

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

S.C. Appeal No. 74/2015
SC/HCCA/LA No. 288/2013
CP/HCCA No. 62/2008
D.C Hatton No. DE/198

In the matter of an Application for Leave
to Appeal

Sinnaiya Siwasamy
112, Ragala Bazar
Halgranoya.

PLAINTIFF

Vs.

M. Nadaraga Moorthi
8 ¼, Ragala Bazar
Halgranoya.

DEFENDANT

NOW BETWEEN

Sinnaiya Siwasamy
112, Ragala Bazar
Halgranoya.

PLAINTIFF-APPELLANT

Vs.

M. Nadaraga Moorthi
8 ¼, Ragala Bazar
Halgranoya.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Sinnaiya Siwasamy
112, Ragala Bazar
Halgranoya.

PLAINTIFF-APPELLANT-APPELLANT

Vs.

M. Nadaraga Moorthi
8 ¼, Ragala Bazar
Halgranoya.

**DEFENDANT-RESPONDENT-
RESPONDENT**

BEFORE: S.E. Wanasundera P.C., J.,
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Rohan Sahabandu P.C., with Hasitha Amarasinghe
For the Plaintiff-Appellant-Appellant

P. Peramunagama with Ranga Peiris
For the Defendant-Respondent-Respondent

WRITTEN SUBMISSIONS TENDERED BY THE APPELLANT ON:
16.07.2015

WRITTEN SUBMISSIONS TENDERED BY THE RESPONDENT ON:
14.10.2015

ARGUED ON: 20.06.2017

DECIDED ON: 27.07.2017

ANIL GOONERATNE J.

The question to be decided in this appeal is whether, the serving of the Notice of Appeal on the counsel is valid, and whether material prejudice has been caused to the Defendant-Respondent by the Plaintiff-Appellant-Appellant due to non-compliance of Section 755 (2) of the Civil Procedure Code, could be excused under Section 759 (2) of the Code. This court on 27.04.2015 granted Leave to Appeal on the questions of law set out in paragraphs 20(1) to (3) and (5) of the petition. It reads thus:

- (1) Did the learned High Court Judge consider that as no material prejudice has been caused the court could have acted under Section 759 (2)?
- (2) Could the High Court consider that objection again, as it has been determined by the Court of Appeal, when the Court of Appeal directed the High Court to hear the appeal?
- (3) Did the High Court Judge err in law in holding that serving of the Notice of Appeal on the Registered Attorney or the Respondent is Mandatory, and the failure results in the rejection of the appeal?
- (4) In the circumstances of the case is the serving of the Notice of Appeal on the counsel who had been appearing instructed by the Registered Attorney bad in law?

The applicability of Sections 759 (2) and 755 (2) had been examined on numerous occasions by the Superior Courts. However each case has to be

decided on facts and circumstances relevant to the case, without causing any harm/injury or by misinterpretation of the above sections of the Code. It is conceded that the Plaintiff did not serve a copy of the Notice of Appeal as required by the procedural law, on the Registered Attorney, but on the counsel.

Sections 755 (2) and 759 (2) reads thus:

755 - The notice of appeal shall be accompanied by –

- (a) except as provided herein, security for the respondent's costs of appeal in such amount and nature as is prescribed in the rules made by the Supreme Court under Article 136 of the Constitution or acknowledgment or waiver of security signed by the respondent or his registered attorney; and
- (b) proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgment of the receipt of such notice or the registered postal receipt in proof of such service.

759 - (2) In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done) the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.

The Judgement in this case was delivered by the learned District Judge on 22.11.2006. The Plaintiff-Appellant appealed against the Judgment of

the District Court. This matter then came up before the High Court and learned counsel for Defendant-Respondent contested the appeal on the ground that caption to the Notice of Appeal and the Petition of Appeal addressed to the Court of Appeal and not to the Provincial Civil Appellate High Court. At that point the High Court sent the case to the Court of Appeal. The President of the Court of Appeal acting in terms of Section 5 (d)(1) of the Provincial High Court (Special Provisions) Act No. 59 of 2006 decided to transfer the appeal to the Provincial High Court.

Notice of Appeal, according to the Notice available in the record shows the date stamp of 30th November 2006, which is within time. This is confirmed by the journal entry dated 01.03.2007 (unsigned) and a line drawn across it. The next journal entry dated 22.05.2007 confirm that the Notice of Appeal had been filed within time. There is reason to comment on the above journal entries but no such matter was raised by either counsel at the hearing of this appeal. Court may presume that judicial and official acts have been regularly performed. (Section 114 illustration (d) of Evidence Ordinance) As stated above the Notice of Appeal is available in the record and proof of service of the registered postal article receipt is also filed of record. As such court has to presume that the Notice of Appeal has been filed within time.

It is conceded that the Notice of Appeal has been sent to the counsel of the Defendant party and not the registered Attorney as required by the procedural law. Mandatory provisions are contained in Section 755 (2) of the Code. The date stamp in the Notice of Appeal is relevant to see whether it is within time 1995 (2) SLR 273. In *Dharmaratne Vs. Kumari* 2005 (1) SLR 269 T.B. *Weerasooriya J.* permitted the aggrieved party to apply under Section 759 (2) – observing that the mandatory provisions of Section 755 (2) could be remedied under Section 759, if such omission has not caused any material prejudice. What is required by looking at both above sections of the Code is to ascertain whether any material prejudice has been caused to the party concerned. In the instant case the Plaintiff's action had been dismissed. Action was filed for declaration of title and ejectment of Defendants. Therefore the question of executing a writ or getting the benefits of the fruits of the Judgment and victory by executing a writ pending appeal did not arise.

Therefore no material prejudice had been caused to the Defendant party. In *Nanayakkara Vs. Warnakulasooriya* 1993 (2) SLR 289 *Kulathunga J.* held: “the power of the Court to grant relief under 759(2) of the Code 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.

However relief cannot be granted in the opinion of court if the Respondent has been materially prejudiced, in which event the appeal has to be dismissed.

I also wish to observe that when court has to consider in granting relief under Section 759(2), it is essential to consider whether there was any carelessness or neglect or gross negligence. In the case in hand I cannot find any of them other than a mistake to serve the notice on counsel. As such court could proceed to grant relief under Section 759(2) which emphasis in granting relief in the event of a mistake omission or defect. Section 759 (2) of the Code is much wider in its application than the corresponding Section 756(3) in the earlier Code. The Special Provisions of Section 759 (2) which empowers the court to grant relief must prevail over Section 33 of the Stamp Duty Act. *Kithsiri Vs. Weerasena 1997 (1) SLR 70*. The relief under 759 (2) would, upon a literal construction, appear to apply even in the case of non-compliance with the requirement of hypothecation contained in Section 757 (1) of the Code. *Martin Vs. Sudahmy. Bar Journal 1990 Vol III pg. 7*.

I consider the question of law as follows:

- (1) No. The High Court has not correctly considered the applicability of Section 759 (2) of the Civil Procedure Code to the case in hand.
- (2) High Court is bound to consider the objection as the President of the Court of Appeal transferred the case back to the Provincial Appellate High Court.
- (3) Yes. The High Court erred.

(4) Ordinarily Notice of Appeal should be served on the registered Attorney, but in view of the provisions contained in Section 759 (2) of the Code a mistake, omission or defect if detected in the service of the Notice of Appeal, a service of Notice on the counsel could be excused.

Upon a consideration of all the facts and circumstances of this case, this court is inclined to allow this appeal in view of the provisions of Section 759 (2) of the Civil Procedure Code. I see no material prejudice caused to the Defendant party. In the context of the case in hand no material prejudice is caused. Case should be decided on its merits and as such the case is remitted to the High Court. Appeal allowed as per sub paragraphs 3 and 4 of the prayer to the petition.

Appeal allowed as above.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Nalin Perera J.

I agree.

JUDGE OF THE SUPREME COURT