

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

C.A. Case No.1369/2000 (F)
D.C. Kandy Case No.26358/MR

Liayana Arachchige Senanayake Yapa
No. 72, Dehideniya,
Peradeniya.

PLAINTIFF-APPELLANT

-Vs-

Chairman,
Janatha Pohora Wyawasaya,
No. 19, Dawala Singharama Mawatha,
Colombo 15.

DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Lakshan Dias for the Plaintiff-Appellant
Sumathi Dharmawardhane, DSG for the
Defendant-Respondent

Argued on : 06.04.2017

Decided on : 11.10.2017

A.H.M.D. Nawaz, J.

The learned Deputy Solicitor General for the Defendant-Respondent has taken a preliminary objection that the petition of appeal is out of time. It would appear from the Journal Entry No.13 dated 29.09.2000 that the judgement had been delivered on 29.09.2000. On 16.10.2000, according to Journal Entry, notice of appeal was tendered.

The notice of appeal has been journalised at Journal Entry No.14. A petition of appeal dated 02.08.2001 has been preferred to this Court, after a lapse of nearly 11 months from the date of judgment.

This Court had occasion to deal with Section 755 (3) of the Civil Procedure Code (CPC) in *Nevanka Gunawardane Liyanapathirana v. Lester Clarence Gunawardane* (CA Appeal No.216/2000 decided on 01.08.2017) and observed that the time limit for filing a petition of appeal has been held to be mandatory as *lex curiae*. A long line of precedents have placed this interpretation on Section 755 (3) of the CPC. Section 755 (3) states as follows:

“Every appellant shall within sixty days from the date of the judgement 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 objections to the judgement or decree appealed against, and containing the particulars required by section 758, which 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 judgement or decree appealed against, the Court shall refuse to receive the appeal.”

In *Wickramasinghe v. Magilin Nona de Silva*, (1978-1979) 2 Sri.LR 65, the judgment had been delivered by the District Court on 11.05.1978. Notice of Appeal was filed on 23.05.1978 and the last date to file petition of appeal was 11.07.1978, but the petition of appeal was filed on 17.07.1978, i.e. after the lapse of 60 days. It was held by Soza J., that,

“The provisions of section 755(3) of the Civil Procedure Code, which requires the petition of appeal to be filed within sixty days from the date of judgment are mandatory. Accordingly, where a petition had been filed after the period of sixty days had lapsed, the learned District Judge was correct in rejecting such a petition.....This was also not a case in which relief should be given under the provisions of section 759(2), specially as there was no averment regarding material prejudice to the respondent in the petition and as the procedure set out in Chapter LX of the Civil Procedure Code was available to the petitioner.”

In 1981 the Court of Appeal in *Perera v. Perera and Another* (1981) 2 Sri.LR 41 declared at pp 42 and 43 that the provisions of Section 755 (3) of the CPC are mandatory. This was a case where the Defendant-Petitioner sought to revise the order of the learned District Judge rejecting his petition of appeal on two grounds, namely; (a) the petition of appeal was out of time and (b) it had been perfected by an Attorney who was not the registered Attorney.

Justice Soza, (with Victor Perera J. agreeing) following his earlier judgment in *Wickramasinghe v. Magilin Nona de Silva* stated at page 43:

“the question is whether the provisions of subsection (4) of section 754 and of subsection (3) of section 755 of the Civil Procedure Code are directory or mandatory. As I pointed out in my judgment in the case of Wickramasinghe v. Magilin Nona de Silva, subsection (3) of section 755 confers private rights and therefore is a mandatory provision.....“I see no reason to differ from or modify the views which I took in that case.”

The learned judge held further:

- 1) The provisions of sub-section 4 of Section 754 and of sub-section 3 of Section 755 of the Civil Procedure Code are mandatory and the Petitioner had filed both his notice of appeal and the petition of appeal out of time. Accordingly, the learned District Judge has correctly rejected the petition of appeal.
- 2) Under the provisions of Section 755(3) the petition of appeal shall be signed by the Appellant or his registered Attorney and so long as there is a proxy on record it is only the registered Attorney who has the authority to sign the petition of appeal.

His Lordship adverted to in this judgment the opinion expressed by Bindra in his work *Interpretation of Statutes* (6th Ed 1975) which states as follows:-

“Statutes conferring private rights are in general construed as being imperative in character and those creating public duties are construed as directory”.

In 1990 the case of *Keerthiratne v. Udena Jayasekera*, 1990 (2) Sri.LR 346 presented the following facts. The notice of appeal was given in time in terms of Section 755(1) of the Civil Procedure Code. The Attorney-at-Law on record failed to file the petition of appeal as required by Section 755(3) of the Civil Procedure Code. The excuse given was that the Appellant was kept in detention and as a result his mental and physical condition deteriorated and after his release he had to obtain treatment for his condition and therefore could not give instructions.

H.W. Senanayake J. (with D.P.S. Gunasekera J. agreeing) expressed the view thus in Court of Appeal:

“The filing of a notice of appeal must be followed by presentation of the petition of appeal within 60 days. Both steps are imperative and mandatory. The responsibility is on the Attorney-at-Law on record and not on the Petitioner.

The provisions of Section 759(2) of the Civil Procedure Code cannot be invoked to condone the negligence and carelessness of the Attorney-at-Law on record.”

In the year 1992 Ananda Coomaraswamy J. articulated the same proposition in *Peter Singho v. Costa* (1992) 1 Sri.LR 49 at 52 (CA).

In 1995 *Nachchiduwa v. Mansoor* (1995) 2 Sri.LR 273 threw up an identical issue revolving around Section 755 (3) of the Code but the facts are worthy of note.

In this case the Petition of Appeal was handed over to the Registrar by the Registered Attorney on 02.12.94. The Registrar had placed his initials and entered the time. According to the practice in the Registry, the petition of appeal had to be thereafter taken to the record room where it was to be entered in the Motion Book and filed in the record. These steps were not taken on 02.12.1994. The relevant entries were made only on 09.12.1994 after the period of 60 days within which the petition of appeal should be presented had lapsed.

The Plaintiff made an application for execution of decree in terms of Section 763 on the basis that there was an appeal filed and the Defendants were noticed. The learned

District Judge rejected the petition of appeal as being out of time on the basis that there was no entry in the Motion Book that the petition of appeal was filed on 02.12.1994, and allowed the application for writ. On appeal, the Court of Appeal held (per S.N.Silva J. (P/CA as he then was, with Dr. Ranaraja J. agreeing)

- (1) *In terms of section 755(3), the appellant has to 'present' to the original court a petition of appeal within 60 days of the judgment.*
- (2) *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.*
- (3) *When the petition of appeal is presented by the appellant and received by Court under section 755(3), section 755(4) provides that the petition should be filed and the record be forwarded to the Court of Appeal.*
- (4) *The act of filing the petition and that of forwarding the record to the Court of Appeal are official acts of the District Court. Any delay in filling a petition in the record cannot be attributed to the appellant."*

In *Silva v. Sankaram and Others* (2002)2 Sri.LR 209, the Court of Appeal once again declared that a strict compliance with Section 755 (3) of the CPC is imperative and non-compliance would be fatal. N.E. Dissanayake J. (with Somawansa J. concurring) followed the judgment of Sharvananda C.J. in the case of *Sri Lanka State Trading (Consolidated Exports) Corporation v. Dharmadasa* (1987) 2 Sri.LR 235 and held;

- (i) *A strict compliance is imperative and non-compliance is fatal to the appeal.*
- (ii) *The words 'within 60 days' in section 755(3) restrict the right of the appellant to file the petition of appeal beyond the time frame of 60 days given.*
- (iii) *The provisions of section 8(1) of the Interpretation Ordinance do not apply.*

It would appear from a survey of the above precedents that compliance with the time limits for both notice as well as petition of appeal is necessary to successfully prefer and maintain an appeal-See *Kiri Banda v. Ukku Banda* (1986) CALR 191.

As soon as the non-compliance with the time limit specified in Section 755 (3) of the Civil Procedure Code comes or is brought to the notice of court, no matter in what manner and at what stage, during the pendency of the appeal, it is bound to dismiss the petition in unstinted obedience to the command of the provision.

Considered in the light of the above enunciation, the objection raised by the learned Deputy Solicitor General was well founded. As the petition of appeal has been filed out of time, this court proceeds to reject and dismiss the petition of appeal *nunc pro tunc*.

JUDGE OF THE COURT OF APPEAL