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

In the matter of an Appeal

SC.Appeal No. 252/2014
SC.HC.CALA.No. 213/2014
HCCA (Avissawella)
WP/HCCA/AV/722/2008(F)
DC.Pugoda Case No. 469/L

Oliver Ranjith Samaranayake,
929/6, Kotte Road,
Etul Kotte,
Kotte.

Plaintiff

-Vs-

1. Rajapakse Mohottige David,
2. Rajapakse Mohottige Dona Nilanthi,

Both of

Dodangahawatte, Samanabedda,
Tittapattera.
Defendants

3. Don Nimal Karunaratne
Samanabedda, Tittapattara.
Added 3rd Defendant

AND BETWEEN

Oliver Ranjith Samaranayake,
929/6, Kotte Road,
Etul Kotte,
Kotte.
Plaintiff-Appellant

-Vs-

1. Rajapakse Mohottige David,(Deceased)
1A and 2. Rajapakse Mohottige Dona Nilanthi,

Both of

Dodangahawatte, Samanabedda,
Tittapattera.
Defendants-Respondents

AND NOW BETWEEN

Oliver Ranjith Samaranayake,
929/6, Kotte Road,
Etul Kotte,
Kotte.
Plaintiff-Appellant-Petitioner-Appellant

-Vs-

1. Rajapakse Mohottige David,(Deceased)
1A and 2. Rajapakse Mohottige Dona Nilanthi,

Both of

Dodangahawatte, Samanabedda,
Tittapattera.
Defendant-Respondent-
Respondent-Respondents

3. Don Nimal Karunaratne
Samanabedda, Tittapattara.

Added 3rd Defendant-Respondent-Respondent

Before : Sisira J de Abrew J
LTB Dehideniya J
Murdu Fernando PC J

Counsel : Thushani Mendis for Plaintiff-Appellant-Petitioner-Appellant
Kamal Suneth Perera for the
1A and 2nd Defendant-Respondent-Respondent-Respondents

Argued on : 27.3.2018
Written Submission
Tendered on : 2.4.2018 by Plaintiff-Appellant-Petitioner-Appellant
10.3.2015 by the 1A and 2A Defendant-Respondent-Respondent-Respondents
2.4.2018 by the Added 3rd Defendant-Respondent-Respondent

Decided on : 6.9.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court dated 25.3.2014 wherein the learned Judges of the Civil Appellate High Court dismissed the appeal on the ground that 3rd Defendant-Respondent-Respondent who is a necessary party had not been brought before court by the Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) when he filed the appeal in the Civil Appellate High Court.

The Plaintiff-Appellant filed action against the 1st and the 2nd Defendant-Respondent-Respondents (hereinafter referred to as the 1st and the 2nd Defendant-Respondents) seeking a declaration of title to the land described in the schedule to

the amended plaint. Later on an application made by the 2nd Defendant-Respondent, the 3rd Defendant-Respondent was added as a party (the 3rd Defendant). The learned District Judge by his judgment dated 24.11.2004 decided that the 3rd Defendant-Respondent is entitled to Lot No.1 of Plan No.2964/w dated 14.5.2001 of DB Wijesinghe Licensed Surveyor. The learned District Judge also granted the relief claimed in paragraphs (a),(b) and (c) of the prayer to the answer of the 1st and 2nd Defendants. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court but failed to name the 3rd Defendant as a party in the Petition of Appeal filed in the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court dismissed the appeal on the ground that the 3rd Defendant-Respondent who is a necessary party had not been named as a party in the Petition of Appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 17.12.2014, granted leave to appeal on questions of law set out in paragraphs 25(a),(b),(c),(d) and (e) of the Petition of Appeal dated 3.5.2014 which are set out below.

a. Did the Provincial High Court of Civil Appeal err in holding that if the Petitioner's action is dismissed it would prejudicially affect the rights of the 3rd Defendant-Respondent?
b. Did the learned Provincial High Court of Civil Appeal fail to take cognizance of the case of Ibrahim Vs Beebee (19 NLR 289) ?
c. Did the Provincial High Court of Civil Appeal err in holding that the 3rd added Defendant was a necessary party to the adjudication of the Appeal ?
d. Did the learned Provincial High Court of Civil Appeal fail to take cognizance of Sections 759(2) and 770 of the Civil Procedure Code

and thereby failed to add the 3rd Defendant-Respondent as a party to the Appeal ?

e. Did the learned Provincial High Court of Civil Appeal fail to take cognizance of and follow the judicial precedent of Your Lordships' Curt in Ediriweera Jayasekara V Willorage Rasika Lakmini (2010 (1) SLR 41?

Learned counsel for Plaintiff-Appellant contended that it was not necessary to name the 3rd Defendant-Respondent in the plaint as no relief claimed against him. She therefore contended that the 3rd Defendant-Respondent is not a necessary party to the appeal. I now advert to this contention. Although learned counsel for the Plaintiff-Appellant contended so, the Plaintiff-Appellant in his Petition of Appeal filed in the Civil Appellate High Court has sought to set aside the judgment of the learned District Judge dated 24.11.2004 and to grant relief as prayed for in the amended plaint. She contended that no relief was sought against the 3rd Defendant in the amended plaint. It has to be noted here that the learned District Judge by his judgment dated 24.11.2004, has granted relief to the 3rd Defendant-Respondent. If the Civil Appellate High Court decided to set aside the judgment of the learned District Judge, then the decision of the Civil Appellate High Court would have set aside the relief granted to the 3rd Defendant-Respondent by the learned District Judge. Therefore if the 3rd Defendant-Respondent was made a party to the appeal filed in the Civil Appellate High Court, he would have defended the judgment of the learned District Judge and would have resisted the relief claimed in the Petition of Appeal. Therefore it appears that the aforementioned failure was a deliberate act by the Plaintiff-Appellant. The conduct of the Plaintiff-Appellant must also be considered. He is a person who did not name the 3rd Defendant in the plaint. I have

earlier observed that the failure of the Plaintiff-Appellant to name the 3rd Defendant in the plaint was a deliberate act on the part of the Plaintiff-Appellant. This is further established by his conduct. When I consider all the above matters, I hold the view that the 3rd Defendant-Respondent is a necessary party to the appeal filed in the Civil Appellate High Court.

When the aforementioned failure on the part of the Plaintiff-Appellant was brought to the notice of court, the Plaintiff-Appellant took up the position that if the Civil Appellate High Court decides that the 3rd Defendant-Respondent is a necessary party, the court has the power to notice the 3rd Defendant-Respondent. The Plaintiff-Appellant however did not make an application to court to add the 3rd Defendant-Respondent as a party. For the above reasons, I am unable to conclude that the failure on the Plaintiff-Appellant to name the 3rd Defendant-Respondent as a party to the appeal filed in the Civil Appellate High Court was a mistake or an omission. If it is a mistake or an omission, the Plaintiff-Appellant should have made an application to the Civil Appellate High Court to add the 3rd Defendant-Respondent as a party to the appeal. For the above reasons, I hold that aforementioned failure was a deliberate act by the Plaintiff-Appellant.

Section 759(2) of the Civil Procedure Code 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, 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."*

I have earlier concluded that failure on the part of the Plaintiff-Appellant to name the 3rd Defendant-Respondent as a party to the appeal filed in the Civil Appellate

High Court was deliberate act. Therefore the said failure cannot be considered as a mistake or an omission or a defect. Thus Section 759(2) of the Civil Procedure Code has no application to the facts of this case.

In Jayasekara Vs Lakmini and Others [2010] 1SLR 41, this court observed the following facts.

> *"The 4th defendant-appellant failed to name the 1st and 2nd defendants in the District Court in the partition action as the respondents in the appeal - only the plaintiff was made a party. On the objection raised by the plaintiff-appellant that the appeal is not property constituted the High Court overruled the objection stating that, all necessary parties had been noticed by the 4thdefendant-appellant in compliance with Section 755 and fixed the case for argument."*

This court held as follows.

> *"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. 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."*

In the present case, I have held that the aforementioned failure was not a mistake or an omission or a defect. Therefore the decision in Jayasekara Vs Lakmini and Others (supra) has no application to the facts of this case.

In considering the appeal of the Plaintiff-Appellant it is important to consider Section 770 of the Civil Procedure Code which reads as follows.

> *"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 hereinbefore 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, is interested in the result of the appeal, the court may issue the requisite notice of appeal for service."*

In terms of the above section the Court of Appeal has the discretion to use the power granted by the said section. When the failure on the part of the Plaintiff-Appellant is a deliberate act, the court has the power to refuse to take steps in terms of Section 770 of the Civil Procedure Code. This view is supported by the observation made by Ennis J in Ibrahim Vs Beebee 19 NLR 289. Ennis J discussing the provisions of Section 770 of the Civil Procedure Code made the following observation.

> *"In my opinion three courses are open to the Court. It may (1) proceed to hear the appeal as it stands, or (2) add, and give notice to, parties under the provisions of section 770 of the Civil Procedure Code, or (3) dismiss the appeal for defect of parties."*

For the aforementioned reasons, I reject the contention of learned counsel for the Plaintiff-Appellant. In view of the conclusion reached above, I answer the 1st question of law as follows.

"If the Civil Appellate High Court allowed the appeal of the Plaintiff-Appellant, it would have affected the rights of the 3rd Defendant-Respondent.''

I answer the 2nd to 5th questions of law in the negative. When I consider the judgment of the Civil Appellate High Court, I feel that there are no reasons to interfere with the said judgment. For the above reasons, I affirm the judgment of Civil Appellate High Court and dismiss the appeal of the Plaintiff-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

LTB Dehideniya J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.