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[2010] 1 SRI L.R. - PART 2

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05.11.2003. Although the matter was fixed for argument on 29.01.2004, on a motion filed by the learned President's Counsel for the respondents dated 10.10.2003, this matter was re-fixed for hearing on 03.03.2004. On 03.03.2004, on an application made on behalf of the learned President's Counsel for the appellant, the hearing was again re-fixed for 01.07.2004. On 01.07.2004, it was not possible for the appeal to be taken up for hearing as the Bench comprised of a judge who had heard this matter in the Court of Appeal and this was re-fixed for hearing on 01.11.2004. On that day it was once again re-fixed for hearing for 17.02.2005. By that time one year and four months had lapsed from the date special leave to appeal was granted. It is not disputed that even on the day this appeal was finally taken up for hearing, viz. on 17.02.2005, the appellant had neither filed his written submissions nor had he given an explanation as to why it was not possible to file such written submissions in accordance with the Rules." (emphasis added)

It is observed that in *Muthappan Chettiar's case (supra),* the delay in filing written submissions ran to several months. Notwithstanding such delay, even thereafter the appellant had not taken any interest to comply with the Rules relating to filing of written submissions. On 17.02.05 when the matter was taken up for hearing, the written submissions were not before Court. When the learned President' Counsel for the respondents took up the preliminary objection, appellant moved to file written submissions on the question of the said preliminary objection. The Court directed the respondents to file their written submissions on or before 07.03.2005 and the appellant to file their written submissions on the said preliminary objections on or before 01.04.2005. The respondents however filed their written submissions on 04.03.2005. and the appellant failed to file his written submissions on

or before 01.04.2005. The appellant finally filed his written submissions only on 10.05.2005.

All the abovementioned events, clearly indicate that the appellant had been consistent in not showing due diligence in prosecuting his appeal. I am therefore of the view that *Muthappan Chettiar's* case is easily distinguishable from the instant appeal.

In the case of *Priyani de Soyza vs. Arsacularatne*[2], at 202, Wijethunga, J. referred to the case of *Piyadasa and Others vs. Land Reform Commission*[3], where a preliminary objection was taken by the learned Counsel for the Petitioners that the Respondents had filed their written submissions 197 days after the date of which they were required by Rule 30(7) to be filed, and it was contended that the Respondents belated submissions should not be accepted and that the Respondents should not be heard even though there was no explanation tendered regarding the delay. Amerasinghe, J. overruled the preliminary objection stating that *"In my view, Rule 30 is meant to assist the Court in its work and not to obstruct the discovery of the truth. There were numerous documents that had to be considered; and in our view, we needed the assistance of learned Counsel for the Petitioner as well as the Respondents, including their written submissions to properly evaluate the information that we had before us. It was therefore, decided that the preliminary objection should be overruled."*

It may be relevant to consider the observations made by Court in the case of *Union Apparels (Pvt) Ltd. vs. Director General of Customs and Others*[4]. The petitioner Company in this case filed its application on 03.06.1999. Hearing was fixed for 20.08.1999, and the written submissions of the petitioner were filed on 19.08.1999. The objection of the

respondents was that the petitioner had failed to comply with Rule 45(7) which required the written submissions to be filed at least one week before the date of hearing. The respondents therefore moved Court that the application must stand dismissed in terms of the Supreme Court Rules of 1990. The Court having considered the purpose of Rule 45(7) in comparison with Rule 30, the object of Rule 34 and specially the surrounding circumstances of the case decided that it could not be said that the petitioner had failed to show due diligence in taking all necessary steps for the purpose of prosecuting the application and overruled the preliminary objection. Amerasinghe, J. commented that the *question whether an application should be rejected for the failure to comply with a rule of the Court depends on whether, having regard to the words of the relevant rule, the Court has a discretion to entertain or reject the application, and whether having regard to the object of the rule and the circumstances of the case the Court is justified in arriving at its decision."*

Considering the above cases, I am of the view that the Appellants in this appeal have tendered their written submissions to the Respondents once the failure to tender written submissions had been brought to their notice. I am of the view that this is an appropriate case for the preliminary objection to be overruled and the application for special leave to appeal to be set down for hearing in due course. I therefore make order accordingly. There will be no costs.

J. A. N. DE SILVA C. J. – I agree

IMAM, J. – I agree.

Preliminary objection over ruled.

Special Leave to appeal application set down for Support.

SAVINDA VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J.
LECAMVASAM. J.
CA 212/2007
HC COLOMBO 2848/2006
OCTOBER 28, 2009
NOVEMBER 6, 9, 20, 2009

Penal Code – Section 364(4) – Rape – Ingredients – Reasonable doubt – Charge should fail? Credible witness – Test of probability – Compensation – default sentence in excess of 2 years – validity?

The accused-appellant was convicted for raping a woman inside a bus and was sentenced to 20 years R. I. and to pay a fine of Rs. 25,000/- carrying a default sentence of 2 years R. I., in addition, he was ordered to pay a sum of Rs. 500,000/- to the victim as compensation carrying default sentence of 5 years R. I.

The respondents' position was that he had sexual intercourse with consent.

Held

(1) To establish a charge of rape, the prosecution must establish the following ingredients.

(i) The appellant committed sexual intercourse on the woman.

(ii) The said intercourse was performed without her consent.

If there is reasonable doubt in one of the ingredients the charge should fail.

(2) The story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. The prosecutrix was not a credible witness.

Per Sisira de Abrew. J.

"In my view in a charge of rape if the evidence of the prosecutrix does not satisfy the test of probability and or the prosecutrix is not a credible witness, Court should reject her evidence and acquit the accused".

Held further:

(3) The default sentence of 5 years R. I. is illegal since the maximum sentence that could be imposed for non payment of compensation is two years.

Gayan Perera for accused-appellant

Ayesha Jinasena SSC for Attorney General.

January 21, 2010

SISIRA DE ABREW, J.

The accused appellant (the appellant) in this case was convicted for raping a woman named Amarasinghe Mudiyanselage Lalini and was sentenced to a term of twenty years rigorous (RI) and to pay a fine of Rs. 25,000/- carrying a default sentence of two years RI. In addition to the above sentence he was ordered to pay a sum of Rs. 500,000/- to the victim as compensation carrying a default sentence of five years RI. This appeal is against the said conviction and the sentence. At the very inception I would like to state here that the default sentence of five years RI is illegal since the maximum default sentence that could be imposed for non payment of compensation under Section 364(4) of the Penal Code is two years.

Facts of this case may be briefly summarized as follows: Lalani, working in Katunayake, on 24.5.2005 boarded a Colombo bound bus at Bodagama, her hometown in Thanamalwila police area in order to come to Colombo. After

the bus was stopped at police check point at Udawalawa, the driver of the bus, the appellant in this case, requested her to come and sit on a small seat behind the driver's seat as she could not continue to stand in the bus. She was, at this time, standing on the foot board. She thereafter got off the bus, got in from the driver's door, occupied the said seat and continued to be on the seat until she came to Colombo. When passengers were getting off at Pattah, she requested him to open the driver's door but he refused to do so as it would disturb the people moving on the road. She says that the front section of the bus was separated from the rear section of the bus by an iron fence and therefore she could not go to the rear section and could not get off from the normal passenger door. However she later says that she jumped over this fence. Vide page 89 of the brief. The driver at this stage asked her to get off at Gunasingherpura which is also in pettah. The driver did not stop the bus at Gunasinghepura but drove to Bastian Mawatha in Pettah and stopped the bus. Thereafter the driver jumped over the fence and went to the rear section of the bus. She too jumped over the fence. The driver then dragged her the rear seat and started fondling her breast. He then got up, put a mat on the floor and pushed her to the mat. Whilst she was on the ground, he pulled her pair of jeans, tie short and panty and raped her.

The appellant in his evidence admitted that he had sexual intercourse with her consent.

Soon after the incident she made a complaint to the police. This is in her favour. The appellant in his evidence says that after the sexual act she kept on asking whether he is married. According to the accused she later addressed him in the following language: "Did you love me to do this? People in the bus trade are like this. "She got off the bus saying

that she would find whether he is married. The appellant further says that he did not give his telephone number to her although she asked for it. From this evidence it appears that her hopes of having a hold on him perhaps hopes of getting married to him have shattered. According to the appellant both of them were having a friendly chat from Udawalawa to Colombo. It appears from the above evidence that friendly association has turn out to be anger when she got off the bus. This is evident from the language used by her soon before she got off the bus. These were the reasons for her to make a prompt complaint to the police.

The appellant had a laceration on his lower lip and a bit mark on his shoulder. This evidence was in favour of the prosecutrix. The appellant says in this evidence that whilst he was performing sexual act with her consent she kept on chewing his shoulder and the lip. Thus the fact that the appellant had injuries is something that can be understood. This evidence of the appellant cannot be an afterthought since the prosecution did not mark any contradiction or omission in his evidence.

The prosecutrix had four contusions and one abrasion on the chest. The appellant says that he fondled her breast with her consent. However she says he did it without her consent. Doctor says that if the sexual act was performed after removing her clothes, injuries could not have been restricted only to these injuries. The prosecutrix says that she was dragged from the iron fence of the bus to the rear of the bus, pushed her to the rear seat thereafter pushed her to the floor of the bus and removed her pair of jeans, tie short, and the panty while she was on the floor. All these things were done against her will. She further says that sexual intercourse was performed on the space between the two sets of seats where the passengers

stand. If this was the situation how did she receive injuries only on her chest? Doctor at page 178 of the brief says that injuries found on the prosecutrix are compatible with the short history given by her. But in her short history given to the doctor she had not said all the details that I stated earlier. She had not even said that she was pushed to the floor of the bus. She had told the doctor that the sexual intercourse was committed whilst she was on a seat. Vide page 159 of the brief. But at the end of cross-examination doctor says that if sexual intercourse was performed after removing her clothes there would have been more injuries than the injuries found on her. The above observation raises a serious doubt about the truthfulness of the story of the prosecutrix that sexual intercourse was performed without her consent.

According to witness Premasiri to whom the prosecutrix complained that she was subjected to a sexual harassment, the bus was parked on Bastian Mawatha facing Fort railway station. She met Premsiri soon after she got down from the bus. At this time he was walking from the direction of Fort railway station towards Court. The bus was on his left hand side. This shows that the doors of the bus were facing the road. The bus was parked 30 feet away from the petrol station at Bastian Mawatha. Although the prosecution relying on IP Ovitigama's evidence, tried to contend that this place was a lonely place, this was negated by the evidence of PC 12717 Kumara who said that this place was a crowded place. PC Kumara was on duty from 2.00 p.m. onwards on the day of the incident (24.5.2005). He said that this place was usually a crowded place and did not notice any change on this day. IP Ovitigama said in evidence that police post at Bastian Mawatha was located 20 meters away from the place where the bus had been parked at the time of the incident. It is therefore seen that at the time of the sexual intercourse the

bus was parked at a crowded place at Bastian Mawatha and that this place was 20 meters away from the police post and 30 feet from the petrol station. The doors of the bus were facing the road. Thus the question that has to be asked: would the appellant select this type of the place to commit sexual intercourse on a woman if it was against her will. Even after an attempt to commit a sexual act thinking that she was consenting, would he continue to do it at this place if he felt that she was not consenting. This question will have to be answered in the negative. I therefore hold that the story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. For these reasons I hold that there is a very serious doubt in the truth of the prosecutrix's story that sexual intercourse was performed against her will. The appellant must be acquitted on this ground alone.

To establish a charge of rape, the prosecution must establish the following ingredients. (1). The appellant committed sexual intercourse on the woman. (2) The said intercourse was performed without her consent. If there is a reasonable doubt in one of the ingredients the charge should fail. The above observations would show that there is reasonable doubt in the 2nd ingredient. Therefore the Court has to conclude that the charge of rape has not been proved beyond reasonable doubt. The appellant is, then, entitled to be acquitted.

Learned SSC pointed out that he was arrested whilst hiding on the ceiling of the appellant's house. She tried to contend that he went into hiding because of the guilty mind. But when considering this contention one must one forget the fact that his wife was present at the time of the arrest. No

man will admit in the presence of his wife that he committed sexual intercourse on a woman with or without consent. Therefore the fact he was hiding in the ceiling is understandable.

When the appellant stopped the bus at Pettah the passengers started getting off. At this time the prosecutrix, according to her, requested the appellant to open the driver's door for her to get down. The appellant had refused to do so as it would disturb the people moving on the road. The fact that she did not make an attempt to get off from the driver's door can be understood as he was a person who had helped her to give a seat. If her intention was, as stated by her, to go to Katunayake why didn't she get off from the passenger door? Her explanation to this was that she could not jump over the iron fence which separated the driver's section and the rear section. Vide page 52 of the brief. But this evidence is belied by her evidence at page 56 and 89 of the brief where she says that she jumped over the iron fence and came to the rear section of the bus. If her intention was to go to Katunayake and she was not permitted to get off the bus through the driver's door, why couldn't she jump over the iron fence when the passengers were getting off at Pettah? She could have easily done this since, according to her evidence, her seat was behind the driver's seat. Vide her evidence at page 48 of the brief. Further she could have easily got the help of the passengers to jump over the fence. Even the appellant could not have done anything to block this attempt since he was on the driver's seat at this time. She herself admits that later at Bastian Mawatha she jumped over the iron fence. Was it natural for this woman to remain in the bus with two men (the driver and the conductor) when she had the opportunity of getting off the bus? I think not. This shows that she was

willing to enjoy the company of the appellant. This raises a reasonable doubt in the truth of her story that she was not a willing partner to the sexual act. According to the prosecutrix, when the passengers were getting off at Pettah, the appellant requested her to get off at Gunasinghepura. But when the bus went to Gunasinghepura it did not stop there, instead the appellant turned the bus at Gunasinhepura and come to Bastian Mawatha. By this time she should know that something serious was going to happen to her. Then why didn't she jump over the iron fence which she did later? I ask the question why she didn't jump over the iron fence at least during the journey from **Gunasinghepura to Bastian Mawatha**. She claims that: she could not jump over the iron fence because the driver was there (page 56) But this cannot be accepted since she admitted that her seat was behind the driver's seat (page 48) During the journey from Gunasinghepura to Bastian Mawatha the driver (the appellant) was driving and if she was seated behind the driver how could the driver do anything to her? This observation would raise a serious doubt about the truth of her story that she was not a willing partner to the sexual intercourse. The above observation would show that the prosecutrix is not a credible witness. As I pointed out earlier if there is a reasonable doubt on the 2nd ingredient of the offence of rape, the appellant should be acquitted.

According to the prosecutrix when the appellant was inserting his male organ to her vagina she shouted. Then he squeezed her neck and addressed her in the following language. "Don't shout. People will hear. If that happens I will have to open the door." This was the evidence of the prosecutrix. Learned Counsel contended that this was a request by the appellant to the prosecutrix and if it was against her will this kind of request would not have been made by him. This evidence too creates a reasonable doubt in

the truth of the prosecutrix's evidence that the sexual intercourse was committed without her consent.

I have earlier pointed out that the story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. Further I have pointed out that the prosecutrix was not a credible witness. In my view, in a charge of rape if the evidence of the prosecutrix does not satisfy the test of probability and/or the prosecutrix is not a credible witness, court should reject her evidence and acquit the accused. For the above reasons, I hold that the prosecution has not proved its charge beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the appellant of the charge with which he was convicted.

LECAMWASAM, J. – I agree.

Appeal allowed.

JAYASEKERA VS. LAKMINI AND OTHERS

SUPREME COURT
J. A. N. DE SILVA C. J.
MARSOOF, J.
CHANDRA EKANAYAKE, J.
SC 15/2009
SC HC (CALA) 29/09
WPHCCA/KALUTARA 101/2003
DC PANADURA 745/P
APRIL 30, 2009
JUNE 5, 2009
JUNE 10, 2010

Civil Procedure Code – Section 755 (1) Section 755 of (2) (a) – 2b – Section 758 (1), Section 759 (2) Section 770 – Complying mandatory?– All necessary parties to be made parties in the appeal? – Partition Act 21 of 1977 – Section 67 – Failure to complete required steps – Fatal? Prejudice caused? Can Appellate Court add a respondent as a party? – Discretion?

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 4th defendant-appellant in compliance with Section 755 and fixed the case for argument.

The plaintiff-respondent sought leave to appeal from the said order and leave was granted.

Held

(1) 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.

(2) 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.

(3) The power of the Court to grant relief under section 759 (2) 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 – relief cannot be granted if the Court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

Per Chandra Ekanayake, J.

"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)

Held further

(4) 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 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.

(5) If a particular party in a partition action who should have been made a respondent is not made a respondent in the appeal, then granting relief to the appellant will not help such a party to safeguard his rights and making him a respondent would not act to the prejudice of the appellant. A discretion necessarily invokes an attitude of individual choice, according to the particular circumstances, and differs from a case where the decision follow exdibito juctitiae, once the facts are ascertained. The exercise of the discretion contemplated in Section 770 is a matter for the decision of the Judge who hears the appeal.

APPEAL from an order of the High Court of Kalutara on a preliminary issue.

Cases referred to :-

(1) *Kiri Mudiyanse and others vs. Bandara Menike* – 1974 76 NLR 371

(2) *Nanayakkara vs. Warnakulasuriya* – 1993 – 2 Sri LR 289

(3) *Keerthisiri vs. Weerasena* – 1997 – 1 SLR 70

(4) *Dias vs. Arnolis* – 17 NLR 289

(5) *Ibrahim vs. Beebe* – 19 NLR 289

(6) *Evans vs. Bartlam* – 1937 – 2 AER 646 at 655

(7) *Gardiner vs. Jay* – 1885 Ch.D. 50

(8) *Hope vs. Great Western Railway Company - 1937 1All ER 625*

(9) *Jerkins vs. Bushby* - [1891] 1. Ch. 483

Manohara de Silva PC with *Arinda Wijesundera* and *G. W. C. Bandara Thalagune* for plaintiff-respondent-appellant.

Uditha Egalahewa with *Amaranath Fernando* for 4th defendant-appellant-respondent.

October 10th, 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 (Holder 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 the 1st , 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 (CI) 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 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 Section 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 acknowledge-

ment 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 circumstance 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 1st and 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 Section 758 (1) of the Civil Procedure Code. Thus the questions of law on which special leave was grated 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 Menike*(1).

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 Section 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 Section 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. Section 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 Section 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*(2) would lend assistance. In the said case per Kulatunga, J.

"The power of the Court to grant relied 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 which event the appeal has to be dismissed."

In the course of the judgment in the said case (at 293) Kulatuga, 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 (CI) 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*[3] 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 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 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."

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 part 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 (Supra)* 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*(4) and *Ibrahim vs Beebe*(5) it was 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 content 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 (Supra)* at 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 (Supra)* 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*(6) at 655:

"To quote again from Bowen L. J., in *Gardner v. Jay,* (7) at 58;