

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an Appeal under Section
755(2) of the Civil Procedure Code.

C.A. Case No. 1285/1996 (F)

D.C. Balapitiya Case No.667/NP

Nigamuni Sujith Chandralal Mendis,

Randombe,

Ambalangoda.

SUBSTITUTED PLAINTIFF

-Vs-

1AA. Kombu Udalawathi,

Randombe,

Ambalangoda.

and Others

DEFENDANTS

AND NOW BETWEEN

Lloyed Mendis Wickramaratne,

Robert De Soyza Mawatha,

Walagedara,

Balapitiya.

74TH A DEFENDANT - APPELLANT

-Vs-

Nigamuni Sujith Chandralal Mendis,

Randombe,

Ambalangoda.

and Others

SUBSTITUTED PLAINTIFF - RESPONDENTS

BEFORE : **A.H.M.D. NAWAZ, J. and
H.C.J. MADAWALA, J.**

COUNSEL : **W. Dayaratne, PC with Ms. R. Jayawardene for
the 74A Defendant-Appellant.**
**D.D.P. Dassanayake for the 95A and 95A₂
Substituted Defendant-Respondents.**

Argued on : **11.03.2016**

Written Submissions on : **24.03.2016 (74A Defendant-Appellant)**
**13.05.2016 (95A and 95A₂ Substituted
Defendant-Respondents)**

Decided on : **30.08.2016**

A.H.M.D. NAWAZ, J.

This order relates to a preliminary objection raised as to the maintainability of this appeal which was filed before this Court as far back as 22.11.1996. The Counsel for the 95A and 95A₂ Defendant-Respondents has objected to this appeal being heard on the ground that the petition of appeal does not bear the name of the registered attorney-at-law who has signed it. In other words, as one could see, the name of the registered attorney-at-law that should usually find its place at the beginning of a petition of appeal is conspicuously absent from the petition of appeal relevant to this

case and this omission to state the name must result in an automatic rejection of the appeal. This was the pith and substance of the submissions of the Counsel for the 95A and 95A₂ Defendant-Respondents. Mr. D.D.P. Dassanayake, the attorney-at-law for the 95A and 95A₂ Respondents also drew our attention to Section 755 of the Civil Procedure Code which requires the notice of appeal to be signed by the registered attorney-at-law.

So, the issue boils down to the simple question – Is the person who signed the notice of appeal and petition of appeal in fact the registered attorney-at-law of the appellants? In fact, the signer claims to be so because the signer of these two documents identifies himself to be the registered attorney-at-law in both documents. It once examines the documents filed in the case from its commencement in the District Court of Balapitiya, all the documents connote nothing but one Mr. Dickson Gunawardena acting as the registered attorney-at-law for the 74th Defendant.

- (a)** Proxy given by 74A – namely Lloyd Mendis Wickramaratne in terms of Section 27(1) of Civil Procedure Code clearly denotes the appointment of Dickson Gunawardena as the registered attorney.
- (b)** The Journal Entry No. 332 at page 200 of Volume I of the brief refers to the said Attorney Dickson Gunawardena filing the proxy.
- (c)** Even after the filing of the petition of appeal which does not contain the name of Mr. Dickson Gunawardena but his signature, the registered attorney-at-law of the 95A Defendant-Respondent has addressed a copy of objections to the appeal to Mr. Dickson Gunawardena - the registered attorney-at-law of the 74A Defendant-Appellant. *Vide the registered articles X3a & X3b.*

This fact shows quite clearly that there was not an iota of doubt in the mind of the 95A Defendant-Respondent or his registered attorney-at-law as to who

signed the petition of appeal, though the signatory has quite inadvertently not identified himself by name.

(d) In the objections filed on 06.01.1997 by the 95A Defendant-Respondent to the appeal, there is no reference to the maintainability of this appeal and the preliminary objection has been taken rather belatedly only on 11.03.2016.

The above facts and circumstances quite unmistakably lead one to the irresistible inference that the 95A and 95A₂ Defendant-Respondents entertain no doubt at all as to the identity of the registered attorney-at-law who has acted for the 74A Defendant-Appellant. Though the name of Mr. Dickson Gunawardena does not appear either in the notice of appeal or petition of appeal, that omission has not caused any prejudice to the 95A and 95A₂ Defendant-Respondents as the documents filed by these Respondents show quite clearly that they understand Mr. Dickson Gunawardena to be the registered attorney-at-law of 74A Defendant-Appellant.

Thus this Court finds no illegality in a petition of appeal that does not carry the name of the registered attorney-at-law when there is material to show that the one and the same registered attorney-at-law has acted for the Appellant every step of the way in the course of this litigation. Section 755(1) of the Civil Procedure Code requires a signature of the appellant or his registered attorney-at-law but not his name, as his identity can be confirmed through the proxy and other documents filed in the case such as has been itemized as in this case. In the same way Section 755(3) of the Civil Procedure Code requires the petition of appeal to be signed by the Appellant or his registered attorney and the veracity as to whether it is the registered attorney who has signed the petition of appeal can be easily gleaned from other documents inclusive of the proxy.

It is not the contention of the Counsel for 95A and 95A₂ Defendant-Respondents that somebody else other than Mr. Dickson Gunawardena has signed the notice of appeal

and petition of appeal-*Please see the written submissions filed by the 95A and 95A₂ Defendant-Respondents.*

Rather the contention is that the name of the registered attorney-at-law is mandatory in the notice of appeal or petition of appeal. Otherwise they became void or are of no force or avail. No doubt, the name of the registered attorney-at-law in a notice of appeal or petition of appeal facilitates the identification of the person who has signed as the registered attorney-at-law but as I have pointed out above, the identity can be traced back to the proxy holding attorney-at-law through several intrinsic aids such as documents filed in both the District Court and Appellate Courts. Therefore the omission to state the name of the registered attorney-at-law in both the notice of appeal and petition of appeal is not so serious as to visit the Appellant with the sanction of a dismissal of his appeal.

This kind of drafting inadvertence, be it slipshod, negligent or careless and whatever adjectival description we give it, should not in my view visit upon an Appellant, who is yet to be heard on his appeal, with a peremptory bolting of the appellate doors.

Procedural Rules

U. De. Z. Gunawardana, J. commented thus on the right of appeal and procedure for appeals in ***Government Medical Officers Association v. Senanayake***¹

*“It is to be observed that although the right of appeal is not a matter of procedure and is a substantive one **the procedure for filing appeal is procedural.** Procedural rules are meant to promote the ends of justice and not to thwart.”*

So the procedural rules that govern a notice of appeal and a petition of appeal should not be strictly interpreted. Provided an aggrieved party to an action shall file a notice of appeal within 14 days from the date of judgment or order inserting the

¹ (2001) 3 Sri.LR 377

particulars referred to in Section 755(1) (a) to (e) of the Civil Procedure Code and follows it up with a petition of appeal in conformity with Section 758 of the Civil Procedure Code, there will be sufficient compliance and omission to state the name of the proxy holder is not a fatal irregularity. It has to be observed that the name of the registered attorneys-at-Law is not materially particularized among the several particulars that are required to be inserted in terms of the sections I have cited above. But of course the registered attorneys-at-law must do well to reflect that a notice of appeal could be signed only by the attorney-at-law who has filed a proxy on behalf of the party appealing.² There is no complaint here that somebody other than the registered attorney-at-law has signed the notice of appeal and petition of appeal.

Liberal Construction of Procedural Statutes

In *Martin Silva and Fernando v. Central Engineering Consultancy Bureau*, Weerasuriya J. citing Bindra's Interpretation of Statutes, 8th Edition 1997 p.582 said that:

"It is stated that there is a difference in the matter in the matter of construction between a law dealing with substantive rights which are already vested and one relating to procedure. It emphasizes that procedural enactments should be construed liberally in such manner as to render the enforcement of substantive rights effective and that rules of procedure are not by themselves an end but the means to achieve the ends of justice."

Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct pathway to justice. Construction of the rule of procedure which promotes justice and prevents its miscarriage by enabling the court to do justice in myriad situations, all of which cannot be envisaged, acting with the

² See *Fernando v. Cybil Fernando* 1996 (2) Sri.LR 169; *Fernando v. Fernando* 1997 (3) Sri.LR 1.

*limits of permissible construction must be preferred to that which is rigid and negatives the ends of justice.*³

Therefore the absence of the name of the registered attorney from the petition of appeal does not vitiate the appeal. I am of the view that Appellate Courts should discourage infructuous objections such as this when the courts could effectively and expeditiously dispose of the final appeal without being hamstrung by having to pronounce incidental decisions on unsustainable objections.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.
I agree

JUDGE OF THE COURT OF APPEAL

³ *Martin Silva v. Central Engineering Consultancy Bureau* (2003) 2 Sri.LR 228 at 231.