FERNANDO
V.
SYBIL FERNANDO AND 2 OTHERS

COURT OF APPEAL.
SENANAYAKE, J.
EDUSSURIYA, J.
C. A. 56/89 F
D. C. COLOMBO 3356/ZL
MARCH 13, 1996.

Civil Procedure Code - S.24, 27(2), 27(1), 28, 755(1) and 759(2) Amendment No. 79 of 1988 - Administration of Justice Law S.323(1) - Notice of Appeal signed by Appellant - Registered Attorney-at-Law on Record - are there exceptional Circumstances?

A preliminary objection was taken that the Notice of appeal was signed by the Appellant himself when there was a proxy filed by the Registered Attorney X and therefore the appeal should be rejected as there is no valid notice of appeal.

Held:

(1) There are no exceptional circumstances averred. One could understand if at the relevant time the Registered Attorney-at-Law was out of the island or that he had been hospitalised which necessitates the Appellant himself signing the Notice of appeal.

(2) S.24 of the Civil Procedure Code gives the freedom to a party to make any appearance or application or appear in Court unless the law authorised that he should be expressly represented by an Attorney-at-Law. But once an Attorney-at-Law was duly appointed by the party concerned he foregoes his rights to tender and sign the Notice of appeal when the Registered Attorney-at-Law is alive and his proxy remains on record without being revoked.

***Per* Senanayake, J.**

"In my view the lapse referred earlier goes to the basic validity of the Notice and Petition of Appeal and as such it is not curable in terms of S.755 and S.759(2) of Act No. 79 of 1988 (Amendment). It is a well accepted principle of interpretation that the statute has to be read as a whole and that every clause should be construed with reference to the context and the other

clauses of the Act, so far as possible to make a consistent enactment of the whole Statute."

AN APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Reid v. Samsudeen* 1 NLR 292.
2. *Kusumawathie v. Nawaratne*, S.C. 16/90 S.C.M. 16.10.1990.
3. *Sharpe v. Wakefield* - 1891 A.C. 173.
4. *Silva v. Kumaratunga* 40 NLR 139.
5. *Reginahamy v. Jayawardane* 1917 4 C.W. R. 390.
6. *Seelawathie v. Jayasinghe* 1985 2 S.L.R. 266.
7. *Hameed v. Deen* - 1988 - 2 S.L.R. 1.
8. *Somawathie v. Buwaneswari* 1990 - 1 S.L.R. 223.

Romesh de Silva, P.C. with *C. Wijeratne* for Appellant.
P.A.D. Samarasekara, P.C. with *Keerthi Sri Gunawardane* for Respondent.

May 10, 1996.
SENANAYAKE, J.

This is an appeal from the Judgment of the learned District Judge of Colombo. When this appeal was taken up for hearing the Court brought to the notice of the learned counsel for the Appellant that the notice of appeal in terms of Section 755 (1) of the Civil Procedure Code has been signed by the Appellant when at the relevant time there was a proxy filed by the Registered Attorney-at-Law Mr. Nimal Siripala de Silva. Therefore the question arose whether the Appellant could proceed with this appeal. The learned counsel for the Appellant indicated to Court that he had been taken by surprise since there was no objection taken by the Respondent. He moved to tender written submissions and the Court granted both parties time to tender written submissions.

The learned Counsel's submission was that when the matter came up for hearing the Respondents did not take up this objection and that the notice of appeal was filed in 1989 and even at that stage no objection was taken by the Respondent.

In perusing the record I find that during the relevant time the Appellant's Registered Attorney was Mr. Nimal Siripala de Silva whose

proxy was on record. The journal entry 105 of the record indicates on 28.02.1989 the Plaintiff-Appellant had tendered to Court the Notice of Appeal and on 26.02.1989 the cash receipt for security and bond were tendered to Court by the said Attorney-at-Law and the motion signed by Attorney-at-Law. But though the Notice of Appeal was not signed by the Registered Attorney-at-Law but by the Appellant himself there was no excuse as to why the Attorney on record did not sign the Notice of Appeal. There were no exceptional circumstances averred. One could understand if at the relevant time the Registered Attorney-at-Law was out of the Island or that he had been hospitalized which necessitated the Appellant himself signing the Notice of Appeal. The facts disclosed on the record clearly establish that the Registered Attorney at the relevant time was in active practice. This was a deliberate act by the Appellant.

The learned Counsel for the Appellant sought permission to tender Notice of Appeal duly signed by the present Registered Attorney-at-Law. I am of the view that such an application cannot be entertained in law at this stage, this would be contrary to the provisions of the Civil Procedure Code.

The learned Counsel in his written submissions had contended that this was a case highly contested and several witnesses were called by either side and deals with a very valuable land, a commercial premises situated in Maradana.

I do not see any relevance of the said submissions to the question in issue. The value of the property or the highly contested nature of this case has no bearing to the crucial question in issue. The Civil Procedure Code gives any party a right to conduct his own case and in the event the Judgment of the Original Court is adverse to him he could in terms of Section 755(1) tender a Notice of Appeal and file a Petition of Appeal himself and present his case and make his submissions before the Court of Appeal. But in the instant case there was a Registered Attorney-at-Law who had filed the proxy and was conducting and taking all necessary steps in terms of the Provisions of the Civil Procedure Code on behalf of the Appellant. Section 27(1) of the Civil Procedure Code and 27(2) provide how an appointment is made and how it could be revoked. Section 28 sets out that all proceedings stand

suspended for a period of 30 days in case of incapacity or death of the Attorney-at-Law on record.

Section 24 of the Civil Procedure Code gives the freedom to a party to make any appearance or application or appear in Court unless the law authorized that he should be expressly represented by an Attorney-at-Law. But once an Attorney-at-Law was duly appointed by the party concerned he foregoes his rights to tender and sign the Notice of Appeal when the Registered Attorney-at-Law is alive and his proxy remains on a record without being revoked.

The learned Counsel for the Appellant submitted that the Civil Procedure Code from time immemorial was used by a party to obtain justice. He relied on the Judgment of *Reid v. Sumsudeen*[1] and referred to the observation of Bonser C.J. at Page 294:- "It is not the duty of a Judge to draw technical conditions in the way of administration of justice but where he sees that is prevented from receiving material or available evidence merely by reasons of technical objection he ought to remove the technical objections out of the way upon proper terms as to costs and otherwise". I am of the view that the observation of Bonser C.J. has no relevance to the instant case. The case of *Reid v. Sumsudeen* (*supra*) was a case filed in the Court of Requests where all technicalities of law are banished and not adhered to. Bonser C.J. at page 293 observed "that such an objection should have been up-held is to me astounding especially in a Court of Requests which is a Court from which all technicalities should be banished." It is my view the said case has no relevance to the question in issue. The learned Counsel referred to the amendment to Section 755 and 759(2) by Act No. 79 of 1988. Where the amendment reads as : "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 the provision specific period within which any act or thing is to be done to the Court of Appeal) if it should be of opinion that the Respondent has not been materially prejudiced grant relief on such terms as it may deem just".

It was submitted by learned Counsel that this Court has the power to grant relief if the case was any mistake made in terms of Section 755. He contended the only matters that were incurable were if there has been non- compliance with a time period. I am unable to agree

with his contention. In my view, the lapse referred earlier goes to the basic validity of the Notice and Petition of Appeal and as such it is not curable in terms of the amendment. It is a well accepted principle of interpretation that the statute has to be read as a whole and that every clause should be construed with reference to the context and the other clauses of the Act, so as far as possible to make a consistent enactment of the whole statute (Maxwell on Interpretation of Statute 12th Edition page 47).

The learned Counsel relied on the case of *Kusumawathie v. Nawaratne*[2]. This case decided the question of non compliance of the rules of the Supreme Court and the Court held that the purpose of the rules had to be analysed and mere non-compliance must not amount to automatic dismissal. In my view the authority cited has no relevance to the instant case. Here the nature of the Act of commission was fatal and it basically affects the validity of the appeal and judicial discretion must be exercised reasonably and it cannot vary as "the Lord Chencellos foot"

In the case of *Sharpe v. Wakefield*[3], it was held discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice not according to private opinion, but according to law and not humour, it be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself.

Lord Halsbury referred to the celebrated Rookes case 1858. In the words of Coke L.J. "for a discretion is a science of understanding to discern between falsity and truth between shadows and substance between equity and colorable glosses and pretences and not according to their will and private affection.

In my view the authorities cited by the learned Counsel for the Appellant though it is from our Supreme Court has no application to the facts of the instant case. Each case has to be considered on its own merits and the interpretation of the law must refer to the whole context of the statute.

It was decided in case of *Silva v. Kumaratunge*[4] Maartensz,J. in a case where the Petition of Appeal was signed by a Proctor at a time when another subsisting proxy was of record, was considered bad in law and he summed up as follows: "The ratio decidendi in the old cases with which I respectfully agree was that this Court cannot recognize two Proctors appearing for the same party in the same cause".

In the Case of *Reginahamy v. Jayawardane*[5] Ennis, J. rejected an appeal which was not signed by the proctor on record.

In the case of *Seelawathie v. Jayasinghe*[6] Seneviratne, J. considered the provisions of Section 323(1) of the Administration of Justice Law. He held that a party could sign the Notice of Appeal only when he has no Registered Attorney. Seneviratne, J. observed at page 270 as follows: "When a party to a case has an Attorney-at-Law on record, it is the Attorney-at-Law on record alone, who must take steps, and also whom the Court permits to take steps. It is a recognized principle in Court proceedings that when there is an Attorney-at-Law appointed by a party such party must take all steps in the case through such Attorney-at-Law. Further, the principle established in a court is that if a party is represented by an Attorney-at-Law such a party himself is not permitted to address court. All the submissions of the party must be made through the Attorney-at-Law who represents such a party."

In the case of *Hameed v. Deen*[7] S. N. Silva, J. observed that a Notice of Appeal signed by the Appellant when the Registered Attorney was on record was bad in law and not curable.

This Court in the Case of *Somawathie v. Buwaneswari*[8] took the same view and I do not see any reasons to differ from the earlier decisions. The amendment of 79 of 1988 allows mistake or omission connected to giving of security and signing of the bonds and those omissions or mistakes of similar nature.

In my view, there is no merit in the written submissions of the learned Counsel. If one were to entertain application of this nature then one could submit that a party could sign and file his pleadings himself inspite of there being a Registered Attorney on record as no material

prejudice is caused to the Defendant. Such a contention is not tenable in law. I am of the view the Notice of Appeal signed by the Appellant himself goes to the validity of Notice of Appeal and this is not curable in terms of the amendment.

Therefore, I reject the Notice of Appeal and the Petition of Appeal and the appeal is dismissed with costs fixed at Rs. 5250/-.

EDUSSURIYA, J. - I agree.

Appeal dismissed.