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

In the matter of an Application for Special Leave to Appeal against the order dated 15th February 2017 of the Court of Appeal Application No. CA 608/1999(F).

SC (Appeal) 103/2018

SC (SPL) LA 62/2017

CA Application No.
CA608/1999(F)

D.C. Colombo: 16262/MR

Thiremuni Peter,
Morakale- Opposite the School,
Upper Kottaramulla.

Plaintiff

Vs.

1. A. S. Jayawardene,
   Secretary to the Treasury,
   The Secretariat,
   Colombo.

2. Daya Liyanage,
   Deputy Secretary to the Treasury,
   The Secretariat,
   Colombo.

3. Seemasahitha Wennappuwa
   Janatha Santhaka Pravahana
   Sevaya,
   Dummaladeniya,
   Wennappuwa.

Defendants

AND BETWEEN

1. A. S. Jayawardene,

Secretary to the Treasury,
The Secretariat,
Colombo.

1A. Punchi Bandara Jayasundara,
Secretary to the Treasury,
The Secretariat,
Colombo 01.

1B. Ranepura Hewage Samantha Samaratunga,
Secretary to the Treasury,
The Secretariat,
Colombo 01.

2. Daya Liyanage,
Deputy Secretary to the Treasury,
The Secretariat,
Colombo 01.

2A. Sajith Ruchika Artigala,
Deputy Secretary to the Treasury,
The Secretariat,
Colombo 01.

Defendants – Appellants

Vs.

Thiremuni Peter,
Morakale- Opposite the School,
Upper Kottaramulla.

Plaintiff - Respondent

Seemasahitha Wennappuwa Janatha Santhaka Pravahana Sevaya,
Dummaladeniya,
Wennappuwa.

Defendant - Respondent

Sri Lanka Transport Board,
No. 200,
Kirula Road,
Colombo 05.

Substituted 3rd Defendant-Respondent

AND NOW BETWEEN

Thiremuni Peter,
Morakale- Opposite the School,
Upper Kottaramulla.

Plaintiff-Respondent-Appellant
Vs.

Sri Lanka Transport Board,
No. 200,
Kirula Road,
Colombo 05.

Substituted 3rd Defendant-Respondent-Respondent

BEFORE: **L.T.B. DEHIDENIYA, J.**
K.K. WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL: Chula Bandara for the Plaintiff-Respondent-Appellant

Ranjith Ranawake with Ravinath Ranawake instructed by Ms. Kosala Perera for the Substituted 3rd Defendant-Respondent-Respondent.

WRITTEN SUBMISSIONS: By the Plaintiff-Respondent-Appellant on 22nd January 2020.

By the Substituted 3rd Defendant-Respondent-Respondent on 17th of May 2019.

ARGUED ON: 17.03.2021.

DECIDED ON: 06.10.2022.

K. K. WICKREMASINGHE, J.

This is an appeal from the judgment of the Court of Appeal dated 15.02.2017. The crux of this matter centers around the question of law based on which leave to appeal was granted, which is;

"Did the Court of Appeal err by dismissing the case filed by the Petitioner before the District Court as regard to the Substituted 3rd Defendant-Respondent-Respondent whereas he had not appealed against the judgment of the learned District Judge to the Court of Appeal?"

Therefore, this discussion hinges on whether a party to an action should be allowed to lawfully invoke an objection to, or dispute a finding in, a lower court's judgment even if the said party had not filed an appeal against the said judgment of the lower court.

The facts of the case are stated briefly as follows:

The Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as the Appellant) was, by letter dated 27.06.1991 (marked P3), appointed as the Executive Director of the Board of the 3rd Defendant-Respondent-Respondent Company (hereinafter sometimes referred to as the 3rd Respondent). Thereafter, the Appellant was also appointed as the General Manager of the 3rd Respondent Company by letter dated 29.06.1991 (marked P4).

The original 1st and 2nd Defendants who were respectively the Secretary and Deputy Secretary to the Treasury had, in their capacity as holders of 50% of share capital of the 3rd Respondent Company, removed the Plaintiff-Respondent-Appellant and three others from the Directorate of the 3rd Respondent and appointed 4 others as Directors. The Appellant filed action in the District Court of Colombo against the original Defendants praying *inter alia* for a declaration that the removal of the Appellant as a director

was illegal, null and void and thereby claiming a sum of Rs. 500,000/- as compensation for pain of mind, and social and financial loss suffered as a result of his removal.

The original Defendants jointly filed their Answer to dismiss the Appellant's action stating that the removal of the Appellant from his position was lawful and in accordance with the terms of Article 10 of the Articles of Association of the 3rd Respondent Company.

The Learned District Judge delivered judgment on the 12th of July 1999 in favour of the Plaintiff-Respondent-Appellant granting him Rs. 200,000/- in damages payable by the 1st-3rd Defendants jointly or severally. The original 1st and 2nd Defendants then preferred an appeal to the Court of Appeal. However, the 3rd Defendant refrained from appealing to the Court of Appeal.

During the pendency of the application before the Court of Appeal, the original 3rd Defendant, *Seemasahitha Wennappuwa Janatha Santhaka Pravahana Sevaya*, was substituted by the Sri Lanka Transport Board established under the Sri Lanka Transport Board Act No. 27 of 2005. By virtue of section 3 (2) (e) of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987, all actions and proceedings instituted by or against the amalgamated bus companies, of which the 3rd Defendant company was one, were vested with the Sri Lanka Transport Board, thus enabling the Board to be substituted as the 3rd Defendant-Respondent.

The Court of Appeal delivered judgment on the 15th February 2017 allowing the Appeal and dismissing the action filed by the Plaintiff-Respondent-Appellant in the District Court. The Court held that the Learned Trial Judge had misapplied Article 10 of the Articles of Association and that the termination of the Appellant's services was not illegal, null and void. Moreover, the granting of compensation to the Appellant was held to be unsubstantiated and bad in law.

Being aggrieved by the said judgment, the Appellant filed a Special Leave to Appeal application to the Supreme Court. The Supreme Court, while granting leave, rejected the legal issues stated in the Petition of Appeal and discharged the 1B and 2A Defendant-Appellant-Respondents from the proceedings, on the basis that the Appellant did not pursue any relief against them.

As Leave to Appeal was not granted on the merits of the Appellant's action, such merits will not be extensively delved into by me at this instance.

Rather, my analysis will be confined to examining the aforesaid question of law based on which leave was granted. In this respect, the question arisen before this Court is whether the Court of Appeal could dismiss the judgment of the District Court granted against the predecessor of the Substituted 3rd Defendant-Respondent-Respondent, even though the aggrieved Substituted 3rd Defendant-Respondent-Respondent had not filed an appeal against such judgment. As this issue rests at the root of this case, the principles of law relating to this contention will be considered by me hereafter.

The Learned Counsel for the Appellant in his submissions observed that the 3rd Respondent Company had refrained from appealing against the District Court judgment. It was further contended that neither has it filed a 'written objection' under Section 772 of the Civil Procedure Code conveying its intent to object to the judgment. Thus, the Learned Counsel for the Appellant submits that the 3rd Respondent had accepted the judgment of the District Court and is thus not entitled to the relief granted by the Court of Appeal which was allegedly not prayed for by him at the said instance.

Section 772 of the Civil Procedure Code provides for written objections or 'cross objections' to be filed as follows;

(1) Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his registered attorney seven days' notice in writing of such objection.

(2) Such objection shall be in the form prescribed in paragraph (e) of section 758.

Section 772 of our Civil Procedure Code is noticeably similar in nature and scope to Order 41 Rule 22 of the (First) Schedule to the Indian Civil Procedure Code of 1908 (as amended), which reads as follows;

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for

hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

Sir John Woodroffe and Ameer Ali, in their Commentary on *The Code of Civil Procedure, 1908, [5th edition]* recognize two distinct rights a Respondent has in an appeal under Rule 22– they are; to either support, or to attack the lower Court's decree.

"Sub-rule 1 of Rule 22 is in two parts. The first part enables any respondent to support the decree as well as to canvass the correctness of the finding against him in the Court below and urge that issue ought to have been decided in his favour. The second part enables him to attack the decree even without filing appeal against the decree by filing cross-objections to the decree within one month from the date of service of notice of hearing of the appeal. Thus, it is clear that the respondent has a right not only to support the decree on any ground whether decided in his favour or against him without filing any appeal or cross-objections to the decree assailed against, but also to challenge the decree by filing cross-objections against any finding or part of the decree."

These two distinctive rights are also recognized in Prasanna Jayawardena, PC, J.'s judgment in ***Parana Mannalage Amara Wijesinghe and others v. Sudu Hakurage Swarnalatha and others (SC Appeal No. 72/2012)*** which stated that;

"Thus, where an appellant from a decree entered by an original Civil Court has filed an appeal seeking to set aside or vary that decree: the first limb of section 772 recognises the right of a respondent to that appeal to resist the appeal and support the decree on any grounds including those decided against him by the trial court, without filing a written objection under section 772; and the second limb of section 772 enables a respondent to the appeal who is dissatisfied with some specific finding in or aspect of the decree but has not filed an appeal to canvass it, to dispute that finding or aspect of the decree and seek to have it set aside or varied or decided in his favour by the appellate court, provided he has duly filed a written objection under section 772."

However, as the 3rd Respondent in this case had not filed any written objection under Section 772, the question remains as to whether he could rightly object to the judgment of the original Court under such circumstances. This issue was dealt with by Middleton J. in ***Rabot v. De Silva ([1905] 8 NLR 82)*** which held that party defendants to an action, notwithstanding that they themselves had not appealed, and notwithstanding that they had filed no objections under section 772 of the Civil Procedure Code, can challenge the District Judge's decision.
Furthermore, Sharvananda C.J., in the decision of ***Ratwatte v. Goonesekera ([1987] 2 Sri LR 260)*** allowed for a wide and flexible interpretation of section 772 as follows;

> *"This section requires the respondent, if he had not filed a cross-appeal, to give the appellant or his Proctor seven days' notice in writing to entitle him to object to the decree or any part of the decree, entered by the trial court. Only if he had duly given the said notice, will he have a right to object to the decree; if he had failed to give such notice, he cannot claim, as a matter of entitlement, the right to take any objection to the decree; but the provision does not bar the court, in the exercise of its powers to do complete justice between the parties, permitting him to object to the decree, even though he had failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice."*

Therefore, it is now settled law that, even though a Respondent who has not duly filed a written objection cannot claim the right to object to a decree as an *entitlement*, an Appellate Court has the discretion, by virtue of its inherent jurisdiction, to permit such objection in the interests of justice.

The next point of contention is whether the scope of the application of written objections under section 772 allows for such objections to be brought by a Respondent against another Respondent– and not merely against an Appellant. The general rule postulated states that any such objection can be invoked by a Respondent only against an Appellant. Accordingly, a Respondent to an appeal cannot, for the most part, challenge a finding in the judgment or decree granted in favour of *another Respondent*.

However, exceptions to the aforesaid general rule have been identified in several notable judicial decisions of both Sri Lankan and Indian Courts.

The Supreme Court of India in ***Mahant Dhangir and another v. Madan Mohan and others (AIR 1988 SC 54)*** noted that;

> *"It is only by way of exception to this general rule that one respondent may urge objection as against the other respondent. The type of such exceptional cases are also very much limited. We may just think of one or two such cases. For instance, when the appeal by some of the parties cannot effectively be disposed of without opening of the matter as between the respondents inter se. Or in a case where the objections are common as against the appellant and co-respondent. The Court in such cases would entertain cross-objection against the co-respondent."*

Drieberg J. in ***Doloswela Rubber & Tea Estate Co. v. Swaris Appu (31 NLR 60)*** made a similar observation that;

> *"It has been held that section 772 is not available to a respondent who wishes to question the decree in favour of other respondents; if he wishes to do so he must appeal, in which the possibility of certain exceptions was recognized; an exception may be allowed in cases where there is an identity of interests between the appellant and the respondent against whom the statement of objections is directed"*

The exception to the general rule in instances where similarities exist between the interests of the Appellant and the Respondent was also observed in the Indian decision of ***Syed Mohammad Hasan v. Syed Mohammad Hamid Hasan And Ors. (AIR 1946 All 395).*** In this case, Malik, J. held that,

> *"So far as this Court is concerned, the law is now well settled that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent."*

Prasanna Jayawardena, PC., J, in the judgment of ***Parana Mannalage Amara Wijesinghe*** which was quoted above, supported this position stating that,

> *"If a party who is dissatisfied with the judgment, fails or neglects to exercise that right of appeal or sees no need to exercise that right of appeal, he should not,* ***other than in exceptional circumstances****, be given a carte blanche to belatedly resort to section 772 in an appeal filed by another party to which he is a respondent and* ***re-agitate his dispute with the other respondents*** *in whose favour the judgment was entered."*

His Lordship further elaborated on two distinct 'exceptional circumstances' where a cross-objection can be directed against a co-respondent as follows;

> *"Section 772 cannot be invoked by a respondent to an appeal [who has not filed his own appeal], to challenge a finding in the decree in favour of another respondent other than in exceptional circumstances such as: in instances where a determination of the relief sought by the appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree inter se the respondents; or where the interests of the appellant and the interests of the respondent against whom a written objection under section 772 is filed, are identical or substantially similar."*

In considering the facts of the case at hand, it is evident that, if proceeded on the basis of the general rule, the 3rd Respondent Company who did not file an appeal to the Court of Appeal would not be able to invoke section 772 to challenge the District Court judgment granted in favour of the Plaintiff-Respondent. Therefore, it now becomes necessary to scrutinize the existence of any of the aforesaid exceptional circumstances which would justify the 3rd Respondent's objection to the decree granted in the Plaintiff-Respondent's favour.

I will firstly consider the second type of exceptional circumstance iterated in the above decision- that is, whether the interests of the Appellant and the interests of the Respondent against whom a written objection under section 772 is filed, are identical or substantially similar.

In the case of ***(Mirza) Husain Yar Beg v. (Sahu) Radha Kishan And Ors. (AIR 1935 All 134)***, the circumstances of which are similar to that at hand, one of the Defendant-Respondents filed a cross-objection in an appeal between the Appellant and the Plaintiff-Respondents. A preliminary objection was taken by the Plaintiff-Respondents that the cross-objections which were directed only against them, and not to any extent against the Appellant, are not maintainable under Order 41, Rule 22 of the Civil Procedure Code. It was held that the cross-objections filed by the Defendant-Respondents which were directed solely against the Plaintiffs-Respondents were not maintainable under Rule 22, and as such, were dismissed.

Accordingly, Niamatullah, J. held that,

> *"The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a*

> *co-respondent also if there is a community of interest between the latter and the appellant. It is clear to us that where the cross-objection is directed solely against a co-respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable."*

In a similar manner, when this case was before the Court of Appeal, the Court dismissed the action filed by the Plaintiff- Respondent Director (who is now the Appellant) in the District Court questioning the termination of his services as regard to the Substituted 3rd Defendant- Respondent who was the Sri Lanka Transport Board. However, the objections taken up by the 3rd Defendant- Respondent Company were directed solely at the Plaintiff-Respondent Director and not to any extent against the 1st and 2nd Defendant-Appellants, who were respectively the Secretary and Deputy Secretary to the Treasury. Accordingly, the Plaintiff-Respondent Director's case has nothing in common with that of the Defendant-Appellants, who assert the legality of his termination. Thus, as their interests cannot be considered similar, the second type of exceptional circumstance enumerated above cannot be said to exist.

I will now consider the first type of exceptional circumstance set out above, that is, whether the determination of the relief sought by the Appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree *inter se* the Respondents.

The 1st and 2nd Defendant-Appellants, in preferring an Appeal to the Court of Appeal had prayed to set aside the verdict of the Learned District Judge holding in favour of the Plaintiff-Respondent Director. The central contention of the said Defendant-Appellants in the Court of Appeal was that the Learned Trial Judge had misinterpreted Article 10 of the Articles of Association of the 3rd Respondent Company in holding that the Plaintiff's termination was illegal. Therefore, at this point it is necessary to ascertain whether the nature of the said relief sought by the Defendant-Appellants was such that it became necessary for Court to examine the lawfulness of the relief granted by the lower Court.

The Learned Judges of the Court of Appeal in delivering judgment had identified the relief sought by the respective parties, and had analyzed the provisions of Article 10 and its implications, in holding that the removal of the Plaintiff-Respondent from his Directorship was not illegal, thus allowing the appeal of the Defendant-Appellants. In arriving at this conclusion, the Court had also scrutinized judicial decisions including the judgment of S. N. Silva, J. in ***Mendis v. Seema Sahitha Panadura Janatha Santhaka***

Pravahana Sevaya and Others **([1995] (2) Sri LR 284)** which held that the appointment and removal of Directors of a company are comprehensively regulated by its Articles of Association. Therefore, I am of the opinion that due to the nature of the relief sought by the Defendant-Appellants, it has been necessarily required for the Court of Appeal to examine the lawfulness of the reliefs granted by the District Court in the Plaintiff-Respondent's favour. Accordingly, I hold that there were exceptional circumstances in this case which justify the cross-objections directed by the Substituted 3rd Defendant- Respondent- Respondent towards his co-respondent, who in this case is the Plaintiff- Respondent- Appellant.

In conclusion, based on the principles of law pronounced in Section 772 of the Civil Procedure Code and those of notable judicial decisions in Sri Lanka as well as India, it is now evident that the Substituted 3rd Defendant-Respondent- Respondent Company may lawfully invoke an objection as against the Plaintiff- Respondent- Appellant, even if it has not appealed against the lower Court's judgment. In view of the above findings, I hold that the question of law raised by the Supreme Court at the onset in determining the granting of leave to this application should be answered in the negative, and in favour of the Respondent.

Therefore, I see no necessity in interfering with the decision of the Learned Judges of the Court of Appeal in dismissing the case filed by the Plaintiff-Respondent-Appellant before the District Court.

The appeal would accordingly stand dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT