

PETER SINGHO
v.
COSTA

COURT OF APPEAL
ANANDACOOMARASWAMY, J. &
GUNASEKERA, J.
C.A. APPEAL NO. 353/85(F)
D.C. COLOMBO NO. 4969/RE
31 OCTOBER 1991 and 14 NOVEMBER 1991

Civil Procedure – Computation of time limit for appeal – Hypothecation of security for costs – Civil Procedure Code, Sections 754, 755, 757(1).

Held :

1. In computing the time limits for filing the notice of appeal and petition of appeal, only the date on which the judgment was pronounced can be excluded.
2. Failure to tender bond hypothecating the security for costs along with the notice of appeal will be excused if the explanation for the default is satisfactory, but illness of the appellant four days after the date on which the notice of appeal was presented is not a satisfactory explanation. Such failure is fatal.

Cases referred to:

- (1) *Wickramasinghe v. De Silva* (1978/9) 2 Sri LR 65.
- (2) *Boyagoda v. Mendis* 30 NLR 321.
- (3) *Sri Lanka State Trading Consolidated Export Corporation v. Dharmadasa* (1987) 2 Sri LR 233.
- (4) *Perera v. Perera* (1981) 2 Sri LR 41, 42.
- (5) *Martin v. Suduhamy* SC 33/90 – S.C. Minutes of 20.01.1991, (1990) BALJ Rep. Vol. iii, Pt. II P. 8.
- (6) *Nanmuni Hanea Babi Thabrew v. Kosgoda Vajiragnana Thero* S.C. No. 27/89 S.C. Minutes of 25.6.1991.
- (7) *Abdul Cader v. Sittinisa* 52 NLR 588.
- (8) *Rustom v. Hapangama* 1978/9 2 Sri LR 225.

APPEAL from judgment of District Court of Colombo.

K. Balapatabendi for appellant.

J. C. T. Kotalawala for respondent.

Cur adv vult.

6th February, 1992.

ANANDACOOMARASWAMY, J.

This is an appeal from the judgment of the Learned District Judge of Colombo dated 30.05.1985.

The Learned Counsel for the Plaintiff-Respondent (hereinafter referred to as respondent) raised two preliminary objections namely:-

- (a) Security for costs has not been hypothecated.
- (b) Appeal is time-barred.

The judgment was delivered on 30.05.1985 and notice of appeal was tendered on 07.06.1985. The petition of appeal was tendered on 30.07.1985, which is clearly out of time by one day.

The Learned Counsel for the Defendant-Appellant (hereinafter referred to as Appellant) relied on the decision in the case of *Wickramasinghe v. De Silva* ⁽¹⁾ where Soza, J., stated in the course of his judgment that the said judgment had been delivered on 11.05.1978 and that the last date for filing the petition of appeal was 11.07.1978. According to the Counsel for the Appellant this judgment clearly showed that both terminal dates were excluded in counting the 60 days to file petition of appeal. This was the view of the Supreme Court in the case of *Boyagoda v. Mendis* ⁽²⁾ according to which one extra day was not considered as out of time, which was allowed as a matter of practice. That was the decision of the former Supreme Court which took the view that due to long practice one day's extension had been allowed in the computation of the time allowed for filing of the petition of appeal. This decision was considered by the present Supreme Court in the case of *Sri Lanka State Trading Consolidated Export Corporation v. Dharmadasa* ⁽³⁾. The Supreme Court is of the view that there is no such practice as far as this section is concerned as this provision was not incorporated in the earlier Civil Procedure Code. In that case the Supreme Court held that the notice of appeal presented on Monday 19.06.1987 on judgment pronounced on 31.05.1987 was out of time as it was not filed on 16.06.1987 which was the due date. Between the two terminal dates namely 31.05.1987 and 19.06.1987, there was no public holiday but 4th and 11th June were Sundays, 17th June was a Saturday (non-working day) and 18th June was a Sunday.

The Learned Counsel for the Respondent relied on the decision in the case of *Perera v. Perera* ⁽⁴⁾ where the Court of Appeal (Soza, J.

with Victor Perera, J. agreeing) stated "Only the date on which the judgment was pronounced can be excluded – see sections 8(3) and 14(a) of the Interpretation Ordinance". The Court of Appeal was considering section 755(3) of the Civil Procedure Code relating to the filing of the petition of appeal. According to this provision the petition of appeal must be filed **within 60 days from** the date of the judgment. The provisions relating to notice of appeal and petition of appeal are not sections under the new Civil Procedure Code. These are sections 754 and 755, and the decision in *Boyagoda v. Mendis (supra)* was under the old Civil Procedure Code No. 2 of 1889 as amended by later Ordinance and Acts (Chapter 101 of the LEGISLATIVE ENACTMENTS OF CEYLON 1965 Revised Edition). The relevant provisions are section 754(1) and section 754(2), according to which petition of appeal should be presented to the court of first instance **within** a period of ten (10) days **from** the date of decree or order, exclusive of the day of that date itself and of the day when the petition was presented and of Sundays and public holidays. While a similar provision is available and applicable to the notice of appeal in the present Civil Procedure Code, there is no provision for notice of appeal in the earlier Civil Procedure Code. The provision relating to petition of appeal is entirely a new one in the new Civil Procedure Code compared to the one in the old Civil Procedure Code. Therefore the decision in *Boyagoda v. Mendis (supra)* is not applicable to cases falling under the new Civil Procedure Code and the decision in *Sri Lanka State Trading Consolidated Export Corporation v. Dharmadasa (supra)* is applicable to notice of appeal and also applicable *mutatis mutandis* to petition of appeal. Accordingly the petition of appeal presented in this case is clearly out of time.

As regards the second objection that the security for costs had not been hypothecated, the affidavits filed by the Appellant and his Attorney-at-Law setting out the reasons for the failure to perfect the bond, do not give satisfactory explanation for not tendering the bond along with the notice of appeal. The reason given is that the Appellant was ill not from the day on which the notice of appeal was presented, but for two (2) weeks from a day four days after the date on which the notice of appeal was presented.

In the case of *Martin v. Suduhamy*⁽⁶⁾ the Supreme Court is of the view that in appropriate cases the court may consider whether there is an explanation for default and if the explanation is satisfactory, grant relief in a fit case.

In the case of *Nanmuni Hanea Babi Thabrew v. Kosgoda Vajiragnana Thero*⁽⁶⁾ the Supreme Court granted relief on the basis that omission to comply with section 757(1) was not wilful and that the sum involved was so small that the Respondent could hardly claim to have been materially prejudiced. In that case the registered Attorney-at-Law failed to tender the bond in the District Court, and while the record was in the Court of Appeal the Attorney-at-Law died.

In the instant case, as the explanation is not satisfactory the failure to comply with section 757(1) of the Civil Procedure Code is fatal and as such the appeal should be rejected on this ground also.

The learned Counsel for the appellant invited us to consider the appeal on the merits of the case, despite the preliminary objections in this appeal. He relied on the decision in the case of *Abdul Cader v. Sittinisa*⁽⁷⁾ where the Supreme Court was of the view that where an appeal did not conform to Civil Appellate Rules, to allow the matter to be heard in Revision, as the Respondent had not been prejudiced. Such revisionary powers could be exercised only in exceptional cases (*Rustom v. Hapangama*⁽⁸⁾). We are not unmindful of these decisions. We have perused the proceedings and the judgment of the learned District Judge and we find no reasons to interfere with his judgment and we find no exceptional circumstances to act in revision.

For the foregoing reasons we dismiss the appeal with costs.

GUNASEKERA, J. – I agree.

Appeal dismissed.