

**NACHCHIDUWA
v.
MANSOOR**

COURT OF APPEAL.

C.A. NO. 909/94

D.C. ANURADHAPURA 12863/L

S. N. SILVA, J. (P/CA)

DR. RANARAJA, J.,

MARCH 28, 1995.

Civil Procedure – S. 755(3) S. 763 of Amendment Act 79 of 1988 – Petition of Appeal – Appealable time – Presenting a Petition of Appeal – Date Stamp – Relevant date.

The Petition of Appeal was handed over to the Registrar by the Registered Attorney on 02.12.94. The Registrar has placed his initials and entered the time. According to the practice in the Registry, the petition of appeal had to be thereafter taken to the record room where it is entered in the Motion Book and filed in the record. These steps were not taken on 02.12.94. The relevant entries were made on 09.12.94 after the period of 60 days within which the Petition of Appeal should be presented had lapsed.

The plaintiff made an application for Execution of Decree in terms of S. 763 on the basis that there was an appeal filed and the defendants were noticed. The learned District Judge rejected the Petition of Appeal as being out of time on the basis that there was no entry in the Motion Book that the Petition of Appeal was filed on 02.12.94, and allowed the application for writ.

Held:

- (1) In terms of S. 755(3) the applicant has to "present" to the original court a petition of appeal within 60 days of the judgment.
- (2) The act of the Registered Attorney in tendering the Petition of Appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the Petition of Appeal constitute presentation of the petition of Appeal.
- (3) When a petition of appeal is presented by the appellant and received by Court under S. 755(3), S. 755(4) provides that the petition should be filed and the record forwarded to the Court of Appeal.
- (4) The act of filing the Petition and that of forwarding the record to the Court of Appeal are official acts of the District Court. Any delay in filing a petition in the record cannot be attributed to the appellant.

AN APPLICATION in Revision from the order of the District Court of Anuradhapura.

N. M. Saheed for Defendants-Petitioners.
H. M. P. Herath for Plaintiff-Respondents.

March 28, 1995.

S. N. SILVA J. (P/CA)

The above application is in revision from the order dated 09.12.94. By that order Learned District Judge, (1) rejected the petition of appeal that had been filed by the defendants, (2) allowed the application of the plaintiff for execution of decree.

Judgment was entered in this case on 05.10.94 in favour of the plaintiffs. The defendants filed a notice of appeal on 12.10.94. It is agreed that the petition of appeal had to be filed on or before 05.12.94.

According to the journal entry of the District Court record the petition of appeal is minuted as at 09.12.94. However, Learned District Judge has found that the petition of appeal has been handed over to the Registrar by the registered attorney of the defendants on 02.12.94. The Registrar has placed his initials and entered the time as 1.20 p.m. It appears that according to the practice in the Registry the petition of appeal had to be thereafter taken to the record room where it is entered in the motion book and filed in the record. These steps have not been taken on 02.12.94.

The plaintiff made an application for execution of decree, in terms of section 763 of the Civil Procedure Code, on the basis that there was an appeal filed from the judgment. Notice of this application has been served by way of substituted service. Thereafter, the defendants appeared in Court and the Court considered the question whether the petition of appeal has been presented within time. Learned District Judge has held that since there is no entry in the motion book it cannot be said that the petition of appeal was filed on 02.12.94. The entry being on 09.12.94 Learned Judge held that the petition of appeal has been filed outside the period of 60 days. On that basis he rejected the petition of appeal and allowed the motion for execution of decree.

Counsel for the petitioner submits that the Learned District Judge was in error when he rejected the petition of appeal. He relies on the provisions of section 755 of the Civil Procedure Code as amended by Act No. 79 of 1988. Counsel for the plaintiffs-respondents submits that the date to be reckoned for the purpose of computing the appealable period is the date on which the petition of appeal is minuted in the record.

We have carefully considered the submissions of learned counsel. we note that in terms of section 755(3) the appellant has to "present" to the original court a petition of appeal within a period of 60 days of the judgment. The act of the registered attorney of the defendants-appellants in tendering the petition of appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the petition of appeal constitute a presentation of the petition of appeal. The proviso to section 755(3) states that if the petition is not presented within the period of 60 days as provided "the court shall refuse to receive the appeal". The contents of the proviso support the interpretation stated above that the act of the Registrar in placing the date stamp on the petition and placing his initials on it amounts to a presentation of the petition of appeal and its receipt by the Court.

When a petition of appeal is presented by the appellant and received by court as stated in section 755(3). Section 755(4) provides that the petition should be filed and the record forwarded to this Court. It is seen that the acts of filing the petition and that of forwarding the record to this Court, are official acts of the District Court. Any delay in filing a petition in the record cannot be attributed to the appellant. Therefore, we are of the view that the Learned District Judge erred in holding that the petition of appeal has not been presented within the period of 60 days. We set aside the order dated 09.12.94. The District Court will now consider the application of the plaintiffs for execution of decree pending appeal after permitting the defendants to file objections. The application should be considered in terms of section 763 of the Civil Procedure Code read with Section 23 of the Judicature Act. The application is allowed. We make no order for costs.

DR. RANARAJA J, – I agree

Application allowed.