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

In the matter of an Application to revise an Order made in terms of Article 154(p) of the Constitution of the Democratic Socialist Repubic of Sri Lanka.

C.A. (PHC)
Appeal No.237/2002
Provincial High Court of Kandy
Rev. Application No.64/1999 (Rev).
Magistrate's Court of Nuwara Eliya
Case No. 94542

A.P. Somapala,
A5/1, Ambulagala,
Mawanella

2nd Party-Respondent-Appellant

Vs.

1. The O.I.C ,
   Police Station,
   Nuwara Eliya.

Complainant-Respondent

2. S.M. Sawahir,
   198, Madawala Road,
   Katugastota.

1st Party-Petitioner-Respondent

3. Arumugam Kanagasabai.

3rd Party-Respondent-Respondent

BEFORE: **W.M.M. Malinie Gunaratne, J. &**

P.R. Walgama, J.

COUNSEL: **Athula Perera with Chaturani de Silva for 2nd Party – Appellant**
H. Withanachchi for 2nd and 3rd Respondent – Respondents.

Argued on: 27.05.2015

Written submissions filed on: 14.08.2015

Decided on: 14.10.2015

Malinie Gunaratne, J.

This is an appeal filed by the 2nd Party Respondent-Appellant (hereinafter referred to as the Appellant) against the judgment of the learned High Court Judge, allowing a Revision Application by setting aside the determination of the learned Magistrate, under Chapter VII of the Primary Court Procedure Act.

When the appeal was taken up for argument on 27.05.2015, the learned Counsel for the Respondent raised a preliminary objection as to the maintainability of this appeal.

The Counsel for the Respondent submitted that as required by Rule 14(1) of the Court of Appeal Rule, the purported Petition of Appeal dated 15.12.2002 has not been addressed to the Court of Appeal and to the other Judges of the Court of Appeal.

The Counsel for the Appellant in reply, contended that, the Appellant had made the present appeal under Rule 2 (1) (a) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988. Further, contended that, Rule 14 (1)(d) is mandatory, but Rule 2(1) (a) is not mandatory. The contention of the learned Counsel is, the word **shall**_ is not in Rule 2(1)(a) and in the circumstances since the present appeal is preferred under Rule 2(1)(a), at the top of the caption, if the Petition of Appeal is addressed to the Court of Appeal, it would be sufficient for the proper constitution of the present Petition of Appeal.

I am not agreeable with the contention of the learned Counsel for the Appellant. The Appellant being aggrieved by the Order made by the High Court has preferred the present Appeal under Rule 2(1)(a) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988. The Appellant has exercised his right of Appeal under Article 154 P (3)(b) of the Constitution. As the learned Counsel for the Appellant has submitted, the Rule 2(1)(a) is not mandatory. The said Rule 2(1)(a) reads as follows:-

> 2(1) Any person who shall be dissatisfied with any judgment or final order or sentence pronounced by a High Court in the exercise of the Appellate or Revisionary Jurisdiction vested in it by Article 154 P (3) (b) of the Constitution, **may** prefer an appeal to the Court of Appeal against such judgment for any error in law for fact.
>
> (a) By lodging within fourteen days from the time of such judgment or order being passed or made with such High

Court, **a Petition of Appeal addressed to the Court of Appeal,** or

(b).....

The said Rule 2(1)(a) describes the procedure and the right of a party, who is dissatisfied with any judgment or sentence or final order pronounced by the High Court Judge.

Where a party who wishes to invoke the jurisdiction of the Court of Appeal under Rule 2(1)(a) of the Court of Appeal shall comply with Rule 14(1) of the Court of Appeal Rules. Rule 14 (1) reads as follows:

14(1) The Petition of Appeal **shall** be distinctly written upon good and suitable paper and **shall** contain the following particulars:-

(a) The name of the Court in which the application is pending;
(b) the names of the parties to the application;
(c) the names of the appellant and of the respondent;
(d) the address to the Court of Appeal;
(e) a plain and concise statement of the grounds of objection to the order appealed against such statement to be set forth in duly numbered paragraphs;
(f) a demand of the form of relief claimed.

It is important to note that the Appellant has not complied with Rule 14 (d) of the Court of Appeal Rules which is mandatory.

The contention of the learned Counsel for the Appellant is, at the top of the caption if the Petition of Appeal is addressed to the Court of Appeal, it

would be sufficient for the proper constitution of the present petition of appeal and non-inclusion of the words "To:- His Lordship the President and the Other Honourable Judges of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka" would not be operative as a fatal defect in the Petition of Appeal.

It is relevant to note, at the top of the Petition it is mentioned "..... ...." and it cannot be considered as "the address to the Court of Appeal". It is the name of the Court in which the application is pending (Rule 14(1)(a).

It is an accepted fact by the Counsel for the Appellant, that the Rule 14(1) is mandatory and cannot be argued in regard to Rule 14(1)(d) namely, omission of "the address to the Court of Appeal" is not a fatal defect.

Hence, I find myself unable to agree with the argument advanced by the learned Counsel in this regard.

Furthermore, it is vital to note that in the recital of the petition of appeal it is not mentioned as follows:-

"..... ...."

Hence, I am of the view that there is no proper petition of appeal and the appellant has not properly invoked the jurisdiction of this Court.

It has been held over and over again by this Court as well as the Supreme Court, non-compliance with the Court of Appeal (Appellate Procedure) Rules is fatal to the application.

The importance and the mandatory nature of the observance of the Rules of the Court of Appeal in presenting an application has been repeatedly emphasised and discussed in a long line of decided authorities by the Court of Appeal and the Supreme Court.

In the case of Coomasaru vs. M/s Leechman and Co. Ltd., and Three Others, Tennekoon, C.J. stated as follows:

"Rules of Procedure must not always be regarded as mere technicalities which parties can ignore at their whim and pleasure". In that case, the preliminary objection raised on behalf of the Respondent that relates to the non compliance of Rules upheld and dismissed the case.

It was held in Nicholas vs. Macan Marker Ltd; (1981) 2 SLR 1, non compliance with the Rule which is in imperative terms would render such application liable to be rejected.

Justice Soza stated in Navarathnasingham vs. Arumugam and Another (1980) 2 SLR 1 "This Petition therefore should have been rejected for non-compliance with Rules. Further he stated that the Supreme Court Rules are imperative and should be complied with.

Same decision was followed in the case of Rasheed Ali vs. Mohamed Ali (1981) 2 SLR 29.

In the case of Koralage vs. Marikkar Mohamed and others (1988) 2 SLR 299, it was held, compliance of the Rules is a mandatory requirement and non –compliance is a material defect in the application and cannot maintain the application.

Same decision was followed in cases Brown and Company Ltd. Vs. Rathnayake (1990) 1 SLR 92, The Attorney General vs. Wilson Silva (1992) 1 SLR 44 and Balasingham and another vs. Puvanthiram (2000) 1 SLR 163. It was stated by Perera J. in Balasingham case, failure to comply with Rules is indeed a failure to show due diligence. The appeal was accordingly dismissed. In the cases of Facy vs. Sanoon and Others (2003) 2 SLR, and Jeganathan vs. Sajyath (2003) 2 SLR 372 same decision has been followed.

It was held in Shanmugadivu vs. Kulatilake (2003) 1 SLR 215, the requirements of Rules are imperative and the Court of Appeal had no discretion to excuse the failure to comply with the Rules.

Hence, the weight of authorities mentioned above, thus favours the view, that non-compliance with Rules is fatal to the application. Parties who invoke the jurisdiction of the Court cannot ignore the Rules and then ask to be heard.

It is to the best interest of the administration of Justice that Judges shall not ignore or deviate from the procedural law and decide matters on equity and justice as Dr. Amarasinghe J. pointed out in the case of Fernando vs. Sybil Fernando and Others (1997) 3 SLR 12. In that case Dr. Amarasinghe J. has made reference to the observation of Lord Justice Scrutton in his lecture "The Work of the Commercial Courts" (1921 – 23) 1 Cambridge Law Journal 6 at P 8 – 9. " ..... The Oath which every judge takes is: I will do right to all manner of people without fear or favour or prejudices according to the law and customs of the realm. And it is the laws and customs of this realm that the judges have to administer. If once you allow the laws and customs which you have to administer to be diverted by the

particular view you take of the particular case, another judge may think otherwise on the same facts, and there ceases to be any certainty in the law. If the laws and customs you have to administer are wrong it is for Parliament to put them right – not for the judges. It is important that the Judges should interpret the settled laws without altering them according to their views of right or wrong in the particular cases".

Dr. Amarasinghe J. pointed out in the case of Fernando vs. Sybil Fernando "there is the substantive law and the procedural law. Procedural law is not secondary. The two branches are complementary. Halsbury points out it is by procedure that the law which puts life into substantive law, gives it remedy and effectiveness and brings it into being".

Hence, in the interests of the administration of justice, there must he order, and therefore there must be compliance with the Rules of the Court of Appeal. As I have observed the defect was not of a purely formal or technical nature. Invoking the jurisdiction of the court is a crucial step in the proceedings.

The Petition of Appeal filed by the appellant in this case has not been directed to the proper forum under the proper provision of law in as much as no proper legally tenable appeal is pending. Therefore it is my considered view that the Appellant has not invoked the jurisdiction of this Court in a proper manner complying with the Rule 2(1) (a) and the Rule 14(1) of the Court of Appeal Rules.

For the reasons stated above I reject the contention of the learned Counsel for the Appellant and uphold the preliminary objection raised by the learned Counsel for the Respondent.

Since this Court has dismissed the appeal for the above stated reasons, this Court is of the view that it is not necessary to go into the merits of the appeal.

This appeal is dismissed accordingly with costs fixed at Rs.25,000/-.

JUDGE OF THE COURT OF APPEAL

P.R.Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal is dismissed