

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

Punchirala Arachchilage Dingiri
Appuhami,
(Deceased)
Ganangamuwa,
Nakkawatta.

Court of Appeal No.
CA 555/94(F)

DC Kuliypitiya Case No.6218L

Plaintiff

Punchirala Arachchilage Amarathunga,
Ganangamuwa,
Nakkawatta.

Substituted – Plaintiff

Vs.

01. Edirisinghe Mudiyansele
KiriBandara,
Nakkawatta.

02. Liyana Pathirahalage Podimanike,
Ganangamuwa,
Nakkawatta.

03. Liyana Pathiranahalage Milinona
Udagorake,
Anukkane.
04. Liyana Pathiranahalage PodiNona,
Koulwewa,
Horombawa.
05. Liyana Pathiranahalage Jayasena,
Ranwala,
Beligala.
06. Edirisinghe Mudiyanse Lage
Podimahaththaya,
Ganangamuwa,
Nakkawatta.
07. Liyana Pathiranahalage Thomas
Singho,
Ganangamuwa, (Deceased)
Nakkawatta.
7. L.P. Premadasa
Substituted 7th A Defendant
08. Liyana Pathiranahalage Premadasa,
Ganangamuwa,
Nakkawatta.

09. U.W. Wimaladasa,
Ganangamuwa,
Nakkawatta.

Defendants

Now Between

01. Liyana Pathirahalage Podimani,
Ganangamuwa,
Nakkawatta.

02. Liyana Pathirahalage Podi Nona
Koulwewa,
Horombawa.

03. U.W. Wimaladasa,
Ganangamuwa,
Nakkawatta.

**2nd, 4th & 9th Defendants –
Appellants**

Vs.

Punchirala Arachchilage Dingiri
Appuhami,
(Deceased)
Ganangamuwa,
Nakkawatta.

Plaintiff – Respondent

Punchirala Arachchilage Amarathunga
Ganangamuwa,
Nakkawatta.

**Substituted – Plaintiff –
Respondent**

01. Edirisinghe Mudiyansele
KiriBandara,
Ganangamuwa,
Nakkawatta.

02. Liyana Pathiranahalage Milinona
Udagorake,
Anukkane.

03. Liyana Pathiranahalage Jayasena,
Ranwala,
Beligala.

04. Edirisinghe Mudiyansele
Podimahaththaya,
Ganangamuwa,
Nakkawatta.

05. Liyana Pathiranahalage Thomas
Singho,
Ganangamuwa, (Deceased)
Nakkawatta.

06. L.P. Premadasa,
7th Substituted Defendant – 6th

Respondent

07. Liyana Pathirahalage Premadasa,
Ganangamuwa,
Nakkawatta.

Defendant – Respondents

Before : P.R.Walgama, J

**Counsel : Rohan Sahabandu, PC with Ms. Chathurani De
Silva for the Appellant.**

**: D.K. Dhanapala with Mr. D.K.V. Jayanath for the
Substituted Plaintiff – Respondent.**

Decided on: 05.05.2016

CASE- NO- 555/94/ (F)- ORDER -28/04/2016

P.R.Walgama, J

The instant order concerns an application made by the Counsel for the Defendant – Appellants (in short the Appellants) to try the below mentioned objection as a preliminary issue and to set aside the judgment dated 01.07.1994 of the Learned District Judge in the case bearing No. 6218 /L in the District Court of Kuliyaipitiya, and to send the record back to the District Court to try the case de novo.

The 2nd, 4th and the 9th Defendant- Appellants assailed the above judgment, on the basis that the Learned District Judge has failed to consider the documents marked by the 8th Defendant (who has not appeal against the said impugned judgment). It is the contention of the Plaintiff – Respondent, that the 8th Defendant marked 8d1, 8d2 and 8d3. As the 8d1 and 8d2 was marked subject to proof and the said two documents were not proved and such the Learned District Judge has not considered the said documents when arriving at the determination. Therefore it is apparent that the said contention is devoid of merits and should stand rejected.

The Plaintiff – Respondent has alleged that the Learned District Judge has not considered the document marked as 8d3, which is the entire case record of the Partition case, in respect of the land in issue, and has decided the rights of the parties including the Plaintiff- Respondent's right of way which is the contentious issue in the matter in hand.

It is contended by the Appellants that to deal with the rights given to the parties to partition action including the right of way was intensely relevant to decide the instant action weather the Plaintiff is entitled to the road way that is being claimed by him out of necessity. Hence it is abundantly clear that the Learned District Judge by failing to consider the outcome of the said Partition Case has flawed in arriving at the above determination. Therefore in the above setting I am of the view that the said JUDGMENT is trammelled with infirmities, and needs to be set aside.

Nevertheless it is the stance of the Plaintiff that the said case record was marked by the 8th Defendant who is not an Appellant and no prejudice has been caused to the other parties. But it is salient to note that the Learned District Judge should have considered the Plaintiff's rights after having recourse to the outcome of the afore said Partition Action.

The Plaintiff- Respondent too has raised an objection as to the maintainability of the said Appeal.

It is alleged by the Plaintiff – Respondent that the notice of appeal as well as the Petition of Appeal are bad in law and as such the appeal should be dismissed in limine.

It is viewed from the Petition of Appeal that the Appeal has been lodged against the original Plaintiff who is deceased. In the course of the trial in the District Court the said original Plaintiff died and his son Punchirala Arachilage Amaratunge was substituted in place of the Plaintiff. But it is seen in the Petition of Appeal the substituted Plaintiff- Respondent has not been made a party to the appeal and it is apparent that the appeal has been lodged against the dead person. Therefore it is contended by the Plaintiff that the said error is fatal and as such the appeal should be dismissed in limine.

Further it is said that the Appellants had failed to make all the Defendants as parties to this appeal, hence it is alleged that the Petition of Appeal is bad in law.

In support of the above proposition the Plaintiff- Respondent adverted Court to the case of SUWARISHAMY .VS. TELENIS - 54.NLR - 282 - which was held thus;

“when in an appeal a necessary party has not been made as a Respondent appeal will be dismissed unless the default is not a one of an obvious character which could not reasonably have been foreseen and avoided”.

Therefore it is contended by the Plaintiff that in this instant the default could be foreseen, and could have been avoided.

Further it is also brought to the notice of Court by the Plaintiff that in the caption in the notice of appeal there are two Plaintiffs. At the time the notice of Appeal was tendered the original plaintiff was dead and his son was substituted in the place of the original plaintiff who was dead. But it is stated in the notice of Appeal, parallel to the name of the original plaintiff it is indicated that he is a party deceased.

In the above setting it is stated that the above notice of appeal is not in conformity with the Section 755 of the Civil Procedure Code. Nevertheless it is worthy to mention that the Appellants had complied with the said requirements laid down in the above Section 755 accordingly.

The Counsel for the Plaintiff while adverting Court to Section 759(2) of the Civil Procedure Code has categorically stated that if the Court acts in terms of the above Section

a material prejudice will be caused to the Plaintiff-Respondent.

Section 759(2)

“in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the forgoing sections.....the Court of Appeal may, if it should be of opinion that the Respondent has not been materially prejudiced, grant relief on such terms as it may deem just.”

The Plaintiff- Respondent raised another objection that the Appellants had moved for different relives in the notice of Appeal and the Petition of Appeal.

In the notice of Appeal the Appellants had moved for the following relives inter alia;

1. To set aside the judgment of the Learned District Judge of Kuliyaipitia,
2. Relief sought in the Answer of the Appellant.

In the Petition of Appeal the following reliefs are sought by the Appellants,

1. To rescind the order of 17/1994 made by the Learned District Judge,
2. Grant the alternate right of way as shown in plan No. 192
3. For such other further reliefs Court shall seems meet.

Therefore it is abundantly clear that there is no uniformity in the reliefs claimed by the Appellants.

Besides it is alleged by the Plaintiff-Respondent that the 5th 7th 8th and 9th relied on the same facts, but only the 9th Defendant had appealed against the said impugned judgment, therefore it is said that one person who relied on the same facts cannot appeal against the judgment.

It is also been noted that the Petition of Appeal mentioned as the Plaintiff the name of the original Plaintiff who is deceased. But the Appellants position is that in the notice of appeal it is correctly stated and no material prejudice has been caused to the Plaintiff-Respondent.

The Plaintiff-Respondent has also taken the objection that the Appellant has failed to mention the names of all parties in the present application. Therefore it is urged by the Appellants that this Court to exercise its discretion in terms of Section 759 (2) and 770 of the Civil Procedure Code to add the necessary parties as the said omission has not caused any material prejudice to the Plaintiff-Respondent.

In support of the above proposition the Counsel for the Appellants had adverted Court to the judicial pronouncement in the case of JAYASEKARA .VS. LAKMINI AND OTHERS-2010-1 SLR- PAGE -41 which held thus;

“the issue at hand falls within the purview of a mistake, omission or defect on the part of the Appellant in complying with the provisions of Section 755. In such a situation if the Court of Appeal was of the opinion that the Respondent has not been materially prejudiced, it was empowered to

grant relief to the Appellant on such terms as it deemed just”

“the power of the Court to grant relief under Section 759 (2) is wide and discretionary and is subject to such terms as the court may deem just. Relief may be granted even if no excuse for non compliance is forthcoming- relief cannot be granted if the Court is of the opinion that the Respondent has been materially prejudiced in which event the appeal has to be dismissed”

“It was further held that Section 770 shows that if it appears to 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,”

“A discretion necessarily invokes an attitude of individual choice, according to the particular circumstances, and differ from a case where the decision follow *ex debito iustitiae*, 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”

In the above setting I am of the view that no material prejudice will be caused to the Plaintiff- Respondent by allowing the Appellants to make all the Defendants as parties to this appeal.

Hence for the above mentioned factual and legal matrix I am inclined to resolve the preliminary objections raised by both parties in the following manner.

As contended by the Counsel for the Appellants the failure on the part of the Learned District Judge to consider the case record marked as 8d3 is fatale as the judgment of the said Partition Action, the corpus of which is the subject land, and as the Plaintiff's rights including the road way had been decided in the above case, was a vital point that would have decided the main matter in the present action.

But it is intensely relevant to note this Court at this juncture need not dwell with the main matter, as the necessary parties are not before Court.

Nevertheless this court acting in terms of Section 759(2) and Section 770(2) of the Civil Procedure Code is inclined to allow the application of the Counsel for the Appellants by allowing to add necessary parties, subject to a cost of Rs. 10,000/.

JUDGE OF THE COURT OF APPEAL