

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

CA/PHC/145/2002

PHC Kandy Case No. 212/99

Abdul Saleem Daniyed
No.6, Godapola Road,
Matale.

**4th Respondent-Petitioner-
Appellant**

-Vs-

Abdul Saleem Milas
No.6, Godapola Road,
Matale.

Abdul Saleem Rinoos

Abdul Saleem Pathima Asuriya
No. 6/1, Godapola Road,
Matale.

Respondents-Respondents

C.A. (P.H.C.) 145/2002 : P.H.C. Kandy Case No. 212/99
Pathadumbara Primary Court Case No. 59928

Before : K.T. Chitrasiri,J. &
Malinie Gunaratne,J.

Counse : A.A. de Silva, P.C. with Ajith de Zoysa for the 4th Respondent-Petitioner-
Appellant
Shabry Haleemdeen for the 1st – 3rd Respondent-Respondent-
Respondents

Argued &

Decided on : 28.11.2014.

K.T. Chitrasiri,J.

Heard both Counsel in support of their respective cases.

Learned President's Counsel, Mr. A.A. de Silva submits that this application dated 02.12.2013 was made invoking the inherent jurisdiction of this Court relying upon the decisions including that of **Siriniwasa Thero Vs. Sudassi Thero (63 N.L.R. page 31.)**

Be that as it may, Section 769(2) of the Civil procedure Code also stipulates that if the Appellant does not appear either in person or by an Attorney-at-Law, to support his appeal, the Court shall consider the appeal and make an appropriate order thereof but it also provides that the Court of Appeal may reinstate such an appeal, if sufficient cause is shown for the absence of the Appellant. Therefore, for us to act in terms of Section 769(2) of the Civil Procedure Code, it is necessary to establish sufficient cause, by the Appellant-Petitioner in order to reinstate the appeal that was dismissed.

Learned president's Counsel submitted that the Appellant did not receive the notice dated 17.09.2012 sent by this Court. However, having perused the Journal Entry entered by the Registry, it is seen that the Registry has issued notice on the Appellant directing him to be present in this Court on 26.11.2012. The said notice had been sent under registered cover to the address given in the Petition of Appeal and it had not been returned. When a notice had been sent under registered cover, the Court will have to act upon it and decide accordingly. Accordingly, this Court on 26.11.2012 has come to the conclusion that the Appellant was absent even though a notice had been sent to him under registered cover directing him to be present in Court on that date. Therefore, merely because the Appellant-Petitioner has stated that he did not receive the notice, we are unable to accept such a position.

We also looked at the other Journal Entries entered in this appeal. This matter had been regularly mentioned in this Court since 06.07.2011. The Appellant-petitioner having paid the brief fees was present in Court on 23.08.2011. Thereafter, when it was mentioned on 25.10.2011, Mr. Neranjan Jayasinghe, Attorney-at-Law had appeared for the Appellant. His appearance had been marked on behalf of the Appellant since then. When it was mentioned on 15.05.2011 also, the Appellant-Petitioner was represented by a counsel. Therefore, we do not see any reason for the absence of the Appellant on the day the briefs were ready i.e. on 12.09.2012. Indeed, the Court might not have issued notice to the Appellant once again when it was mentioned on 12.09.2012 since he had been either personally present in Court or was represented by a counsel till then.

Moreover, it is brought to the notice of Court by the learned Counsel for the Respondent that the Appellant-petitioner was present in the Magistrate's Court on 21.11.2013, when the matter was mentioned in that Court on that date in order to inform the decision of this Court. The Appellant was present on that date in the Magistrate's Court having received the notice which was sent to the same address given in the Petition of Appeal filed in this Court. Therefore, we are unable to accept the position that the Appellant-Petitioner did not receive the notice sent by this Court to the address given in the Petition of Appeal. In the circumstances, it is clear that the decision of this Court made on 26.11.2012, stating that the Appellant did not prosecute the appeal is ~~not~~ incorrect. Considering the circumstances referred to above, it is also clear that the Appellant-Petitioner has failed to show sufficient cause for his absence on 26.11.2012. Therefore, this Court is not in a position to act in terms of the proviso to Section 769(2) of the Civil Procedure Code in order to consider the application for re-instate the Appellant. ✓

The learned President's Counsel also submitted that the proceedings recorded on 26.11.2012 show that only one Judge of the Court of Appeal has decided the appeal since such a position is found in the Judgment. He referring to the Journal Entry made on that date, submitted that there were two Judges sitting on the Bench on that particular day even though the Judgment has been signed only by a single Judge. However, we are of the view that such a matter cannot be considered in an application for re-listing such as this, since it is purely a matter that is to be argued in an appeal. Therefore, we are not inclined to consider the said

submissions made by the learned President's Counsel. For the aforesaid reasons, this application for re-listing is dismissed.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Malinie Gunaratne, J.

I agree

JUDGE OF THE COURT OF APPEAL

Cr/-