

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

**In the matter of an Appeal with Leave to
Appeal granted by the Supreme Court
against the judgment of the High Court of
the Province of Sabaragamuwa held in
Kegalle.**

SC. Appeal 49/2012

SC/HCCA/LA No. 503/2011
PHC Kegalle
No. SP/HCCA/KAG/725/2010

DC. Kegalle No. 176/RE.

Sunil Pathirana alias
Sinhala Pedige Karunaratne of
Waligamuwa, Kotawella,
Rambukkana.

Plaintiff

Vs.

1. Hemalatha Edirisinghe (Deceased)
- 1A. Lalajini Hemali Edirisinghe
- 1B. Lalani Rukmali Edirisinghe

all of No. 17, Gemunu Mawatha,
Kinigahapitiya, Rambukkana.

2. P.M. Premarathne of No. 14A,
Main Street, Rambukkana.

Defendants

And Between

P.M. Premarathne of No. 14A,
Main Street, Rambukkana.

2nd Defendant-Appellant

Vs.

Sunil Pathirana alias
Sinhala Pedige Karunaratne of
Waligamuwa, Kotawella,
Rambukkana.

Plaintiff-Respondent

Hemalatha Edirisinghe
of No. 17, Gemunu Mawatha,
Rambukkana.

1st Defendant-Respondent

And Now Between

P.M. Premarathne of No. 14A,
Main Street, Rambukkana.

**2nd Defendant- Appellant-Appellant
Vs.**

Sunil Pathirana alias
Sinhala Pedige Karunaratne of
Waligamuwa, Kotawella,
Rambukkana.

Plaintiff-Respondent-Respondent

Lalajini Hemali Edirisinghe
Lalani Rukmali Edirisinghe

both of No. 17, Gemunu Mawatha,
Kinigahapitiya, Rambukkana.

1A and 1B Defendant-Respondents

* * * * *

BEFORE : **S. Eva Wanasundera, PC. J.**
B. Aluwihare, PC.J. &
U. Abeyratne, J.

COUNSEL : Sunil Abeyratne for the 2nd Defendant-Appellant-
Appellant.
Dr. Sunil F.A. Cooray for Plaintiff-Respondent-Respondent

ARGUED ON : **12.03.2015**

DECIDED ON : **27.03.2015**

S. Eva Wanasundera, PC.J.

In this Appeal, leave to appeal was granted on the questions of law set out in paragraphs 7(a), (b), (b) ,(c) and (d) of the Petition dated 30.11.2011. They are as follows:-

- 7(a) Whether the learned Judges of the High Court of Provinces Civil Appeals, Kegalle failed to consider the law relating to Section 755 of the Civil Procedure Code?
- (b) Wasn't there prejudice caused to any party of the case as a result of making the original deceased 1st Defendant as the 1st Defendant-Respondent to the present appeal? (meaning the High Court appeal)
- (b) Whether the learned Judges of the High Court of Provinces (Civil Appeals), Kegalle and the learned District Judge, Kegalle erred in law to consider that the Petitioner had only to **present** the Notice of Appeal to the original Court and **not to address** the same and the Petition of Appeal to the same Court?
- (c) Whether the learned Judges of the High Court of Provinces (Civil Appeals), Kegalle has failed to consider the fact that the word 'order' instead the word 'judgment' has not caused any material defect to the present appeal (meaning the High Court appeal) or prejudiced any party to the appeal in this case?
- (d) Whether the learned Judges of the High Court of Provinces (Civil Appeals), Kegalle erred in facts and law of this case?

I observe that in the Provincial High Court of Kegalle at the commencement of the hearing, the 1A and 1B Defendant-Respondent-Respondents had taken up two preliminary objections, ie.

(1) A deceased person is named as a Respondent and the appeal is therefore bad in law.

(2) The notice of appeal as well as the petition of appeal filed by the Appellant against the judgment of the learned District Judge of Kegalle was not in conformity with the provisions of Sections 754(3) and 754(4) of the Civil Procedure Code.

Due to these defects, they pleaded that the notice of appeal and the petition of appeal should be dismissed in limine.

The Learned High Court Judges of the Civil Appellate High Court of Kegalle held that the appeal before them should be rejected on the basis that,

(a) The notice of appeal and the petition of appeal were not addressed to the original Court, ie. the District Court of Mawanella. .

(b) In the notice of appeal and the petition of appeal, only the name of Hemalatha Edirisinghe appeared as the 1st Defendant-Respondent which person had died pending the District Court action and therefore the notice and petition were both bad in law.

(c) The Judges of the High Court *cannot comply* with Section 755(4) when the Notice and Petition are bad in law.

In this regard, I would like to reproduce Sections 754 and 755 of the Civil Procedure Code. They read as follows:-

Sec.754(1) Any person who shall be dissatisfied with any judgment, pronounced by any original Court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of

Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to the court of appeal against such order for the correction of any error in fact or in law, with the leave of the court of appeal first had and obtained.

(3) Every appeal to the court of appeal from any judgment or decree of any original Court shall be lodged by giving **notice of appeal to the original court within such time and in the form and manner hereinafter provided.**

(4) The notice of appeal shall be presented to the court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. **If such conditions are not fulfilled, the court shall refuse to receive it.**

(5) Notwithstanding anything to the contrary in the Ordinance, for the purposes of this Chapter-

“judgment” means any judgment or order having the effect of a final judgment made by any civil court; and

“order” means the final expression of any decision in any civil action proceeding or matter, which is not a judgment.

Sec.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;
- (e) the nature of the relief claimed;

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

(2) The notice of appeal shall be accompanied by -

- (a) except as provided herein, security for the 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 acknowledgment or waiver of security signed by the respondent or his registered attorney; and
- (b) proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgment of the receipt of such notice or the registered postal receipt in proof of such service.

(3) Every appellant shall within sixty days from the date of the judgment or decree appealed against, present to the original court, a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty.

Provided that, if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against, **the court shall refuse to receive the appeal.**

(4)

(5)

I find that Section 759(1) and (2) and Section 770 of the Civil Procedure Code is relevant to this case in hand and as such I would like to reproduce the same as follows:-

Sec.759(1) If the petition of appeal is not drawn up in manner set out in the preceding section **it may be rejected or be returned to the appellant for the purpose of being amended, within a time fixed by court; or be amended then and there** .When the court rejects any petition of appeal under this section, it shall record the reasons for such rejection. And when any petition of appeal is amended under this section, **the Judge, or such officer as he shall appoint in that behalf, shall attest the amendments by his signature.**

(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 facts on which parties were before the District Court are as follows:-

The Plaintiff, as land lord instituted action in the District Court against his tenant, the 1st Defendant and the sub-tenant, the 2nd Defendant, seeking ejectment of the said Defendants on the ground of unlawful sub-letting. Anyway, the 2nd Defendant claimed tenancy under the Plaintiff. The 1st Defendant died pending the action and his wife and daughter were substituted in place of the deceased 1st Defendant as 1A and 1B Defendants. At the end of the trial the District Judge entered judgment in favour of the Plaintiff.

The 2nd Defendant (alleged in the plaint as sub tenant) who was aggrieved by the judgment lodged an appeal in the Civil Appellate High Court of Kegalle.

The High Court dismissed the appeal upholding the preliminary objections taken up by the Plaintiff-Respondent on two grounds, namely,

1. That all necessary parties who were before the District Court had not been named as parties to the appeal, and
2. That the notice of appeal was invalid.

The High Court in its judgment states that the notice of appeal was addressed to the High Court of Civil Appeals instead of addressing the same to the District Court which was the original Court. **Section 754(3) and (4) if read correctly, states how to commence an appeal.** Firstly notice of appeal should be presented to the Court of first instance. The Section **does not specifically say to which Court the notice should be addressed.** The notice is a document to be **firstly lodged within time in the original Court.** I am of the opinion that **it cannot become invalid so long as the notice is filed in the registry of the Court of first instance within time.**

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 the case of *Jayasekera Vs. Lakmini (2010) 1 SLR 41*, Justice Chandra Ekanayake (with J.A.N. de Silva, CJ. and Marsoof, PC.J. agreeing) held that ,

“if the issue at hand falls within the purview of a mistake, omission or defect on the part of the Appellant in complying with the provisions of Section 755, and if the Court of Appeal is of the opinion that the Respondent **has not been materially prejudiced, it is empowered to grant relief to the appellant on such terms as it deemed just**”.

“When 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.**”

It was held further that “Section 770 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 was 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**”.

I am of the opinion that this is a fit and proper case where the High Court of Civil Appeals, Kegalle should be directed to allow the notice and the petition to be corrected and/or the Court could correct the notice under its hand and then the appellate procedure should be allowed to proceed from there onwards. No prejudice would be caused to any party to the matter to be adjudicated namely, the Plaintiff, the 1A and 1B Defendants and the 2nd Defendant, when the notice of appeal is corrected and also when the petition of appeal is corrected because they have been filed **mainly according to Section 754(4) and Section 755(3) of the Civil Procedure Code.**

I am of the opinion that in this instance, no material prejudice would be caused to any party by correcting the notice of appeal and the petition of appeal. The

High Court should have corrected the petition and heard the appeal. Furthermore I find that the High Court sitting in appeal had considered two judgments, Talayaratne Vs Talayaratne (1957) 61 NLR 112 and Wimalasiri Vs Premasiri (2003) 3 SLR 330 and applied them wrongfully to the present case in hand. I answer the questions of law enumerated at the commencement of this judgment, in favour of the 2nd Defendant – Appellant – Appellant.

I conclude that the High Court should hear the matter on the merits after accepting the notice of appeal and after the corrections are done to the petition of appeal. The order of the High Court of Civil Appeal dated 25.10.2011 rejecting the notice of appeal and the petition of appeal, is hereby set aside. This appeal is allowed. The Registrar is directed to send this judgment forthwith to the High Court of the Province of Sabaragamuwa held in Kegalle with the High Court brief and the District Court brief if available, for the appeal to be heard on its merits.

Judge of the Supreme Court

B. Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

U. Abeyratne, J.

I agree.

Judge of the Supreme Court

