

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

**Assistant Commissioner of Corporative
Development,**
(Kandy District),
Department of Central Province Corporative
Development.
Ehelepola Kumarihamy Road, Bogambara,
Kandy.

**Court of Appeal Case No:
CA/PHC/0033/2019**

Plaintiff

Vs.

**Kandy High Court Case
No: HC(APPEAL)02/2019**

**Kandy Magistrate Court
Case No: 9549**

**Central Province Vehicle Dealing
Cooperative Society Limited,**
No 172/4/A, Miniruwan, Kudagalawatta,
Polgolla.
Presently at
No 207, D. S. Senanayaka Street, Kandy.

Defendant Cooperative Society

1. **Amal Pradeep Jayasinghe,**
No 90/2, Aniwaththa,
Kandy.
2. **L. N.S. Naurunna,**
No 02, Sirimalwaththa,
Gunnepana.
3. **M.K. Weerasinghe,**
No 32, Bahirawakanda Lane, Asgiriya,
Kandy.
4. **S. M. S. Herath,**
Dodamwala road, Asgiriya,
Kandy.

Presently at
NO 207, D. S. Senanayaka Street, Kandy.

Notice received Respondents

AND BETWEEN

1. **Central Province Vehicle Dealing
Cooperative Society Limited,**
No 172/4/A, Miniruwan, Kudagalawatta,
Polgolla.
Presently at
No 207, D. S. Senanayaka Street, Kandy.

Defendant-Appellant

Vs.

2. **Amal Pradeep Jayasinghe,**
No 90/2, Aniwaththa,
Kandy.
3. **L. N.S. Naurunna,**
No 02, Sirimalwaththa,
Gunnepana.
4. **M. K. Weerasinghe,**
No 32, Bahirawakanda Lane, Asgiriya,
Kandy.

2nd to 4th Appellants

Vs.

**Assistant Commissioner of Corporative
Development,**
(Kandy District),
Department of Central Province Corporative
Development.
Ehelepola Kumarihamy Road, Bogambara,
Kandy.

Plaintiff-Respondent

2. **S. M. S. Herath,**
Dodamwala road, Asgiriya,
Kandy.
Presently at
NO 207, D. S. Senanayaka Street, Kandy.

2nd Respondent

AND NOW BETWEEN

1. **Central Province Vehicle Dealing
Cooperative Society Limited,**
No 172/4/A, Miniruwan, Kudagalawatta,
Polgolla.
Presently at
NO 207, D.S.Senanayaka Street, Kandy.

Defendant-Appellant-Appellant

2. **Amal Pradeep Jayasinghe,**
No 90/2, Aniwaththa,
Kandy.
3. **L. N.S. Naurunna,**
No 02, Sirimalwaththa,
Gunnepana.
4. **M. K. Weerasinghe,**
No 32, Bahirawakanda Lane, Asgiriya,
Kandy.

Notice Received 2nd to 4thAppellants-Appellants

Vs.

**Assistant Commissioner of Corporative
Development,**
(Kandy District),
Department of Central Province Corporative
Development.

Ehelepola Kumarihamy Road, Bogambara,
Kandy.

Plaintiff-Respondent-Respondent

2. **S. M. S. Herath,**
Dodamwala road, Asgiriya,
Kandy.
Presently at
NO 207, D. S. Senanayaka Street, Kandy.

2nd Respondent-Respondent

AND NOW BETWEEN

In the matter of an application for re-listing
under and in terms of section 769(2) of the
Civil Procedure Code.

1. **Central Province Vehicle Dealing
Cooperative Society Limited,**
No 172/4/A, Miniruwan, Kudagalawatta,
Polgolla.
Presently at
NO 207, D.S.Senanayaka Street, Kandy.

Defendant-Appellant-Appellant

2. **Amal Pradeep Jayasinghe,**
No 90/2, Aniwaththa,
Kandy.
3. **L. N.S. Naurunna,**
No 02, Sirimalwaththa,
Gunnepana.
4. **M. K. Weerasinghe,**
No 32, Bahirawakanda Lane, Asgiriya,
Kandy.

Notice Received 2nd to 4thAppellants-Appellants

Vs.

Assistant Commissioner of Corporative Development,
(Kandy District),
Department of Central Province Corporative Development.
Ehelepola Kumarihamy Road, Bogambara,
Kandy.

Plaintiff-Respondent-Respondent

2. **S. M. S. Herath,**
Dodamwala road, Asgiriya,
Kandy.
Presently at
NO 207, D. S. Senanayaka Street, Kandy.

2nd Respondent-Respondent

Before:

D. THOTAWATTA, J.
K. M. S. DISSANAYAKE, J.

Counsel:

Priyantha Alagiyawanna with Sahan Gunasekara instructed by Bushra Hashim for the Defendant-Petitioner-Appellant.

Shemanthi Dunuwille S.C. instructed by Dr Rizni Firdous, S.S.A. for the Plaintiff-Respondent-Respondent.

Argued on : 04.09.2025

Written Submissions
of the 1st Defendant-
-Appellant-Appellant
and the 2nd, 3rd and the
4th Appellants-Appellants
tendered on

: 03.10.2025

Written Submissions
of the Plaintiff-Respondent
-Respondent and the 2nd
Respondent-Respondent
tendered on

: Not tendered.

Decided on

: 24.10.2025

K. M. S. DISSANAYAKE, J.

Being aggrieved by the order made by the learned Magistrate of Kandy dated 22.01.2019, the 1st Defendant-Appellant and the 2nd, 3rd and 4th Appellants had preferred an appeal to the Provincial High Court of the Central Province holden in Kandy and the learned High Court Judge of the Provincial High Court of the Central Province had by his order dated 15.03.2019, dismissed it on the basis that right of appeal from the said order of the learned Magistrate of Kandy was not available to the Appellants. Being aggrieved by the said order of the learned High Court Judge, the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants had preferred an appeal therefrom to this Court. When this matter came on before this Court on 30.01.2024, this Court had dismissed the appeal without costs for want of appearance of the Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants in Court on that day. Thereafter, the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants had made an application to this Court seeking to set aside the order of this Court dated 30.01.2024 dismissing the instant appeal for want of appearance of the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants in Court on that day and to have it re-listed for hearing. At the hearing into the application for re-listing, this Court heard Counsel in support of their respective positions so adverted to by them and the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants had afterwards, furnished written submissions to this Court.

I would think it expedient at this juncture to examine the law governing an application for re-listing.

Rule embodied in Sub-Rules (1) and (2) of the Rule 7 of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988, Published in the Extra-Ordinary Gazette of the Democratic Socialist Republic of Sri Lanka bearing No 549/6 of 13.03.1989 to be read with Sub-Rule (1) of Rule 2 thereof, would be the Rule that would in my opinion, be relevant and pertinent in this regard and therefore, not the section 769(2) of the Civil Procedure Code as relied on by the Appellants in their application for re-listing for; the instant appeal had arisen from an order made by the Provincial High Court in the exercise of the Appellate Jurisdiction vested in it by Article 154P(3)(b) of the Constitution to be read with section 5 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, and they may be reproduced *verbatim* the same as follows;

“7(1) When the appeal comes on for hearing, the appellant if present, shall be first heard in support of the appeal and then the respondent if present shall be heard against it.

(2) If the appellant does not appear to support his appeal, the Court shall consider the appeal and may make such order thereon as it may deem fit.”

Having cited the relevant Rule, let me now, examine the binding judicial precedents applicable in this regard.

It was held in **Packiyanathan Vs. Singarajah-1991 [2] Sri L.R 205** at page 209 that,

“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.”

It was further held in **Packiyanathan Vs. Singarajah** (Supra) at page 205 that, “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 its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.”

It was held in **Pakir Mohideen Vs. Mohamadu Casim- 04 N.L.R 299** that, “If the Proctor did not do his duty, he is to blame for the absence of the defendant and the defendant must suffer for the fault of his position.”

Similarly, it was held in **Schareguivel v Orr [1926] 11 N.L.R 302**, that, “To my mind facts indicate that there was negligence on the part of the proctor and not personal negligence on the part of the Plaintiff. That however is immaterial. The plaintiff must suffer for his proctor's negligence. This is clearly laid down by Bonser CJ in Pakir Mohideen v Mohamadu Cassim (4 NLR 299).”

It was held in **Appuhamy Vs. Appuhamy 14 N.L.R. 233** at page 236 that, “The Court has undoubtedly a discretion as to whether or not an appeal shall be dismissed, when it is first called for hearing, on the ground of non-appearance, and we exercise that discretion every day”.

In **Jinadasa and another Vs. Sam Silva and Others [1994] 1 Sri L.R. 232** it was held at page 248 that, “A judge must ensure a prompt disposition of cases, emphasising 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.”

The Court in **Jinadasa and another Vs. Sam Silva and Others** (Supra) had cited the **Abdul Aziz v. Punjab National Bank [AIR 1929 Lahore 96, 99, 100]**, where Court had stated that, “In this connection due regard must be had to the nature of duties of counsel towards his other clients and the other courts. At the same time the court cannot be expected to give unlimited or unreasonable latitude to counsel in this respect. Counsel is ordinarily expected to be ready in court when the case is called and it is no good excuse to say he was busy elsewhere.”

In **Kanagasabai Vs. Kirupamoorthy 62 N.L.R. 45**, while elucidating that if parties are required by law or by court to be present, then they must be present, Court had held at page 58 that, “Where, as in this case, the party is required to appear in person and he does not do so, then he must suffer the consequences of his non-appearance. It is not sufficient to say that he gave a proxy to a Proctor and that the Proctor failed to appear by an “oversight”.

It was held in **D.S Ranaweera Vs. W.W.P Jinadasa and another [1992] BAL Vol.IV, Part II at page 20** that, “Dealing instead, in the matter before it, with a mere invocation for the assistance of the Court of Appeal in the exercise of its discretion, the court had an uncontrolled power of disposal, so long as that power was not exercised in transgression of the law and legal principles, and so long as it was not actuated by whim or caprice, and exercised in good faith.”

In **Shamdasani and others Vs. Central Bank of India, [1938 Bombay 199] at page 202** it was held that, “It is, after all, a very serious matter to dismiss a man’s suit or summons, or whatever it may be, without hearing it, and that course ought not be adopted unless the court is really satisfied that justice so requires.”

If the court is to wield its discretion to dismiss a case without hearing, such must be done to meet the ends of justice. In **D.S Ranaweera Vs. W.W.P Jinadasa and another (Supra)** it was held that “‘the needs of justice’ go beyond the narrow interest of justice one or all of litigants in a matter and it was further held at page 21 that, “The needs and expectations of the community as a whole in the due administration of justice must be considered. *Interest rei publicae ut sit finis litum.*” It was further held at page 23 that “the Court would order reinstatement in an application dismissed for want of appearance only if the defaulting party furnished the court with a ‘comprehensive and satisfactory disclosure of all attendant circumstances’.

It was *inter-alia*, held in **Jinadasa and another Vs. Sam Silva and Others (Supra)**, at page 250 that, “The court may have reinstated the matter upon such terms as to costs or otherwise as it thought fit, yet it could only do so if sufficient cause for reinstatement had been established.”

It was *inter-alia*, held in **Jinadasa and another Vs. Sam Silva and Others (Supra)**, at page 233 that, “A court will hold that there was sufficient cause if the facts and circumstances established as forming the grounds for absence are not absurd, ridiculous, trifling or irrational but sensible, sane, and without expecting too much, agreeable to reason.”

The law governing an application for re-listing of an appeal dismissed for want of appearance of the Appellant in Court as can be deducible from the above binding judicial precedents, may be laid down as follows;

- a) The Court has undoubtedly, a discretion as to whether or not an appeal shall be dismissed, when it is first called for hearing, on the ground of non-appearance, and the Court exercises that discretion every day;
- b) If, the parties are required by law or by Court to be present, then, they must be present, and where, as in this case, the party is required to appear in person and he does not do so, then, he must suffer the consequences of his

non-appearance. It is not sufficient to say that he gave a proxy to an Attorney-At-Law;

c) When, an Attorney-At-Law fails to appear by an “oversight”, the Court would order reinstatement in an application dismissed for want of appearance only if the defaulting party furnishes the court with a ‘comprehensive and satisfactory disclosure of all attendant circumstances’;

d) The Court may reinstate the matter upon such terms as to costs or otherwise as it thinks fit, yet, it can only do so if sufficient cause for reinstatement has been established;

e) A Court will hold that there was sufficient cause if the facts and circumstances established as forming the grounds for absence are not absurd, ridiculous, trifling or irrational but sensible, sane, and without expecting too much, agreeable to reason.

It is in this context, let me now, consider the facts and circumstances that led this Court to have by its order dated 30.01.2024, dismissed the instant appeal. It is in this endeavour, I would think it most appropriate and necessary to reproduce *verbatim* the same the minutes of this Court pertaining to 30.01.2024 in its totality as contained in the record and it reads thus;

“Appellant is not present and had not been present for some time. However, on 18/12/2023 there is a minute to say that the Appellant's lawyer bearing a letter, received the brief from the office.

The letter mentioned carries the seal of Mr. Bushra Hassim as the Attorney-at-Law and the letter instruct to hand over the brief to Hewayalage Shashikala Madhuwanthi Jayaratne, the Junior lawyer of Mr. Bushra Hassim.

There is no appearance of anyone in this Court today, neither the Senior Lawyer nor the Junior lawyer is present.

The Court has issued notices on the Appellant on two occasions.

Since the Appellant has not taken interest to appear and present this case, we dismiss this application without costs.

Proceedings are terminated.”

Upon a careful scrutiny of the minutes of Court pertaining to 30.01.2024 as reproduced above, it manifestly, appears without any doubt that, neither the Appellants nor the senior or junior Attorney-At-Law for the Appellants were present in Court on that day, despite notices being issued on them directing them to be present in Court on that date; and that they had not been present in Court not only on that day, namely; 30.01.2024, but also had they not been present in Court for sometime even though brief had been collected by one Attorney-At-Law who is said to be the junior to one Mr. Bushra Hassim-Attorney-At-Law. In the circumstances, this Court had proceeded to dismiss the appeal in the premise that, the Appellants had not taken interest to appear and support their appeal in Court.

In the light of the law set out above, in order to succeed in their application for re-listing, the sole burden of proof is rested upon the Appellants to furnish sufficient cause for their default in appearance in Court on 30.01.2024.

The sole reason adduced in paragraph 4 of the re-listing application furnished to this Court by the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants for their default in making appearance before this Court on 30.01.2024 is that although notices were issued on the Appellants, they could not appear before this Court inasmuch as the said notices were not received by the Appellant Society, Namely; the 1st Defendant-Appellant-Appellant for; the office of the 1st Defendant-Appellant-Appellant had been shifted to No. 90/2, Aniwatta Road, Kandy since January 2022 as manifest from the lease agreement annexed to their Petition marked as **P3** and the true copies of letters dated 28.03.2024 and 02.05.2024 dispatched to the new

address of the 1st Defendant-Appellant-Appellant by the Department of Cooperative Development annexed to their Petition marked as **P4**. Furthermore, the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants had in paragraph 5 of their re-listing application had explicitly, conveyed regrets to this Court for inconvenience caused to it in view of the inadvertence of not furnishing to this Court the said new address of the Appellants. It is in this premise that the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants had urged that the order of this Court dated 30.01.2024 dismissing the appeal, be set aside and it be re-listed for hearing.

However, in my view, the ground so urged in the application for re-listing by the 1st Defendant-Appellant-Appellant and the 2nd, 3rd and 4th Appellants-Appellants, should fail at least for the following two reasons that I would enumerate.

It is significant to observe that the instant appeal had been preferred to this Court by four appellants, namely; the 1st Defendant-Appellant-Appellant, and the 2nd, 3rd and 4th Appellants-Appellants.

Hence, this is not an appeal preferred to this Court only by the 1st Defendant-Appellant-Appellant as being the sole appellant thereto, but also, there are three other appellants to the instant appeal.

The sole ground urged by the Appellants in paragraph 4 of their re-listing application for their default in appearance in Court on 30.01.2024 is that although notices were issued on them, they could not appear before this Court inasmuch as the said notices were not received by the Appellant Society, Namely; the 1st Defendant-Appellant-Appellant for; the office of the 1st Defendant-Appellant-Appellant had been shifted to No. 90/2, Aniwatta Road, Kandy since January 2022 as manifest from the lease agreement annexed to their Petition marked as **P3** and the true copies of letters dated 28.03.2024 and 02.05.2024 dispatched to the new address of the 1st Defendant-Appellant-

Appellant by the Department of Cooperative Development annexed to their Petition marked as **P4**.

However, it is significant and interesting to observe, that the 2nd, 3rd and the 4th Appellants-Appellants had anywhere in their application for re-listing, stated that the addresses stated in the caption to the appeal had undergone any change at any point of time thereafter and therefore, they did not receive the notices issued by this Court on them, directing them to be present before this Court on 30.01.2024 and therefore, they too, were not able to make an appearance in Court on 30.01.2024 as directed by this Court.

Furthermore, it is significant to observe that, three different addresses had been mentioned in the caption to the appeal as the addresses of those three Appellants, namely; the 2nd, 3rd and the 4th Appellants-Appellants thereby, clearly, showing that the 2nd, 3rd and the 4th Appellants-Appellants are living in three different places.

In the absence of an allegation and/or a denial as such, the 2nd, 3rd and the 4th Appellants-Appellants are in law, deemed to have duly, received the notices issued by this Court on them, directing them to be present before this Court on 30.01.2024-Vide-Illustration “d” to section 114 of the Evidence Ordinance.

In the circumstances, even, if, it is to be assumed for a moment only for the sake of argument that, the assertion of the 1st Defendant-Appellant-Appellant that it did not receive the notices issued by this Court directing it to be present before this Court on 30.01.2024, for; the office of the 1st Defendant-Appellant-Appellant had been shifted to No. 90/2, Aniwatta Road, Kandy since January 2022, yet, the other three Appellants to the instant appeal, namely; the 2nd , 3rd and the 4th Appellants-Appellants could have been present in Court as directed by this Court on the notice dispatched on them in the absence of denial and/or allegation that they too, had not received notices dispatched on them by this Court directing them to be present before this Court on 30.01.2024.

Hence, I would hold that the sole reason and/or the ground adduced by the Appellants for their default in appearance in Court on 30.01.2024, as enumerated above, is absurd, ridiculous, trifling or irrational and therefore, not sensible and sane and hence, it cannot in any manner, sustain both in fact and law and as such it should be rejected *in-limine*.

Secondly, as clearly, and unequivocally, admitted by all the Appellants in paragraph 5 of their application for re-listing, alleged change of the address of the 1st Defendant-Appellant-Appellant had not been notified to Court at any point of time thereafter as required by law and therefore, the Appellants are in breach of the law in this regard and as such the Appellants should bear whatever the consequences that would derive by law upon their failure to forthwith notify the Court of the alleged change of address of the 1st Defendant-Appellant-Appellant as required by law.

Hence, I would hold that the sole reason and/or the ground adduced by the Appellants as forming grounds for their default in appearance in Court on 30.01.2024, as enumerated above, is absurd, ridiculous, trifling or irrational and therefore, not sensible and sane and hence, it cannot in any manner, sustain both in fact and law and as such it should be rejected *in-limine*.

It is to be noted that for the reasons stated above, the facts and the circumstances of the case in **SC/APPEAL No. 92A/2008** which is relied on by the Appellants in support of their application for re-listing, differ from the facts and circumstances of the instant application for re-listing and therefore, the facts and circumstances of the said case can clearly, be distinguishable from the facts and circumstances of the instant application for re-listing, and as such, it has, if I may say so respectfully, no application to the facts of the instant application for re-listing.

In view of all the above facts and circumstances, I would hold that this Court is under no obligation to order a reinstatement of the appeal dismissed by this

Court for default in appearance of the Appellants before this Court of 30.01.2024.

In the result, I would dismiss the instant application for re-listing with costs.

JUDGE OF THE COURT OF APPEAL

D. THOTAWATTA, J.

I agree.

JUDGE OF THE COURT OF APPEAL