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

C.A. Case No.651/1997 (F)

D.C. Mount Lavinia Case No.1042/P

D. Ellen Weerasinghe *nee* Hettiarachchi
No.683/2, Station Road,
Maharagama.
PLAINTIFF

-Vs-

1. A.D. Piyasena Ramanayake
   Kurunegala Road, Alawathuwala,
   Anuradhapura.
   and 17 others
   DEFENDANTS

AND NOW BETWEEN

4a. Chandrawathie Ramanayaka
8. Don Premadasa ramanayaka
9. Don Darmadasa Ramanayaka
10. Don Karunawathie Ramanayaka
    all are from Garmana Road, Maharagama.
    7A, 8, 9, and 10 DEFENDANT-APPELLANTS

-Vs-

D. Ellen Weerasinghe *nee* Hettiarachchi

No.683/2, Station Road,

Maharagama.

PLAINTIFF-RESPONDENT

4a. Kottage Don Premawathie,

No.24/36, Gammana Road,

Maharagama

and 16 others

DEFENDANT-RESPONDENTS

AND

01(a)(a)/15(a). Anil Ramanayaka,

No.14, 2nd Lane, Gammana Road,

Maharagama.

Substituted 1(a)(a) and 15th DEFENDANT-APPELLANT

C.A. Case No.653/1997 (F)

D.C. Mount Lavinia Case No.1042/P

-Vs-

D. Ellen Weerasinghe *nee* Hettiarachchi

No.683/2, Station Road,

Maharagama.

PLAINTIFF-RESPONDENT

2a. S.C. Luxmi Devi Herath *nee* Ramanayake

Trinity College,

Kandy

and 18 others

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Rohan Sahabandu, PC with Surekha Withanage for the 7A, 8th, 9th and 10th Defendant-Appellants Upul Kumarapperuma with Ms. Udumbara Dasanayake for the 1(a)(a) and 15(a) Defendant-Appellant Samadhi Senevirathne with Yohan Gamage for the 4A Defendant-Appellant W. Jayathilake for the 16th Defendant-Respondent Mahinda Nanayakkara with Aruna Jayathilka for the 17(1) Defendant-Respondent
Decided on	:	22.06.2018

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

The preliminary objection that has been raised against the appeal of the 7A, 8th, 9th and 10th Defendant-Appellants is that their notice of appeal is not traceable and it is not found on the record.

I must observe that Journal Entries recorded in the case prove otherwise and there is evidence that a notice of appeal has indeed been filed.

The journal Entry No.53 dated 10.09.97 indicates that a notice of appeal was tendered on 10.09.1997 and it is crystal clear that this notice of appeal was given on behalf of the 7A, 8th, 9th and 10th Defendant-Appellants.

According to Section 755(3) of the Civil Procedure Code, the appealable period is prescribed as 60 days from the date of judgment. That is to say, "anyone who is dissatisfied with the judgment of the District Court shall file the petition of appeal within 60 days of such judgment. But as the first step, he shall file a notice of appeal within 14 days from the date of judgment". This is a pre-requisite of appeal proceedings.

Thus, the present provisions of the Civil Procedure Code, as amended by Law No. 20 of 1977, clearly provide for two stages in the process of appealing, namely:-

(i) the giving of a notice of appeal within 14 days of the date of judgment; and

(ii) the presentation of a petition of appeal within 60 days of the date of judgment.

The lodging of the notice of appeal within 14 days takes place in terms of Section 754 (3) of the Civil Procedure Code.

The first step that a party who prefers an appeal must take, in terms of the provisions of Section 754(3) of the Civil Procedure Code, is to file a notice of appeal in the original court, which passed the judgment or order within such time and in the form and in the manner prescribed. Section 754(3) states that "every appeal to the Court of Appeal from any judgment or order of any original Court shall be lodged by giving notice of appeal to the original Court within such time and in the form and manner hereinafter provided."

Actual notice of appeal means compliance with Section 755(1), (2) and Section 754(4) regarding the time within which the Notice of Appeal must be presented and also Section 755(1) and (5). Tissa Dias Bandaranayake, J. (with Wijetunge, J. agreeing) held in ***Mahatun Mudalali alias Parantota v. N.A. Naposingho*** 1986 (3) CALR 318 that these requirements are mandatory to constitute a proper Notice of Appeal, and if not fulfilled, the Court has the power to refuse to receive the Notice of Appeal-

Though the complaint raised before this Court is that the notice of appeal is not found in the record. he same record reflects the fact that the Appellants had filed their notice of appeal and as junior counsel for the 7A, 8th, 9th and 10th Defendant-Appellants has stated in the written submissions, the duty to maintain an accurate record with the documents in tow is an official act of the District Court. In fact this Journal Entry raises the presumption that **Judicial and Official Acts have been regularly performed**-see Illustration (d) to Section 114 of the Evidence Ordinance.

The rule embodied in the illustration flows from the maxim *omnia proesumuntur rite et solemnitere sse acta, i.e.*, all acts are presumed to have been rightly and regularly done.

In my view the minute in Journal Entry 53 raises the presumption in Illustration (d) to Section 114(d) of the Evidence Ordinance.

I had occasion to comment on this presumption in relation to a Journal Entry in **CA 765/2000** CA minutes of 30.05.2018. Even an earlier case **CA 477/2000** (F) decided on 12.09.2017 (A.H.M.D. Nawaz, J. with E.A.G.R. Amarasekara, J. concurring) went into this rebuttable presumption. It has been laid down that the Court is entitled to presume that the journal entries, made in a case in compliance with the requirements of Section 92 of the Civil Procedure Code, set out the sequence correctly-*see* ***Seebert Silva v. Aronona Silva*** (1957) 60 N.L.R 272

What the learned Justice Frederick Ninian Dimitri (F.N.D) Jayasuriya quite pertinently observed in ***Jayaweera v. Asst. Commissioner of Agrarian Services, Ratnapura and Another*** 1996 (2) Sri L.R. 70 becomes pertinent.

> *"It is not open to the petitioner to file a convenient and self serving affidavit for the first time before the Court of Appeal and thereby seek to contradict either a quasi judicial act or a judicial act."*

There was nothing proffered in this case to rebut this presumption being drawn. Therefore the argument that the notice of appeal is not seen on the record fails and in any event the resolution of this issue is also founded on the maxim '***actus curiae neminemgravabit'*** *i.e.*, an act of Court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law", said Cresswell, J. in ***Freeman v. Tranah*** (12 C.B. 406). If the notice of appeal is *non est* in the record, that is no ground to dismiss the appeal of the Appellant because it is not through his remissness that the notice of appeal may have gone missing from the record.

Once the notice of appeal is filed, the effect it entails was given in the case of ***MahatunMudalali*** *alias* ***Parantota v. N.A. Naposingho and Another*** *(supra);*

"the effect of filling the notice of appeal is to inform the Respondents that the jurisdiction of the lower court will be suspended once the appeal is taken and also to deprive the respondent temporarily of the fruits of his victory."

This passage harks back to the observations of the Lord Chancellor Lord Westbury in the case of ***The Attorney-General v. Herman James Sillem*** (1864) 11 E.R 1200 at 1208:-

"The ordinary rule is that once an appeal is taken from the judgment and decree of an inferior Court, the jurisdiction of that Court in respect of that case is suspended except of course in regard to matters to be done and directions to be given for the perfecting of the appeal and its transmission to the Court of Appeal."

The fact that the Appellants followed their notice of appeal with a petition of appeal is evidenced by the day stamp on the Petition of Appeal of the 7A, 8, 9 and 10th Defendant-Appellants which is dated 22.10.1997 and there is also an endorsement by the registrar on the first page of the Petition that it was accepted on 22.10.1997. All this shows that a properly constituted appeal exists before this Court pending disposal.

Once the petition of appeal as duly constituted has been lodged in this Court, it has been observed by the Supreme Court in ***Elias v. Cader and another*** SC Appeal No. 50/2008 on 28th June 2011:-

"For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law."

One need not have recourse to Section 759(2) of the Civil Procedure Code (CPC) as there is no mistake, omission or defect in complying with the provisions relating to notice of appeal and therefore the preliminary objections raised in regard to the appeal preferred by the 7A, 8th, 9th and 10th Defendant-Appellants have to be overruled.

In regard to the other objection raised namely some of the parties who were named in the District Court have not been named as respondents to the appeal Section 759(2) of the Civil Procedure Code would come into play.

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. I surveyed the case law surrounding this area in **CA Case No. 1105/1996 (F)** (CA minutes of 22.06.2018) and I would point to Section 770 of the CPC that resolves this issue.

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. In ***Kiri Mudiyanse v. Bandara Menika***, (1972) 76 N.L.R. 371 Pathirana, J. (with Rajaratnam, J agreeing) considered both ***Dias v. Arnolis*** 17 N.L.R 200 and ***Ibrahim v. Beebee*** 19 N.L.R 289. 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*** *(supra)* 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. As I observed in **CA Case No. 1105/1996 (F)** *(supra)*, the criteria to be adopted to exercise the discretion in Section 770 will depend on the 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 instant appeal, there is no allegation that any party has been *materially prejudiced* by the non-joinder of any original party 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.

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 L.R. 70 (G.P.S.de Silva CJ) and ***Jayasekera v. Lakmini and Others*** (2010) 1 Sri L.R. 41.

I also take note of the fact that this matter is yet to be argued and in the absence of any material prejudice which is palpable, the 1A and 15th Defendant-Appellants are permitted to amend their petition of appeal in order to bring in the original parties who are not before Court. The gravamen of the complaint of the 4 (a) Defendant-Appellant is that the Petition of Appeal filed by the 1A and 15th Defendant-Appellants is defective in that it contains the name of only the Plaintiff-Respondent and accordingly I allow the 1A and 15th Defendant-Appellants to cite the additional Respondents who should have been impleaded.

It would appear that none of the other objections would impact on these appeals and I would overrule them. Once the amended petition is filed, this matter could be set down for hearing.

JUDGE OF THE COURT OF APPEAL