

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

Suraweera Arachchige Somalatha
Indumathie Suraweera,
Warakapola.
4th Defendant-Appellant (deceased)
Nanhimi Achchi Kankanamlage
Hemachandra Kulasekera,
Meerigama Road,
Warakapola.
4A Defendant-Appellant

CASE NO: CA/839/1998/F

DC KEGALLE CASE NO: 22133/P

Vs.

Dahanaka Arachchige Amarasena
Gunapala,
Warakapola.
Plaintiff-Respondent
And Several Other Defendant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Manohara De Silva, P.C., with Hirosha
Munasinghe for the 4A and 4B Defendant-
Appellants.

Chandana Wijesuriya for the 1A and 2A
Defendant-Respondents.

Dr. Sunil Cooray for the 3rd and 5th Defendant-
Respondents.

Decided on: 01.08.2019

Mahinda Samayawardhena, J.

This is an appeal filed by the 4th defendant-appellant against the Judgment of the District Court dated 24.07.1998.

When this appeal was taken up for argument, the learned counsel for the respondents took up a preliminary objection to the maintainability of this appeal on the premise that Notice of Appeal has been signed by the appellant herself and not the Attorney on record and therefore the appeal is not properly constituted. There is no dispute that the Petition of Appeal which followed the said Notice of Appeal has been signed by the Attorney on record.

The short question to be decided at this stage of the case is, in the said circumstances, whether there is no valid appeal before this Court to be decided on merits.

The learned counsel for both parties agreed to decide the matter on written submissions.

The learned President's Counsel for the appellant in his written submissions drawing the attention of this Court to section 754(4) of the Civil Procedure Code says that, according to the said section, there is no necessity to sign the Notice of Appeal, and what is necessary is to present the Notice of Appeal to Court within the

stipulated time, and therefore the Court cannot refuse to receive it on the aforesaid basis.

Section 754(4) of the Civil Procedure Code reads 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.

Then the learned President's Counsel refers to section 755(1), which reads as follows:

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 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.

It is the submission of the learned President's Counsel for the appellant that non-compliance of section 755(1) shall not be a ground to refuse to receive such Notice of Appeal, and Notice of Appeal can only be refused if conditions set out in section 754(4) are not fulfilled and not otherwise. The learned President's Counsel places emphasis on the last sentence of section 754(4) which says that "*If such conditions are not fulfilled, the court shall refuse to receive it*" and says no such phraseology has been used in section 755(1).

Then the learned President's Counsel draws the attention of Court to section 755(3) which deals with the Petition of Appeal and states that in that section, unlike in section 755(1), it has clearly been stated that if the Petition of Appeal has not been signed by the appellant or his registered attorney, the Court shall refuse to receive the appeal.

Section 755(3) reads as follows:

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 setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty. 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.

It is the final submission of the learned President's Counsel for the appellant that although a Petition of Appeal cannot be tendered without signing, a Notice of Appeal can be so tendered, and therefore, it is immaterial to consider who signed the Notice of Appeal.

I cannot bring myself to accept that line of argument.

According to that argument, although section 755(1) of the Civil Procedure Code says that every Notice of Appeal "*shall be signed by the appellant or his registered attorney*", there is no necessity to sign the Notice of Appeal and mere presentment of the Notice of Appeal without any signature is sufficient.

If that argument is accepted, the registered Attorney, the appellant or even a stranger can present a Notice of Appeal upon Judgment being pronounced. No Court will accept such an argument.

Section 754(4) cannot be read in isolation. It shall be read in conjunction with section 755(1) and the other sections of the Code. Maxwell states that "*Every clause of a statute is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute.*"¹

If the Notice of Appeal does not bear the name and the signature of the person who presents it, on that ground alone, it shall be rejected. Court should know who presents the Notice of Appeal. That is not high-flown law, but common sense. Law is consistent with common sense and logic.

¹ Maxwell on The Interpretation of Statutes, 12th Edition (Butterworths), page 47.

The learned President's Counsel for the appellant has cited *Medhananda Thero v. Dhammananda Thero*² in support of his argument. In that case it has been held that there was a sufficient compliance with the requirements of section 755 of the Civil Procedure Code, where a Petition of Appeal did not bear the signature of a Proctor or Advocate but the stamps on the Petition were cancelled by the signature of the Proctor.

The law and the facts involved in that case differ from those of the instant case.

In *Medhananda Thero's* case, the signature of the Proctor appeared in the Petition of Appeal.

More importantly, that case has been decided in 1944. According to the 1956 Revised Edition of the Legislative Enactments of Ceylon, section 755 of the Civil Procedure Code (Chapter 101), as it stood at that time, reads as follows:

All petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received.

It is clear that the procedural law has drastically been changed between then and now. The Petition of Appeal cannot now be signed by "*some advocate or proctor*". It shall necessarily be signed, if there is a registered Attorney, by the registered Attorney of the appellant and no one else—not even the appellant.

However, the question here is not whether an unsigned Notice of Appeal is acceptable, but whether a Notice of Appeal signed by the appellant himself when there is an Attorney on record is acceptable. This question has not been addressed by the learned

² (1944) 46 NLR 117

President's Counsel for the appellant straightforwardly. The answer to that question is emphatically in the negative.

It is well settled law that when there is an Attorney on record, a party cannot take any step in the case on his own. Until the Attorney on record is removed or incapacitated on the grounds stated in section 27(2) of the Civil Procedure Code, or simply stated, until the proxy is revoked, every step in the case shall be taken through such Attorney.³

When there is an Attorney on record, if a party is allowed to take steps, there can be situations where both the party and the Attorney taking the same steps in a case simultaneously. In that event, Notice of Appeal and Petition of Appeal can even be filed by both of them on different grounds. Can that be allowed?

Although both sections 755(1) and 755(3) state that Notice of Appeal and Petition of Appeal can be signed by the appellant or his registered Attorney, the appellant can sign them and file in Court only if there is no registered Attorney on record.⁴

In *Somawathie v. Buwaneswari*⁵, *Seelawathie v. Jayasinghe*⁶, *Hameed v. Deen*⁷, *Fernando v. Sybil Fernando*⁸, the Notices of Appeal signed by the appellant were held to be bad in law.

³ *Seelawathie v. Jayasinghe* [1985] 2 Sri LR 266 at 270, *Jinadasa v. Sam Silva* [1994] 1 Sri LR 232 at 266, *Fernando v. Sybil Fernando* [1997] 3 Sri LR 1

⁴ *Reginahamy v. Jayawardane* [1917] 4 CWR 390, *Silva v. Cumaratunga* (1938) 40 NLR 139, *Perera v. Perera* [1981] 2 Sri LR 41, *Somawathie v. Buwaneswari* [1990] 1 Sri LR 223, *Seelawathie v. Jayasinghe* [1985] 2 Sri LR 266

⁵ [1990] 1 Sri LR 223

⁶ [1985] 2 Sri LR 266

⁷ [1988] 2 Sri LR 1

⁸ [1996] 2 Sri LR 169

Finally, in *Fernando v. Sybil Fernando*⁹ the Supreme Court¹⁰ authoritatively held that:

The provision in section 755(1) Civil Procedure Code, that every notice of appeal "shall be signed by the appellant or his registered attorney" must be conferred with reference to the content and other clauses of the Code. Where the notice of appeal is signed by the appellant himself when he had a registered attorney on record, the lapse is fatal and is not curable in terms of section 759(2) Civil Procedure Code.

For the aforesaid reasons, preliminary objection is upheld and the appeal is dismissed but without costs.

Judge of the Court of Appeal

⁹ [1997] 3 Sri LR 1

¹⁰ Judgment was delivered by Amarasinghe J. with the agreement of Perera J. and Bandaranayake J.