IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal

Leader Publication (Pvt) Limited
C/o Com- Sec Management Services (Pvt) Ltd
No.41, Alfred House Gardens, Colombo3

And presently of
No.24, Katukuruduwatta Road, Ratmalana.

Defendant-Appellant-Petitioner-Petitioner-Appellant

SC Appeal 81/2014
SC(Spl) LA 35/2014
CA Appeal No. 790/99(F)
DC Colombo Case No. 17964/MR

Vs

Ronnie Peiris
No.155, Notting Hill Gate, London
W 113LF, United Kingdom.

Plaintiff-Respondent-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
NalinPerera J
Vijith Malalgoda PC J

Counsel : Faiz Musthapa PC with Randila de Silva for the Defendant-Appellant-Petitioner-Petitioner-Appellant
Romesh de Silva PC with NR Sivendran and Renuka Udumulla for the Plaintiff-Respondent-Respondent-Respondent-Respondent

Argued on : 4.10.2017

Written Submission
Tendered on : 15.7.2014 by the Defendant-Appellant-Petitioner-Petitioner-Appellant

Decided on : 9.2.2018

Sisira J De Abrew J

This is an appeal against the judgment of the Court of Appeal dated 18.3.2014 wherein the Court of Appeal refused an application to relist the appeal filed by the Defendant-Appellant-Petitioner-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant). Facts of this may be briefly summarized as follows:

The Plaintiff-Respondent-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action against the Defendant-Appellant claiming damages for publishing a defamatory article on 5.12.1995 in Sunday Leader News Paper which was owned by the Defendant-Appellant. The case was decided ex-parte as the Defendant-Appellant was absent on the trial date. Later an application to vacate the ex-parte judgment was dismissed by the learned District Judge. Being aggrieved by the said order of the learned District Judge, the Defendant-Appellant filed an appeal in the Court of Appeal. Having filed the appeal in the Court of Appeal the Defendant-Appellant failed to make an application to the Registrar of the Court of Appeal for issue of copies of the record as set out in Rule No.4 of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978 which reads as follows.

"Within two weeks of the presentation of the Petition of Appeal the appellant shall apply in writing to the Registrar of the Court of Appeal for the number of copies of

the record stating in such application whether the copies of the whole or portions only, and if so of what portions of the record are necessary for the decision of the appeal. Such application shall state the number of copies required by him. The appellant shall within three days of his so filing his application serve a copy of the same on the respondent who shall within seven days of receipt by him of the said copy file in the said court a memorandum of any further portions of the record which he considers necessary for the decision of the appeal and of such portion which he considers unnecessary together within an application specifying the number copies required by him."

In the present case the Registrar of the Court of Appeal directed the parties to appear in the Court of Appeal on 4.10.2011. On 4.10.20111 the Defendant-Appellant was absent and unrepresented. The Court of Appeal on 4.10.2011 directed the Registrar of the Court of Appeal to notify the Defendant-Appellant to pay brief fees on or before 31.12.2011 in terms of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978 and to be present in court on 30.1.2012. The Court of Appeal also directed the Registrar of the Court of Appeal to send a copy of the said notice to the Registered Attorney-at-law of the Defendant-Appellant. The Registrar of the Court of Appeal complied with the said direction of the Court of Appeal. But the Defendant-Appellant failed to pay brief fees as directed by the Court of Appeal. On 30.1.2012 when the case was called in open court, the Court of Appeal observed that the Defendant-Appellant was absent and unrepresented and by judgment dated 30.1.2012 dismissed the appeal of the Defendant-Appellant in terms of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978. In February 2014 (the date is not mentioned in the petition) the Defendant-Appellant filed an application in the Court of Appeal to relist his appeal which was

dismissed on 30.1.2012. It is noted here that this relisting application was filed two years after the dismissal of the appeal. The Court of Appeal by its judgment dated 18.3.2014 refused the application to relist the appeal. Being aggrieved by the said judgment of the Court of Appeal, the Defendant-Appellant has filed this appeal in this court.

This court by its order dated 4.6.2014 granted leave to appeal on questions of law stated in paragraphs 24(a) (b) and (c) of the Petition of Appeal dated 19.3.2014 which are set out below.

1. Did the Court of Appeal misdirect itself in failing to take into account that there has been noncompliance with requirements of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978?

2. Did the Court of Appeal fail to take into account that the order of the Court of Appeal dated 30.1.2012, rejecting the appeal(C), had been based on the presumption that the notice on the Registered Attorney-at-Law had been served, whereas, such a presumption could not have been drawn in as much as the said notice had not been dispatched to the proper address of the then Registered Attorney-at-Law of the Petitioner Company?

3. Did the Court of Appeal fail to take into account that the notice dated 23.9.2011 requiring the attendance of the Petitioner in Court was flawed in as much as it was not in breach of the requirement that the petitioner should be noticed to deposit the brief fees?

This court also framed the following question of law.

Has the learned trial Judge indulged in a proper assessment of damages having regard to the evidence placed before the Court?

If the answer to the aforementioned question is in the affirmative is the amount of damages awarded excessive?

The Court of Appeal in its judgment dated 30.1.2012 observed the following matters.

1. The notice sent to the Defendant-Appellant (dated 18.11.2011) had been returned with an endorsement that the Defendant-Appellant was not at the given address and that change of address (if any) had not been notified to the Registry of the Court of Appeal by the Defendant-Appellant.

2. The notice sent to the Registered Attorney of the Defendant-Appellant is presumed to have been served as the same had not been returned undelivered.

The Court of Appeal rejected the appeal of the Defendant-Appellant for failure to pay brief fees in terms of Rule 13 (b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978. The fact that the notice dated 18.11.20111 sent to the Defendant-Appellant was returned undelivered with an endorsement that the Defendant-Appellant was not at the given address is not disputed by the parties in this case. The Defendant-Appellant in his petition of appeal filed in this court takes up the position that after filing the appeal in the Court of Appeal, his address was changed. Learned President's Counsel who appeared for the Defendant-Appellant took up this position at the hearing before us. But has the Defendant-Appellant notified the Registry of the Court of Appeal about his change of address? This question is answered in the negative.

Learned President's Counsel who appeared for the Defendant-Appellant relying on Section 27 of the Civil Procedure Code contended that court could not send notice to the Defendant-Appellant when a proxy had been filed on his behalf and that any notice should be sent to the Registered Attorney. I now advert to this contention. Section 27 of the Civil Procedure Code reads as follows.

> *27. (1) The appointment of a registered attorney to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.*
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> *(2) When so filed, it shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court, or until the client dies, or until the registered attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.*
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> *(3) No counsel shall be required to present any document empowering him to act. The Attorney-General may appoint a registered attorney to act specially in any particular case or to act generally on behalf of the State.*

Learned President's Counsel cited the judicial decision in the case of Podisingho Vs Perera 75 NLR 333 to support his contention. In the said case His Lordship Justice Wimalaratne (single Judge) observed the following facts.

"The defendant, tenant of the plaintiff, denied that he received a notice to quit the premises let. In proof of the notice to quit, the plaintiff relied on the copy of the notice and the registered postal article receipt. Although the copy of the notice to quit contained the full address of the defendant, there was no evidence that the same address was inserted on the envelope enclosing the notice. In the postal article receipt neither the name of the road nor the number of the premises was inserted."

His Lordship held as follows.

"The evidence was not sufficient to prove that the notice to quit had been properly addressed. The postal receipt was only proof of the posting of a letter, but not proof of the posting of a letter properly addressed."

In my view, the above judicial decision does not support the contention of learned President's Counsel. Although learned President's Counsel advanced the above contention, Section 27 of the Civil Procedure Code does not prohibit court from sending notices to the parties.

Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978 reads as follows.

"Where the appellant fails to pay the fees due under these rules, the Court of Appeal may direct the appellant to comply with such directions as the court may think fit to give, and may reject such appeal if the appellant fails to comply with such directions."

According to the above rule, the Court of Appeal has the power to send notices to the appellant. Further the established practice of our judicial system is to send notices to the parties although the proxies have been filed by their Registered

Attorneys. Considering all the aforementioned matters, I reject the above contention advanced by Learned President's Counsel for the Defendant-Appellant. If an appellant after filing an appeal changes his address given to court, it becomes the duty of such appellant to inform the Registry of the Court of Appeal about his new address. The Registry of the Court of Appeal cannot be blamed for his failure. He has to suffer the consequence of his failure. The Defendant-Appellant did not notify the Registry of the Court of Appeal about the change of his address. It is therefore seen that failure to pay brief fees has occurred due to the negligence and fault of the Defendant-Appellant. If the Court of Appeal cannot contact the Defendant-Appellant due to the aforementioned failure and when the Court of Appeal rejects his appeal, the Court of Appeal cannot be blamed. Once an appeal is filed, it becomes the duty of the appellant and his Registered Attorney to make inquiries of the appeal. After filing the appeal if the appellant fails to comply with Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978, the Court of Appeal has the power to reject his appeal and also it becomes the duty of the Court of Appeal to reject such an appeal. If the Court of Appeal does not perform this duty, the respondent would not be able to implement the judgment of the court below. Such decisions of the Court of Appeal would undoubtedly minimize the laws delay in this country. It has to be mentioned here that the courts' appointments are definite and that it is the duty of the Judge to conclude cases without any delay. This view is supported by the judgment of Justice Amarasinge in the case of Jinadasa Vs Sam Silva [1994] 2SLR page 232 wherein His Lordship held thus:

> *"A judge must ensure a prompt disposition of cases, emphasizing that dates given by the court, including dates set out in lists published by a court's registry, for hearing or other purposes, must be regarded by the parties and*

their counsel as definite court appointments. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for."

It has to be noted here that the Defendant-Appellant filed the appeal in the Court of Appeal against the judgment of the District Court in 1999 and the Court of Appeal sent notices in 2011. When his appeal was dismissed on 30.1.2012, he filed a relisting application only in February 2014. The above conduct of the Defendant-Appellant shows the fact that he was not interested in his appeal.

Learned President's Counsel for the Defendant-Appellant next contended that the decision of the Court of Appeal is wrong when it decided that notice issued on Samararathne Associates (Registered Attorney) was presumed to have been served as the same had not been returned. He contended that the correct address of Samararatne Associates as borne out by notice dated 23.9.2011 is 810, "2nd Floor, Maradana Road Colombo 10" but the address stated in the notice dated 18.11.2011 is "108, 2nd Floor, Maradana Road Colombo 10". I now advert to this contention. Although the number written in the notice dated 18.11.2011 is wrong, was the said notice returned undelivered by the relevant post office? The answer is in the negative. Although Mr.Samararathne in his affidavit dated 17.2.2014 stated that he did not receive the notice dated 18.11.2011, it was not returned by the post office. When I consider the above matters, I hold that the conclusion reached by the Court of Appeal on 30.1.2012 that 'the notice on Samararathne Associates (Registered Attorney) is presumed to have been served as the same had not been returned undelivered' is correct. For the above reasons, I reject the said contentions of learned President's Counsel for the Defendant-Appellant. If the notice dated

18.11.2011 which is presumed to have been served on the Registered Attorney had directed the Defendant-Appellant to pay brief fees and if the brief fees were not paid by the Defendant-Appellant the Court of Appeal was correct when it rejected the appeal. When the Registered Attorney received such a notice (directing the Defendant-Appellant to pay brief fees) it becomes the duty of the Registered Attorney to inform his client about the direction given by the Court of Appeal. I have earlier held that the failure to pay brief fees had occurred due to the negligence of the Defendant-Appellant. At this stage it is relevant to consider a judicial decision in the case of Pakiyananthan Vs Singaraja [1991] 2SLR 205 wherin this court held as follows:

"Relief will not be granted for default in prosecuting an appeal where –

(a) the default has resulted from the negligence of the client or both the client and his attorney-at-law,

(b) the default has resulted from the negligence of the attorney-at-law in which event the principle is that the negligence of the attorney-at-law is the negligence of the client and the client must suffer for it.

As the applicant's default appeared to be the result of his own negligence as well as the negligence of his attorney-at-law the conduct of the appellant and his attorney-at-law cannot be excused. The appellant had failed to adduce sufficient cause for a re-hearing of the appeal.

It is necessary to make a distinction between mistake or inadvertence of an attorney-at-law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. The Court will in granting

relief ensure that it's order will not condone or in any manner encourage the neglect of professional duties expected of Attorney-at-Law."

In my view when the appellant fails to pay brief fees as directed by court, the Court of Appeal has the right to reject the appeal of the appellant in terms of Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978.

For the above reasons, I hold that the Court of Appeal was correct when it rejected the appeal of the Defendant-Appellant on 30.1.2012.

The Court of Appeal by its judgment dated 18.3.2014 rejected the application of the Defendant-Appellant to relist his appeal. To succeed in a relisting application, he must establish sufficient reasons for his failure to appear on the date of argument. This view is supported by the judicial decision in Jinadasa Vs Sam Silva (supra) wherein at page 234 His Lordship Justice Amarasinghe held as follows.

> *"Where a party has established that he had acted bona fide and done his best, but was prevented by some emergency, which could not have been anticipated or avoided with reasonable diligence from being present at the hearing, his absence may be excused and the matter restored. The Court cannot prevent miscarriages of justice except within the framework of the law: it cannot order the reinstatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds. Inasmuch as it is a serious thing to deny a party his right of hearing, a court may, in evaluating the*

established facts, be more inclined to generosity rather than being severe, rigorous and unsparing."

In the present case, I have earlier held that the Court of Appeal was correct when it rejected the appeal of the Defendant-Appellant on 30.1.2012. The Defendant-Appellant has not established sufficient reasons for his failure to pay brief fees and for his failure to appear on 30.1.2012. In view of the conclusion reached above, I answer the 1st to 3rd questions of law in the negative. The other two questions of law do not arise for consideration.

Considering all the aforementioned matters, I hold that the Court of Appeal was correct when it rejected the application for relisting on 18.3.2014. For the above reasons, I affirm the judgments of the Court of Appeal dated 18.3.2014 and 30.1.2012 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.