

**FRANCIS
VS.
PREMAWATHY AND ANOTHER**

COURT OF APPEAL.
MS. EKANAYAKE, J.
SRISKANDARAJAH, J.
CA 1948/2003 (REV.).
DC GALLE P/11133.
SEPTEMBER 22, 2005.

Civil Procedure Code, sections 754, 754(4), 755(2), 755(2)(b), 759(f) – Notice of appeal not served on respondent – Rejected by District Judge – Validity? Failure – Is it fatal ?

The District Court rejected the notice of appeal on an objection being taken that the notice of appeal was not served on the respondents. The defendant – petitioner moved in revision.

HELD:

- (1) One of the imperative requirements of section 755(2) (b) is that a copy of the notice of appeal should be served on the registered Attorney-at-law of the respondent.

- (2) By the failure to serve a copy of the notice of appeal on the registered attorney for the plaintiff-respondent neither he nor his client is aware that an appeal is being filed.
- (3) Where the notice of appeal is void it is not possible to give relief under section 759(2); to give relief under section 759(2) would lead to laxity and carelessness on the part of the appellants.

APPLICATION in revision from an order of the District Court of Galle.

Cases referred to :

1. *Thambirajah vs. Doral and others* CA 1306/87 CAM 6.9.1996.
2. *Sumanaratne Banda vs. Jayaratne* CA (Rev) 1025/85 CAM 26.6.87
3. *Kiri Banda vs. Ukku Banda* (1986) CALR 191

N.R.M. Daluwatte, P. C. with Gayathrie de Silva for 7th defendant-appellant-petitioner.

Daya Guruge for plaintiff-respondent-respondent.

Cur.adv.vult.

November 07, 2005.

SRISKANDARAJAH J.

The 7th defendant petitioner's Attorney-at-Law filed a Notice of Appeal on the 13th of June, 2003 to appeal against the order of learned District Judge delivered on the 2nd of June, 2003 in the District Court Galle Case No. 11133/P. By this order the Learned District Judge has rejected the claim of the 7th defendant petitioner in the land sought to be partitioned in the said case. The Petitioner's Attorney-at-Law with the aforesaid Notice of Appeal filed the receipt for the deposit of Rs. 750 being security and also registered postal article receipts in proof of notice to the Respondents. This fact is borne out by the journal entry No. 33 dated 25.06.2003. Subsequently the Petition of Appeal was filed on 29th July, 2003. According to the proceedings dated 7.7.2003 the plaintiffs-respondent-respondent's Attorney-at-law has brought to the notice of Court that no Notice of Appeal has been served on the Plaintiff or to her Attorney-at-law in terms of section 754(4) of the Civil Procedure Code and he moved that

the Notice of Appeal be rejected. The Attorney-at-law of the 7th defendant petitioner admitted this position and stated that a mistake has occurred in respect of this matter. The learned District Judge after considering the submission made in this regard held on the same day i.e. 7.7.2003 that there is no proof of service of Notice of Appeal on the plaintiff and the 7th defendant appellant acted in breach of section 755 (2) (b) of the Civil Procedure Code and hence under section 754, the Court has power to reject the Notice of Appeal and rejected the Notice of Appeal.

The 7th Defendant Petitioner being aggrieved by the aforesaid order of rejection of his Notice of Appeal has filed this Revision Application to revise and set aside the said order dated 7.7.2003. The Petitioner submitted that section 754(4) deals with time limits of filing the Notice of Appeal and in which court it should be presented and who should present it. If the Notice of Appeal is not presented within the prescribed time limit or not fulfilled the aforesaid conditions the Court is empowered to reject the Notice of Appeal. The Petitioner further submitted that section 755(2) deals with additional material that has to accompany the Notice of Appeal. But it does not empower the trial judge to reject the Notice of Appeal for non-fulfillment of the requirements of section 755(2). The Respondent also submitted that the Petitioner is not prejudiced by not giving notice within the 14 days in which the Notice of Appeal has to be filed. He also submitted that the failure to give notice to the Plaintiff is admittedly by a mistake by the Attorney-at-law of the 7th defendant respondent therefore the court could grant relief under section 759(2) of the Civil Procedure Code. This section is to give relief in case of a mistake, omission or defect made in complying with the procedure except non-compliance with section 754(4).

In *Thambirajah vs. Doral and others* (v. Wijeratne, J held :

"I cannot accept the submission that the Notice of Appeal once accepted cannot be rejected.

Section 754(4) of the Civil Procedure Code states-

"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 public holidays, and the court to which the notice is so presented shall receive it and deal with it as herein-after provided. If such conditions are not fulfilled, the court shall refuse to receive it.”

This means that the Notice of Appeal should be dealt with as set out in the succeeding section.

Section 755(1) sets out the particulars which should be contained in the Notice of Appeal.

Section 755(2)(b) lays down that the notice of appeal shall be accompanied by 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 acknowledgement of the receipt of such notice or the registered postal receipt in proof of such service.

Thus it is seen that one of the imperative requirements of section 755(2)(b) is that a copy of the notice of appeal should be served on the registered Attorney-at-law of the respondent. This has not been done in this case.

The purpose of this requirement is to apprise the registered Attorney-at-law of the other party (the respondent) that an appeal is being filed and that the first step is being taken by tendering the Notice of Appeal. By the failure to serve a copy of the notice of appeal on the registered Attorney-at-law for the plaintiff-respondent, neither he nor his client is aware that an appeal is being filed.

There was no valid Notice of Appeal as a copy of the notice was not served on the registered Attorney-at-law for the plaintiff-respondent, which is a fundamental requirement. Therefore the learned District Judge has jurisdiction to reject the Notice of Appeal, which has no validity.

In this respect I follow the judgment in *Sumanaratne Bandara vs. Jayaratne* ⁽²⁾ where it was held that where the notice of Appeal was not duly stamped, the District Judge could reject the Notice of Appeal.

Section 759(2) provides that in case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the relevant sections (other than the provisions specifying the period within which any act or thing 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 that it may deem just.

In the case of *Kiri Banda vs. Ukku Banda* ⁽³⁾ where it was contended that where there has been a mistake, omission or defect on the part of the appellant in complying with the provisions of these sections, this court should grant relief if it should be of opinion that the respondent has not been materially prejudiced, *P. R. P. Perera, J.* stated at 194-

“In my view, if this construction sought to be placed by learned Counsel on section 759(2) is accepted, even where such failure is occasioned by gross negligence or carelessness or neglect on the defaulting party or his registered Attorney, it would result in such conduct being condoned by the court. Further it would render nugatory express mandatory provisions of procedure. I regret I am unable to agree with these submissions.”

In my view these observations apply with equal force to the facts of this case. To give relief under section 759(2) would lead to laxity and carelessness on the part of appellants.

In any event where the Notice of Appeal (which is the starting point and the foundation of the appeal procedure) is void, as in this case, it is not possible to give relief under section 759(2) of the Civil Procedure Code.”

The above case applies to the instant Application in all force and this court holds that the Notice of Appeal filed by the 7th defendant-appellant-petitioner in the given circumstances is void therefore the Petitioner cannot be given relief under section 759(2) of the Civil Procedure Code. Hence this court upholds the order of the learned District Judge dated 7.7.2003 and dismiss this application with costs fixed at Rs. 5000.

EKANAYAKE, J. — I agree

Application dismissed.