

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal in terms
of Section 331 of the Code of
Criminal Procedure Act No.15/1979
of the Democratic Socialist Republic
of Sri Lanka.

C.A.No.466/2017

H.C. Colombo No.HCB1822/2009

Girigoris Jansage Lesli Senadeera

Accused-Appellant

Vs.

Commission to Investigate

Allegations of Bribery or Corruption.

No. 36, Malalasekara Mawatha

Colombo 07

Complainant-Respondent

BEFORE : **ACHALA WENGAPPULI, J.**
K. PRIYANTHA FERNANDO, J.

COUNSEL : Anil Silva P.C. for the Accused-Appellant.
Subashini Siriwardena Assistatnt-Director
General for the Complainant- Respondent

ARGUED ON : 06-10-2020

WRITTEN SUBMISSIONS

TENDERED ON : 23-10-2020

ORDER ON : 16-11-2020

ACHALA WENGAPPULI, J.

In this appeal, the accused-appellant (hereinafter referred to as the Appellant) seeks to set aside his convictions for offences committed under the Bribery Act and the sentences imposed upon the said convictions. The indictment upon which the Appellant was tried by the High Court had been filed under the signature of the Director General of the Commission to Investigate Bribery or Corruption.

The Appellant, in his petition of appeal had named the Commission to Investigate Bribery or Corruption as the only Respondent.

Learned Counsel for the Respondent Commission had raised a preliminary objection as to the maintainability of this appeal on the basis that the Director General of the Commission to Investigate Bribery or Corruption had not been made a party to the appeal, in view of the reasoning of the judgment of the Supreme Court in *Senanayake v Attorney*

General & Another(2010) 1 Sri L.R. 149 and therefore the petition of appeal of the Appellant is fatally defective.

Learned President's Counsel who appeared for the Appellant conceded to the preliminary objection raised by the Respondent and moved to amend the caption of the petition of appeal under Section 355(2) of the Code of Criminal Procedure Act No. 15 of 1979, seeking to add the Director General of the Commission to Investigate Bribery or Corruption also as a Respondent.

Learned Counsel for the Respondent Commission objected to that application as well on the basis that the if the application is allowed it would cause material prejudice to the Respondent.

The parties made their submissions in support of their respective positions and the Court was called upon to make a ruling on the application.

Before this Court ventures to consider the application of the Appellant, it is appropriate to consider the applicable statutory provisions, in relation to lodgement of appeals, preferred against judgment/order of the High Court.

Section 331(1) provides for lodgement of an appeal by presenting a petition to the Registrar of the High Court within fourteen days from the pronouncement of the Judgement/order against which the said appeal is preferred. If a person is in prison, then he may lodge an appeal to the Jailor of the prison and such Jailor is obligated to *"prepare a petition of appeal and lodge it with the High Court"*.

These statutory provisions clearly envisage a situation where the petition of appeal is drawn by person who is not an Attorney-at-Law.

Section 331(4)(c) requires such petition of appeal to contain "*the name and address of the appellant and the respondent*". Obviously, this provision imposes the duty on an appellant to name a respondent and to provide his address. If there is a situation where the petition of appeal is not in compliance of the statutory provisions of Section 331, the remedial measures that are available to such an appellant are provided in Section 332 as it provides the manner in which the petition of appeal should be amended.

If the appeal "*is not given in the proper manner prescribed herein*", then such appeal should be returned to the appellant for the purpose of being amended within a time period as specified by the Court. If the appellant fails to amend the appeal during that period, the Court "*may for the reasons recorded by it, reject it.*"

Even in the failure to comply with the act of amending the petition within the period that had been specified by the Court, yet the Court is conferred with a discretion to reject it after recording its reasons as the operative word is "may".

Perusal of the above statutory provisions indicate the underlying Legislative intent of allowing an appellant of a generous margin of error in the lodgement of his appeal, perhaps for the reason that it may have taken into consideration of the fact that there may be situations where the petition had not been prepared by an Attorney-at-law and would therefore

results in a position of noncompliance with the provisions of Section 331 and 332 of the Code.

It is in this context the provisions contained in Section 355 of the said Code should be considered. Therefore, it is important to refer to the said section in its entirety.

Section 355 of the Code states as follows;

- “(1) Where there is any error, omission or default in complying with the provisions of this Code relating to the lodging of an appeal, the High Court shall, notwithstanding such error, omission or default forward to the Court of Appeal the petition of appeal together with all the relevant papers and proceedings of the case.*
- (2) The Court of Appeal shall not exercise the powers vested in such court by this Code to reject or dismiss an appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of this Code unless material prejudice has been caused thereby to the respondent to such appeal.*
- (3) The Court of Appeal shall, in the case of any appeal referred to in subsection (2) which is not rejected or dismissed by such court, direct the appellant to comply with such directions as the court may deem necessary for the purpose of rectifying, supplying or making good any error, omission or default so referred*

to within such time and upon such conditions as may be specified in such directions, and shall reject or dismiss the appeal if the appellant fails to comply with such directions."

It is clear from the wording in Section 355(1) that the High Court could forward an appeal to the Court of Appeal, notwithstanding any "error, omission or default in complying with the provisions of this Code relating to lodging of an appeal". Therefore, it could safely be inferred that this particular provision could be considered as the 2nd chance an appellant was given to challenge a judgment or an order of a High Court, even by way of a defective appeal. The 1st chance was the opportunity provided for an appellant to correct such defect under Section 332 in the High Court itself. If the defect had already been corrected by making the necessary amendment to the petition under Section 332, then there is no point in providing the statutory approval for the second time to forward a defective appeal to the Court of Appeal, notwithstanding its defect.

In the instant appeal, there is no return of the petition for correction of the defect as per the provisions of Section 332.

Then the Section 355(2) had imposes a restriction on this Court in relation to such defective appeals as it "*shall not exercise the powers vested in such Court by this Code to reject or dismiss an appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of this Code unless material prejudice has been caused thereby to the respondent to such appeal.*" It is interesting to note that even if there is material prejudice is caused to the Respondent, this Court is vested with an alternative of either rejecting the defective appeal or dismissing it.

Section 355(1) imposes a duty on this Court, if there is no material prejudice caused to the Respondent, and if the defective appeal is not already rejected or dismissed, to direct the appellant to comply with its directions as this Court may deem necessary for the purpose of rectifying, supplying or making good any error, omission or default so referred to within such time and upon such conditions. It is important to note the word "shall" in relation to the applicability of these provisions.

If the appellant failed to comply with such directions issued by this Court, then again the Court is vested with a discretion in whether to reject the defective appeal or dismiss it.

It is also important to note here that none of these provisions highlights the requirement that there should be an application made by the appellant, who had lodged a defective appeal, in seeking indulgence of Court to cure the defective appeal.

Learned Counsel for the Respondent Commission contended that material prejudice would cause in this situation is the alteration of state of unchallenged conviction of the accused-appellant, by a way of an appeal, which means continuation of the litigation through the appellate process.

Learned President's Counsel submitted that the Respondent is not materially prejudiced since already the Commission to Investigate Bribery or Corruption is named as a Respondent by the Appellant in his appeal and is represented before this Court. He further submitted that simply by adding the Director General of the Commission to Investigate Bribery or Corruption as another Respondent to the appeal will not make any

difference or would cause any material prejudice to the Commission to Investigate Bribery or Corruption.

He further informed Court that he could not find an authority on the point in relation to the provisions in the Section 355(3) of the Code of Criminal Procedure but in the judgment of the Supreme Court in *Dayaratne v Wijeratne* (2012) 2 Sri L.R. 156, the apex Court had dealt with a similar application made under Section 759 of the Civil Procedure Code and its reasoning could equally be adopted in this instance as well.

Section 759(2) of the Civil Procedure Code states that;

"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."

Similar to the Section 355(2) of the Code of Criminal Procedure Act, there is provision in the Section 759(2) of the Civil Procedure Code to the term "*material prejudice*".

The Privy Council in *Sameen v Abeywickrama* 64 NLR 553 had considered the question whether the Respondents in the matter before their Lordships Court were materially prejudiced by the appellant's failure to comply with the requirements of Section 756 of the Civil Procedure Code when he failed to serve notice with security for costs. Having considered the purpose of the said section, their Lordships have held, owing to the mere technicality of the Respondent's objection, the Respondent had not been materially prejudiced.

The Supreme Court, in its judgment of *Kithsiri v Weerasena* (1997) 1 Sri L.R. 70, had dealt with a situation where 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 negligent act on his part. The Court was of the view that 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. It also noted that *"The approach of the Privy Council in Sameen's case (Supra) to the power of the Court to grant relief 'in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of this section' (i.e. Section 756 only) was refreshingly liberal and unfettered by undue technicality; it marked a significant departure from some of the previous decisions of the Supreme Court where the power of the Court to give relief to an appellant was construed narrowly and restrictively."*

The Court had further quoted the definition provided to the phrase *"material prejudice"* from the judgment of *Martin v. Suduhamy* (1991) 2 Sri L. R. 279, where Kulatunga J sought to define it as;

"What is required to bar relief is not any prejudice but material prejudice, i.e. detriment of the kind which the respondent cannot reasonably be called upon to suffer."

In the instant appeal the alleged material prejudice as complained by the learned Counsel for the Respondent Commission was the continuation of the criminal matter upon the appeal of the Appellant.

In the same judgment, *Fernando J* had observed that;

"... the Court of Appeal was clearly in error in holding that 'the very continuance of litigation would itself amount to material prejudice'; if that be correct, that would be true of every case (including Sameen v. Abeyewickrema) in which relief is sought under section 759(3), and every application for relief would have to be refused on that ground. Such an interpretation must be resisted, unless compelled by clear words."

Adaptation of a consistent approach by the apex Court on this aspect could be seen from the judgments of the Supreme Court in *Jayasekera v Lakmini & Others* (2010) 1 Sri L.R. 41.

Since continuation of a litigation cannot be considered as situation where material prejudice is caused to the Respondent, the appeal of the accused-appellant is not rejected or dismissed by this Court on that account. In the circumstances, this Court turns to implement the mandatory statutory provisions of Section 355(3) of the Code of Criminal Procedure Act, in relation to the instant appeal, by directing the accused-appellant to amend the caption of his appeal by adding the Director General of the Commission to Investigate Bribery or Corruption as a Respondent, within three weeks from the pronouncement of this order.

Application of the accused-appellant to amend the caption of his petition is allowed and the Registrar is accordingly directed to mention this matter after three weeks.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL