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

In the matter of an Appeal 1 to the Court of Appeal of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No.1118/1999 (F)

D.C. Balapitiya Case No.928/P

Meera Maar Beach Hotel Co. Ltd.,
No. 137, Vauxhall Street,
Colombo.
PLAINTIFF

-Vs-

1. **Heethaka Sanion de Soysa** (Deceased)
   Paratharathe, Kosgoda.
1A. **Anthonidura Pushpa de Soysa**
   Paratharathe, Kosgoda.
2. **Heethaka Seelin Nona de Soysa**
   Paratharathe, Kosgoda.
3. **Heethaka Disilin Nona de Soysa**
   Paratharathe, Kosgoda.
4. **Medibe Padumawathie**
   Nape, Kosgoda.
5. **Medibe Wansawathie**
   Nape, Kosgoda.
6. **Medibe Wilson**
   Nape, Kosgoda.
7. **Handunetti Leelawathie de Soysa**
   Nape, Kosgoda.

8. **Appuwadura Ariyawathie de Soysa**
   Nape, Kosgoda.
9. **Appuwadura Kumara de Soysa**
   Nape, Kosgoda.
10. **Agampodi Sarlin Mendis** (Deceased)
    Nape, Kosgoda.

10A. **Jagasmuni Waralin de Soysa**
    Paratharathe, Kosgoda.

11. **Agampodi Laantin Mendis** (Deceased)
    Nape, Kosgoda.

11A. **Epatha Sherman de Soysa**
    Paratharathe, Kosgoda.

12. **Heethaka Sisil Upali de Soysa**
    Nape, Kosgoda.
13. **Ranjith de Soysa**
    Nape, Kosgoda.
14. **Heethaka Dickson de Soysa**
    Nape, Kosgoda.
15. **Heethaka Allen de Soysa**
    Nape, Kosgoda.
16. **Heethaka Amitha de Soysa**
    Wilegoda, Ambalangoda.
17. **Heethaka Gnanawathie de Soysa**
    Wilegoda, Ambalangoda.
18. **Heethaka Siriyawathie**
    Wilegoda, Ambalangoda.
19. **Heethaka Siriyawathie de Soysa**
    Wilegoda, Ambalangoda.
20. **Heethaka Chandrawathie de Soysa**
    Wilegoda, Ambalangoda.

21. Heethaka Banduwathie de Soysa
Wilegoda, Ambalangoda.

22. Heethaka Hada de Soysa
Wilegoda, Ambalangoda.

23. Heethaka Nalin de Soysa
Wilegoda, Ambalangoda.

24. Heethaka Mala de Soysa
Wilegoda, Ambalangoda.

25. Heethaka Rukman de Soysa
Wilegoda, Ambalangoda.

26. Heethaka Sirima de Soysa
Wilegoda, Ambalangoda.

DEFENDANTS

AND NOW BETWEEN

1A. Anthonidura Pushpa de Soysa
Paratharathe, Kosgoda.

2. Heethaka Seelin Nona de Soysa
Paratharathe, Kosgoda.

18. Heethaka Siriyawathie
Wilegoda, Ambalangoda.

19. Heethaka Siriyawathie de Soysa
Wilegoda, Ambalangoda.

20. Heethaka Chandrawathie de Soysa
Wilegoda, Ambalangoda.

1A, 2nd, 18th, 19th & 20th DEFENDANT-APPELLANTS

-Vs-

Meera Maar Beach Hotel Co. Ltd.,
No. 137, Vauxhall Street,
Colombo.
PLAINTIFF-RESPONDENT

3. Heethaka Disilin Nona de Soysa
   Paratharathe, Kosgoda.
4. Medibe Padumawathie
   Nape, Kosgoda.
5. Medibe Wansawathie
   Nape, Kosgoda.
6. Medibe Wilson
   Nape, Kosgoda.
7. Handunetti Leelawathie de Soysa
   Nape, Kosgoda.
8. Appuwadura Ariyawathie de Soysa
   Nape, Kosgoda.
9. Appuwadura Kumara de Soysa
   Nape, Kosgoda.
10A. Jagasmuni Waralin de Soysa
   Paratharathe, Kosgoda.
11A. Epatha Sherman de Soysa
   Paratharathe, Kosgoda.
12. Heethaka Sisil Upali de Soysa
   Nape, Kosgoda.
13. Ranjith de Soysa
   Nape, Kosgoda.
14. Heethaka Dickson de Soysa
   Nape, Kosgoda.

15. **Heethaka Allen de Soysa**
Nape, Kosgoda.

16. **Heethaka Amitha de Soysa**
Wilegoda, Ambalangoda.

17. **Heethaka Gnanawathie de Soysa**
Wilegoda, Ambalangoda.

21. **Heethaka Banduwathie de Soysa**
Wilegoda, Ambalangoda.

22. **Heethaka Hada de Soysa**
Wilegoda, Ambalangoda.

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Wilegoda, Ambalangoda.

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Wilegoda, Ambalangoda.

25. **Heethaka Rukman de Soysa**
Wilegoda, Ambalangoda.

26. **Heethaka Sirima de Soysa**
Wilegoda, Ambalangoda.

DEFENDANT-RESPONDENTS

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

COUNSEL : Gamini Marapana, PC with Keerthi Sri Gunawardana and Navin Marapana for the 1A, 2nd, 18th, 19th & 20th Defendant-Appellants

Rohan Sahabandu, PC with Surekha Withanage for the 18A Defendant-Appellant

Anuruddha Dharmaratne with Upendra Walgampaya for the Plaintiff-Respondent

Mokshini Jayamanne for the 26th Defendant-Appellant

Decided on : 05.12.2017

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

A preliminary objection has been taken to the maintainability of this appeal. In a nutshell the contention of the Plaintiff-Respondent is that the petition of appeal dated 09.12.1999 does not contain a prayer for setting aside the judgment of the court *a quo* and therefore it is fatally flawed. Mr. Anuruddha Dharmaratne for the Plaintiff-Respondent quite eloquently submitted that it is imperative that the petition of appeal must contain a demand for relief namely a prayer that the judgment of the District Court be set aside. He submitted that it is only then that the petition of appeal would comply with Section 755(3) and Section 758(1)(f) of the Civil Procedure Code (hereinafter sometimes referred to as "the Code" or "CPC").

The impugned petition of appeal before this Court contains only the following plea - *"It is respectfully, submitted that the plaintiff's action be dismissed"*.

Signed

Attorney-at-Law for the Appellants

Both Counsel for the Plaintiff-Respondent and Ms. Mokshini Jayamanne for the 26th Defendant-Respondent on behalf of the legal aid commission contended that the aforesaid sentence - *"It is respectfully submitted that the plaintiff's action be dismissed"* would not suffice for purposes of Section 755(3) and 758(1)(f) of the Civil Procedure Code. Both counsel chorused in unison that the way in which the petition of appeal is couched as above, would not qualify, without more, to be a proper petition of appeal and hence it has to be rejected *in limine*.

The argument was that the petition of appeal must pray for what the counsel called a "substantive relief" such as a demand that the judgment of the District Court be set aside and an "incidental relief" such as *"plaintiff's action be dismissed"*. Only then the

petition of appeal will become compliant with Sections 755(3) and 758(1)(f) of the Civil Procedure Code.

At this stage both the above provisions of the Code bear scrutiny.

Section 755(3) Code states as follows:-

> *"Every appellant shall within sixty days from the date of the judgment or decree appealed against, present to the original court, a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty. Provided that, if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against, the court shall refuse to receive the appeal."*

Section 758(1) which is a concomitant accompaniment to Section 755(3) reads thus:-

> *"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**"*

At first blush upon a careful reading of the two provisions it would appear that *"a demand of the form of relief claimed"* as described in Section 758(1)(f) of the Code is an indispensable adjunct to a petition of appeal because the word "shall" is used in the

chapeau of Section 758(1) of the Civil Procedure Code. Has such a demand been made for a form of relief in the petition of appeal? If so, is it sufficient for purposes of Section 758(1)(f) of the CPC?

The form of relief that has been couched in the petition of appeal goes as follows:-

"It is respectfully submitted that the plaintiff's action be dismissed"

Mr. Gamini Marapana, PC submitted in his forceful reply to the preliminary objection that the precatory words - *"It is respectfully submitted that the plaintiff's action be dismissed"* is certainly a demand as a demand could well be. A demand could be a precatory plea as above and the draftsman of the provincial bar who formulated the petition of appeal did not commit a cardinal sin when he put pen to paper what he thought he must demand of the Court of Appeal. But Mr. Anuruddha Dharmaratne submitted that there has to be an order in which the relief must sequentially be demanded from the Court of Appeal namely,

1. the judgment of the District Court be set aside
2. dismiss the plaintiff's action
3. any other relief

In the petition of appeal under impugnation, Mr. Anurudda Dharmaratne submitted that the above order is missing or the absence of prayer (1) above from the petition of appeal renders the petition incurably deficient and so it must be dismissed. He further argued that the sentence *"It is respectfully submitted that the plaintiff's action be dismissed"* is not a demand and additional forms of reliefs must have been demanded such as "the judgment of the District Court be set aside."

As opposed to this contention, Mr. Gamini Marapana, PC submitted that a demand could be respectful and the words *"It is respectfully submitted that the plaintiff's action be dismissed"* amount to nothing but an unambiguous form of demand which duly complies with Section 758(1)(f) of the Civil Procedure Code.

If I may summarize Mr. Anuruddha Dhramaratne's argument in yet another way, the learned Counsel argued that there must be prayers that must plead the following namely "appeal be allowed" and "the judgment of the District Court be set aside". If these prayers are not inserted in a petition of appeal, such a petition of appeal must be dismissed *in limine*. The learned President's Counsel countered this by contending that this objection was being raised rather late in the day and such a belated objection was being put forward to deprive the appellants of the merits of their appeal being investigated by this Court and in fact the learned President's Counsel invoked the celebrated words of Sydney Abraham, CJ in ***Dulfa Umma et al v. U.D.C. Matale*** 40 N.L.R. 474 at p. 478:-

> *"Civil procedure should be a vehicle which conveys a litigant safely, expeditiously and cheaply along the road which leads to justice and not a juggernaut car which throws him out and then runs over him leaving him maimed and broken on the road."*

Ms. Mokshini Jayamanne who appeared for the 26th Defendant-Respondent associated herself with the submissions made by Mr. Anuruddha Dharmaratne.

If I once again summarize the submissions made towards the dismissal of the petition of appeal, the pith and substance of the submission is that the plea "*it is respectfully submitted that the plaintiff's action be dismissed*" does not satisfy Section 758(1)(f) of the Civil Procedure Code. In other words it does not amount to a demand.

The petition of appeal must have incorporated pleas such as "appeal be allowed" or "the judgment of the District Court be set aside". In fact, the argument was that no relief has been claimed and so this Court must dismiss the petition of appeal.

Before I determine the interesting issue arising in this appeal, let me deal with some case law that the Counsel for the Plaintiff-Respondent cited to buttress his argument, which succinctly put, meant "if there is no demand, there will be no relief".

Surangi v. Rodrigo (2003) 3 Sri L.R. p.35 was the first case to be cited. Section 40(e) of the Civil Procedure Code stipulates that a demand of the relief which the Plaintiff

claims must be specified as an essential particular in a plaint. Gamini Amaratunga J. adverting to the above at p.38 of the judgment stated that no court is entitled or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint. The learned Judge cited ***Sirinivasa Thero v. Sudassi Thero*** 63 N.L.R. 31; ***Martin Singho v. Kularatne*** CA 248/1995 CA minutes of 18.12.96; ***Wijesuriya v. Senaratne*** (1997) 2 Sri L.R. 323.

It has to be remembered that the failure to comply with Section 40(e) of the Code does not result in an automatic dismissal of the plaint. Under Section 46(2) of the Civil Procedure Code, the Court may return the plaint for amendment then and there, or within such time as may be fixed by the Court. So "no prayer for relief, no relief" is not a mantra that gives an unqualified licence to reject the plaint. As far as plaints are concerned, a curative provision exists in the form of Section 46(2) of the CPC to ensure *audi alteram partem*. But the question before me is whether there is a relief or no relief at all that has been claimed in the petition. I take the view that the plea "*It is respectfully submitted that the plaintiff's action be dismissed*" is certainly a form of relief demanded of the Court of Appeal as contemplated in Section 758(1)(f) of the Civil Procedure Code. It is a demand, albeit in polite terms, as there is no prohibition for demands to be made in precatory terms. It is not as if a demand for a relief has not been prayed for in the petition of appeal. The invocation "*the plaintiff's action be dismissed*" certainly qualifies to be a form of relief as contemplated within the ambit of Section 758(1)(f) of the Civil Procedure Code.

So in my view the allusion to ***Surangi v. Rodrigo*** (*supra*) could not be pertinent as Justice Amaratunga was dealing with a situation where there was no demand at all for permanent alimony in that case. In ***Surangi v. Rodrigo*** (*supra*), the Plaintiff claimed a divorce on malicious desertion/constructive desertion from her husband and also damages at Rs. 700,000/- as permanent alimony. The Defendant contended in the answer that the Plaintiff had no right to claim damages. The Plaintiff, after her evidence was led, raised an issue whether the Plaintiff was entitled to permanent

alimony in a sum of Rs. 700,000/-. This was objected to on the basis that there was no prayer for permanent alimony. This was upheld by the District Court.

Upon appeal, Gamini Amaratunga J. held that;

1. No Court is entitled to or has jurisdiction to grant reliefs to a party which are not prayed for in the plaint.
2. In the absence of a prayer for alimony, the Court was correct in refusing to allow the Petitioner to frame an issue relating to alimony.

As I said before, the case before me does not present a situation where no relief has been demanded in the petition of appeal. The relief demanded is that the action filed in the District Court should be dismissed. The question is whether this Court possesses the power to grant this relief in its appellate jurisdiction. The answer would be in the affirmative for the following reason.

The power of the Court of Appeal on an appeal is set out in Section 773 of the Code:-

> *"Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree, or order, according to law, or to pass such judgment, decree or order therein between and as regards the parties, or to give such direction to the court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial."*

In fact Articles 138 and 139(1) of the Constitution expatiate on the appellate jurisdiction *in extenso*. Article 139(1) of the Constitution which is marginally titled as *Powers in appeal* sets out as follows:-

> *The Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, decree or sentence according to law or it may give directions to such Court of First*

Instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit.

Thus one can see how both Section 773 of the Civil Procedure Code and Article 139(1) of the Constitution echo the identical language and mirror the appellate power of this Court in similar import. They are so extensive enough to enable this Court to set aside the judgment of the District Court and dismiss the case of the Plaintiff provided this Court finds for the Defendant-Appellant. It has to be remembered that Section 773 does not use the words "allow the appeal or set aside the judgment of the District Court" though these words do often appear in pleadings. But words to that effect are reflected in the provisions. Words such as "*affirm, reverse, correct or modify any judgment, decree, or order....*" connote among other things the setting aside the judgment and once it is done by the Court of Appeal, what follows would be the dismissal of the action. Even the most commonplace pleadings do not pray for " reversals" but rather invoke a "setting aside or allowing the appeal" words which are not found in Section 773 but the legalese "setting aside the judgment", though not found in Section 773, passes muster owing to its over frequent usage.

What then could be the objection to a petition of appeal that prays for the ultimate relief namely "*the plaintiff's action be dismissed*"? Even if the exact formulae as found in these provisions namely "*affirm, reverse, correct or modify any judgment, decree, or order, according to law,.....*" are not used by pleaders in their petitions of appeal, the Court of Appeal in its final judgment achieves these results and one cannot then cry foul of a petition of appeal that submits in precatory terms that the plaintiff's action be dismissed.

As Mr. Gamini Marapana, PC quite rightly submitted, such an invocation is a form of relief demanded of this Court and on reflection this conclusion that it is a demand as a demand could be is also supportable having regard to the following considerations too.

If in the exercise of its appellate jurisdiction the Court of Appeal proceeds to reverse a judgment, it would necessarily have the effect of dismissing the action of the Plaintiff in the court below and if a Defendant-Appellant *qua* the Appellants before me submits that the action be dismissed, it is implicit in that submission that he invokes the appellate jurisdiction of this Court to do one of the acts stipulated in the aforesaid provisions namely "..... *reverse the judgment, decree, or order, according to law,.....*". Because the Appellants have not used a particular form of words such as "*the appeal be allowed*" or "*the judgment of the District Court be set aside*", it is no reason that their appeal must be dismissed.

So it becomes clear that the relief sought in the petition of appeal namely "*the plaintiff's action be dismissed*" is capable of being granted by this Court in its appellate jurisdiction and therefore ***Surangi v. Rodrigo*** *(supra)* has no application at all to this case because in ***Surangi*** there was no relief sought whereas in this case before me there is clearly a relief sought namely "*the plaintiff's action be dismissed*". In the same way the case of ***Weragama v. Bandara*** 77 N.L.R. 289 would be similarly inapposite to this appeal.

In this case the 1st Plaintiff had sought a declaration that he was the Maha Kapurala of the Maha Saman Dewale. The trial Judge held that it had not been proved that there was an office of Maha Kapurala of the Dewale. Nevertheless he answered the issues framed relating to the 1st plaintiff's claim to be Maha Kapurala and granted him a declaration that he was a Kapurala of the Dewale.

Samarawickrame J. held that the trial Judge had erred in granting the 1st Plaintiff relief not prayed for and not claimed in the action by him.

As is apparent the instant appeal before me does not throw up such issues. The form of relief demanded in the instant petition of appeal is the dismissal of the plaintiff's action. At the end of the conclusion of this appeal, this relief is capable of being granted by this Court if this Court takes the view that the appeal must be allowed and the judgment of the learned District Judge should be set aside. Merely because the Appellant has omitted to add the prayers, "*appeal be allowed and the judgment be set*

aside", it does not disentitle him to maintain this appeal. It is open to him to have and maintain the appeal because he has added a prayer- "*the plaintiff's action be dismissed*". Thus there is a form of relief that has been sought in the case and this is exactly what Section 758(1)(f) of the Civil Procedure Code requires a pleader to do and the pleader in this case has done just that-namely couching his relief in the form-"*the plaintiff's action be dismissed.*"

In an identical manner ***Inaya v. Fathima*** (2006)2 Sri L.R. 124 was also cited by Counsel for the Plaintiff-Respondent. The Court of Appeal held in that case that in the absence of a prayer seeking leave to appeal from a specific order made by the original court and without praying to set aside that order, one cannot seek a declaration and a direction to be given to the trial judge. The Counsel for the 2nd Defendant-Respondent in *Inaya's* case had taken up a preliminary objection that there was no prayer for leave to appeal from any order or a prayer for setting aside any order. In any event an application for leave to appeal must seek permission of Court of Appeal for an order in terms of Section 753(2) of the Civil Procedure Code and that plea was non-existent in ***Inaya v. Fathima*** *(supra)*. It was in those circumstances that the Court of Appeal rejected the application for leave to appeal.

In the instant appeal against a partition judgment from the District Court of Balapitiya, a form of relief has been demanded and I have held that a precatory plea for a dismissal of the plaintiff's action is within the four corners of the relief that is contemplated within Section 758(1)(f) of the Civil Procedure Code. I have held that this relief sought in the petition of appeal is capable of being awarded in terms of the wide powers of the Court of Appeal bestowed on it by both the Civil Procedure Code and the Constitution -see Section 773 of the Code and Articles 138 and 139(1) of the Constitution.

I must also allude to the submissions made by Ms. Mokshini Jayamanne. The learned Counsel cited the case of ***Illangakoon Mudiyanselage Gnanathilaka Illangakoon v.***

Anula Kumarihami S.C .H.C.C.A.LA 277/2011 (SC minutes of 05.04.2013). She placed reliance on the following words of Sripavan J. (as His Lordship then was) in the case:-

> *"The plaintiff in paragraph (b) of the prayer to the petition seeks to set aside the judgment of the Court of Appeal when in fact no judgment was delivered by the Court of Appeal but by the High Court of Central Province in Kandy."*

Thus in that case the pleader committed the faux pas of praying for an annulment of a judgment of the Court of Appeal when the judgment had in fact been delivered by the Provincial High Court. It was this defect along with some other cardinal errors such as non-compliance with Rules 28(2) and 28(5) of the Supreme Court Rules, 1990 that eventuated in the dismissal of the application for leave to appeal in ***Illangakoon Mudiyanselage Gnanathilaka Illangakoon v. Anula Kumarihami*** *(supra)*. Sripavan, J. (as His Lordship then was) also made some pertinent observations as to the importance of applying the skill and diligence required of an Attorney-at-Law.

> *"I must emphasize that when accepting any professional matter from a client, it shall be the duty of any attorney-at-law to exercise his skill with due diligence in drafting the necessary papers with due regard to its duty to Court and to the client."*

I must say that the degree of negligence that the Supreme Court found in the drafting of the application for leave to appeal in that case, which resulted in the dismissal of the application, is non-existent in this case. In the instant appeal before me it was only an omission to add two more prayers namely- *"the appeal be allowed and the judgment of the District Court be set aside"* that is being complained of as vitiating the petition of appeal. In my view these two remedies are subsumed in the relief that has been sought- *"the plaintiff's action be dismissed"*. I would further expatiate on this later in the judgment.

The Supreme Court in ***Illangakoon Mudiyanselage Gnanathilaka Illangakoon v. Anula Kumarihami*** had also followed the previous precedent of ***Sudath Rohana and Another v. Mohamed Zeena and Another*** (2011) 2 Sri L.R. 134; (2011) B.L.R 277

where Her Ladyship Dr. Shirani A. Bandaranayake, J. (as Her Ladyship then was) reiterated the importance of procedural law and cited with approval the pertinent observations of His Lordship Dr. Amerasinghe, J. in ***Fernando v. Sybil Fernando and others*** (1997) 3 Sri L.R. 1, wherein the learned Judge proclaimed:-

> *"Procedural law is not secondary; the two branches are complementary. When it is stated that the substantive law and procedural law are complementary, it signifies the importance of procedural law in a legal system. Whilst the substantive law lays down the rights, duties, powers and liberties, the procedural law refers to the enforcement of such rights and duties. In other words the procedural law breathes life into substantive law, sets it in motion, and functions side by side with substantive law."*

The combined effect of the respective arguments of Mr. Dharmaratne and Ms. Jayamanne was that the petition of appeal is defective and it should be dismissed. Mr. Dharmaratne also submitted that the plea "*setting aside of the judgment of the District Court*" must have been prayed for, because he contended that it was the *substantive relief* in an appeal, whilst the dismissal of the plaintiff's action is only *incidental.* Here the Appellants have only asked for the incidental relief as they have only prayed for a dismissal of the plaintiff's action without having asked for a setting aside of the judgment dated 22.10.1999. This is the fatal flaw that infects the petition of appeal. This was the argument of both Counsel for the Plaintiff-Respondent and the 26th Defendant-Respondent. The Counsel for the Appellants Mr. Marapana, PC quite forcefully traversed the arguments on two frontal positions.

1. The objection was belated.
2. There was a relief that has been properly prayed for.

On the question of belated objection he argued that this is a case which was argued thrice and after written submissions were filed by all parties, the hearing Judge had fixed the matter for judgment but the judgment was not pronounced as the learned Judge went into retirement thereafter. The Plaintiff-Respondent had filed his written

submissions and at no stage had he taken up this objection. An objection that has not been taken in time is deemed to be waived - so he argued. In ***Navaratnasingham v. Arumugam and Another*** (1980) 2 Sri L.R. 1 one finds this poignant observation.

> *"Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed and make a valid order. In the present case, the objection to jurisdiction was raised for the first time when the matter was being argued in the Court of Appeal and the objection had not even been taken in the petition filed before that Court".*

It was in this context that the learned President's Counsel Mr. Gamini Marapana, PC cited the ever resonant words of Dr. Amerasinghe, J. in ***Fernando v. Sybil Fernando and others*** *(supra)*

> *"Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly."*

This was in addition to his harking back to the analogy of Sydney Abraham, CJ in likening the usage of civil procedure like a juggernaut to throw a litigant out and run over him leaving him maimed and lame.

It is axiomatic that a court should not be fettered by technical objections on matters of procedure -see Dias, J., in ***Podihamy v. Simon Appu*** 47 N.L.R 503 at 504; G.P.S. De Silva, C.J., in ***Colgan and Others v. Udeshi and Others*** (1996) 2 Sri L.R. 220. I take the view that a defect in a petition of appeal, real or imaginary, cannot fetter and shackle the appellate jurisdiction of this Court so as to frustrate the administration of justice when this Court finds that the so called defect does not go to jurisdiction.

Be that as it may, it is his second argument that resonates with this Court and to which Mr. Dharmaratne responded again in reply reiterating his argument that one cannot ask for an *incidental relief* of dismissal without asking for a *substantive relief* of setting aside a judgment.

The learned President's Counsel for the Appellants submitted that the assertion in the petition - i.e., "*It is respectfully submitted that the plaintiff's action be dismissed*" is the final relief which would result when the court sets aside the judgment and in order to grant the final relief, this Court has to necessarily set aside the judgment of the District Court.

In my view, one cannot be too legalistic and literalistic with the terms "*substantive relief*" and "*incidental relief*". What reliefs that this Court can grant upon the conclusion of an appeal have already been set out by me, as is quite manifestly clear upon a perusal of Section 773 of the CPC. This Court is statutorily enjoined to grant these reliefs at the conclusion of the hearing of the appeal. Should the Appellant use the appropriate words stipulated in the said provision? In my view, it is preferable that if those words are used by pleaders. But what is the consequence that would ensue if the pleader omits to couch his relief in the words found in the Section 773 of the CPC? What if he does not use the commonplace phrase such as "*the appeal be allowed*"? Is it a ground on which the petition of appeal must be dismissed? Both upon principle and law I answer the question in the negative.

Section 759(2) of the CPC

I take the view that if there is clarity and no ambiguity as to the relief that an Appellant is praying for, an insistence on a strict adherence to language is bound to drive a coach and horses through the procedural enactment of Civil Procedure Code which has curative provisions that go a long way to ensuring due process for parties. In fact the better part of the argument before me was focused on Section 759(2) of the CPC-the curative provision that excuses mistakes, omission or defect on the part of any Appellant in complying with the provisions relating to appeals and Section 759(2) is a provision which vests a discretion in the Court of Appeal to grant relief to an Appellant for his lapses provided the Respondent has not been materially prejudiced.

In fact Mr. Anuruddha Dharmaratne argued that Section 759(2) cannot be applied in the case of these Appellants who have not prayed for a relief, whilst Mr. Marapana, PC contended that recourse to Section 759(2) does not arise as his Appellants have prayed for a relief and they have not violated any provisions pertaining to the procedure of appeals.

Allowing the appeal and setting aside the judgment

After having given anxious consideration to the interesting arguments placed before me, I must observe as I have done in this judgment that there is a clear enough prayer that leaves no room for ambiguity. When the Appellants have pleaded that the plaintiff's action must be dismissed, the dismissal encompasses the process of "*allowing the appeal*" and "*setting aside the judgment*".

The final destination of dismissal of the plaintiff's action cannot be reached without passing the signposts of allowing the appeal and setting aside the judgment. In any event Section 773 of the CPC statutorily enjoins this Court to reverse any judgment according to law and this reversal necessarily entails the final result of dismissing the action of the plaintiff's action. The relief sought - i.e., *dismissal of the plaintiff's action* admits of no doubt as to what the Appellants have sought in this appeal and before this relief is granted, this Court has to do one of the constituent acts of Section 773 such as reversing the judgment to grant the relief that the Appellants have specifically sought in the petition of appeal.

One cannot put labels such as *substantive relief* and *incidental relief* on the remedies that this Court is empowered to grant namely an Appellant must use particular formulae in petitions of appeal (setting aside a judgment etc.,) and in default of such language being used, the Appellant must suffer the consequence of dismissal of his petition of appeal.

The Twelve Tables and Formalism of Roman Judges

This is reminiscent of Roman Judges who insisted on formalism in pleadings. In Roman law, the Twelve Tables introduced an action against anyone who secretly cut

down trees belonging to another's property. The action was known as *actio arborum furtim caesarum*. The fixed penalty of 25 asses for each tree was later changed to double value by the Praetorian action *actio de arboribus succicis*. So if one wished to sue a wrongdoer for cutting down trees, he had to use the exact form of words -*actio de arboribus succicis*. Gaius in his *Institutes* 4.11 attests to the odiously technical view Roman Judges took of the form of the action. It so happened that one wanted to sue another for cutting down his vines. The Roman Judges were so formalistic that a man who, in suing for the cutting down of his vines, used the word "vines" lost his case; he ought to have used the word "trees" (*arboribus*). Though later this action was extended by interpretation to the case of "*vites succisae*" (the cutting down of vines), the Plaintiff was still bound to state the case in the terms of the original rule "*de arboribus succicis*" only and any omission or variation in the prescribed form nullified the action. Once the pleadings were filed, it could not be retracted, repeated or amended, and it completely extinguished the party's statutory right of action. So in Roman law the exact *verba legis* (the letter of the law) should be employed.

We cannot act *a la* the Roman Judges, because our civil procedure does not require us to make a fetish of the written word. That is why the words such as "allow the appeal" are used quite liberally in a prayer even though this exact collocation of words is nowhere found in the Civil Procedure Code. It is non-existent in Section 773 of the CPC. The liberality shown towards drafting in our procedure, provided what the Appellant seeks is plain as a pikestaff, is in total contrast to the uncompromising literalism shown by Roman Judges and I am not inclined to dismiss this petition of appeal merely because it does not contain two additional prayers namely "*appeal be allowed*" and "*judgment of the District Court be set aside*". In my view they are subsumed in the relief that has been sought- "*the plaintiff's action be dismissed*" though this plea is, more often than not, found in plaints -see the Latin maxim *Omne majus continet in se minus (the greater includes the lesser)*. But that plea in the petition of appeal under

impugnation brings home what the Appellants want this Court to do provided it is permissible in law.

Before I part with this judgment I would like to make a few general observations. Non-compliance with any procedural enactment relating to a pleading should not entail automatic dismissal or rejection and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Our Civil Procedure Code teems with curative provisions to undo irregularities and I do not deem it necessary to resort to Section 759(2) of the CPC as I find that the plea "*the plaintiff's action be dismissed*" is a relief that has been demanded of this Court and it is within the plenary jurisdiction of this Court to grant such relief in appeal.

Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.

A code of procedure is a body of law designed to facilitate justice and further its ends, and should not be treated as an enactment providing for sanctions and penalties. *Ubi jus ibi remedium* (where there is a right, there is a remedy) is a principle that is ingrained in our legal system and this Court is invested with the widest possible discretion to see that proceedings that affect lives and property must continue in the presence of parties and they should not be precluded from participating in them owing to linguistic paucity imaginarily perceived in their pleadings.

So I would overrule the preliminary objections to the maintainability of this appeal and proceed to order that the argument on the merits is set down for hearing.

JUDGE OF THE COURT OF APPEAL