

WICKRAMASINGHE
vs
KULASINGHE

COURT OF APPEAL.
EKANAYAKE, J.
SRI SKANDARAJAH, J.
CA NLT 1535/2003.
DC GAMPAHA 39754/L, 39754/L
DECEMBER 5, 2005.

Civil Procedure Code, sections 75014, 755, 756, 766 - Leave to appeal notwithstanding lapse of time - What are the mandatory requirements contained in section 766 ? - What should the prayer include ?

The defendant - petitioner filed papers seeking leave to appeal notwithstanding lapse of time and to hear the appeal after the grant of leave and set aside the judgment.

The plaintiff–respondent contended that the application is misconceived as much as it is an application for leave to appeal and does not fulfill all the requirements provided in the Code.

HELD:

- (1) The defendant-petitioner has totally failed to pray that the appeal may **be admitted notwithstanding lapse of time** in addition to the prayer for relief.
- (2) The relief the defendant has prayed for is to grant leave to appeal notwithstanding lapse of time and **not to admit the appeal notwithstanding lapse of time**. The Code does not provide to grant leave to appeal notwithstanding lapse of time.”

APPLICATION under section 765 of the Civil Procedure Code.

Aravinda Athurupana with *Tissa Bandara* for defendant-petitioner.

Sanjeewa Jayawardane with *Nishantha Sirimanne* for plaintiff–respondent.

Cur. adv. vult.

May 11, 2006.

CHANDRA EKANAYAKE, J.

The defendant-petitioner (hereinafter sometimes referred to as the defendant) by his petition dated 11.09.2003 had sought *inter alia* leave to appeal notwithstanding lapse of time, to hear the appeal after the grant of leave and to set aside the judgment dated 25.06.2003 pronounced by the learned District Judge of Gampaha and to dismiss plaintiff–respondent’s

action and for judgment as prayed for in the answer filed by the defendant in the District Court.

The plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) appearing through his Attorney had instituted the action bearing No. 39754/L in the District Court of Gampaha seeking declaration of title to the property morefully described in the schedule to the plaint, for ejectment of the defendant and all those holding under him there from and that he be restored to quiet and vacant possession and for damages against the defendant as prayed in sub-paragraph (c) of the prayer to the plaint. The defendant had moved for a dismissal of the plaintiff's action and for a declaration in his favour that he is the statutory tenant of the premises in suit bearing No. 29.

When the case came up for trial on 04.01.1999 the plaintiff's action had been dismissed due to non appearance and it had been later restored to the trial roll. Thereafter the case had been fixed for trial on 26.07.2001.

As evidenced by the proceedings of the said trial date (26.07.2001) after recording an admission and issues 1-11 raised by both parties further trial had been postponed for 19.10.2001. After conclusion of the evidence led by both parties the learned trial Judge had pronounced the judgment dated 25.06.2003 granting the reliefs prayed for in the plaint in favour of the plaintiff.

Being aggrieved by the aforesaid judgment the defendant having filed a notice of appeal, though all arrangements were made to file a petition of appeal within the stipulated time period for filing of the same through his registered Attorney-at-law had failed to file same as he was said to have been suffering from acute piles and unable to go about at the relevant times to make the required arrangements to file same within the period stipulated in section 755(3) of the Code. In support of the above he has annexed a medical certificate dated 08.08.2003 (P Y) to his present petition. The defendant had further contended that there was no other

reason or cause whatsoever which prevented him from making arrangements through his instructing Attorney to file a petition of appeal other than the aforementioned reasons and he was thus prevented from presenting the petition of appeal within the time period due to reasons beyond his control. In the aforesaid premises the defendant had invoked the extra ordinary jurisdiction vested in this Court by way of leave to appeal notwithstanding lapse of time. Further it has been averred in the petition that along with the instant application seeking leave that he has already filed another application by way of revision also. As per order of this Court dated 12.01.2005 the connected revision application preferred by the defendant bearing No. CA 1534/2003 has been withdrawn by the defendant.

At the hearing of the application counsel for the plaintiff-respondent had raised the following preliminary objections :

1. The application the defendant has filed before this Court is misconceived in as much as it is an application for leave to appeal and does not fulfill all the requirements provided in the Civil Procedure Code.
2. The certified copy of the decree of the District Court which must be mandatorily annexed has not been complied with and therefore this Court cannot consider this application.

The counsel who represented both parties were heard with regard to the above preliminary objections and written submissions too have been filed.

With regard to the first preliminary objection it would be pertinent to consider the provisions of section 765 of the Civil Procedure Code (as amended). Section 765 thus reads as follows :

“It shall be competent to the Supreme Court to admit and entertain a petition of appeal from a decree of any original court, although the provisions of section 754 and 755 have not been observed :

Provided that the Supreme Court is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions ; and

Provided also that it appears to the Supreme Court that the petitioner has a good ground of appeal, and that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment-creditor that the decree or order appealed from should be disturbed."

In support of the first preliminary objection the respondent's counsel has strenuously submitted that the defendant has not demonstrated to this Court in any valid or convincing manner either of the aforesaid two requirements enumerated in the above section 765 for the purpose of availing himself of the discretionary remedy embodied in the aforesaid section.

On a perusal of the present petition it has to be observed that the defendant has totally failed to pray that the appeal may be admitted notwithstanding the lapse of time in addition to the prayer for relief in respect to the subject of appeal contrary to the provisions of section 766 of the Civil Procedure Code which is to the following effect :

"In every such petition of appeal as is the subject of the last section the judgment-creditor shall be named respondent, and the petition shall be accompanied by a certified copy of the decree or order appealed from, and of the judgment on which it is based, as well as by such affidavits of facts and other materials as may constitute *prima facie* evidence that the conditions precedent to the petition of appeal being entertained, which are prescribed in the last section, are fulfilled. Also, every such petition shall be presented immediately to the Supreme Court in the appellate jurisdiction, and in addition to the prayer for relief in respect to the subject of appeal it shall contain a prayer that the appeal may be admitted notwithstanding the lapse of time."

In this case the defendant has totally violated the requirement and failed to pray that the appeal may be admitted notwithstanding the lapse of time.

Further according to sub-paragraph (b) of the prayer to the present petition the defendant has moved for leave to appeal notwithstanding lapse of time and by sub-paragraph (c) what has been moved for is to hear the appeal after the grant of leave and to set aside the judgment. Even the caption of the present petition is to the following effect :

"In the matter of an application for Leave to Appeal notwithstanding lapse of time."

Therefore it becomes quite clear that the relief the defendant has prayed for by this petition is to grant leave to appeal notwithstanding lapse of time and not to admit the appeal notwithstanding lapse of time. The provisions pertaining to the applications for leave to appeal are embodied in section 756 of the Civil Procedure Code (as amended) but no provisions have been provided by the Code to grant leave to appeal notwithstanding lapse of time.

For the foregoing reasons I conclude that the present petition is not in conformity with the mandatory requirements contained in section 766 of the Civil Procedure Code and therefore same is misconceived and the first preliminary objection is a valid one. In the light of the above no necessity arises to consider the second preliminary objection raised. Accordingly the defendant-petitioner's application is hereby dismissed with costs fixed at Rs. 7500/-.

SRISKANDARAJAH, J. – I agree.

Application dismissed.