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

Bulanawewe Gedera Loku Banda
Dharmasena,
Pelwehera, Madipola, Udasiya Pattuwa,
Udugoda, Matale.
Plaintiff

SC APPEAL NO: SC/APPEAL/29/2014
SC LA NO: SC/HCCA/LA/75/2013
HCCA KANDY NO: CP/HCCA/KANDY/62/2009 (F)
DC MATALE NO: P/2433

Vs.

1. Bulanawewe Gedera Abeyratne Banda
   Karunathilake,
   Pelwehera, Madipola, Matale.
2. Bulanawewe Gedera Tikiri Banda
   Dhanapala Bulanawewa,
   Bambaragaswewa (Deceased).

2(a). Sunil Dharmasiri Bandara,
Bulanawewa, Bambaragaswewa,
Galewela.

3. Bulanawewe Gedera Heen Banda,
   Meditation Institute, Polpithi
   Mukalana, Ja-ela (Deceased).

3(a). Lalitha Bulanawewa,
"Sandhasiri", Ganankete, Uhumeeya,
Kurunegala.

4. Ekanayake Mudiyanselage Somaratne,
   Pelwehera, Madipola, Matale.
5. Ekanayake Mudiyanselage
   Bulanawewe Gedadera Lalitha Kumari
   Herath,
   Kurunegala Road, Dombawela,
   Mahawela, Matale.
6. Ekanayake Mudiyanselage
   Bulanawewe Gedadera
   Narendrasinghe Karunathilake,
   No. 126 Road, Mahawehera, Madipola,
   Matale.
7. Ekanayake Mudiyanselage
   Bulanawewe Gedadera Abeywansa
   Amanodana,
   Bulanawewe, No. 126 Road,
   Mahawehera, Madipola, Matale.
8. Ekanayake Mudiyanselage
   Bulanawewe Gedadera Anurudhdhika
   Jinadharee Indrani Bulanawewe,
   C/o Indrani Caldera, Dabagolla Road,
   Galewela, Matale.

   Defendants

AND BETWEEN

Ekanayake Mudiyanselage Somaratne,
Pelwehera, Madipola, Matale.
4th Defendant-Appellant

Vs.

Bulanawewe Gedera Loku Banda
Dharmasena,
Pelwehera, Madipola, Udasiya
Pattuwa, Udugoda, Matale.
Plaintiff-Respondent

AND NOW BETWEEN

Ekanayake Mudiyanselage Somaratne,
Pelwehera, Madipola, Matale.
4th Defendant-Appellant-Appellant

Vs.

Bulanawewe Gedera Loku Banda
Dharmasena,
Pelwehera, Madipola, Udasiya
Pattuwa, Udugoda, Matale.
Plaintiff-Respondent-Respondent

1. Bulanawewe Gedera Abeyratne Banda
   Karunathilake, Pelwehera, Madipola,
   Matale.
2. Bulanawewe Gedera Tikiri Banda
   Dhanapala Bulanawewa,
   Bambaragaswewa (Deceased).

2(a). Sunil Dharmasiri Bandara
Bulanawewa,
Bambaragaswewa, Galewela.

3. Bulanawewe Gedera Heen Banda,
Meditation Institute, Polpithi
Mukalana, Ja-ela (Deceased).

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8. Ekanayake Mudiyanselage
Bulanawewe Gedadera Anurudhdhika
Jinadharee Indrani Bulanawewe,
C/o Indrani Caldera, Dabagolla Road,
Galewela, Matale.

Defendant-Added Respondents

Before: Murdu N.B. Fernando, P.C., J.
S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Kushan De Alwis, P.C., with Anuruddha Dharmaratne and Shashindra Mudannayake for the 4th Defendant-Appellant-Appellant.
Dulindra Weerasuriya, P.C., with H.K.M. Pasan Malinda for Plaintiff-Respondent-Respondent.

Argued on : 15.11.2022

Written submissions:
by the 4th Defendant-Appellant-Appellant on 16.04.2014.
by the Plaintiff-Respondent-Respondent on 05.06.2014.

Decided on: 06.04.2023

Samayawardhena, J.

This is a partition action. At the time of the trial, in addition to the plaintiff, there were eight defendants. The only contesting defendant was the 4th defendant. The others were sailing with the plaintiff. Those defendants (except the 4th) did not raise issues, cross-examine the plaintiff's witnesses or lead evidence. After trial, the District Judge of Kandy entered judgment as prayed for by the plaintiff allotting undivided shares to all the parties. Being dissatisfied with the judgment, the 4th defendant appealed to the High Court of Civil Appeal of Kandy. At the argument before the High Court, counsel for the plaintiff-respondent moved that the appeal be dismissed *in limine* since the other defendants had not been made parties and hence there was no properly constituted appeal.

The High Court upheld this preliminary objection and dismissed the appeal. This appeal by the 4th respondent is against the judgment of the High Court.

In terms of section 755(1)(c) and (d), and section 758(1)(b) and (c) of the Civil Procedure Code, the notice of appeal and the petition of appeal shall contain *inter alia* the names and addresses of the parties to the action and the names of the appellants and the respondents. The failure to name the 1st-3rd and 5th-8th defendants as parties to the appeal violates these sections.

In *Talayaratne v. Talayaratne* (1957) 61 NLR 112 the Supreme Court held "*The Civil Procedure Code does not require a party appellant to name as respondent to an appeal every party to the proceedings in the lower Court. A party against whom no order is sought by the appellant need not be named as a respondent.*"

It was held in *Ibrahim v. Beebee* (1916) 19 NLR 289 at 293 that for the proper constitution of an appeal, all parties to an action who may be prejudicially affected by the result of the appeal should be made parties.

This means, not all the parties, but all the necessary parties shall be made parties to the appeal. Necessary parties to the appeal are the parties who will be prejudicially or adversely affected by the result of the appeal.

The Civil Procedure Code provides for the rectification of such defects in appropriate cases.

Section 759(2) of the Civil Procedure Code reads as follows:

> *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.*

In terms of this section, any mistake, omission or defect on the part of any appellant in complying with the provisions of chapter 58, which deals with appeals, may be remedied if it has not caused material prejudice to the respondent. As noted in cases such as *Martin v. Suduhamy* [1991] 2 Sri LR 279 and *Keerthisiri v. Weerasena* [1997] 1 Sri LR 70, what is contemplated in section 759(2) is not mere prejudice but material prejudice.

In the Supreme Court case of *Nanayakkara v. Warnakulasuriya* [1993] 2 Sri LR 289 at 290, Kulatunga J. stated:

> *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 the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.*

Drawing the attention of the Court to section 759(2) of the Civil Procedure Code, learned President's Counsel for the 4th defendant-appellant contends that the failure to name the 1st-3rd and 5th-8th defendants as parties to this appeal caused no material prejudice to those defendants, as they did not actively participate in the trial because they were sailing with the plaintiff. I am unable to agree with this submission for the reason that, after trial, the District Judge in his judgment allotted undivided shares to all the defendants, and in the event the 4th defendant's appeal was allowed, those defendants would have been materially prejudiced as the 4th defendant seeks dismissal of the plaintiff's action. Undoubtedly, those defendants are necessary parties to the appeal.

In my view, section 759(2) is inapplicable to cater to a situation such as the present one where the issue is failure to name necessary parties as respondents. A careful reading of section 759(2) reveals that it caters to a situation where the Court can grant relief to an appellant despite mistake, omission or defect "if it should be of opinion that the respondent has not been materially prejudiced". When a necessary party has not been made a respondent, this section has no applicability.

I am aware that relief has been granted for failure to make necessary parties as parties to the appeal under section 759(2) on the basis that no material prejudice has been caused by such failure. This seems to me not to be correct. The question is not whether prejudice has been caused to the named respondents by not naming necessary parties as respondents, which, to my mind, is meaningless. If that interpretation is given, the appellant can name only parties who support him as respondents and say no prejudice has been caused to them by the failure to name other parties as respondents.

Apart from naming the correct parties as respondents, there are several other requirements to be fulfilled for the constitution of a proper appeal. *Vide*, for instance, sections 755(1)(a), (b) and (e), 756, 758(a), (d) to (f). Section 759(2) refers to those requirements.

In a situation such as in the instant appeal, the applicable section is section 770 of the Civil Procedure Code, which 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, the court may issue the requisite notice of appeal for service.

If at the hearing of the appeal, it is brought to the notice of Court or the Court *ex mero motu* realises that a necessary party has not been named as a respondent to the appeal or, having made a respondent, notice has not been served on him, the Court need not dismiss the appeal *in limine* on the ground that the appeal is not properly constituted. The Court has the discretion to rectify such defects under section 770.

The invocation of section 770 is not a right of the appellant but is at the discretion of the Court, which the Court shall exercise judicially and not arbitrarily or capriciously.

I am conscious of the fact that it was the view of the Supreme Court especially in the past that failure to make necessary parties respondents to the appeal was a fatal irregularity which could not be cured by the application of section 770 – *vide Seelananda Thero v. Rajapakse* (1938) 39 NLR 361.

Nevertheless, the Full Bench decision of the Supreme Court in the case of *Ibrahim v. Beebee* (1916) 19 NLR 289 considered the application of section 770 somewhat favourably in instances where necessary parties are not made parties. The Full Bench held that where an appeal has not been properly constituted by the necessary parties being made respondents, the appeal should be dismissed "*unless the defect is not one of an obvious character which could not reasonably have been foreseen and avoided*." The discretion was considerably limited by this qualification. In the circumstances of that case, however, the Full Bench was inclined to act under section 770 to cure the defect where necessary parties were not made parties to the appeal.

More often than not, *Ibrahim v. Beebee* was followed in later cases, not to grant but to deny relief under section 770.

In *Suwarishamy v. Thelenis* (1952) 54 NLR 282 the 1st plaintiff respondent took up the objection that the appeal was not properly constituted in that the 3rd plaintiff, who is a necessary party, had not been made a respondent. The appellant accepted that the 3rd plaintiff was a necessary party but moved to act under section 770.

Following *Ibrahim v. Beebee*, the Supreme Court was not inclined to grant relief under section 770. Gunasekara J. stated: "*In the present case, which is an action for partition of land, the order that is appealed from was made upon an intervention by the appellants, who claimed to have succeeded to certain interests that at one time belonged to one Eliashamy. The learned District Judge after inquiry held that Eliashamy's interests have now devolved on the 1st plaintiff and the 3rd plaintiff. In these circumstances it is not possible to say that it was not obvious that the 3rd plaintiff was a necessary party or that the defect was not one that could not reasonably have been foreseen and avoided.*" Accordingly, the appeal was dismissed *in limine*.

In cases such as *Gunasekera v. Perera* (1971) 74 NLR 163, *Wijeratne v. Wijeratne* (1971) 74 NLR 193, H.N.G. Fernando C.J. followed *Ibrahim v. Beebee* to refuse relief under section 770.

The oft-quoted judgment of the Court of Appeal in *Wimalasiri v. Premasiri* [2003] 3 Sri LR 330, which held *"default of citing a person not living as the respondent in the notice of appeal and the petition of appeal which resulted from the negligence of the defendant-appellant and the registered Attorney-at-Law would render notice and the petition of appeal void ab initio. The defect being incurable the defendant-appellants cannot seek relief under section 759(2)*" cannot be treated as good law in view of the

Supreme Court judgment in *Nanayakkara v. Warnakulasuriya* [1993] 2 Sri LR 289 at 293, where Kulatunga J. held "*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 as in the cases of default curable under Sections 86(2), 87(3) and 771. Such negligence may be relevant but it does not fetter the discretion of the Court to grant relief where it is just and fair to do so.*" In any event, in *Wimalasiri v. Premasiri* the Court of Appeal did not consider the applicability of section 770 at all.

In *Kiri Mudiyanse v. Bandara Menika* (1972) 76 NLR 371, the Supreme Court did not find favour with the restrictive approach adopted by the Full Bench of the Supreme Court in *Ibrahim v. Beebee* in interpreting section 770. In *Kiri Mudiyanse*, the plaintiff-respondent relying on *Ibrahim v. Beebee* raised a preliminary objection that the appeal was not properly constituted as some of the defendants who had been granted shares in the judgment had not been made party respondents to the appeal and that only the plaintiff-respondent had been made a party respondent. Pathirana J. with the agreement of Rajaratnam J. at pages 375-377 stated:

> *With all due respects to the decisions that have been followed regarding the principles on which the discretion had been exercised in respect of section 770, while admitting that there may be much to be said for the principles enunciated in these cases, I am of opinion that the Court cannot be fettered in exercising a discretionary power which is given so widely by section 770 by being bound to exercise the discretion only in conformity with the principles laid down in those cases.*
>
> *To emphasise my point that the principle laid down in Ibrahim v. Beebee is not the sole criterion for exercising the discretion under section 770, I would refer to the case of Dias v. Arnolis (1913) 17*

NLR 200 which is a full bench decision. …. The case of Dias v. Arnolis had not laid down the principle which formed the decision in Ibrahim v. Beebee, namely, that the power of dismissal should be exercised unless the defect is not one of an obvious character which could not have been reasonably foreseen and avoided. On the other hand, the question whether or not the respondent ought to be added in a particular case is a question for decision of the judge who hears the appeal was laid down in the full bench case. Much the same flexible language was used by Shaw J. in Ibrahim v. Beebee when he stated as the second reason for the exercise of the discretion, namely, unless some good cause is given for non-joinder.

With all respects to the decisions which followed Ibrahim v. Beebee and while we are conscious of the commendation attached to it that it had been consistently followed, I would rather on the facts and circumstances in this case prefer to follow the principles laid down in the full bench case of Dias v. Arnolis and also the second reason given by Shaw J. in Ibrahim v. Beebee by stating that the exercise of the discretion is a matter for the decision of the judge who hears the appeal in the particular case and also that it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

Rajaratnam J. added at page 378:

Section 770 of the Civil Procedure Code has survived intact all the authorities referred to above to give us still an unfettered discretion to adjourn the hearing of the appeal to a future date and to direct that the 1st to the 3rd and 6th to the 8th defendants be made respondents and the requisite notices of appeal be issued to the Fiscal for service. We have done so in the interests of a just hearing

> *of the appeal while being most respectfully mindful of the guiding principles laid down by this Court. The plain meaning of this section, however, shines with a clear and constant simplicity in the midst of all the wise observations made round it during the last half of a century.*

In my view, *Kiri Mudiyanse v. Bandara Menika* was the watershed in the progressive development of the law in respect of defective appeals. The current trend of authority in the Supreme Court endorses this approach. Accordingly, mistakes, omissions, defects or lapses such as the failure to make necessary parties as respondents, naming deceased parties (without substitution) in the caption, naming parties incorrectly in the caption, failure to give notice to all named parties etc. are curable defects under sections 759(2) and 770 of the Civil Procedure Code.

Whilst appreciating that the discretion of the Court shall not be circumscribed by self-imposed fetters, I must add that the Court shall not however allow defects or lapses to be cured on the application of either section 759(2) or 770 as a matter of course or as a matter of routine unless the appellant gives a good reason to the satisfaction of the Court for such defect or lapse, as otherwise the express provisions of the Civil Procedure Code under chapter 58, which lay down the procedure for the proper constitution of an appeal, will be rendered nugatory.

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. On the preliminary objection taken for non-joinder of necessary parties, Ekanayake J. (with Asoka de Silva C.J. and Marsoof J. 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. Ekanayake J. 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. When it was 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, the Supreme Court went so far as to say at page 51 "*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.*"

In the Supreme Court case of *Wilson v. Kusumawathi* [2015] BLR 49 Sisira de Abrew J. with the concurrence of Marsoof J. and Sarath de Abrew J. took the same view.

In *Premaratna v. Sunil Pathirana* (SC/APPEAL/49/2012, SC Minutes of 27.03.2015), when a preliminary objection to the maintainability of the appeal was raised *inter alia* on the ground that a deceased party had been named as a respondent, Wanasundara J. with Aluwihare J. and Abeyratne J. agreeing stated:

> *The parties to the action in the District Court are the parties to the action in the appellate court, in this instance the High Court of Civil Appeals. The petition of appeal had not contained in the caption, the names 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 had 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.*

In a similar case where a deceased party was named as a respondent, Dep J. (later C.J.) in *Heenmenike v. Mangalika* (SC/APPEAL/41/2012, SC Minutes of 01.04.2016) held:

> *I hold that 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 sections 759(2) and section 770 of the Civil Procedure Code. I set aside the judgment in the High Court (Civil Appeal), Kegalle in case No. 639/2009. I direct the learned judges of the High Court (Civil Appeal) Kegalle to delete the name of the deceased 2nd plaintiff-respondent and add the 2nd substituted-plaintiff as the 2nd substituted-plaintiff-respondent and proceed to hear the appeal on merits and deliver judgment according to law.*

However, it may be mentioned that if the appeal has been filed out of time, it cannot be cured by invocation of section 759(2) of the Civil Procedure Code because relief can be granted under that section for non-compliance with the provisions relating to the appellate procedure "*other than a provision specifying the period within which any act or thing is to be done*" as stated in the section itself. The time limits within which steps are to be taken, such as filing the notice of appeal and petition of appeal, are mandatory and imperative.

In the Supreme Court case of *Raninkumar v. Union Assurance Limited* [2003] 2 Sri LR 92 at 96, Edussuriya J. held "*no relief whatsoever can be granted where there is any mistake, omission or defect in complying with*

a provision specifying the period within which any act or thing is to be done, even if the respondent is not materially prejudiced."

Mark Fernando J. in *The Ceylon Brewery Ltd v. Jax Fernando* [2001] 1 Sri LR 270 emphasised "*It is settled law that provisions which go to jurisdiction must be strictly complied with*."

After section 759(2) was amended by the Civil Procedure Code (Amendment) Act, No. 79 of 1988, the judgment of the Supreme Court in *Vithana v. Weerasinghe* [1981] 1 Sri LR 52 (and the judgments that followed it), which held that the provisions of section 759(2) of the Civil Procedure Code are wide enough to accommodate appeals filed out of time provided good cause is shown, cannot be regarded as binding. Let me quote the legislative history.

Prior to the Administration of Justice Law, No. 44 of 1973, the corresponding section to the present section 759(2) of the Civil Procedure Code was section 756(3), which read as follows:

> *In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just.*

Section 353(2) of the Administration of Justice Law, No. 44 of 1973, read as follows:

> *Subject to the provisions of section 330, the Supreme Court shall not exercise the powers vested in such court by this Law to reject or dismiss an appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions*

> *of this Law, unless material prejudice has been caused thereby to the respondent to such appeal.*

Section 759 was amended by the Civil Procedure Code (Amendment) Law, No. 20 of 1977, by introducing the following as section 759(2):

> *In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Supreme Court 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.*

Section 759(2) was repealed and the following section was substituted by the Civil Procedure Code (Amendment) Act, No. 79 of 1988:

> *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.*

In the instant case, the 4th defendant-appellant has named only the plaintiff as the respondent in the notice of appeal as well as in the petition of appeal. However I find that a copy of the notice of appeal has been sent to the registered attorney of the said defendants by registered post although those defendants were not named as respondents in the notice of appeal. The original registered postal article receipt has been tendered to the District Court with the notice of appeal.

As I stated at the outset, as against the plaintiff's case, the only contesting defendant at the trial was the 4th defendant-appellant. The other defendants did not raise issues, cross-examine the plaintiff's witnesses,

or lead any evidence. The 4th defendant-appellant made the plaintiff the only respondent in the notice of appeal and the petition of appeal.

On the facts and circumstances of this case, I take the view that the High Court ought to have exercised its discretion in terms of section 770 in favour of the 4th defendant-appellant and rectified the error in the interest of justice.

The questions of law upon which leave to appeal was granted by this Court and the answers to them are as follows:

> Q. Have the learned Judges of the High Court erred in law by failing to appreciate and consider that in the circumstances aforesaid, no material prejudice has been caused to the 1, 2(A), 3(A) and 5 to 8th defendants by not naming them as respondents in the notice of appeal and the petition of appeal?
>
> A. No.
>
> Q. Have the learned Judges of the High Court erred in law by failing to appreciate and consider that in the circumstances of this case, failure to name the defendants as respondents is a curable defect under and in terms of Section 759(2) Civil Procedure Code and the High Court of Civil Appeal has the power to grant such relief?
>
> A. It is a curable defect but not under section 759(2).
>
> Q. Have the learned Judges of the High Court erred in law by failing to appreciate and consider that under and in terms of Section 770 of the Civil Procedure Code, the Court can issue the requisite notice of appeal for service on a person who was a party to the action in the court against whose decree the appeal is made but also who has not been made a party to the appeal?

A. Yes.

I set aside the judgment of the High Court and allow the appeal but without costs. The 4th defendant will amend the caption of the petition of appeal and take steps to serve notice on the 1st-3rd and the 5th-8th defendant-respondents. The High Court will hear the appeal on the merits.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court