

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

In the matter of an application for
Re-listing of the appeal bearing
No.946/98(F)

K.B. Charles Silva of No.256,
Main Street,
Kantale.

C.A. No. 946/98 (F)

D.C.No.Trincomalee/2337/L

Plaintiff

Vs.

T.H. Chandra alias
Chandrathilaka of No. 140,
Pottan Kadu Road, (Opposite
Bank of Ceylon)
Kantale.

Defendant

And

T.H. Chandra alias
Chandrathilaka of No. 140,
Pottan Kadu Road, (Opposite
Bank of Ceylon)
Kantale.

Defendant – Appellant

Vs.

K.B. Charles Silva of No.256,
Main Street,
Kantale.

Plaintiff – Respondent

T.H. Chandra alias
Chandrathilaka

**Defendant – Appellant –
Petitioner**

Vs.

K.B. Charles Silva

**Plaintiff – Respondent –
Respondent**

Before : W.M.M.Malinie Gunarathne, J

: P.R.Walgama, J

**Counsel : Athula Perera with Chathurani de Silva for the
Defendant – Appellant – Petitioner.**

**: Srinath Perera P.C. with Nevillie Ananda for the
Respondent.**

Argued on : 30.11.2015

Decided on: 28.03.2016

P.R.Walgama, J

The Defendant – Appellant – Petitioner (in short the Petitioner) made the instant application to Court to have the appeal relisted as the same has been dismissed by this Court on 22.11.2011 for want of appearance of the parties.

A schematic examination of the journal entries reveal that on 02.10.2013 the Defendant-Appellant- Petitioner has filed a petition and an affidavit along with the necessary documents to have this matter relisted for argument.

The following facts stemmed from the petition of the Petitioner;

The Plaintiff – Respondent instituted action against the Defendant in the District Court of Trincomalee, for a declaration that he is entitled to the land more fully described in the schedule to the plaint.

At the conclusion of the trial the Learned District Judge entered the judgment and the decree in favour of the Plaintiff.

Being aggrieved by the said judgment the Petitioner appealed to this Court to have the impugned judgment set aside/ vacate.

It is stated by the Petitioner that he was anxious to prosecute this appeal and was awaiting a notice from this Court. Nevertheless for his dismay he received a notice from the District Court of Trincomalee requesting him to appear before the District Court of Trincomalee for the purpose of pronouncement of the Judgment of Court of Appeal.

Pursuant to the afore said notice, when the Petitioner went to the District Court he came to know that the appeal has been dismissed due to the non payment of the brief fees.

It is viewed from the journal entries that when this case came up on 07.10.2011 both parties were absent and unrepresented and the Registrar of this court was directed to re issue notices returnable 22.11.2011 and also the Registrar was directed to issue notice in terms of Rule 13(b) requesting the Appellant to pay the brief fees on or before 08.11.2011. The said notice has been dispatched on 25.10.2011 and it is seen from the journal entry dated 21.11.2011 the said notice has been returned with the endorsement “ that there was nobody came to accept the letter”.

But it is the contention of the Petitioner that he is residing in the same address given in the caption which is No. 140, Pottan Kadu Road (opposite Bank of Ceylon) Kantale and right throughout he is residing in the said address.

It is also submitted by the Petitioner that the said Bank of Ceylon Kantale Branch had been shifted further 500 meters away from the house of the Petitioner, and presently it is located at Depot junction of Kantale town.

Therefore it is alleged by the Petitioner that the postman has gone to a wrong address, where the Petitioner is not residing, and the said notice has been returned with the endorsement as stated above.

In the above setting it is stated that the Petitioner that he was keen to prosecute his appeal, therefore if he had received the said notice he would have deposited the brief fees in time. In addition to the afore said the Petitioner stressed the fact that the demise of his Attorney at law, he was unable to receive any information as to the progress of the case. In proof of the said death of the Attorney at law his death certificate has been marked as Z and tendered to Court.

It is contended by the Petitioner that the Plaintiff-Respondent had taken steps to execute the writ and if the writ is executed irreparable loss and damage would be caused to the petitioner.

The substituted Plaintiff- Respondent by way of objection to the said application has stated the following;

That the Defendant after the pronouncement of the judgment of the District Court of Trincimalee in favour of the Plaintiff- Respondent, the Petitioner has permitted one Samarasekara Gunasekara Stanley and his agents to occupy the said premises for a consideration received by him.

It is also alleged by the Respondent that
After the afore said act of the Petitioner he has been residing at No. 85, Main Street, Kantale.

Therefore it is said that the Petitioner has failed to informed Court of his correct address and there by had failed to act with due diligence. But it is salient to mention that said facts remain without any proof.

In the said backdrop it is alleged by the Plaintiff- Respondent that the Petitioner has suppressed material facts from this Court in order to obtain an order from this Court to have this matter re-listed.

It is reiterated by the Plaintiff- Respondent that the Petitioner has failed to bring to the notice of this Court the change of the residence and the fact that the disputed land has been sold to a third party.

The Plaintiff – Respondent alleges that, cumulative effect of the non disclosure of the above material facts, should result in a refusal of the Defendant-Appellant-Petitioner's application for the re listing of the instant appeal.

It is pertinent to note that as per document marked 'R1' the claimant – Petitioner has tendered a Petitioner in the case bearing No. L/2337/86 and stated thus;

That on 28.08.2013 the fiscal of the District Court of Kantale had moved to execute the writ in respect of the land described in the schedule to the plaint. But it is the position of the Claimant that the said land is a state land and he has made an application for a permit for the said land. But the claimant has not taken the position that the said land was purchased from the Defendant – Appellant – Petitioner.

In dealing with applications of this nature this Court is vested with a wide discretionary power to consider whether or not to grant to re list the appeal. The said rationale was observed in the case of JINADASA .VS. SAM SILVA AND OTHERS - (1994)- 1 Sri.L.R. 232 which states thus;

“Since there is no legislation governing the matter under what authority could the court have ordered the relisting of the application, I think the Court had the power to restore the application to the list in the exercise of its inherent jurisdiction”.(emphasis added)

Further it is handed down in the said judgment that;

“I have pointed out later on my judgment that a Court ought not to be too severe and rigorous in exercising its powers relating to reinstatement, but

rather that it should be generous. Yet it is an entirely different matter to hold that a court must be prepossessed with a favourable opinion with regard to an absent party. The burden of alleging and proving the existence of facts on the basis of which a court may decide that there is a good cause for absence , rests on the absent party who seeks reinstatement.”.

Thus in the above exposition of the fact and law I am compelled to hold with the Defendant – Appellant – Petitioner by allowing the application for relisting.

Accordingly Petitioner’s application allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malinie Gunarathne, J
I agree,

JUDGE OF THE COURT OF APPEAL