

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

A. N. Shyamalee Puspha Kumari  
Maayin-oluwa  
Dorawaka

**Substituted 2B Defendant- Appellant  
And Others**

**Substituted Defendant-Appellants**

**C.A.NO.555/99 (F)**

**D.C.KEGALLE CASE NO.1989/P** Vs

Horathal Pedige Selena  
Ihala Maayin-oluwa  
Dorawaka

**Substituted Plaintiff-Respondent**

Godayalage Agoris  
Maayin-oluwa  
Dorawaka

Substituted 1<sup>st</sup> Defendant-Respondent  
**And Others**

**Defendant- Respondents**

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

**COUNSEL** : Faisz Musthapha P.C with Sanjeewa Kaluarachchi for the  
2A, 3A and 4A Substituted-Defendant- Appellants

Daya Guruge for the Plaintiff-Respondent

R.Wimalaweera for the substituted 1<sup>st</sup> Defendant-Respondent

**ARGUED ON** : 20.05.2014

**WRITTEN SUBMISSIONS FILED ON** : 04.06.2014 by the 1<sup>st</sup> Defendant-Respondent  
09.06.2014 by the 2B, 3A and 4A Substituted  
Defendant-Appellants

**DECIDED ON** : 21<sup>st</sup> July 2014

**CHITRASIRI, J.**

When this matter was taken up for argument on 25.04.2014, Mr. Wimalaweera who appeared for the substituted 1<sup>st</sup> defendant-respondent brought to the notice of Court that the appellants in this case have failed to name the substituted 1<sup>st</sup> defendant as a party, in the notice of appeal as well as in the petition of appeal. Accordingly, he moved to have this appeal dismissed, as the appellants have failed to comply with the mandatory provisions in the Civil Procedure Code.

Admittedly, in both, the notice and the petition of appeal, 1<sup>st</sup>, 5<sup>th</sup> and the 6<sup>th</sup> defendants were not been named as parties to the appeal. Section 755(1) of the Civil Procedure Code refers to the particulars that should contain in a notice of appeal whilst Section 758(1) stipulates the matters that should contain in a petition of appeal. Accordingly, the names of the parties in the action filed in the court below shall contain in the notice and in the petition of appeal. It is evident by the word “shall”, appearing in both Sections 755(1) and 758(1) of the Civil Procedure Code. Therefore, it is clear that it is mandatory to have mentioned the names of all the parties to the action in the notice and in the petition appeal. Then only the appellate court will be able to inform all the parties to the action of the hearing of the appeal.

Learned President’s Counsel for the appellants admitted that the appellants have failed to name the substituted 1<sup>st</sup> defendant as a party to this appeal. However, he invited this Court to issue notice on the defendants who were not

named as parties to the appeal, acting in terms of Section 770 of the Civil Procedure Code.

Section 770 of the Civil Procedure Code reads thus:

*770.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.*

Accordingly, it is seen that Section 770 referred to above permits the Court before which the appeal is taken up for hearing, to issue notice of the appeal on the parties who were not made as parties to the appeal, informing them of hearing of the appeal, despite the mandatory character contained in Sections 755(1) and 758(1) of the Civil Procedure Code.

The manner in which the aforesaid discretion referred to in Section 770 is being exercised had been discussed in numerous judicial pronouncements. It had been comprehensively discussed in a very early decision pronounced in the case of **Ibrahim v. Beebee. [19 N.L.R. at 289]** It was a Full Bench decision and in that it was held as follows:

*“It is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and unless they are, the petition of appeal should be rejected.”*

However, in that decision, it was further held that:

*“An appeal defective owing to non-joinder of necessary respondents can be remedied in a proper case by an order of Court under Section 770 of the Civil Procedure Code, directing those parties to be added or noticed.”*

In that decision intervention of the persons who were not made parties to the appeal was finally allowed and then the Court had issued notices on them acting in terms of Section 770 of the Civil Procedure Code even though the requirement to have all the parties named had been highlighted by the Full Bench as an important factor.

However, in the case of **L.R.Gunasekera v. R.A.S. Perera [74 N.L.R. at 163]** appeal had been rejected by the appellate court due to non-joinder of the 1<sup>st</sup> to 5<sup>th</sup> defendants in the appeal having followed the guidelines enumerated in the decision in **Ibrahim v. Beebee.** (supra) It must be noted that in that appeal, there was no application made under Section 770 to have the notice issued on the defendants who were not made parties to the appeal.

In **Ibrahim v. Nadarajah [1991, 1 S.L.R. at 131]** Amerasinghe, J had the following to state on this point:

*“the exercise of its discretionary power in terms of Section 770 of the Civil Procedure Code when some good excuse was given for non-joinder or when it was not very apparent that the parties not joined might be affected by the appeal or where the defect was not of an obvious character which could not reasonably have been foreseen and avoided”.*

The appeal filed in that case (Ibrahim Vs Nadarajah) was dismissed for not making the necessary parties in the appeal, having refused to act under Section

770 of the Civil Procedure Code. In the case of **W.R.M.Kiri Mudiyanse and another v. W.R.M.Bandara Menike [76 N.L.R. at 371]**, Supreme Court having over-ruled the preliminary objection had directed that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants be made respondents acting under Section 770 of the Civil Procedure Code. Having held so, the Supreme Court has stated thus:

*“The exercise of the discretion contemplated in Section 770 is a matter for the decision of the judge who hears the appeal in the particular case. Furthermore, it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.”*

In the case of **Jayasekera v. Lakmini and others [2010, 1 S.L.R. at 41]**, Chandra Ekanayake, J has held as follows:

*“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 section 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.”*

*“If a particular party in a partition action who should have been made a respondent is not made a respondent in the appeal, then granting relief to the appellant will not help such a party to safeguard his rights and making him a respondent would not act to the prejudice of the appellant. A discretion necessarily invokes an attitude of individual choice, according to the particular circumstances, and differs from a case where the decision follow *exdibito juctitiae*, once the facts are ascertained. The exercise of the discretion contemplated in Section 770 is a matter for the decision of the Judge who hears the appeal.”*

The authorities referred to hereinbefore show that the Court which takes up an appeal, in an appropriate case, has directed that the notices be issued

to the parties in the Original Court who were not made parties in the appeal acting in terms of Section 770 of the Civil Procedure Code. It is entirely a discretion vested with the judges who hear the appeal. However, the said discretion shall not be exercised arbitrarily or capriciously. It has to be exercised in a judicious manner. When such discretion is exercised, the Court should look at the circumstances as to why they were not made parties to the appeal. The party who seeks to act under Section 770 should state the reasons or a valid excuse as to why those parties were not joined in the appeal. Moreover, the Appellate Court also should consider the prejudice that may cause to the parties to the action, in the event the appeal is dismissed or is taken up for argument in the absence of the parties who were not joined in the appeal.

Accordingly, I will now turn to consider whether the circumstances of this case permit this Court to act under Section 770 of the Civil Procedure Code and then to decide whether it is correct to issue notice on the defendants who were not been made parties to the appeal. The 1<sup>st</sup> defendant had died while the case was proceeding in the District Court. It was brought to the notice of the District Judge on 30.03.1995 (vide proceedings at page 49 in the appeal brief). Accordingly, substitution papers have been filed on the next date namely on 16.08.1995. Having considered the application for the substitution, learned District Judge made order substituting Godayalage Agoris as the 1A substituted-defendant. (vide proceedings at page 50 in the appeal brief) However, the caption had not been amended accordingly, to show the substitution effected in the room of the deceased 1<sup>st</sup> defendant until even the petition of appeal was filed in the District

Court. Nothing is found even in the caption to the plaintiff, to show the substitution that had been effected pursuant to the application made on 16.08.1995. Therefore, any person who looks at the caption will not be able to see that the substituted 1<sup>st</sup> defendant had been made a party to this action before filing the appeal. Therefore, making the substituted 1<sup>st</sup> defendant a party in the appeal may not be possible until the appellant becomes aware of the matters contained in the journal entry made on 16.08.1995.

Furthermore, rights of the parties to the action may greatly be prejudiced if the appeal is dismissed for not making the substituted 1<sup>st</sup> defendant a party to the appeal particularly because the learned District Judge has already allocated much bigger share of the land amounting it to 2/3<sup>rd</sup> share, to the 1<sup>st</sup> defendant.

Also, it must be noted that the interests of the substituted 1<sup>st</sup> defendant had been looked after by an Attorney-at law when this appeal was mentioned in numerous occasions in this Court. Therefore it is seen that the substituted 1<sup>st</sup> defendant is already been aware of the pendency of this appeal. Hence, this Court cannot dismiss the appeal on the basis that there was no notice given to him of this appeal since he, himself has already taken notice of this appeal.

In the circumstances, it is my opinion that this is a fit case to issue notice, exercising the discretion of this Court under Section 770 of the Civil Procedure Code, to the defendants who were not made parties to the appeal.

However, it must be noted that the failure on the part of the appellants to make the necessary defendants as parties to the appeal has caused unnecessary expenses to the plaintiff-respondent and to the substituted 1<sup>st</sup> defendant-respondent. Therefore, I make order directing the appellant to pay Rupees Thirty Five Thousand (Rs.35,000/-) to the plaintiff-respondent and another Rupees Thirty Five Thousand (Rs.35,000/-) to the substituted 1<sup>st</sup> defendant-respondent as costs, in order to recover the expenses they have incurred due to the failure on the part of the appellants to comply with the matters referred to in Sections 755 and 758 of the Civil Procedure Code.

Accordingly, I acting in terms of Section 770 of the Civil Procedure Code, direct the Registrar to issue notices to the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant-respondents directing them to be present in this Court on 04.09.2014. The notices should be tendered by the appellants within two weeks from today enabling the Registrar to send out notices as directed.

Mention on 04.09.2014

  
JUDGE OF THE COURT OF APPEAL