

RANINKUMAR
v
UNION ASSURANCE LIMITED

SUPREME COURT
S.N. SILVA, C.J
BANDARANAYAKE, J. AND
EDUSSURIYA, J.
SC (CHC) APPEAL NO. 46/99
H.C. COLOMBO (CIVIL)
CASE NO 55/96(1)
29TH APRIL AND 6TH AND 27 JUNE 2003

Civil Procedure Code – Validity of notice of appeal filed personally by appellant and not by his registered attorney – Section 754(4) of the Code – Defect not curable under section 759(2).

Section 754(4) of the Civil Procedure Code (“The CPC”) requires that “the notice of appeal shall be presented to the court of first instance by the party-appellant or his registered attorney within a period of 14 days” In the instant case the appellant himself had signed the notice of appeal and not his registered attorney.

Held :

The lapse by the appellant's failure to present the notice of appeal by his registered attorney goes to the basic validity of the notice and as such is not curable in terms of the provisions of section 759(2) of the Code which excludes the application of that section to any provision which prescribes the period within which the act or thing is to be done.

Cases referred to

1. *Fernando v Fernando* (1997) 3 SRI LR 1
2. *Hameed v Deen* (1988) 2 SRI LR 1
3. *Sameen v Abeywickrama* 61 NLR 553

APPEAL from the judgment of the High Court of Colombo.

Gamini Marapana, PC with Navin Marapana for appellant.
S:L. Gunasekera with Kushan De Alwis for respondent.

Cur.adv.vult.

July 24, 2003

EDUSSURIYA, J.

When this appeal was taken up for hearing, the learned Counsel for the respondent invited this Court to reject the appeal in as much as the appellant himself has signed the notice of appeal and not his registered attorney-at-law. 01

Learned President's Counsel for the appellant then proceeded to make submissions on this question and at the end of the day the Court invited him to tender written submissions.

Learned President's Counsel, by his oral submissions as well as written submissions, has stated that he does not wish to attempt to justify the appellant's conduct in signing the "Notice of Appeal" in question when there was a registered attorney-at-law appearing for him, but invited this Court to exercise the discretion vested in this Court in terms of section 759(2) of the Civil Procedure Code in the appellant's favour since no material prejudice will be caused to the respondent. 10

Learned President's Counsel has submitted that the facts considered in the judgment in *Fernando v Fernando* ⁽¹⁾ were similar to the case now before us. However he contends that even though the learned Judges in deciding that case had cited with approval the statement of S.N.Silva,J. as he then was, in the Court of Appeal judgment, in *Hameed v Deen* ⁽²⁾, wherein S.N.Silva, J. had stated that "counsel for the appellant did not invite this Court to act in terms of section 759(2) of the Civil Procedure Code. In any event, this lapse referred to above goes to the basic validity of the Notice and Petition and as such is not curable in terms of the provisions of section 759(2)", the decision of the Privy Council in *Sameen v Abeywickrama* ⁽³⁾ had not been considered by Court either in 20

Fernando v Fernando (Supra) or in *Hameed v Deen (supra)* and that therefore both these decisions were *per incuriam* and that had the decision of the Privy Council in *Sameen v Abeywickrama (supra)* been considered Their Lordships who decided *Fernando v Fernando (supra)* and *Hameed v. Deen (supra)* would have arrived at a different decision. 30

Learned President's Counsel has submitted that Their Lordships of the Privy Council had taken the view that in granting relief under section 756(3) of the Civil Procedure Code it was wrong to decide whether the non compliance complained of would amount to a substantial non-compliance and that relief under section 756(3) should be granted only when there was more or less trivial non compliance and further that there was no limitation to the power to grant relief. 40

In *Sameen v Abeywickrama (supra)* the Privy Council discussed the scope of section 756(3) of the Civil Procedure Code and the question whether relief could be given in terms of that section to an appellant who had (1) failed to give notice of the filing of a petition of appeal and (2) failed to sign the bond relating to security for costs in appeal. 50

At the date of the decision in *Sameen v Abeywickrama (supra)* an appellant who was aggrieved with a decision of the District Court had to file a petition of appeal within ten (10) days of the pronouncement of the judgment as prescribed in section 754(2) of the Civil Procedure Code.

Section 755 required all petitions to be signed by some advocate or proctor. Section 756(1) required the petitioner to forthwith give notice to the respondent that he will on a day specified within the period set out in the section tender security for the respondent's costs of appeal as directed therein etc. The section also required notice of appeal to issue immediately on the respondent as set out therein on security for costs being accepted.

Section 756(3) reads as follows; 60

"In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of *this section*, the Supreme Court, if it should be of opinion that the respon-

dent has not been materially prejudiced, may grant relief on such terms as it may deem just”

So that, clearly, relief may be granted in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of section 756 only, and section 756(3) did not extend to any mistake, omission, or defect in complying with section 755 which required the petition of appeal to be signed by some advocate or proctor or section 754(1) which required the petition of appeal to be presented to the court of first instance within a period of ten days or seven days as the case may be as set out in that section, and therefore that Their Lordships of the Privy Council were not called upon to decide on the applicability of section 756(3) with regard to the failure of an appellant to comply with the requirements relating to the presenting of a petition of appeal as prescribed in section 754(1) or the provisions of section 755.

70

It must be borne in mind that the Privy Council decision in *Sameen v Abeywickrama (supra)* dealt with only the failure to sign the bond in respect of security for costs of the respondent and the failure to give notice of the filing of a petition of appeal.

80

Under the Administration of Justice Law, No. 44 of 1973 which repealed the Civil Procedure Code, an appellant was required to present a notice of appeal within the period prescribed, followed by a petition of appeal.

Thereafter, the Administration of Justice Law, No. 44 of 1973 was repealed by the Civil procedure Code which required an appellant to present a notice of appeal as prescribed in section 754(3) and section 754(4).

90

Section 755 sets out that a notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Section 755(1) sets out the particulars to be contained in a notice of appeal. Section 755(2) provided for the furnishing of security for the respondent's costs in appeal etc. Section 755(3) required a petition of appeal to be presented within the period prescribed therein. Section 755(4) referred to the forwarding of such an appeal to the Court of Appeal. Section 756 referred to the procedure to be followed in respect of an appeal

100

and an application for leave to appeal. Section 757 refers to security for costs. Section 758(1) sets out the particulars to be contained in the petition of appeal followed by section 758(2) which sets out that the appellant shall not be confined to the grounds set forth at the hearing of the appeal etc. Then comes section 759(1) followed by section 759(2) the purview of which this Court has been called upon to examine.

Section 759(2) as amended by Act, No.79 of 1988 reads as follows :

“In the case of any mistake, omission or defect on the part 110
of any appellant in complying with the provisions of the fore-
going 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 the opinion that the respon-
dent has not been materially prejudiced, grant relief on such
terms as it may deem just”.

Therefore, no relief whatsoever can be granted where there
is any mistake, omission or defect in complying with a provision
specifying the period within which any act or thing is to be done,
even if the respondent is not materially prejudiced. 120

Learned President’s Counsel has in the course of his sub-
missions referred to several judgments which set out that techni-
calities should be overlooked or that relief should be granted in
the case of non compliance of mere trivial requirements. Those
judgments have no bearing on the question to be decided by this
Court.

Although section 755(1) sets out that the notice of
appeal shall be signed by the appellant or his registered
attorney and section 755(1) does not refer to any act which
has to be done within a specified period, section 754(4) 130
specifies that *“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 four-
teen 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 notice of appeal*

is presented and of Sundays and public holidays, and the Court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, Court shall refuse to receive it".

140

The words "The notice of appeal *shall be presented by the party appellant or his registered attorney* within a period of fourteen days" in section 754(4) connote the handing over to the Court of first instance a duly signed notice of appeal within the period prescribed and not merely the physical act of handing over of a purported notice of appeal which is not duly signed as required by law by the party appellant or his registered attorney. Hence, a notice of appeal which has been signed by an appellant and not by his registered attorney-at-law will not be a notice of appeal contemplated by section 754(4) of the Civil Procedure Code.

It is for this very same reason I believe that S.N. Silva, J. as he then was, in the Court of Appeal judgment in *Hameed v Deen (supra)* stated "In any event this lapse (where the appellant had signed both the alleged Notice of Appeal and alleged Petition of Appeal and not his registered attorney-at-law) referred to above goes to the basic validity of the Notice and Petition and as such is not curable in terms of the provisions of section 759(2)".

That decision was pronounced on 25th March 1988 and then section 759(2) was amended by Amendment Act, No.79 of 1988 which was certified on 18th December 1988 to read that section 759(2) shall not apply to a provision specifying a time within which an act has to be done and that amendment was the last nail in the coffin as far as the learned President's Counsel's contention is concerned.

Therefore section 759(2) clearly does not apply to a situation where a purported notice of appeal is not duly signed, since section 754(4) requires a notice of appeal to be presented by the appellant or his registered attorney to the court of first instance within the period prescribed therein. I repeat such a purported notice is not one contemplated by section 754(4).

170

In any event, what is the relief that can be given? To entertain the notice of appeal despite the defect and hear the appeal? That cannot be done as it would amount to a situation where this Court would entertain an appeal in spite of there being no notice of appeal as required by section 754(4). In the alternative, direct the appellant to tender a duly signed notice of appeal? Such a notice of appeal would be clearly in breach of section 754(4) as it would be filed beyond the period prescribed therein.

Therefore it is clear, that the appellant advisedly refrained from moving Court to accept a duly signed notice of appeal, unlike in the case of *Fernando v. Fernando (supra)*. 180 0

For the above mentioned reasons, the "Notice of Appeal" is rejected *nunc pro tunc* and accordingly the appeal is also rejected. No costs.

S.N. SILVA, C.J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal rejected.