

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

In the matter of an Application for Leave to  
Appeal under the provisions of the High  
Court of the Provinces (Special Provisions)  
(Amendment) Act No. 54 of 2006

1. S.M. Heenmenike,
  2. S.K.A. Priyanthe Senanayake
  3. S.K.A. Chamila Kumari Senanayake
- All of 1/27, Main Street,  
Rambukkana.

**Substituted Defendants-Appellants**  
**Appellants**

SC Appeal No. 41/2012  
SC HC CA LA No. 179/2011  
Civil Appellate High Court Appeal  
No. 639/2009  
DC Kegalle Case No. 7692/Special

Vs.

1. Suraweera Aratchchilage Mangalika  
Malkanthi
2. Kaluaratchchilage Pushpa  
Kaluaratchchi  
Both of “Abaya Niwasa”  
Walalgoda  
Rambukkana

**Plaintiffs-Respondents-Respondents**

Before : Priyasath Dep, PC. J  
Sisira J. de Abrew, J &  
Anil Gooneratne, J.

Counsel : D.M. Dissanayake with L.M.C.D. Bandara for  
Substituted Defendant-Appellant-Petitioners.

Dinesh de Alwis instructed by Janaki Sandakalum  
for 1<sup>st</sup> Plaintiff-Respondent-Respondent.

Argued on : 08.06 2015

Decided on : 01.04.2016

**Priyasath Dep, PC, J**

The Substituted- Defendant –Appellant- Appellants( hereinafter referred to as “Appellants”) filed a Leave to Appeal Application against the judgment dated 25.04 2011 of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden at Kegalle in Case No. SP/HCCA/KAG/639/2009 and obtained leave to appeal from this court.

The Plaintiffs-Respondents-Respondents (hereinafter referred to as “Respondents”) instituted action in the District Court of Kegalle in Case No. 7692/Spl against the Defendant-Appellants. When the action was proceeding in the District Court the 2<sup>nd</sup> Plaintiff passed away and the 1<sup>st</sup> Plaintiff who is the mother of the 2<sup>nd</sup> Plaintiff filed a petition and an affidavit dated 15<sup>th</sup> July 2008 and moved to substitute her in place of the deceased 2<sup>nd</sup> Plaintiff. The Court allowed the substitution and substitution was effected on 02.07.2008. This is reflected in page 55 of the Appeal Brief. The Court ordered the 1<sup>st</sup> Plaintiff Respondent to file an amended caption. However, this was not complied with. Thereafter trial proceeded and the judgment was delivered in favour of the Plaintiffs.

The Defendants-Appellants appealed against the judgment of the District Court to the Provincial High Court (Civil Appeals). In the Notice of Appeal and in the Petition of Appeal, the Appellants had cited the 2<sup>nd</sup> Plaintiff who is dead as a Respondent. The Plaintiff-Respondents at the hearing of the appeal took up a preliminary objection to the effect that the Notice of Appeal and Petition of Appeal filed by the Defendants are defective for the reason that the 2<sup>nd</sup> Respondent named therein was dead on the date of filing of the appeal.

The Appellant submitted that in the District Court it was the 1<sup>st</sup> Plaintiff-Respondent-Respondent who filed papers to substitute her in place of the deceased 2<sup>nd</sup> Plaintiff who is her daughter. The 1<sup>st</sup> Plaintiff –Respondent-Respondent had failed to amend the caption as ordered by court. The Appellant submitted that 1<sup>st</sup> Plaintiff-Respondent-Respondent after the substitution became the only Respondent and she was properly cited as the Respondent in the appeal and there is no prejudice caused.

The Honourable High Court judges held that the Petition of Appeal is not in conformity with 758(1) of the Civil Procedure Code. 758(1) deals with the language and the form of the appeal and it reads thus;

758 (1) The petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars:-

- (a) the name of the court in which the case is pending;
- (b) the name of the parties to the action;

- (c) the name of the Appellant and of the respondent;
- (d) The address to the Court of Appeal;
- (e) A plain and concise statement of the grounds of objection to the judgment, decree or order appealed against – such statement to be set forth in duly numbered paragraphs;
- (f) A demand of the form of relief claimed.

The Respondents heavily relied on the decision of the Court of Appeal in the case of *Wimalasiri and another vs. Premasiri* (2003) 3 SRI LR page 330 where it was held that:

“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-Appellant cannot seek relief under section 759(2)”.

“There is a distinction between mistakes or inadvertence of an Attorney-at-law or party and negligence, a mere mistake can generally be excused but not negligence.”

The learned High Court Judges upheld the preliminary objections and rejected the appeal. The Appellants filed a Leave to Appeal Application and obtained leave on following questions of law.

1. Has the Civil Appellate High Court misinterpreted the judgment in the case of *Wimalasiri Vs. Premasiri* (2003) 3 ,Sri.LR 330, in applying the same to the facts of the case at hand ? and
2. In the aforesaid context has the Civil Appellate High Court misdirected in law in coming to the finding that, the failure to name the 2<sup>nd</sup> Defendant Respondent a party to the Appeal, is an incurable defect which cannot be allowed to be rectified or relief could be sought under section 759(2) of the Civil Procedure Court ?

The Appellants submit that the facts in this case are different from the facts in the case of *Wimalasiri vs. Premasiri* (Supra) which was relied upon by the Respondents. The Appellants submitted that the Hon. Judges of the High Court misinterpreted the judgment when it applied the same principles to the present case. In *Wimalasiri vs. Premasiri* there was only one defendant and he was dead at the time of instituting the action. In the present case there are two Plaintiffs and the 2<sup>nd</sup> Plaintiff died pending the action. 1<sup>st</sup> Plaintiff was duly substituted in the place of the deceased 2<sup>nd</sup> Plaintiff. The Learned Counsel for the Appellants submits that no prejudice would be caused as the 1<sup>st</sup> Plaintiff-Respondent is cited as a party and she is one and the same person substituted in the place of the deceased 2<sup>nd</sup> Plaintiff. Therefore, appeal could proceed against her despite the fact that she was not cited as the 2<sup>nd</sup> Substituted Plaintiff-Respondent.

The Appellant submitted that though substitution had taken place in the District Court, the Plaintiff-Respondent had failed to amend the caption as ordered by Court. The initial mistake was done by the Respondent and the Respondent is precluded from raising the objection. The learned Counsel for the Plaintiff –Respondent submitted that there is no legal requirement to amend the caption though as a matter of practice it is done. In support of his argument he cited section 394 of the Civil Procedure Code. According to this section what is required is for the court to ‘cause an entry to that effect to be made on the record and proceed with the action’.

The Learned Counsel for the Respondents submitted that the 1<sup>st</sup> Plaintiff represents her interest as the 1<sup>st</sup> Plaintiff. As the 2<sup>nd</sup> substituted Plaintiff her capacity is different as she represents the estate the deceased 2<sup>nd</sup> Plaintiff. Therefore, in the caption her name should also be included as a party substituted in the place of the deceased 2<sup>nd</sup> Plaintiff.

The learned Counsel for the Respondent cited cases where Supreme Court held that citing a deceased person as a party or failure to cite all the parties cited in the court below render the appeal ab initio void.

In SC SPL LA No. 39/2010, (Supreme Court Minutes dated 14.05.2010) then, Chief Justice J.A.N. de Silva (Sripavan J, and Ekanayake J. agreeing) dismissed the application upholding a preliminary objection that the application is defective for the reason that a dead person has been made a party.

In *Illangakoon Mudiyansele Gnanathileke Illangakoon vs. Anula Kumarihamy* SC HC LA 277/11 (SC Minutes of 21.01.2013) Sripavan J, (Hettige, PC J and Dep PC J agreeing) upheld the preliminary objection and dismissed the Plaintiff’s leave to appeal application for noncompliance with Rule 28(2) of the Supreme Court Rules of 1990. In that case it was held that the Plaintiff has failed to set out the full title in the application which includes all the persons cited as parties in the proceedings below.

These two cases refer to leave to appeal applications filed against the judgments of the High Court (Civil Appeal) to the Supreme Court for which Supreme Court Rules of 1990 applies. Therefore these two judgments are not relevant to the present appeal. In the case before us, we are dealing with an appeal from the District Court to the High Court (Civil Appeal). The sections applicable to this case are 758 ,759 (2) and 770 of the Civil Procedure Code.

The Learned Counsel for the Appellants submitted that the mistake in citing a deceased party and the failure to name the substituted 2<sup>nd</sup> Plaintiff as a Respondent is a curable defect under section 759(2) of the Civil Procedure Code. The section 759(2) reads thus:

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, (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.

The decision of the Supreme Court in *Nanayakkara vs. Warnakulasuririya* [1993] 2 Sri. L.R 289 would be relevant to the present case. In this case the notice of appeal was accompanied by security for the Respondent's costs of appeal as required under section 755(2). However there was a failure to hypothecate the sum of money tendered by bond as required under section 755 ( C ) of the Civil Procedure Code. In the said case Kulatunga, J held that:

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

In the course of the judgment in the said case Kulatunga, J.at page 293 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 default curable under sections 86(2), 87(3) and 771 of the Civil Procedure Code. 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 *Keerthisiri vs Weerasena* [1997] 1 Sri.LR 70 , the Appellant failed to duly stamped the notice of appeal as required under section 755 (1) of the Code. G.P.S.de Silva CJ held that:

“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 this 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.”

The section 770 of the Civil Procedure Code which is reproduced below is also applicable to this case.

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.”

In *KiriMudiyanse vs. BandaraMenika* 76 NLR Page 371 an objection was taken that some of the parties in the lower court were not joined as Respondents in the Notice of Appeal and in the Petition of Appeal. It was held that:

‘The Supreme Court had the discretionary power under section 770 of the Civil Procedure Code to direct the 1<sup>st</sup> to the 3<sup>rd</sup> and the 6<sup>th</sup> to the 8<sup>th</sup> 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 non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

In *Jayasekera and Lakmini and others* [2010] 1Sri.L.R at page 41 there was a failure to comply with sections 755(1), 755(2) and 758(1) of the Civil Procedure Code. The Appellant had failed to :-

- (a) to name the parties to the action,
- (b) to name all the respondents to the action,
- (c) to give required notices of this appeal to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and to submit proof thereof.
- (d) to provide security for the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants costs of appeal?

In *Jayasekera and Lakmini*(supra). Chandra Ekanayake, J., cited with approval the judgments in *Nanayakkara vs. Warnakulasuririya*(supra) *Keerthisiri vs Weerasena*(supra) and *KiriMudiyanse vs. BandaraMenika*(supra) and held :

“ In the case at hand the notice of appeal had been filed by the registered attorney-at-law and the failure to comply with section 755 appears to be a negligence on his part – such 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”- what is required to bar relief under Section 759(2) is not any prejudice but material prejudice – 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).

Having considering the authorities cited above, I hold that failure to comply with section 755(1) by not citing the 2<sup>nd</sup> 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 2<sup>nd</sup> Plaintiff- Respondent and add the 2<sup>nd</sup> Substituted- Plaintiff as the 2<sup>nd</sup> Substituted- Plaintiff-Respondent and proceed to hear the appeal on merits and deliver judgment according to law.

I order the 1<sup>st</sup> Plaintiff- Respondent-Respondent to pay Rs. 50 000/= to the Defendant-Appellant- Appellant as costs of this application.

Judge of the Supreme Court

Anil Goonerathne J,

I agree.

Judge of the Supreme Court