

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

**C.A. 864/2000(F)**

D.C. Kurunegala Case No: 4886/L

M. Serasinghe  
Mahapitiya,  
Pothuhera.

**Appellant.**

**Vs.**

D.M. Kanakarathna  
Mahapitiya,  
Pothuhera.

**Respondent.**

**C.A. 864/2000(F)**

**D.C. Kurunegala Case No: 4886/L**

**BEFORE** : **K.T. CHITRASIRI, J.**

**COUNSEL** : Kamal Nissanka for the 2<sup>nd</sup> Defendant-Appellant.

Ranjan Suwandarathne with Dinoo Dharmaratne and  
A. Fernando for the Plaintiff-Respondent.

**ARGUED &  
DECIDED ON** : 07.06.2013

**K.T. CHITRASIRI, J.**

This is an appeal seeking to set aside the judgment dated 18.09.2000 of the learned District Judge of Kurunegala. By that judgment, learned trial Judge decided the case in favour of the plaintiff against both the defendants. Being aggrieved by the aforesaid judgment, the 2<sup>nd</sup> Defendant –Appellant filed this appeal dated 15.11.2000.

When the appeal was taken up for hearing, learned Counsel for the Plaintiff-Respondent raising a preliminary objection submitted that the person named as the 1<sup>st</sup> defendant in the original court has not been made a party, either in the notice of appeal or in the petition of appeal as required by Sections 755 and 758 of the Civil Procedure Code, respectively. Accordingly, he moved this Court to dismiss the appeal stating that it is mandatory to have named all the parties to the original action both in the notice of appeal and in the petition of appeal.

Requirement to make all the parties to the original action in the notice and in the petition of appeal is to inform them or their registered attorneys in order to keep them inform of filing an appeal challenging the judgment so that they could take necessary steps accordingly. If one party is not being informed of filing of an appeal he is prevented from taking such steps. Such inaction by the appellant may lead to serious consequences.

Hence, needless to say that it is mandatory on the part of an appellant to act in terms of Sections 755 and 758 of the Civil Procedure Code. However, depending on the circumstances, the Court where the appeal is being heard is empowered to issue notice, exercising discretion of the Court under Section 770 of the procedure Code, on the party who had not been named in the petition of appeal. In the case of **Jayasekara vs Lakmini and others, [2010(1) S L R]** it was held:

*“Section 770 shows that if it appears to the Court at the hearing of the appeal that any person who was a party to the action in the Court against whose decree the appeal, is made but who has not been made a party to the appeal, it is within the discretion of the court to issue the requisite notice of appeal on those parties for service.”*

In that decision it was further held that:

*“the exercise of the discretion contemplated in Section 770 is a matter for the decision of the Judge who hears the appeal.”*

However, it must be noted that such discretion of the Court has to be exercised judiciously, particularly if no substantial prejudice is caused to the other parties who are already been given notice.

Admittedly, the 1<sup>st</sup> Defendant in the original court has not been named as a party both in the Notice of Appeal and in the Petition of Appeal. Therefore on the face of the Notice of Appeal and the Petition of Appeal, it is clear that the appellant has failed to act in compliance with the requirements referred to in Sections 755 and 758 of the Civil Procedure Code.

However, learned Counsel for the appellant at this stage moves Court to exercise the discretion referred to in Section 770 of the Civil Procedure Code and to issue notice of Appeal on the 1<sup>st</sup> defendant.

Section 770 of the Civil Procedure Code reads thus:

*If, at the hearing of the appeal, the respondent is not present and the court is not satisfied upon the material in the record or upon other evidence that the notice of appeal was duly served upon him or his registered attorney as herein before provided, or if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, **but who has not been made a party to the appeal, the court may issue the requisite notice of appeal for service**".*

In terms of the aforesaid Section 770 of the Civil Procedure Code, the Court taking up an appeal is empowered to exercise discretion and to issue requisite notice on the person who has not been made a party to the Appeal. Therefore, I will consider whether, it is possible for this Court to issue notice on the 1<sup>st</sup> defendant exercising discretion under the aforesaid Section 770 of the Civil Procedure Code.

However at this stage, it is brought to the notice of Court that the person who was not made a party to the Appeal, namely R.D.William who is the 1<sup>st</sup> defendant in the original court has passed away on 15<sup>th</sup> April 2006. His Death Certificate has been tendered to Court along with the submissions of the appellant filed on 23.01.2013. Moreover, no substitution has been effected yet to substitute the heirs of the deceased 1<sup>st</sup> defendant as a party to the action..

Under those circumstances, even if this Court is to consider exercising discretion under Section 770, such a course of action is impossible since the party who had not been made a party to the appeal is now dead. No substitution to substitute his heirs has been effected either. Therefore, this court is prevented from exercising discretion under 770 of the Civil Procedure Code in order to consider the application of the learned Counsel for the appellant.

In the circumstances, Court has no option than to dismiss the appeal for not adhering to the requirements referred to in Section 755 and 758 of the Civil Procedure Code.

For the aforesaid reasons this appeal is dismissed with costs.

*Appeal dismissed with costs.*

**JUDGE OF THE COURT OF APPEAL**

Jmr/-