

**Perera**  
**v.**  
**Perera and Another**

COURT OF APPEAL.

SOZA, J. AND VICTOR PERERA, J.

C. A. APPLICATION No. 471/80—D. C. COLOMBO 1325/L.

DECEMBER 12, 1980.

*Civil Procedure Code, sections 754 (2), 755 (3),—Non compliance—Notice of appeal and petition of appeal filed out of time—Mandatory provisions—Interpretation Ordinance (Cap. 2) sections 8 (3), 14 (a)—Relief under section 759 (2).*

The defendant-petitioner in this application 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.

**Held**

(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 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.

**Case referred to**

(1) *Wickremasinghe v. de Silva, (1978–79) 2 Sri L.R. 65.*

APPLICATION to revise an order of the District Court, Colombo.

*Nimal Senanayake, with Miss S. M. Senaratne, for the defendant-petitioner.*  
*E. D. Wickremanayake, for the plaintiff-respondent.*

*Cur. adv. vult.*

January 21, 1981.

**SOZA, J.**

This was a suit which the plaintiff-respondent had instituted against the defendant-petitioner for a declaration of a servitude of cartway over the defendant's land described in schedule B of the plaint and certain consequential relief. After trial the learned District Judge had delivered order on 16th May, 1979, granting

the relief prayed for in the plaint. On 6th June, 1979, the defendant-petitioner filed notice of appeal. Thereafter he filed his petition of appeal on 30th July, 1979. The learned District Judge accepted the petition and made order that the record be forwarded to the Court of Appeal. On 16.8.1979 the respondents filed motion giving reasons why the petition of appeal should not have been accepted. The learned District Judge inquired into this matter after notice to the present petitioner and on 21.2.1980 made order rejecting the petition of appeal on two grounds:

- (1) The petition of appeal was out of time;
- (2) It had been perfected by an Attorney who was not the registered Attorney.

It is this order that the petitioner seeks to canvass before us.

Under section 754 (4) of the Civil Procedure Code notice of appeal should be presented to the Court of first instance within a period of 14 days from the date when the decree or final order appealed against was pronounced, exclusive of the day of that date itself and of the day when the notice is presented and all Sundays and public holidays. The subsection further lays it down that if this condition is not fulfilled "the court shall refuse to receive" the notice of appeal. The last day for presenting the notice of appeal in the instant case was 4th June, 1979. Hence the notice of appeal was out of time and the Court was bound to refuse to receive the notice of appeal.

Subsection (3) of section 755 further stipulates that the appellant shall within 60 days of the judgment 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 objection to the judgment or decree appealed against. There is no provision for the District Judge to extend the time for filing the petition. Subsection (4) of the same section states that upon the petition of appeal being filed the Court shall forward it to the Supreme Court. Not only the notice of appeal, but even the petition of appeal also was filed out of time. As, unlike in section 754 (4), there is no express provision to exclude Sundays and Public holidays, these must be included in computing the sixty days. Only the date on which the judgment was pronounced can be excluded—see section 8 (3) and 14 (a) of the Interpretation Ordinance.

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 *Wickremasinghe v. Magilin Nona de Silva* (1), subsection (3) of section 755 confers private rights and therefore is a mandatory provision. Bindra in his work *Interpretation of Statutes*, 6th ed. (1975) states as follows at page 599 :

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

In my judgment in the case under reference I referred to a number of authorities and held that the provisions of section 754(4) in regard to notice of appeal are imperative and mandatory. I came to a similar conclusion in regard to section 755 (3) and stated as follows:

“Subsection (3) of section 755 of the Civil Procedure Code which requires the appellant to present to the original Court a petition of appeal within sixty days is couched in imperative terms. This is a new provision and is clearly mandatory. The filing of the petition of appeal is an essential concomitant of the filing of the notice of appeal. Both steps are mandatory and imperative steps in lodging an appeal. Until these steps are taken as directed by the Civil Procedure Code the Judge cannot comply with subsection (4) of section 755. The learned District Judge was therefore right in rejecting the petition of appeal. The notice of appeal too lapses for want of compliance with the subsequent requirements and should now be rejected.”

I see no reason to differ from or modify the views which I took in that case.

The next question is whether it is open to this Court to grant relief under the provisions of subsection (2) of section 759. I have discussed this subsection also in my judgment to which I have already referred and need only add that there are no circumstances in the present case which would justify this Court acting under the provisions of section 759 (2) of the Civil Procedure Code. The plaintiff-respondents undoubtedly will be prejudiced if this appeal is accepted despite the failure of the petitioner to comply with the imperative provisions governing the lodging of the petition of

appeal. There is nothing in the instant case to redeem the laches of the petitioner. The petition of appeal has been lodged out of time and the learned District Judge was quite right in rejecting it. The orders which the original Court made in regard to the notice of appeal and the petition of appeal were per incuriam as the provisions of the Civil Procedure Code pertaining to these steps had been ignored. The learned District Judge was therefore right in entertaining the application of 16.8.1979 made by the respondents.

The second matter that needs consideration is the fact that the petitioner's registered Attorney had not signed the petition of appeal. It was argued that the Attorney who signed the petition of appeal had been acting along with the registered Attorney right through the case and that he does have the capacity to sign a petition. The question is not whether the Attorney who signed the petition of appeal has the capacity to sign it but whether he has the authority to sign it. It is only the registered Attorney who has the authority that can sign it so long as his proxy is there on the record. The appellant himself can also sign it but no one else. Section 755 (3) states that the petition of appeal "shall be signed by the appellant or his registered attorney". So in the case before us there has been no compliance with an express provision of section 755 (3). Therefore this is another ground on which the petition of appeal should be rejected.

The application is therefore dismissed with costs.

VICTOR PERERA, J.—I agree.

*Application dismissed.*