

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

In the matter of an appeal  
notwithstanding lapse of time  
(S. 765 CPC)

Court of Appeal No: CA 1441/2001 NLT

District Court of Kandy No: 11764/P

W.A. Nandana Athuda

2<sup>nd</sup> Added Defendant-  
Petitioner

Vs.

Sarath Moregoda

Plaintiff-Respondent & three  
other respondents

Before: **Eric Basnayake J**

Counsel: Rohan Sahabandu for the 2<sup>nd</sup> Added Defendant-Petitioner  
Nihal Jayamanne P.C. with Niroshini Jayamanne for the 1<sup>st</sup> defendant-  
Respondent

Argued On: 25.3.2011

Written Submissions Tendered On: For the 1<sup>st</sup> Defendant-Respondent: 13.5.2008

Decided On: 3.6.2011

Eric Basnayake J

The 2<sup>nd</sup> added defendant-petitioner (petitioner) filed this application on 11.9.2001 under section 765 of the Civil Procedure Code inter alia to admit the petition of appeal notwithstanding lapse of time and to set aside the judgment ,interlocutory decree and the final decree and the order dated 24.4.2001 of the learned District Judge of kandy.

The plaintiff-respondent had filed this partition action on 22.8.1986 to which the 1<sup>st</sup> defendant was made a party. The 2<sup>nd</sup> added defendant-petitioner (petitioner) was not made a party. The judgment in this case was entered between the plaintiff and the 1<sup>st</sup> defendant and the interlocutory decree and final decree were entered.

The petitioner and her husband who live abroad filed application in the Court of Appeal in case No: 1919/87 seeking intervention. On 1.7.1992 after a settlement in court, the intervention was allowed. Thereafter the petitioner and her husband tendered a statement of claim through Mrs. Charmaine Kiriella, Attorney-at-Law. Evidence of several witnesses was recorded and the case was fixed for judgment (order). However as the Judge who heard the case had demised, the judgment could not be pronounced.

The case was called in court on 23.8.2000, on which date the Judge made order to notice the parties and the instructing Attorneys-at-law. The petitioner states that no notices were issued. Thereafter this case was called on 24.4.2001 before another District Judge who proceeded to deliver the impugned order. The petitioner states that on this date the petitioner was absent and unrepresented. The petitioner claimed that the petitioner was unaware of the proceedings of 28.8.2000 and 24.4.2001 as the petitioner was not noticed, although an order was made to that effect.

The petitioner states that she became aware of the judgment in the month of June. The Judge by his order dated 24.4.2001 had dismissed the petitioner's application and confirmed the interlocutory decree and the final decree that were already entered.

The 1<sup>st</sup> defendant reveals the following facts in the objections filed. This case was due to be called on 18.10.2000 after noticing the parties. On 18.10.2000 when the case was called Mr. A.L.M. Aneez Attorney-at-Law of S.M. Mustapha Associates tendered the revocation of proxy and new proxy. The revocation was signed by the petitioner and her husband. The 1<sup>st</sup> defendant states that, in the proceedings, the petitioner and her husband were referred to as the plaintiffs which is evident from X1 filed along with the objections. A copy of the new proxy of Mr. Aneez is produced marked X2.

When this case was called on 24.1.2001, the petitioner was represented by Mr. Tilekeratne, Attorney-at-Law, on the instructions of Mr. Mustapha (or Aneez AAL who filed a proxy for Mustapha Associates). The Attorney-at-Law had consented to judgment being given by the sitting Judge. After adopting the proceedings the Judge had announced that the judgment would be delivered on 24.4.2001. On 24.4.2001 Mr. Atulathmudali, Attorney-at-Law had taken notice of the judgment.

The above facts are borne out from the record. The petitioner does not controvert those facts.

Section 765 is as follows:-

765: It shall be competent to the Court of Appeal to admit and entertain a petition of appeal from a decree of any original court, although the provisions of section 754 and 755 have been observed:

**Provided that the Court of Appeal is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions;** and (emphasis added)

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The learned counsel for the petitioner could not deny the fact that the petitioner had revoked the proxy and a new proxy was given to Mr. Aneez (from Mustapha Associates). If that is the case, I am not convinced that the petitioner had no notice of the order delivered on 24.4.2001. On the above reasons this petition has to fail. Hence this application is refused. Under the circumstances of this case I do not order costs. Application dismissed.

Judge of the Court of Appeal