WIMALASIRI AND ANOTHER
v
PREMASIRI

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A. 1150/93
D. C. KANDY 11187/P
MAY 19, 2003
JUNE 12, 2003

Civil Procedure Code – Sections 93, 755(1)d, 2(b) 758(1)(c), and 759(2) – Respondent died pending trial – Party Substituted – Appellant names deceased defendent as respondent – Validity – Is it fatal?

Held:

(1) 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-appellants 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".

APPEAL from the Judgment of the District Court of Kandy.

Cases referred to:

1 *Keerthiratne* v *Udena Jayasekera* –1990 2 Sri LR 346

2 *Don Alwis* v *Village Committee of Hiripitiya* – 54 NLR 225

3 *Packiyanathan* v *Singarajah* – 1991 2 Sri LR 205

4 *Sri Lanka General Workers Union* v *Samaranayake* – 1992 2 Sri LR 268

5 *Martin* v *Suduhamy* – 1991 2 Sri LR 279

6 *De Silva* v *Seenathaumma* – 41 LR 241

S.C.B. Walgampaya with *Eranga Perera* for defendant-appellant.

Hemasiri Withanachchi for plaintiff-respondent.

Cur.adv.vult.

September 12, 2003

SOMAWANSA, J.

When this appeal was taken up for hearing counsel for the substituted-plaintiff raised a preliminary objection in relation to the validity of both the notice of appeal and the petition of appeal on the basis that the party cited as the 'respondent' therein is the deceased plaintiff who died pending the trial in the District Court and not the substituted plaintiff.

It was submitted by counsel for the substituted-plaintiff that the original plaintiff Medagedara Premasiri died during the pendency of the trial and on 18.10.1990 his daughter Chamari Premasiri was substituted in the room of the plaintiff. This is borne out by the journal entry No.49 dated 18.10.1990. The caption in the amended plaint was also amended with the insertion of the name of the said Chamari Premasiri as the substituted plaintiff as shown on page 37 of the brief. That the substituted-plaintiff was present in Court thereafter as the proceedings of 17.01.1992 and 19.05.1992 would indicate. He submits that in the circumstances it is inconceivable that the death of the original plaintiff and the substitution of the daughter were not within the full knowledge of the defendants-appellants and their registered Attorney-at-Law. However he submits that in the instant appeal the caption of both the notice and the petition of appeal carry the name of a person who was not among the living and who was non existent, as the respondent. Therefore he submits that in terms of section 755(1)(d) 2(b) and section (1) (c) both the notice and the petition of appeal are defective for non compliance with the provisions of the said sections and that this defect is not a curable defect and as the irregularity was fatal both the notice and the petition are *void ab initio.*

It is contended by counsel for the 1st to 4th defendants-appellants that the original caption has not been amended in the journal nor an amended caption filed and that after the order was made for substitution it was the duty of the substituted-plaintiff to take steps to amend the caption. The counsel also refers to section 93(4) of the Civil Procedure Code wherein mandates that the additions or alterations be clearly made on the face of the pleadings affected by the order or if this cannot conveniently be done, a fair copy of the pleadings as altered be appended in the record.

It is common ground that the original plaintiff died during the pendency of the trial and on 18.10.1990 his daughter Chamari Premasiri was substituted in the room of the plaintiff. On an examination of the record it is to be seen that though the caption in the original plaint has not been amended the caption in the amended plaint has been amended with the insertion of the name of the said Chamari Premasiri with a reference to journal entry 49. Therefore it appears to me that there was no other duty or burden cast on the substituted-plaintiff to take any further steps in this regard. The fact that the original plaint was not amended is irrelevant for once an amended plaint is filed of record with permission of Court proceedings are based on the amended plaint and not on the original plaint. Hence it is to be seen that the argument of counsel that the original caption should have been amended in the record has no merit and I would agree with counsel for the substituted plaintiff that the defendants-appellants in order to cover up their negligence are attempting to take refuge in some imaginative lapse on the part of the substituted-plaintiff when the basic requirements had been complied with.

In any event, the provisions of section 93 have no application to the amendment of the caption inasmuch as the pleadings were not amended and the amendment to the caption has been duly recorded. In the circumstances the defendants-appellants cannot be heard to say that they were misled by an omission on the part of the substituted-plaintiff.

It is also submitted by the counsel for the defendants-appellants that the motion dispensing security for costs tendered to Court along with the notice of appeal and the appearance of

counsel on behalf of the substituted-plaintiff would establish that the substituted-plaintiff has had notice of the appeal and thus the defendants-appellants have duly complied with the provisions of section 755 (2)(b). However notice of appeal is not the issue that is being canvassed but the validity of the petition of appeal.

The relevant section pertaining to the issue at hand is as follows:

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:

(d) the names of the appellant and respondent;"

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

(c) the names of the appellant and of the respondent;"

In the instant appeal, it is to be seen that both in the notice as well as the petition of appeal the name given in the caption as the plaintiff-respondent is a person who was no longer living. Therefore it is clear that the defendants-appellants will not be able to proceed with the appeal in view of the failure to comply with the provisions in the said sections. In any event, they cannot proceed against a dead person.

Counsel for the defendants-appellants knowing the precarious position the defendants-appellants are placed with submitted that the mistake, omission or defect of the defendants-appellants in not naming the substituted-plaintiff as respondent has not materially prejudiced the substituted-plaintiff at all and therefore he contended that the defendants-appellants are entitled to relief in terms of section 759(2) of the Civil Procedure Code. The said section reads as follows:

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, 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".

In the case *Keerthiratne* v *Udena Jayasekera*[1] the head note reads:

"Notice of appeal was given in time in terms of S.755(1) of the Civil Procedure Code. The Attorney-at-Law on record failed to file the petition of appeal as required by S.755(3) of the Civil Procedure Code. The excuse given was that the appellant was kept in detention and as a result his mental and physical condition deteriorated and after his release he had to obtain treatment for his condition and therefore could not give instructions.

The filing of a notice of appeal must be followed by presentation of the petition of appeal within 60 days. Both steps are imperative and mandatory. The responsibility is on the Attorney-at-Law on record and not on the petitioner.

The provisions of S. 759(2) of the Civil Procedure Code cannot be invoked to condone the negligence and carelessness of the Attorney-at-Law on record".

The relief that the defendants-appellants are seeking is to amend the caption in the notice and petition of appeal to include the name of the substituted-plaintiff as the respondent. It is well settled that where a plaintiff has instituted action against a wrong party as the defendant the plaintiff cannot subsequently amend the caption so as to have the proper person added as a defendant.

Don Alwis v *Village Committee of Hiripitiya*[2] the head note reads:

"Where a plaintiff has instituted action against a wrong party as the defendant the plaint cannot be subsequently amended so as to have the proper person added as a defendant. In such a case, the proper course is for the plaintiff to drop the action which has been wrongly instituted and commence a new action against the proper person who should have been made the defendant."

In *Packiyanathan* v *Singarajah*[3] it was held:

"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.

As the applicant's default appeared to be the result of his own negligence as well as the negligence of his Attorney-at-Law the conduct of the appellant and his Attorney-at-Law cannot be excused. The appellant had failed to adduce sufficient cause for a re-hearing of the appeal.

It is necessary to make a distinction between mistake or inadvertence of an Attorney-at-Law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. The Court will in granting relief ensure that it's order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law".

As stated above, the fact that the original plaintiff was no longer living and on his death his daughter Chamari Premasiri had been substituted in the room of the plaintiff was well within the knowledge of the defendants-appellants and the registered Attorney-at-Law. The fact that substitution had been effected in the room of the dead plaintiff is manifest in the caption to the amended plaint. In the circumstances citing the original plaintiff who was no longer living as the respondent to the notice of appeal as well as to the petition of appeal could only be construed as negligence and not as a mistake or inadvertence on the part of the defendants-appellants and their Attorney-at-Law. Such negligence in my opinion should not be condoned or in any manner encouraged. If not, it would be opening the flood gates for parties and the registered Attorney-at-Law to seek relief for their negligence in the guise of mistake or inadvertence.

Counsel for the defendants-appellants have cited the decision in *Sri Lanka General Workers Union* v *Samaranayake* (4) to strengthen his claim for relief in terms of section 759(2) of the Civil Procedure Code. However the said decision has no application to the issue at hand for that decision deals with the mandatory nature of the time limit laid down in section 31 (D) of the Industrial Disputes Act. He also cites the decision in *Martin* v *Suduhamy*(5) and *De Silva* v *Seenathaumma*(6) where it was observed:

"It does not follow that relief should be given even if the respondents have not been materially prejudiced but relief should not be lightly withheld, for the effect of refusing relief may be to deprive a litigant of access to the Supreme Court and if the original judgment is wrong amount to denial of justice."

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 the petition of appeal which resulted from the negligence of the defendants-appellants and the registered Attorney-at-Law would render the notice of petition and the petition of appeal *void ab initio* and liable to be rejected in limine. This defect being incurable the defendants-appellants 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.

For the above reasons, I would uphold the preliminary objection raised by the plaintiff-respondent and reject the appeal. The defendants-appellants will each pay Rs.1250/- to the plaintiff-respondent as costs of this appeal. Registrar is directed to return the case record to the appropriate District Court forthwith.

DISSANAYAKA, J. - I agree.

Appeal rejected.