

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

C.A. Case No. 696/1997

D.C. Colombo Case No.
4104/ZL

1. W. Siyadoris (Deceased)
2. R.P. Sisilin Nona (Deceased)

Both at: 35/1, Malapalla,

Homagama.

PLAINTIFF-APPELLANTS

- 1a. Wanniarachchige Susila Piyawathi,
No. 37/3, Wekada Road,
Malpalla, Homagama.
- 1b. Wanniarachchige Dharmadasa Jayasinghe,
No. 47, Wekada Road,
Malpalla, Homagama.
- 1c. Wanniarachchige Kusuma Chandrawathi,
No. 45, Wekada Road,
Malpalla, Homagama.
- 1a. Wanniarachchige Chandrani Lalitha,
2nd Lane, Malapalla,
Homagama.

Substituted PLAINTIFF-APPELLANTS

-Vs-

1. Maharage Jamis Perera (Deceased)
No. 54/1, Siddartha Road,
Colombo 06.

2. Maharage Helena Perera (Deceased)

No. 34, Galawila Road,

Homagama.

2a. P.A. Lily Fonseka,

Ihala Thalduwa, Kamburupola Road,

Avissawella.

2b. P.A. Marynona,

No. 639, Pinketha Road,

Homagama.

2c. P.A. Kusumalatha

2d. P.A. Ariyawathi

Both at: No. 34, Galabodawatte,

Malapalla, Homagama.

DEFENDANT-RESPONDENTS

BEFORE

:

A.H.M.D. Nawaz, J.

COUNSEL

:

Chathura Galhena with Manoja Gunawardena
for the Substituted-Plaintiff-Appellants

Shashikala Wijesekara for the 2(a) Defendant-
Respondent

Sudarshani Cooray with Narmada Nayanakanthi
for the 2(b), 2(c) and 2(d) Defendant-
Respondents.

Decided on

:

27.01.2017

A.H.M.D. Nawaz, J.

The original Plaintiffs-one Siyadoris and Sisilin Nona who were both husband and wife instituted this action in the District Court of Colombo praying *inter alia* for the recall of a probate issued to the 1st Defendant in Case bearing No. 27801/T. The relief prayed for against the original 2nd Defendant- Maharage Helena Perera was that a deed in favour of the said 2nd Defendant-Maharage Helena Perera executed consequent to the issue of the probate should be nullified. The Defendants filed answer traversing the claims of the original Plaintiffs and as 2nd Defendant Maharage Helena Perera passed away during the pendency of the action in the District Court, 2(a), 2(b), 2(c) and 2(d) Defendants stepped into the shoes of the deceased 2nd Defendant as the *Substituted Defendants*-vide Journal Entry 26 dated 26.11.1986 of the appeal brief. At the end of the trial, the learned District Judge of Colombo pronounced judgment dated 13.10.1997 dismissing the action with costs. So it is clear that when the judgment was delivered on 13.10.1997, the contending parties were the Plaintiffs on the one hand and 2(a), 2(b), 2(c) and 2(d) Defendants on the other. The Plaintiffs filed a notice of appeal within 14 days designating the 2(a), 2(b), 2(c) and 2(d) Defendants as the designated Substituted Defendant-Respondents.

The preliminary objection that has been raised before this Court is to the effect that only the original 1st Defendant and the original deceased 2nd Defendant- Maharage Helena Perera have been made as the Respondents in the petition of appeal, whilst the Substituted 2(a), 2(b), 2(c) and 2(d) Defendants have been omitted to be mentioned as Respondents in the petition of appeal. It has to be noted that though the petition of appeal makes no reference to these Defendants as Respondents, they have exhibited diligence in opposing the appeal of the Plaintiff-Appellants and they have all been represented by Counsel before this Court as the journal entries before this Court amply demonstrate. There is proof enough that the substituted 2(a), 2(b), 2(c) and 2(d) Defendants have had notice of this appeal despite their non-designation as

Respondents in the petition of appeal and even though this matter was first fixed for argument and subsequently, it is noteworthy that this objection was not been taken.

In fact, Counsel for 2(b), 2(c) and 2(d) Defendants filed written submissions dated 05.05.2014 on the main appeal and even these written submissions have been filed in the names of 2(b), 2(c) and 2(d) Substituted Defendant-Respondents, despite the preliminary objection raised by the 2(a) Defendant is that all of them have not been named as Respondents in the petition of appeal. It has to be noted that it is the 2(a) Defendant who has raised the objection to the maintainability of the appeal, whilst 2(b), 2(c) and 2(d) Defendants have specifically stated to this Court that they would not associate themselves with the said preliminary objections- vide Journal Entry of 23.03.2016 in this Court. As I observed before, even the 2(c) Defendant filed a written submission dated 03.06.2013 opposing this appeal on merits, whilst arguing that Section 758(1)(c) of the Civil Procedure Code (CPC) which has to be read with Section 755(3) and 759 is mandatory.

Upon a perusal of documents and written submissions filed in this Court, it is quite clear that right from the time the defective petition of appeal was forwarded to this Court, the unnamed Defendants namely 2(a), 2(b), 2(c) and 2(d) Defendants have had notice of the appeal and have been quite diligently prosecuting the appeal against them by taking several steps such as collecting the briefs, retaining counsel and settling written submissions etc. They have always acknowledged themselves as Respondents to this appeal, and it is only one of them-2(a) Defendant who has moved for the sanction of a rejection of the appeal on the basis that he along with 2(b), 2(c) and 2(d) Defendants have been omitted to be named as Respondents in the petition of appeal. None of the written submissions filed by the Substituted Defendants wherein they have designated themselves as Respondents to the appeal complain of material prejudice that has been caused to them. The only basis seems to be that the naming of a Respondent is mandatory in 758(1) of the Civil Procedure Code. Section 758(1) which deals with the form of an appeal sets out:

“The petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars:-

(a) the name of the court in which the case is pending;

(b) the names of the parties to the action;

(c) the names of the appellant and of the respondent;

(d) the address to the Court of Appeal;

(e) a plain and concise statement of the grounds of objection to the judgment, decree, or order appealed against- such statement to be set forth in duly numbered paragraphs; form of relief

(f) a demand of the form of relief claimed.”

In regard to the constituent element (c) of Section 758(1) the draftsman of the petition of appeal has been no doubt wanting in care by not naming the Substituted 2(a), 2(b), 2(c) and 2(d) Defendants.

In my view, remissness on the part of a draftsman of a petition in not naming some of the Defendants as Respondents could not result in an automatic dismissal of the appeal. The guiding principle is clearly given in Section 759(2) of the Civil Procedure Code in the following tenor:

“In the case of any mistake, omission or defect on the part of any in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done), 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.”

When Section 759(2) of the CPC alludes to “the provisions of the foregoing sections”, Section 758(1)(c) of the CPC which requires the names of the Appellant and Respondent to be set out falls within Section 759(2) but the curative provision Section 759(2) spells out the power of the Court of the Appeal to grant relief on such terms as it may deem just in the event there is a non compliance with a foregoing provision such as Section 758(1) (c) of the CPC. The discretion vested in the Court of Appeal has to be

exercised subject to a guiding principle namely the Respondents should not have been materially prejudiced. The question whether the Respondents have been materially prejudiced does not go a begging. It brings forth an immediate answer. On the facts and circumstances of this case and the conduct exhibited by the Respondents, they cannot be heard to complain that they have been prejudiced by the omission to be named in the petition of appeal. Counsel for the Substituted Plaintiff-Appellants Mr. Chathura Galhena in his written submissions has quite pertinently drawn the attention of this Court to the judgment of Chandra Ekanayake J. in the Supreme Court decision of *Jayasekera v. Lakmini and Others* (2010) 1 Sri.LR 41 wherein Her Ladyship focusing on Sections 758(1) and 759(2) of the CPC has observed as follows:

“The power of the Court to grant relief under s. 759 (2) of the Code 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. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.”

“In the case at hand the notice of appeal had been filed by the registered attorney-at-law and the failure to comply with Section 755 appears to be a negligence on his part – such negligence though relevant does not fetter the discretion of Court to grant relief when it appears that it is just and fair to do so – “What is required to bar relief under Section 759(2) is not any prejudice but material prejudice”–I am inclined to the view that the plaintiff being the only respondent named in the notice of appeal would not be materially prejudiced by the grant of relief under Section 759(2)”.

In the circumstances I proceed to overrule the preliminary objection and since I take the view that the Appellant must be granted an opportunity to remedy the defective petition of appeal, I direct that the substituted Plaintiff-Appellant be permitted to file an amended petition of appeal.

JUDGE OF THE COURT OF APPEAL