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

C.A. Case No. 1105/1996 (F)

D.C. Kegalle Case No. 2263/P

1. Wickrama Arachchilage Ran Menika
2. Atukoralage Punchi Banda
3. Atukoralage Dingiri Banda
4. Atukoralage Podimenika

All of Asideniya

PLAINTIFFS

-Vs-

1. Kasturi Aratchillage Piyadasa
2. Atukoralage Podihamy

Both of Asideniya

3. Rev. Saranankara, Dematapitiya
4. Dolawatta Appuhamilage Piyadasa
5. Kasturi Aratchillage Tikiri Banda
6. Kasturi Aratchillage Mudiyanse
7. Kasturi Aratchillage Herat Banda

DEFENDANTS

AND

Kasturi Aratchillage Piyadasa (Deceased)

1st DEFENDANT-APPELLANT

Kasturi Aratchillage Podiralahamy

of "Kasturi Stores",

Dambtanpitiya, Hakahinna.

1A DEFENDANT-APPELLANT

-Vs-

1. Wickrama Arachchilage Ran Menika
2. Atukoralage Punchi Banda
3. Atukoralage Dingiri Banda
4. Atukoralage Podimenika (Deceased)

All of Asideniya

PLAINTIFFS-RESPONDENTS

AND NOW

Kasturi Aratchillage Podiralahamy
of "Kasturi Stores",
Dambtanpitiya, Hakahinna.

1A DEFENDANT-APPELLANT

-Vs-

1. Wickrama Arachchilage Ran Menika
2. Atukoralage Punchi Banda
3. Atukoralage Dingiri Banda

All of Asideniya

PLAINTIFFS-RESPONDENT-RESPONDENTS

4a. Wickrama Arachchilage Ramanayake

4b. Wickrama Arachchilage Chandra Hathurusighe

4c. **Wickrama Arachchilage Seelawtahie**
All of "Kandegedara", Haloluwa,
Hettimulla, Kegalle.

4d. **Wickrama Arachchilage Dingiri Menike**
No. 198, Ambulugala,
Mawanella.

Substituted 4th PLAINTIFF-RESPONDENTS

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL : Amrith Rajapakse for the 1A Defendant-Appellant

Mahinda Nanayakkara with Aruna Jayatilaka for the 3rd Plaintiff-Respondent

Decided on : 22.06.2018

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

When this matter came up in this Court for argument, a preliminary objection was taken up on behalf of the 3rd Plaintiff-Respondent, to wit

(a) the 2nd Defendant has not been made a party in the notice of appeal;

(b) the 2nd Defendant has not been made a party in the petition of appeal;

(c) thus there is no properly constituted appeal before this Court;

(d) hence the 1st Defendant-Appellant has not invoked the appellate jurisdiction of this Court;

(e) in the circumstances the appeal of the 1st Defendant-Appellant should stand dismissed.

When the 2nd Defendant passed away, his brother was substituted and he became the substituted 2A Defendant. In the judgment he was allotted 1/48th share.

> "2අ විත්තිකරුට- මුල් 2 වන විත්තිකරුවන අතුකෝරලරාලලාගේ පොඩිහාමිට හිමිවන 1/48 කොටස 2අ විත්තිකරුට හිමිවිය යුතුය."-*see* page 9 of the judgment or page 121 of the appeal brief.

Thus the argument has been made that as the substituted 2A Defendant is a necessary party to the appeal he should have been made a party respondent.

Section 755(1) of the Civil Procedure Code (CPC) that deals with the filing of a notice of appeal goes as follows:-

> "Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Such notice shall also contain the following particulars:
>
> a) the name of the court from which the appeal is preferred;
>
> b) the number of the action;
>
> c) the names and addresses of the parties to the action;
>
> d) the names of the appellant and respondent;
>
> e) the nature of the relief claimed"

In light of this provision, it was contended that the notice of appeal filed by the 1st Defendant-Appellant was void and it has not effect in law whatsoever.

Section 758(1) of the Civil Procedure Code which deals with a petition of appeal states as follows:-

> "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;

f) a demand of the form of relief claimed"

The complaint of the Counsel for the 3rd Plaintiff-Respondent is that that 1st Defendant-Appellant has not made the 2nd Defendant a party even in the petition of appeal.

In the circumstances, it was submitted that the 1st Defendant-Appellant violated the mandatory provisions of Section 755(1) and 758(1) of the Civil Procedure Code.

A chronology of events would bring out the following facts. The proxy of the 2nd Defendant had indeed been filed by Attorney-at-Law Mr. A.L.M. Yusuf and a subsequent Journal Entry bearing No. 51 states that the 2nd Defendant had passed away and steps must be taken.

On 15.09.1989, an application had been made to substitute the brother of the 2nd Defendant in his room. Thus Atukoralage Ranbanda became the substituted 2nd Defendant (2A Defendant) and continued to be present in Court. But no statement of claim had been filed on behalf of 2nd Defendant or his substituted Defendant.

As I reproduced the relevant portion of the judgment, the learned District Judge in his judgment dated 02.04.1996 has allotted 1/48th share of the subject-matter to the substituted 2A Defendant. The Counsel for the 3rd Plaintiff-Respondent submitted that the 1st Defendant-Appellant had not complied with the mandatory provisions of the Civil Procedure Code in not naming the substituted 2A Defendant as a party respondent. Neither in the notice of appeal nor in the petition of appeal has the substituted 2A Defendant been made a party.

In these circumstances should the 1st Defendant-Appellant be visited with the sanction of dismissal of his petition of appeal? In this case, there were 4 Plaintiffs and 7 Defendants. In the notice of appeal of the 1st Defendant-Appellant, only the Plaintiffs

have been named as Respondents. The 2nd to the 7th Defendants have been omitted. This seems to be the case in the petition of appeal as well. Upon a perusal of the proceedings in the court *a quo*, I find that just like the 2nd Defendant, the 5th, 6th and 7th Defendants had not filed any statements of claim. Even the 4th Defendant did not file a statement of claim. It would appear that the 5th, 6th and 7th Defendants who had been omitted were also the siblings of the 1st Defendant-Appellant. However, these Defendants were not allotted any shares.

It is axiomatic that if the 1st Defendant-Appellant succeeds, it is bound to impact on the rights of the 2nd Defendant who has been allotted a share. There is a likelihood that the rights of the 2nd Defendant may be reduced in the event of the success of the 1st Defendant-Appellant's appeal. To the extent of an omission to cite the 2nd Defendant in the petition of appeal, there is a mistake, omission or defect on the part of the 1st Defendant-Appellant.

I took the opportunity to observe in **CA 696/1997** (CA minutes of 27.01.2017) that remissness on the part of a draftsman of a petition of appeal 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 in the petition of appeal 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.

This curative provision 759(2) of the CPC has to be read with Section 770 of the CPC. But Section 770, whilst conferring a discretion on the Court of Appeal to implead as Respondents the parties necessary for the appeal but who had not been joined, does not spell out a guiding principle as to how and in what manner that discretion should be exercised. As a result one has to look to case law to ascertain the remit of the discretion that our Courts have imposed.

Section 770 of the CPC

Section 770 of the Civil Procedure Code states that, '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 hereinbefore 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.*' Thus there is a statutory discretion to implead a party and serve notice on him even at the stage of the appellate hearing. As to how and on what criteria the discretion to add as Respondents necessary parties out of those who participated in the District Court, there have been divergent observations.

The Full Court in ***Dias v. Arnolis***, 17 N.L.R. 200 decided that the Appeal Court could act under Section 770 of the Civil Procedure Code, and that it was a question for the decision of a Judge who heard the appeal whether or not a Respondent ought to be added in any particular case. It was held that it was competent to the Supreme Court to order that any party to an action who had not been made a party to the appeal, but who was interested in the result of the appeal, must be made a respondent to the appeal.

In another Full Bench decision of the then Supreme Court ***Ibrahim v. Beebee*** (1916) 19 N.L.R. 285 it was held that it was 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 were, the petition of appeal should be rejected. 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 Code directing those parties to be added or noticed.

In fact the Supreme Court Appeal (Special Provisions) Act No. 4 of 1960 was possibly enacted to give recognition to the above principles adumbrated in ***Dias v. Arnolis*** *(supra)* and ***Ibrahim v. Beebee*** *(supra)*. More particularly Section 4(1) of this Act enacts as follows:-

(1) Subject to the provisions of subsection (2), where an appeal referred to in Section 2 or Section 3, has been presented to the Court of first instance, or the appropriate authority, as the case may be, within the time prescribed by any written law relating to such appeal, the Supreme Court shall not exercise the powers vested in such Court by any written law to reject or dismiss that appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of any written law relating to such appeal, unless material prejudice has been caused thereby to the respondent to such appeal.

(2)The Supreme Court shall, in the case of any appeal referred to in subsection 1, which is not rejected or dismissed by such Court direct the appellant to comply with such directions as the Court may deem necessary for the purpose of rectifying, supplying or making good any error, omission or defect so referred to within such time and upon such conditions as may be specified in such directions, and shall reject or dismiss that appeal if the appellant fails to comply with such directions.

(3)In this section, the expression "appellant", in relation to any appeal under any written law, includes any agent of the appellant who is authorized by that law to make such appeal or to represent the appellant at the appeal.

A careful perusal of Section 4 of the Supreme Court Appeal (Special Provisions) Act No. 4 of 1960 would reveal that the letter and spirit of both Sections 759(2) and 770 of the

current CPC are reflected in the 1960 legislation. It is worth noting that Section 759(2) of the current CPC did not have a corresponding counterpart in the old CPC and I would opine that Section 4 of the Supreme Court Appeal (Special Provisions) Act No. 4 of 1960 could be regarded as the precursor to Section 759(2) of the current CPC.

Whilst Section 4 postulates no dismissal of the petition of appeal unless there has been material prejudice caused to the Respondent, the section prescribes latitude to Court to remit the petition of appeal for rectification of errors within prescribed time and specified directions. Only when there was a failure to comply with such directions, the non-compliance eventuated in a dismissal or rejection of the petition of appeal.

It was possibly in the aftermath of the liberality of this legislation that the case of ***Kiri Mudiyanse v. Bandara Menika***, (1972) 76 N.L.R. 371 was decided but this case did not allude to Supreme Court Appeal (Special Provisions) Act No. 4 of 1960 but rather relied heavily on Section 770 of the old Civil Procedure Code. The case also considered both ***Dias v. Arnolis*** *(supra)* and ***Ibrahim v. Beebee*** *(supra)*. Pathirana, J. (with Rajaratnam, J.) held that the Supreme Court had the discretionary power under Section 770 of the old Civil Procedure Code to direct the 1st to 3rd and the 6th to the 8th Defendants to be added as Respondents. The exercise of the discretion contemplated in Section 770 of the old CPC was a matter for the decision of the Judge who heard the appeal in the particular case. Furthermore, it should be exercised when some good reason or cause was given for the non-joinder. The discretion which was an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

In fact Pathirana, J. (with Rajaratnam, J. agreeing) stated that intrinsically there is nothing in Section 770 either expressly or by necessary implication to inhibit the discretion to the principles that have been set out in the case of ***Ibrahim v. Beebee*** as to do so will be tantamount to saying that the exercise of the discretion is cribbed, cabined and confined exclusively to these principles, limiting the exercise of the discretion in a particular way, and thereby putting an end to the discretion itself. Pathirana, J. quoted

the observations made by Lord Wright in ***Evans v. Bartlam*** (1937) 2 A.E.R. 646, at 655; (1937) AC 473 at 488:-

> *"To quote again from Bowen L.J. in **Gardner v. Jay** (1885) 29 Ch.D 50: 'When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so?"*

In fact Section 770 of the Old Civil Procedure Code went as follows:-

> *"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, is interested in the result of the appeal, the Court may adjourn the hearing to a future day, to be fixed by the Court, and direct that such person be made a respondent, and may issue the requisite notices of appeal to the Fiscal for service."*

Pathirana, J. held that Section 770, in his view, gave a very wide discretion to Court and there was room for introducing other principles by which the Court could exercise its discretion.

These observations will equally hold true for Section 770 of the current Civil Procedure Code which enacts a wide discretion, but does not prescribe any particular guideline. The criteria to be adopted to exercise the discretion in Section 770 will depend on facts and circumstances of each case and, the previous cases, which upheld preliminary objections based on non-joinder of the original Defendants or substituted Defendants as Respondents to petitions of appeal, cannot be applied across the board to reject a petition of appeal which, in the opinion of Court, requires rectification by way of an amendment.

In the facts and circumstances of this case before me, there is no allegation that the Plaintiff-Respondents have been *materially prejudiced* by the non-joinder of the 2nd Defendant in the case. No material has been placed to substantiate any allegation of

material prejudice. In the absence of such material prejudice as postulated in Section 759(2) of the Civil Procedure Code, nothing would inhibit this Court to permit an amendment of the petition of appeal.

Moreover Section 770 too would permit such a course to be adopted as the decree appealed against is one that was made *in rem* and it is pertinent to observe that the 2nd Defendant, though he did not participate at the trial, needs to be noticed of the appeal subject to any objections that the 1st Defendant-Appellant may take as to his participation in the appeal. It has to be noted that apart from having filed a proxy, the 2nd Defendant never participated at the trial and it is inequitable to precipitate a dismissal of the petition of appeal merely on the ground that the non-participating 2nd or 2A Defendant was not impleaded in the petition of appeal. Maybe the draftsman of the petition of appeal, albeit erroneously, thought that a non-participating 2A Defendant, notwithstanding the allotment of shares, was not a necessary party as oftentimes their participation *qua* an Appellant is objected to-*see* Dheeraratne, J. in ***Mendis v. Dublin de Silva and two others*** (1990) 2 Sri L.R. 249:-

> *"I find it difficult to subscribe to the proposition advanced on behalf of the appellant, that a defaulting party who is disentitled to raise a contest on a dispute as a matter of right at the trial, acquires such a right once trial is concluded."*

Dheeraratne, J. observed in this case that a party who did not file a statement of claim at the trial could not prefer even an appeal. I had occasion to refer to this case in the context of an aggrieved party in **CA 853/1999 (F)**-DC *Avissawella* 10624/P (CA minutes of 08.06.2016).

I would not interpose these observations in a case such as this where a non participating Defendant has to become a Respondent and in order to ensure due process I would countenance the filing of an amended petition of appeal even at this belated stage.

I am also fortified by two precedents from the Court of Appeal and the Supreme Court which also impel me to permit the amendment of the petition of appeal to add the substituted 2A Defendant.

In ***Anura Senanayake and others v. Mudiyanse Senanayake and others*** (2012) B.L.R Bar Association Law Journal Vol. XIX, Part II, p 348 a preliminary objection had been raised in the Court of Appeal on behalf of the Plaintiff-Respondent in the case that the petition of appeal did not include the names of parties as required in Section 758(1)(b) and Section 758(1)(c) of the Civil Procedure Code. The parties who were allotted shares in the original Court were not made parties to the Appeal

The Court of Appeal held:-

(a) The Appellate Court has a discretion to either reject the Petition of Appeal or permit the Appellant to file an amended Petition of Appeal, provided the Respondents have not been materially prejudiced.

(b) Those who were allotted shares in a partition suit and also the parties who were parties in the Original Court should be made parties in terms of Section 758(1)(b) of the Civil Procedure Code.

(c) The present Civil Procedure Code on grounds of rejection of the Petition of Appeal is somewhat liberal in its approach when compared with the earlier Civil Procedure Code. (Section 759(2) in the present Code was not found in the earlier Code. All in all this seems to be a curable defect).

His Lordship Justice Priyasath Dep, PC/J (as His Lordship then was) quite percipiently held in ***Heenmenike v. Mangala Malkanthi*** (2016) B.L.R 110 that the failure to comply with Section 755(1) by not citing the 2nd substituted Plaintiff as a Respondent in the notice of appeal and in the petition of appeal is a curable defect under Section 759(2) and Section 770 of the CPC. His Lordship Priyasath Dep, PC/J (as His Lordship then was) drew in aid among a host of judicial precedents the decision of the Supreme Court in ***Nanayakkara v. Warnakulasuriya*** (1993) 2 Sri L.R. 289 wherein Kulatunga, J. had held:-

> *"The power of the Court to grant relief under section 759(2) of the Code is wide and discretionary and 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 course of the judgment, His Lordship also cited ***Keerthisiri v. Weerasena*** (1997) 1 Sri.LR 70 (G.P.S.de Silva CJ) and ***Jayasekera v. Lakmini and Others*** (2010) 1 Sri L.R. 41.

In the circumstances, I take the view that the failure to add the 2nd Defendant as a party to the notice of appeal and the petition of appeal is not a fatal irregularity and hence I hold that the discretion of this Court must be exercised to permit an amendment. I allow the 1A Defendant-Appellant to file an amended petition of appeal incorporating the parties in the District Court who have not been named as Respondents. Once the amended petition of appeal is filed, the Registrar is directed to serve notices on the added Respondents. Thereafter this Court will proceed to hear the appeal on the merits.

I order the 1st Defendant-Appellant to pay the Plaintiff-Respondents a sum of Rs. 7,000/- each. All other parties and Respondents who were allotted shares by the learned District Judge must be paid a sum of Rs. 4,000/- each. The costs ordered have to be deposited in the registry after the amended petition of appeal has been filed and they have to be defrayed to the parties before argument takes place. The order for costs has to be mandatorily complied with.

JUDGE OF THE COURT OF APPEAL

Preliminary objection overruled.