

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

A. D. Wimala Perera of
"Weeragiri" Walpita Road,
Mapatana, Horana.

12TH DEFENDANT-APPELLANT

C.A 195/1997 (F)
D.C Horana 3799/P

Vs.

Harsha Kumara Hettiwatte
Wimala Kumara Hettiwatte
Sarathchandra Hettiwatte of
Remuna, Anguruwatota
Next Friend of Plaintiffs-
Respondents

PLAINTIFFS-RESPONDENTS

J.H. Karannagoda and others

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Faiz Mutapha P.C for the 12th Defendant-Appellant
Athula Perera for the Plaintiff-Respondents

ARGUED ON: 02.06.2011

DECIDED ON: 08.11.2011

GOONERATNE J.

When this appeal came up before this court on 2.6.2011 learned counsel for Plaintiff-Respondent raised a preliminary objection regarding the maintainability of this appeal. It was his position that all parties who had obtained rights from the partition decree are not named as parties to this appeal in the Petition of Appeal. Only the two Plaintiffs and the 1st Defendant, 12th Defendant-Appellant are named in the petition of appeal. The learned counsel also raised the question of giving security for costs of appeal to all Defendants. On this question both parties were permitted by court to file written submissions.

The notice of appeal of 8th April 1997 gives the required particulars like name of the court from which appeal is preferred, number of action, names and addresses of parties to the action, name of the two Plaintiffs, Next friend of Plaintiff's and 30th Defendants are described in the caption. The Appellant is the 12th Defendant. The petition of appeal describes the two Plaintiffs and Defendants No. (1), the 12th Defendant-

Appellant. The 1st Defendant-Respondent is named and described as 'and others'. At the bottom of 1. J. H. Karannagoda ... and others it is typed as Defendant-Respondents. However the names of other Respondents do not appear in the caption.

In the written submissions the Plaintiff-Respondents emphasizes that the 12th Defendant-Appellant is aware of all parties effected by the decree, and it is negligence of the Attorney-at-Law and as a result the 12th Defendant-Appellant must suffer the consequences. It would be important and necessary to incorporate from the written submissions the following:

Necessary parties

As per the judgment 16 parties namely, 1st and the 2nd plaintiffs, 1st 2nd 3rd 4A, 5th 7th 9th, 10th 12th 20th, 21st, 27th 28th 29th defendants had been given rights. The 12th defendant appellant seeks to exclude lot 17 in the preliminary plan. If as claimed by the 12th defendant appellant lot 17 is excluded from the corpus it would affect prejudicially, the rights of all the parties who had been given rights. In the circumstances for the proper constitution of the petition of appeal all parties who would be prejudicially affected by the result of the appeal should be named as parties, unless they are the petition of appeal is defective.

If the present appeal of the 12th defendant is allowed all the parties who obtained rights would be prejudicially effected without adding them as parties to the present appeal. In such circumstances for the proper constitution of the appeal all parties who would be prejudicially affected should be named as parties. None inclusion of the necessary parties would be a fatal defect which cannot be curable at this stage of the case.

There are no provisions in the Partition case which demonstrate the requirements of filing of a petition of appeal. However as stated in Section 67 of the Partition Act the provisions in Civil Procedure code apply to any appeal that would be preferred against a judgment entered in a partition case.

Section 758 of the Civil Procedure Code lays down the requirements that have to be included in the petition or appeal.

I also had the benefit of reading and adopting the following case laws cited by learned counsel for Plaintiff-Respondent.

Ibrahim vs. Beebee 19 N.L.R 285

It is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and unless they are, the petition of appeal should be rejected.

Gunasekera vs. Perera 74 N.L.R 163

Failure of the appellant, in an appeal filed by him, to join as a respondent a party who will be adversely affected if the appeal were to succeed renders the appeal liable to be rejected if objection is taken by a party-respondent.

Wijerathna vs. Wijerathna 74 N.L.R. 193

Where the failure to name a necessary party as a respondent to an appeal is a defect of an obvious character, the appeal is liable to be dismissed. In such a case the decision of the Full Bench in Ibrahim v. Beebee (19 N.L.R 289) continues to be binding despite the enactment of the Supreme Court Appeals (Special Provisions) Act No. 4 of 1960.

Ibrahim vs. Nadarajah 1991 (1) S.L.R 131

Held.

A Failure to comply with the requirements of Rules 4 and 28 of the Supreme Court Rules 1978 is necessarily fatal.

Per Amerasighe, J.

“It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected”.

Talayaratna vs. Talayaratna 61 N.L.R 112

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.

Mahathun Mudalali vs. N.A. Naposingno 1986 (3) CALR 318

The requirements of a notice of appeal are spelt out in section 755 subsections 1 and 2. it shall be distinctly written on suitable paper, signed by the appellant or his registered Attorney and be stamped whenever applicable. It will also contain the particulars enumerated therein and shall accompanied by security Further more proof of service of such notice on the respondents shall be furnished. In my view all of the above requirements which are mandatory requirements must be satisfied in order to constitute a proper notice of appeal. This the notice that is presented to Court in terms of Section 754(4); and if such conditions are not fulfilled the Court refuse to receive it...

Undikkunda Arachchige Arnolis Perera vs Karunapeli Arachchige Premalatha CA Minutes dated 14.2.2005.

Weerasuriya Arachchige Podi Ralahamy vs. Sapumal Bandaranayake Ralalage alias Kiriwelle Ralalage Punchi Banda Weerasuriya CA Minutes dated 3.12.2004 it was held that;

In the instant appeal, I would hold that the default of citing a person not living as the respondent in the notice of appeal and in the petition of appeal which resulted from the negligence of the 2nd defendant appellant and his registered Attorney at Law would render the notice of appeal and the petition of appeal void ab initio and liable to be rejected in limine. This defect being incurable the defendant appellant cannot seek any relief in terms of section 759(2) of the Civil Procedure Code to amend the caption to bring in the person who should have been made respondent to the notice of appeal and the petition of appeal

In Keerthiratne Vs. Udena Jayasekera reported in 1990 (2) SLR 346 it was held that, the provisions of Section 759(2) of the Civil Procedure Code cannot be invoked to condone the negligence and carelessness of the Attorney at Law on record.

In Packiyathan Vs. Singarajah 1991 (2) SLR 305 it was held that, “relief will not be granted for default in prosecuting an appeal where-

- (a) The default has resulted from the negligence of the client or both the client and his attorney at Law.
- (b) The default has resulted from the negligence of the Attorney at Law in which event the principle is that the negligence of the Attorney at Law is the negligence of the client and the client must suffer for it.

The other complaint of the learned counsel for Respondent is the failure of the Appellant to give security for costs of appeal of the Respondents. He emphasis that the Appellant has not complied with Section 755(2)(a) of the Civil Procedure Code which is mandatory. As such appeal of the 12th Defendant-Appellant needs to be rejected.

Section 755 (2)(a) reads thus:

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

- (a) except as provided herein, security for the respondent's costs of appeal is 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.

I have also perused the written submissions of the 12th Defendant-Appellant filed on 30.8.2011. Those submissions deal with the merits of the case and on points where the original court Judge has erred as alleged by the Appellant. No submissions are contained on the preliminary objection raised by Plaintiff-Respondent. Court has to decide on the maintainability of this appeal prior to considering the merits. However further opportunity was given to reply the written submission filed by each other for 18.10.2011.

On 18.10.2011 the 12th Defendant-Appellant filed further written submissions in reply to the submissions of Plaintiff-Respondents and relies on Section 759(2) of the Civil Procedure Code. It is also submitted

therein that the notice of appeal gives the particulars of all Respondents and invites court to permit the 12th Defendant-Appellant to amend the Petition of Appeal and to make security deposits in respect of the Respondents.

Section 759(2) of the Code reads thus:

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.

There are authorities that suggest that the provisions of Section 759 (2) of the Code are wide and it is the discretion of the Court of Appeal to grant relief in an appropriate case. 1982 (1) SLR 56; 1993 (2) SLR 289; 1997 (1) SLR 70.

There are also decided cases which suggests that Section 759 (2) of the Code cannot be invited to condone the negligence and carelessness of the Attorney-at-Law on record. 1990 (2) SLR 346; 1986 (2) CALR 191.

In *Martin vs. Sudahamy – Bar Association Law Journal III Part II* pg. 7 – Relief under Section 759 (2) would, upon a literal construction, appear to apply even in a case of non-compliance with the requirement of hypothecation contained in Section 757 (1) of the Code.

I would incorporate in this judgment the above case reported in 1993(2) SLR 289 Nanayakkara Vs. Warnakulasuriya

Where notice of appeal was given accompanied by security for respondent's costs of appeal as required by Section 755(2) (a) but there was failure to hypothecate the sum deposited as security by bond as required by s. 757 (1) (and petition of appeal was filed in terms of s. 755(3) and the court ordered the record to be forwarded to the Court of Appeal as required by s. 755(4), the negligence of the attorney in not hypothecating 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. The rule that negligence of attorney-at-law is the negligence of the client does not apply.

Per Kulatunga J.

“Even though the District Court appears to have no power to reject a notice of appeal for failure to hypothecate security, it may perhaps call upon the appellant to rectify the defect where the non-compliance is observed at the stage when notice of appeal is given. If this were done, it may help in reducing the volume of incidental proceedings before the Court of Appeal resulting from the failure to hypothecate security by bond.

When I compare the earlier Civil Procedure Code (on grounds of rejection of the petition of appeal) with the present Code, somewhat a liberal view had been incorporated by Section 759(2) of the present Civil Procedure Code. Section 759(2) was not found in the earlier Civil Procedure Code. The law as it stood prior to 1972 was very strict in its application and had made mandatory provision with regard to provisions relating to notice of appeal, Petition of Appeal and security for costs of appeal. The legislature in

it's wisdom has contemplated to relax the rules since mistakes, omissions and defects occur very frequently by the legal profession, and one has to be mindful of all this which may take place due to human error. However on the other hand it is not the intention of the legislature to permit clients to abuse the process. As such facts and circumstances of each case would differ from case to case. The procedure on this aspect prior to 1972 was mandatory and it's application was strict. Earlier appeals were abated whenever notice of tender of security was not given forthwith. 41 NLR 241; 61 NLR 49; 22 NLR 1; SC117/57 –F dated on 1.2.1960.

In all the above circumstances it is apparent to this court that due to either carelessness or negligence of the registered Attorney of Appellant, Petition of Appeal had been filed without following the available procedural provisions of the law. I would adopt the dicta in *Nanayakkara vs. Warnakulasuriya* – vide negligence of Attorney-at-Law is not the negligence of client. Notwithstanding the lapse of registered Attorney of Appellant. I am of the view that it is a curable defect and permit filing of amended Petition of Appeal although a lapse of long period of time. As such Respondents who should be in the case along with the Plaintiff-Respondents need also to be compensated by way of costs.

Therefore I overrule the preliminary objections and this court direct that a prepayment order for cost be made as follows. A sum of Rs. 5000/= to be paid as costs to each of the Plaintiff-Respondents by the 12th Defendant-Appellant. All other parties and or Respondents who were allotted shares by the final decree who should be made parties to this appeal be paid as costs a sum of Rs. 3000/- each. Cost to be paid as aforesaid on or before 12 noon of 24th November 2011 (Deposited in the Registry of this court). Amended Petition to be filed on or before 24.11.2011 (In the registry of the Court of Appeal).

Failure to comply with the above direction of court on the due date and time will result in automatic rejection and dismissal of this appeal.

Preliminary objections overruled.

JUDGE OF THE COURT OF APPEAL