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

In the matter of an application for Special Leave to Appeal under and in terms of Article 128(2) of the Constitution from an order of the High Court established under Article 154P of the Constitution and in terms of Section 5A of the High Court of the Provinces (Special Provisions)(Amendment) Act No.54 of 2006.

Ediriweera Jayasekera
Kurundupatabendige Chandrani,
GalgeVihara Road,
Main Street,
Devinuwara.

PLAINTIFF

SC Appeal No. 15/2009
SC.HC.(CALA) No. 29/09
WP/HCCA/KALUTARA No.101/2003
DC PANADURA No.745/P

vs.

1. Ediriweera Jayasekera
   Kurundupatabendige Badhra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

2. Gampolage Chandra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

3. Senadheeerage Alice Nona,
   No.248, Batadombathuduwa Road,
   Alubomulla (Deceased)

4. Willorage Rasika Lakmini,
   Batadombathuduwa Road,
   Alubomulla

DEFENDANTS

AND BETWEEN

Willorage Rasika Lakmini,

Batadombathuduwa Road,
Alubomulla

4TH DEFENDNT-APPELLANT

V.

Ediriweera Jayasekera
Kurundupatabendige Chandrani,
GalgeVihara Road,
Main Street,
Devinuwara.

PLAINTIFF-RESPONDENT

1. Ediriweera Jayasekera
   Kurundupatabendige Badhra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

2. Gampolage Chandra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

3. Senadheeerage Alice Nona,
   No.248, Batadombathuduwa Road,
   Alubomulla (Deceased)

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Ediriweera Jayasekera
Kurundupatabendige Chandrani,
GalgeVihara Road,
Main Street,
Devinuwara.

PLAINTIFF-RESPONDENT-PETITIONER

V.

Willorage Rasika Lakmini,
Batadombathuduwa Road,
Alubomulla.

4TH DEFENDNT-APPELLANT RESPONDENT

1. Ediriweera Jayasekera
   Kurundupatabendige Badhra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

2. Gampolage Chandra De Fonseka,
No.51/3, De Fonseka Road,
Panadura.

3. Senadheeerage Alice Nona,
No.248, Batadombathuduwa Road,
Alubomulla. (Deceased)

DEFENDANT-RESPONDENT-RESPONDENTS

Before	:	**J A N de Silva, C J** **Saleem Marsoof P C, J** **Chandra Ekanayake, J**
Counsel	:	Manohara de Silva, PC with Arinda Wijesundara and G.W.C.Bandara Thalagune for the Plaintiff - Respondent - Appellant. Uditha Egalahewa with Amaranath Fernando for the 4th Defendant-Appellant-Respondent.
Argued on	:	10.06.2010.
Written submissions tendered on	:	30.04.2009 (by the plaintiff-respondent - appellant). 05.06.2009 (by the 4th defendant-respondent - respondent)
Decided on	:	07.10.2010.

Chandra Ekanayake, J.

The plaintiff-respondent-petitioner (hereinafter sometimes referred to as the plaintiff) by her petition dated 25.02.2009 has sought inter alia, special leave to appeal to this Court from the order of the learned Judges of the High Court of Civil Appeal of the

Western Province (Holden in Kalutara) dated 15.01.2009 marked "E", to uphold the preliminary objections raised on her behalf and to dismiss the appeal filed by the 4th defendant-appellant-respondent (hereinafter sometimes referred to as the 4th defendant). When the above application was supported this Court by its order dated 19.03.2009 had granted special leave to appeal on the questions of law set out in sub paragraphs (a) to (g) of paragraph 9 of the said petition. Those sub paragraphs are reproduced below:

(a) The said order is contrary to law and against the weight of the evidence,

(b) The learned Judges of the High Court erred in holding that "all necessary parties have been noticed" by the 4th defendant appellant,

(c) The learned Judges of the High Court failed to take in to consideration that only the plaintiff has been named as respondent in the notice of appeal, and only the plaintiff and the 1st defendant are named as respondents in the Petition of Appeal,

(d) The learned Judges of the High Court failed to take into consideration that the bond furnished by the appellant only covers the cost of the plaintiff-respondent and does not cover the cost of the 1st, 2nd, and 3rd respondents and that the appellant has failed to obtain an acknowledgement or waiver of security from the said 1st , 2nd and 3rd respondents as required by Section 755(2) (a)of the Civil Procedure Code as amended by Act No.79/1988.

(e) The learned Judges of the High Court failed to take in to consideration that the appellant had failed to serve a copy of the notice of appeal on all the respondents and to furnish proof of service as required by Section 755(2) (a) of the Civil Procedure Code.

(f) The learned Judges of the High Court erred by considering that "the 1st and 2nd defendants both have tendered one proxy and not tendered a statement of claim" (which fact only establishes that the 1st and 2nd defendants did not dispute the plaintiff's claim in the District Court) and thereby concluding that the 1st and 2nd defendants would not be contesting the appeal of the 4th defendant-appellant.

(g) The learned Judges of the High Court erred by holding that "in the instant case only the plaintiff and 3rd and 4th defendants remain as disputed parties" as in the event the District Court judgment is set aside or varied in any manner, the rights of the 1st and 2nd defendants who have not been given an opportunity to be heard before the High Court, would be prejudiced.

According to Section 5C(1) of the said Act No. 54 of 2006 an appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154 P of the constitution, with leave of the Supreme Court first had and obtained. But in the present case the plaintiff – respondent – petitioner (hereinafter referred to as the plaintiff) by petition dated 25-02-2009 has sought special leave.

At the hearing of the appeal before this Court the Counsel for the plaintiff vehemently stressed on the preliminary objection raised in the High Court on 25-08-2008 by the plaintiff which had been to the following effect – (vide pg – 4 of the written submissions of the plaintiff filed in this Court on 30-04-2009):

'that the 4th defendant-appellant-respondent had failed to comply with the mandatory provisions of Sections 755(1), 755(2)(a), 755(2)(b) and 758(1) by:-

(a) failing to name the parties to the action,

(b) failing to name all the respondents to the action,

(c) failing to give required notices of this appeal to the 1st, 2nd and 3rd defendants, and to submit proof thereof.

(d) failure to provide security of the1st, 2nd and 3rd defendants' costs of appeal ?

With regard to (c) and (d) above it has to be noted that 3rd defendant had died before the delivery of the judgment by the District Judge.

In addition to the oral submissions made here plaintiff-respondent-petitioner and 4th defendant-appellant-respondent have filed their written submissions also. The appeal preferred by the 4th defendant was one against the judgment pronounced by District Judge of Panadura in case bearing No. 745/ Partition – instituted against the 1st to 4th defendants, to partition the land morefully described in the amended plaint filed in the said partition case. The Learned High Court Judges by their judgment dated 15.01.2009 had concluded that all necessary parties had been noticed by the 4th defendant-appellant-respondent in compliance with the provisions of Section 755 of the Civil Procedure Code and proceeded to fix the case for argument after overruling the aforementioned preliminary objection raised by the plaintiff with regard to the maintainability of the appeal in the High Court.

However, perusal of the notice of appeal (C1) filed in the District Court makes it clear that only following particulars were included under items (3) and (5) thereof:-

Under item (3) i.e. – Names and addresses of the parties	)	only plaintiff's and 4th defendant's names and addresses given.
Under item (5) i.e. – Name of the respondent	)	only plaintiff's name and address given.

What needs to be examined now is whether the finding of the learned High Court Judge viz- 'all necessary parties were noticed in compliance with Section 755 of the Civil Procedure Code' - is correct?

To examine the same one should first consider the procedure that has to be followed when preferring an appeal against an interlocutory decree or judgment entered in a partition action. It is undisputed that the appeal in hand is an appeal preferred from the judgment of the District Court. Now Section 67 of the Partition Act No.21 of 1977 (as amended) would become relevant. The said section thus reads as follows:

> 67. "An appeal shall lie to the Supreme Court against any judgment, decree or order made or entered by any court in any partition action; and all the provisions of the Civil Procedure Code shall apply accordingly to any such appeal as though a judgment, decree or order made or entered in a partition action were a judgment, decree or order made or entered in any action as defined for the purposes of that Code."

A plain reading of the above section would make it amply clear that in an appeal lodged against the judgment/decree made or entered by Court in a partition action – all the provisions of the Civil Procedure Code shall apply. This renders the entire chapter in the Civil Procedure Code pertaining to appeals namely – Chapter LVIII applicable to an appeal preferred from a judgment entered in a partition action also.

The relevant Section in the Civil Procedure Code with regard to 'Notice of Appeal'- appears to be Section 755. As the requisites of notice of appeal are embodied in sub-paragraph (i) of Section 755 same is reproduced below:

755(1)"Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Such notice shall also contain the following particulars:

(a) the name of the court from which the appeal is preferred;

(b) the number of the action;

(c) the names and addresses of the parties to the action;

(d) the names of the appellant and respondent;

Provided that where the appeal is lodged by the Attorney-General, no such stamps shall be necessary."

Further Section 755(2) of the Civil Procedure Code is clear enough as to what should accompany a notice of appeal- namely security for a respondent's costs of appeal in such amount and nature as is prescribed in the rules enacted under Article 136 of the Constitution, or acknowledgement or waiver of security signed by the respondent or his registered attorney. Sub Sections 755(2) (a) and 2 (b) thus read as follows:

755 (2) "The notice of appeal shall be accompanied by –

(a) except as provided herein, security for respondent's costs of appeal in such amount and nature as is prescribed in the rules made by the Supreme Court under Article 136 of the Constitution, or acknowledgement or waiver of security signed by the respondent or his registered attorney; and

(b) proof of service, on the respondent or on the his registered attorney, of copy of the notice of appeal, in the form of a written acknowledgement of the receipt of such notice or the registered postal receipt in proof of such service."

Examination of the security bond in this case (C2) amply demonstrates that it only covers the cost of the plaintiff-respondent and it does not cover the costs of 1st and 2nd defendant-respondents and it accompanied the proof of service only on the plaintiff. Therefore it has to be observed that the security bond C2 is not in compliance with the provisions of sections 755 (2) (a) and 755(2)(b).

The contention of the Counsel for the plaintiff was that when it comes to statutes of procedure, failure to complete required steps within the specified time frame, is fatal to the case and thus the preliminary objection should have been upheld by the Learned Judges of the High Court due to non-compliance of the provisions of Section 755(1), 755(2)(a) and 755(2)(b) which had to be complied with when the notice of appeal was tendered and that was within 14 days from the judgment.

The main submission of the 4th defendant-appellant-respondent's Counsel was that - no prejudice was caused to the 2nd defendant-respondent-respondent by not making her a party and further this Court has the power to add the 2nd defendant as a party to the said appeal. This merits careful consideration in the light of the circumstances of this case. It is to be noted that the following matters were not in dispute:-

1. plaintiff had instituted this partition action naming 1 to 4 defendants as the defendants in the case,

2. the 3rd defendant who had passed title to the 4th defendant reserving life interest had died on 29-03-2003.

3. by the judgment of the learned District Judge dated 21.07.2003 pronounced after trial, only the plaintiff, 1st defendant and 2nd defendant (who got only life interest of the share allocated to the 1st defendant) were given shares,
4. as per the notice of appeal filed by the 4th defendant (C1) only the plaintiff had been named as a party (naming him as a respondent) but not the 1st and 2nd defendants,
5. failure to give required notice of the appeal to the 1st and 2nd defendants,
6. failure to provide security for the costs of appeal of the 1st and 2nd defendants.

From the above it is manifestly clear that although shares were given to the plaintiff, 1st defendant and 2nd defendant (to whom life interest of 1st defendant's share was given by the judgment) none of them were made respondents to the appeal or given notice, and failed to provide security for the costs of appeal of 1stand 2nd defendants. Even in the petition of appeal dated 02-09-2003 (C3) only the plaintiff and the 1st defendant were named as respondents and as such the petition of appeal too is not in conformity with the provisions of S-758 (1) of the Civil Procedure Code. Thus the questions of law on which special leave was granted by this Court are answered in the affirmative and the impugned judgment of the High Court is hereby set aside.

The 4th defendant's position is that the failure to make the 2nd defendant a party to the appeal and non-compliance of the provisions of Section 755 of the Civil Procedure Code has not caused any prejudice to the plaintiff-appellant. The Learned Counsel for the 4th defendant-appellant-respondent has submitted that Court has the power even at this stage to add the 2nd defendant as a party to the appeal. For this

submission he has relied on the principle of law enunciated in the decision in Kiri Mudiyanse and another vs. Bandara Menika (1974) 76 NLR-371.

This leads me to the next point viz - 'would it be correct to say that failure on the part of the 4th defendant to comply with the requirements of Sec. 755 has not caused any prejudice to the other parties to the main partition case?' The gist of the submission of the Counsel for the plaintiff was that as it is mandatory to comply with steps that need to be taken during a permitted period of time and as the 4th defendant has failed to comply with the same, the preliminary objection raised in the High Court should have been upheld and the appeal was liable to be dismissed there. Further he has urged that since the 4th defendant has failed to move Court for relief under Section 759 of the Civil Procedure Code granting relief under said section (S. 759) does not arise. I am unable to agree with the said submission for the reason that it is undoubtedly incumbent upon the Court to utilize the statutory provisions and grant the relief embodied therein if it appears to Court that it is just and fair to do so. In this background S-759(2) of the Civil Procedure Code [which is similar to former section -756(3) of the old Civil Procedure Code] has to be considered. S-759 (2) thus 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, it if should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as may deem just."

The issue at hand clearly falls within the purview of a mistake, omission or defect on the part of the appellant (i.e.- 4th defendant) in complying with the provisions of S-755 when filing the notice of appeal. In such a situation if the Court of Appeal was

of the opinion that the respondent has not been materially prejudiced, it was empowered to grant relief to the appellant on such terms as it deemed just. A plain reading of the said subsection (2) makes it clear that the power of Court to grant relief under the same is discretionary. In this regard the decision of the Supreme Court in Nanayakkara vs. Warnakulasuriya 1993 (2) SLR 289 - would lend assistance. In the said case per Kulatunga, J.

> "The power of the Court to grant relief under S.759(2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced which event the appeal has to be dismissed."

In the course of the judgment in the said case (at page 293) Kulatunga, J. had further observed that:-

> "In an application for relief under section 759(2), the rule that the negligence of the Attorney-at-Law is the negligence of the client does not apply as in the case of defaults curable under sections 86(2), 87(3) and 77 of the Civil Procedure Code. Such negligence maybe relevant, it does not fetter the discretion of the Court to grant relief where it is just and fair to do so."

It was a case where the failure to hypothecate the sum deposited as security by bond as required by section 757(1) was considered by Court. In the case at hand also the notice of appeal (C1) had been filed by registered attorney-at-law and the failure to comply with the provisions of section 755 as already concluded above appears to be a negligence on his part. In view of the above principle of law I hold that such a negligence though relevant does not fetter the discretion of court to grant relief when it appears that it is just and fair to do so.

Further in this regard it would be pertinent to consider the pronouncement made by the Supreme Court in the case of Keerthisiri vs Weerasena 1997 1SLR 70. This too was an instance where non compliance of section 755(1) of the Civil Procedure Code (failure to duly stamp the notice of appeal) arose and granting relief under section 759(2) of the Code was considered. In the above case it was held by G P S de Silva, CJ (with Kulatunga, J. and Ramanathan, J. agreeing) that:

> "Section 759(2) of the Civil Procedure Code which required the Notice of Appeal to be 'duly stamped' is imperative. However, the Court of Appeal has jurisdiction to grant relief to the appellant in terms of Section 759(2) of the Code in respect of the 'mistake' or 'omission' in supplying the required stamp fee."

Further, G P S de Silva, CJ. in the course of the said judgment has observed that "what is required to bar relief under Section 759(2) is not any prejudice but "material prejudice". Per G P S de Silva, CJ at page 74:

> "What is required to bar relief is not any prejudice but material prejudice, i.e. detriment of the kind which the respondent cannot reasonably called upon to suffer. In the instant case there is nothing to suggest that the respondent has been materially prejudiced. I accordingly hold that the Court of Appeal had jurisdiction to grant relief in terms of section 759(2) of the present Code."

Having considered all the facts and circumstances of the present case I am inclined to the view that the plaintiff, being the only respondent named in the notice of appeal, would not be materially prejudiced by the grant of relief under Section 759(2).

It is clearly seen that persons who were parties to the action in the Court against whose decree the appeal is made (namely – the District Court) have not been made parties in the High Court of Civil Appeal. As such although the impugned judgment of the High Court has been already set aside, I am of the view that ***Section 770 of the Civil Procedure Code is more to the point.*** The aforesaid section thus reads as follows:-

> 770 "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 herein before 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."

The above section shows that if it appears to the Court at the hearing of the appeal 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, it is within the discretion of the Court to issue the requisite notice of appeal on those parties for service. In the case at hand too the 4th defendant-appellant respondent had failed to name the 1st and 2nd defendants to the District Court case as respondents in the appeal. The 2nd defendant was made entitled only to the life interest of the 1st defendant. The impugned judgment of the learned District Judge (dated 21.07.2003) also reveals that the 4th defendant was given rights subject to the life interest of the 3rd defendant. But the 3rd defendant had died on

29.3.2003. So the question of adding the 3rd defendant as a respondent to the appeal does not arise.

At this juncture it would become pertinent to consider whether the 1st and 2nd defendants would be prejudicially affected if the 4th defendant appellant succeeds in the appeal. When considering this, the pronouncement of the Supreme Court in Kiri Mudiyanse & another vs Bandara Menike 74NLR 371 would be of importance. Being a partition suit the main issue in the said case was also a preliminary objection raised by the plaintiff that the appeal was not properly constituted because some parties who were allocated shares in the judgment were not made party respondents to the appeal. In the above case having discussed the pronouncements in the previous two Full Bench decisions, namely, Dias vs Arnolis (17 NLR 200) and Ibrahim vs Bebbe (19 NLR 289) it was held that:

> "The Supreme Court had the discretionary power under section 770 of the Civil Procedure Code to direct the 1st to the 3rd and the 6th to the 8th defendants to be added as respondents. The exercise of the discretion contemplated in section 770 is a matter for the decision of the Judge who hears the appeal in the particular case. Furthermore, 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."

It is evident from the points of contest raised at the trial by the parties that the plaintiff had relied on the title by deeds and prescription as averred in the amended plaint and 3rd and 4th defendants too had claimed the share on deeds and prescription. Further according to the judgement buildings marked as A, B and C have been given according to soil rights and improvements D and E given to the 3rd defendant without any

soil rights in the corpus. Even the plantation had been given according to soil rights. In view of the above I am inclined to conclude that in the present case if the appeal preferred against the judgement pronounced in the partition case is ultimately allowed, the 1st, and 2nd defendants' rights also would be prejudicially affected. Further in the aforementioned Kiri Mudiyanse's case at page 375 Pathirana J. goes onto say this:

> "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* 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. In this connection I would quote the observations made by Lord Wright in *Evans v. Bartlam*, [1] 1937, 2 A.E.R., 646, at 655:
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> "To quote again from Bowen, L.J., in *Gardner v. Jay*, at p.58;
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> "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?
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> Similarly, it has been held by the Court of Appeal, in *Hope v. Great Western Railway Company* (7), that the discretion to grant or refuse a Jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As Kay, L. J., said in

Jenkins v. Bushby (8), at p. 495: the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

A discretion necessarily involves a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows *ex debito juctitiae,* once the facts are ascertained."

When a discretion necessarily involves a range of individual choice the manner in which it has to be exercised would depend on facts and circumstances of each case. On the other hand it is needless to stress that the discretion given under S - 770 is a very wide one and same has to be exercised cautiously which being a power expressly and plainly conferred on the Judge who hears the appeal.

On the other hand if a particular party in a partition case who should have been made a respondent is not made a respondent in the appeal, then granting relief to the appellant (in this case to the 4th defendant) will not help such a party to safeguard his rights and making him a respondent would not act to the prejudice of the appellant. For the above reasons I conclude that 1st and 2nd defendants named in the District Court case should be added as respondents to the appeal pending in the High Court.

In view of the above necessity has now arisen to consider which Court should exercise this power given by Sec – 770 of the Civil Procedure Code. The impugned judgment of the High Court is already set aside. Perusal of the above section shows that 'if at the hearing of the appeal, if it appears to 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 has the discretion to issue the requisite notice of appeal for service. In the case at hand the appeal had been taken up for hearing in the High Court of Civil Appeal (although it was originally pending before the Court of Appeal) under the provisions of High Court of the Provinces (Special Provisions) –Amendment - Act No. 54/2006. Thus it becomes clear

that it is the High Court of Civil Appeal that has to exercise this power now and, I direct the High Court in terms of Sec - 770 of the Civil Procedure Code that 1st and 2nd defendants in the District Court case (also named as 1st and 2nd defendant - respondent – respondents in the caption to the present petition) be made respondents to the appeal preferred by the 4th defendant and to issue the requisite notices of appeal on them.

The Learned Judges of the High Court of Civil Appeal are further directed to take such other appropriate steps under the Civil Procedure Code and to conclude the appeal expeditiously. The plaintiff – respondent – appellant will however, be entitled to Rs.15,000/- as costs payable by the 4th defendant – appellant - respondent.

Judge of the Supreme Court

J A N de Silva, C J

Judge of the Supreme Court

Saleem Marsoof P C, J.

Judge of the Supreme Court