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

1. S.K. Podiappuhamy,
   Moratota,
   Palmadulla.
   Defendant-Appellant (Deceased)
   S.K. Linton Karunaratne,
   Rabuka,
   Morathota,
   Palmadulla.
   Substituted Defendant-Appellant

CASE NO: CA/314/2000/F
DC RATNAPURA CASE NO: 4221/L

Vs.

1. Hidellana Janasiri Seneviratne,
   Thiriwanketiya,
   Ratnapura. (Deceased)
1A. Leelawathie Seneviratne,
1B. Hidellana Piyasamara
   Seneviratne,
1C. Hidellana Puraka Seneviratne,
   All of Thiriwanaketiya,
   Ratnapura.
2. Balaberakarayalage Gunapala,
   Marapana,
   Ratnapura. (Deceased)

3. Balaberakarayalage Gunapala,
Marapana,
Ratnapura.
(Deceased)

3A. Balaberakarayalage alias
Bamunusinghege Jayantha
Chandrasiri,
Marapana,
Ratnapura.

4. Balaberakarayalage Suwaneris,
(Deceased)

4A. Balaberakarayalage Hemalatha,
Kirindigala,
Balangoda.

4B. Balaberakarayalage
Chandralatha,
Kirindigala,
Balangoda.

4C. Balaberakarayalage Piyaseeli,
Kirindigala,
Balangoda.

5. Naiyanndikarage Vidhyananda,
Marapana,
Ratnapura.

6. Gamchaari Hemangani
Vidhyananda,
Marapana,
Ratnapura.
Plaintiff-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Anuruddha Dharmaratne for the Substituted Defendant-Appellant.

Navin Marapana for the 6th Plaintiff-Respondent.

Decided on: 01.11.2018

Samayawardhena, J.

The defendant-appellant filed this appeal against the Judgment of the District Court of Ratnapura dated 17.02.2000. At the stage of preparing and collecting the Appeal Briefs, as seen from the Journal Entry dated 14.03.2012, the learned counsel appearing for the 1A plaintiff-respondent, has informed Court that the name of the 1A plaintiff-respondent does not appear in the Notice of Appeal and therefore the Notice of Appeal is invalid. Thereafter, the registered Attorney for the appellant, by way of a petition and affidavit dated 01.04.2013 has moved Court, with notice to the registered Attorney of the plaintiff-respondents, to accept the amended caption, which included the parties substituted in the District Court in place of the deceased 1st and 3rd plaintiffs. This has been objected to by the learned counsel for the 6th plaintiff-respondent, who moves to dismiss the appeal *in limine*, on the basis that the substituted plaintiffs in place of the deceased 1st and 3rd plaintiffs have not been named as parties to the Appeal. Hence this order.

There had been six original plaintiffs, and for all of them, there had been one registered Attorney. Pending trial in the District Court, the 4th, the 1st and the 3rd plaintiffs have passed away, respectively, at regular intervals, and substitutions have been effected; and the same registered Attorney for the plaintiffs has filed proxies on behalf of the substituted plaintiffs as well.

It is the explanation of the learned counsel for the appellant that, although substitutions have been so made, the registered Attorney for the plaintiffs have not filed amended captions, and that has led to the present fiasco.

The action has been instituted as far back as in 1980, and thereafter plaint has been amended at least three times. By the time the second amended plaint was tendered in 1983, although the 4th plaintiff was dead and substitutions were effected, the caption of the amended plaint does not reflect it.[1] That is reflected only in the third amended plaint filed in 1984. The 1st and 3rd plaintiffs have died and substitutions were made thereafter, and no amended captions have been filed by the registered Attorney for the plaintiff reflecting such substitutions. The Notice of Appeal and the Petition of Appeal are based on the caption of the last amended plaint. Therefore, in my view, the registered Attorney for the plaintiffs is also responsible for the present predicament.

As I said earlier, the same registered Attorney for all the original six plaintiffs has filed proxies for all the substituted plaintiffs as well, and the said registered Attorney has also accepted a copy

[1] Vide page 71 of the Appeal Brief.

of the Notice of Appeal without a murmur.[2] Therefore there cannot be any dispute that the registered Attorney for the plaintiffs was well aware of the Appeal, and in fact, sent a counsel to represent the 1A plaintiff in this Court despite her (the 1A plaintiff) name not appearing in the Notice of Appeal and the Petition of Appeal.[3] This clearly goes to show that no prejudice whatsoever has been caused to the substituted plaintiffs for the failure to name the substituted 1st and 3rd plaintiffs in the Notice of Appeal and the Petition of Appeal.

The learned counsel for the 6th plaintiff-respondents has cited several authorities to say that failure to name the proper parties in the Notice of Appeal and the Petition of Appeal warrants dismissal of the appeal *in limine*.

Nevertheless, the trend of authority in later cases has been to interpret the relevant provisions of law liberally as opposed to restrictively allowing the defaulting party to cure the defect, if any, and dispose of the appeal on merits, as opposed to on high technical grounds, unless the defect has caused material prejudice to the other party, in which event the Court can dismiss the appeal *ab initio*.

Sections 755(1) and 758(1) of the Civil Procedure Code spell out the particulars to be included in the Notice of Appeal and the Petition of Appeal respectively, and one such requirement is to name the parties to the action in them.

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[2] Vide page 319 of the Appeal Brief.

[3] Vide JE dated 14.03.2012 of the Docket.

Section 759(2) of the Civil Procedure Code reads thus: "*In the case of any mistake, omission or defect on the part of any appellant 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.*"

It must be noted that, as Justice Kulatunga remarked in *Martin v. Suduhamy [1991] 2 Sri LR 279 at 306* and Chief Justice G.P.S. de Silva stressed in *Keerthisiri v. Weerasena [1997] 1 Sri LR 70 at 74*, the phrase used in section 759(2) is not "*mere prejudice*" but "*material prejudice*".

As was held by the Supreme Court in *Nanayakkara v. Warnakulasooriya [1993] 2 Sri LR 289:* "*The power of the court to grant relief under Section 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 same case at page 293, Justice Kulatunga (with the agreement of Chief Justice G.P.S. de Silva and Justice Wijetunga) further added that: "*In an application for relief under section 759(2), the rule that the negligence of the Attorney-at-Law is the negligence of the client does not apply.*"

In the Supreme Court case of *Jayasekera v. Lakmini [2010] 1 Sri LR 41* both the Notice of Appeal and the Petition of Appeal were

not in conformity with the provisions of sections 755(1) and 758(1) of the Civil Procedure Code *inter alia* by not making all the defendants parties to the Appeal. On the preliminary objection taken on that ground, Justice Ekanayake (with Chief Justice Asoka de Silva and Justice Marsoof agreeing) held that those lapses can be rectified in terms of section 759(2) of the Civil Procedure Code since it has not caused material prejudice to the other parties.

Justice Ekanayake further held that section 770 of the Civil Procedure Code can also be made use of by the Appellate Court when granting such relief to a defaulting appellant.

That section reads as follows: "*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, is interested in the result of the appeal, the court may issue the requisite notice of appeal for service.*"

When pointed out by counsel for the respondent that no such application invoking the provisions of section 759 had been made for the Appellate Court to grant such relief to the defaulting appellant, the Supreme Court at page 51 went so far as to say that "*it is undoubtedly incumbent upon the court to utilize the statutory provisions and grant the relief embodied therein if it appears to court that it is just and fair to do so.*"

The *ratio* in *Jayasekera v. Lakmini (supra)* has consistently been followed by later Supreme Court Judgements.

In *Wilson v. Kusumawathi [2015] BLR 49*, Justice Sisira de Abrew (with Justice Marsoof and Justice Sarath de Abrew agreeing), citing with approval *Jayasekera v. Lakmini*, held that failure to name all the parties in the Petition of Appeal is a curable defect in terms of section 759 of the Civil Procedure Code, so long as no material prejudice has been caused to the respondents.

In *Premaratna v. Sunil Pathirana (SC Appeal 49/2012 decided on 27.03.2015)*, Justice Wanasundera (with Justice Aluwihare and Justice Abeyratne concurring), citing *inter alia Jayasekera v. Lakmini*, held that:

"*The Petition of Appeal had not contained in the caption, the name of the substituted parties. I feel that, the mere fact that only the name of the dead person was mentioned in the caption, cannot be held against the party seeking relief from Court. It is a lapse on the part of the petitioner's Attorney-at-Law. The litigant who has come before Court for relief should not be deprived of his right to seek relief due to a lapse on the part of the lawyers preparing and filing the papers. In the case in hand, the dead person has been substituted promptly in the District Court and named as 1A and 1B defendants. It is only a lapse of not writing down the caption properly. I am of the view that this is a matter which should have been corrected by the High Court Judges as provided for in section 759(1) and (2). It is not an incorrigible defect, good enough for rejecting the Petition of Appeal.*"

The learned counsel for the 6th defendant-respondent says that the last Judgment cited above has no binding effect on this Court as it is *per incuriam* in view of the Five Bench Judgment of the Supreme Court in *Jeyaraj Fernandopulle v. Premachandra de Silva [1996] 1 Sri LR 70* where it has been held that: "*The court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead or a non-existent company or, in certain circumstances, a judgment in default or a consent judgment. Where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the Court will set it aside*." I am unable to agree. Firstly, as seen from page 105 of the said Judgment, that is only a citation from Halsbury, Vol.26, Paragraph 556. Secondly, it speaks of Judgments entered against persons who were dead at that time. Here no such situation has arisen. The Judgment has not been entered against a dead party. The main appeal has not, at least, been taken up for argument yet.

In the instant case, as I stated earlier, no prejudice has been caused to the 6th plaintiff-respondent by not naming the substituted 1st and 3rd plaintiff-respondents as parties to the Notice of Appeal and the Petition of Appeal.

The amended caption which has been filed with notice to the registered Attorney of the plaintiff-respondents with the petition and affidavit dated 01.04.2013 is accepted.

The preliminary objection is overruled subject to costs in a sum of Rs.25,000/= payable by the 6th plaintiff-respondent to the substituted defendant-appellant.

Counsel for both parties move to fix the main appeal for argument for 22.02.2019.

Before I part with this order, I must mention that the 6th defendant-respondent in his statement of objections tendering a document marked A, has stated that the 2nd plaintiff also died pending appeal. However, that document is not a copy of the Death Certificate of the 2nd plaintiff. If the 2nd defendant is in fact dead, the registered Attorney for the 6th plaintiff-respondent shall, with a copy to the registered Attorney for the appellant, tender a copy of the Death Certificate together with a name of a person who can be substituted in his place, within one month from today, for the limited purpose of prosecuting this appeal. Court will appreciate if the proxy of the party to be substituted can also be tendered to avoid formalities as this is a simple declaration of title action filed more than 38 years ago in July 1980.

Judge of the Court of Appeal