice of appeal by his registered attorney goes to the basic validity of the notice and as such is not curable in terms of the provisions of section 759(2) of the Code which excludes the application of that section to any provision which prescribes the period within which the act or thing is to be done.”

Further, I wish to call the Supreme Court decision in **JAYASEKERA vs. LAKMINI AND OTHERS**, [2010 1 SLR 41], which is most relevant to the instant case,

It was held that,

“An appeal lodged against the judgment / decree made or entered by Court in a partition action all the provisions of the Civil Procedure Code shall apply.”

The issue at hand falls within the purview of a mistake, omission or defect on the part of the appellant in complying with the provisions of Section 755. In such a situation if the Court of Appeal was of the opinion that the respondent has not been materially prejudiced, it was empowered to grant relief to the appellant on such terms as it deemed just.

The power of the Court to grant relief under section 759 (2) is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming - relief cannot be granted if the Court is of the opinion that the respondent has been materially prejudiced in which event, the appeal has to be dismissed.

Considering the aforementioned reasons, it is evident that the Defendant Appellant has failed to comply with the requirements set out in Section 755 (1) of the Civil Procedure Code.

Furthermore, In the District Court, the Respondent instituted this action for declaration of title to the portion of the land encroached by the Appellant (*vide page 54 of the appeal brief*), the learned District also satisfied with the Respondent's pleas and grant the necessary relief according to his Plaint dated 19th September 1989. Hence, this Court does not extend its discretionary powers to allow or be lenient on Appellant's Case.

Therefore, I uphold the Preliminary Objection taken by the Respondent and dismiss the appeal without Costs.

Preliminary Objection allowed.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL