

ANEEZA UMMA
v.
LEELAWATHIE AND ANOTHER

COURT OF APPEAL
WEERASURIYA, J.,
KULATILAKE, J.
C. A. NO. 743/97.
D. C. KANDY NO. 15354/L.
MAY 10, 1999.

Appeal notwithstanding lapse of time – Civil Procedure Code, S. 765 – Sufficient cause – Causes not within the control.

The plaintiff-appellant tendered the Notice of appeal but failed to file the petition of Appeal within 60 days from the date of judgment. In an application under s. 765 CPC –

Held:

1. The position of the plaintiff-appellant, that due to her illness she was prevented from meeting her lawyer cannot be accepted as the medical certificate does not speak of any inability to attend Court on a particular day.
2. The assertion of the defendant-respondent that the husband of the plaintiff-appellant was the person who attended to the matters relating to the case remain uncontroverted; this position has to be considered in the light of the cultural background, *vis-a-vis* the position of a female in that particular community.
3. There was no averment that she was in a serious condition of health necessitating her to be admitted to the hospital and attendant difficulties leading to a disarranged way of life of the entire household.
4. The medical certificate had been issued after expiry of the alleged period of bed rest recommended by the Doctor, there is no reference to previous instances of high blood pressure necessitating medical treatment nor is

there any reference to a diagnostic card or a prescription showing history and the manner of illness or the treatment administered to the patient.

5. The circumstances enumerated by the plaintiff-appellant were not sufficiently unusual and compelling to satisfy that they were causes not within the plaintiff-appellant's control. There was negligence, inaction and want of *bona fides* on the part of the plaintiff-appellant.

APPLICATION under s. 765 of the Civil Procedure Code.

Cases referred to:

1. *M. I. Foenander v. Attorney-General* – 80 CLW 31.
2. *Krishna v. Chatahpan* – 13 Madras Series 269 at 271.
3. *Omar Lebbe Seynath Umma v. Mohammed Sally Rajabdeen* - BALJR 1996 vol. I part 2.

M. A. Q. M. Ghazalli with Ms Mallika Somasunderam for plaintiff-petitioner.

A. A. de Silva, PC with Janaka Silva and S. A. D. S. Suraweera for defendant-respondent

Cur. adv. vult.

June 11, 1999.

WEERASURIYA, J.

The plaintiff-appellant instituted action in the District Court of Kandy seeking a declaration of title to the land called Girakaduwa Aramba morefully described in the schedule to the plaint, ejection of the defendant-respondents therefrom and damages. The defendant-respondents sought dismissal of the action and a declaration that they are the owners of the land described in the schedule to the answer. The case proceeded to trial on 12 issues and the learned District Judge after conclusion of the case, by his judgment dated 04.07.1997, dismissed the action. Thereafter, the plaintiff-appellant tendered notice of appeal against the said judgment on 22.7.1997 but failed to file the petition of appeal within 60 days from the date of the judgment.

The present application has been filed seeking an order to admit the appeal notwithstanding lapse of time in terms of section 765 of the Civil Procedure Code.

Section 765 of the Civil Procedure Code reads as follows:

765 – " It shall be competent to the Court of Appeal to admit and entertain a petition of appeal from a decree of any original court, although the provisions of sections 754 and 755 have not been observed:

Provided that the Court of Appeal 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 Court of Appeal 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."

It is, therefore, incumbent to examine whether the plaintiff-appellant has satisfied Court that she was prevented by causes not within her control from filing her appeal in time.

Learned counsel for the plaintiff-appellant contended that –

- (a) Court ought not look into the question of the intensity or degree of the cause affecting the incapacity of the plaintiff-appellant; and
- (b) the test ought to be the conduct of the plaintiff-appellant, vis-a-vis her case.

He cited the cases of *M. T. Foenander v. Attorney-General*⁽¹⁾ and *Krishna v. Chatahpar*⁽²⁾ at 271 in support of his contention. In *Foenander v. Attorney-General (supra)* it was held that the word 'sufficient cause' in the Indian Limitations Act had been interpreted to receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is attributed

to the appellant. In that case, the petitioner's absence from Sri Lanka subsequent to the judgment, his change of residence, from time to time, his wife's serious illness which necessitated her being taken to Australia and subsequent return to Sri Lanka resulting in readjustment to live in this country were held to be sufficiently unusual and compelling to satisfy Court that they were causes not within his control.

In the Indian case of *Krishna v. Chatahpan (supra)* the plaintiff who desired to appeal against the decree dismissing his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was filed and was returned for presentation to the District Court on the basis that the value of the action was less than Rs. 5,000. The District Judge rejected it on the ground that it was barred by limitations holding that the delay caused by the error which the appellant committed in taking proceedings in the wrong Court could not be excused. It was held that the District Judge should have decided whether the appellant under the special circumstances of the case in appealing to the High Court acted on the honest belief with due care and attention.

It was observed at page 271 that the true rule is whether under the special circumstances of each case the appellant acted under an honest belief though mistaken belief formed with due care and attention. It was held that the wording 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputed to the appellant.

It is to be noted that in the Indian Limitations Act reference is to 'sufficient cause', whereas the emphasis in terms of section 765 of the Civil Procedure Code is to 'causes not within his control'.

In the instant case, the plaintiff-appellant has averred that on or about 15.08.1997 she was treated for high blood pressure and was recommended bed rest for one month as evidenced by the medical certificate marked P5.

The medical certificate marked P5 is dated 15.09.1997 meaning that it had been issued after expiry of the alleged period of bed rest recommended by the doctor. There is no reference to previous instances of high blood pressure, necessitating medical treatment nor is there any reference to a diagnosis card or a prescription showing

history and the manner of illness or the treatment administered to the patient. Thus, P5 could be aptly described as a certificate that the patient had been recommended bed rest for one month from 15.08.97 without any supporting material. Further, the material contained in the medical certificate had been challenged by the defendant-respondents.

The plaintiff-appellant by this medical certificate purported to support her position that *due to her illness, she was prevented from meeting her lawyer to prepare the petition of appeal*. It is noteworthy that the medical certificate marked P5 does not speak of any inability to attend Court on a particular day. Another circumstance which may merit consideration is that the period covered being one month whether the doctor has examined her during that period to ascertain her true condition relating to her inability to attend to urgent and compelling needs outside the precincts of the house.

The petition of appeal has to be lodged within 60 days from the date of judgment, namely before 04.09.1997. Therefore, it is not possible for anyone to assert on the strength of the medical certificate that the plaintiff-appellant was prevented from meeting the lawyer to give instructions to prepare the petition of appeal.

The assertion of the defendant-respondents that the husband of the plaintiff-appellant was the person who attended to the matters relating to the case remain uncontroverted. It is significant that this position has to be considered in the light of the cultural background, *vis-a-vis* the position of a female in that particular community.

The defendant-respondents in their objections had submitted that the registered Attorney-at-law of the plaintiff-appellant resides within half a mile from the residence of the plaintiff-appellant. The material furnished by the plaintiff-appellant is insufficient to establish that due to her illness the whole household was disorganized. There was no averment that she was in a serious condition of health necessitating her to be admitted to the hospital and attendant difficulties leading to a disarranged way of life of the entire household. In the absence of any material that she was the only member of the household available, the conclusion is inescapable that any matter relating to the petition of appeal could have been attended to by her husband or any other member of her household.

Learned counsel for the plaintiff-appellant cited the case of *Omar Lebbe Seynath Umma v. Mohamed Sally Rajabdeen*⁽³⁾ in support of his contention that the Appellate Court need not look into the intensity of the incapacity of the appellant.

In that case what was in issue was an application in terms of section 86 (2) of the Civil Procedure Code. Section 86 (2) of the Civil Procedure Code provides for an application by a defendant to excuse his default relating to the entering of an *ex parte* decree. In terms of this provision the burden is imposed on the defendant to satisfy Court that he had 'reasonable grounds' for such default. In the medical certificate tendered in that case there was a specific reference to the petitioner being unfit to attend Court on a specified date. Further, petitioner in that case had placed before Court uncontradicted evidence that none of her children were available to have the medical certificate sent to Court on that date.

The pivotal question in the circumstances of this case is whether the plaintiff-appellant was prevented by 'causes not within her control' from complying with the requirement to file petition of appeal within a period of 60 days. Having carefully examined all the material placed before us, it seems to me that there was negligence, inaction and want of *bona fides* on the part of the plaintiff-appellant. Therefore, the circumstances enumerated by the plaintiff-appellant were not sufficiently unusual and compelling to satisfy us that they were causes not within her control.

The next question which remains to be examined is whether there is a good ground of appeal. Having examined the judgment, it seems to me that it is a difficult proposition to assert that there is a good ground of appeal.

For the above reasons, I dismiss the application with costs.

KULATILAKE, J. – I agree.

Application dismissed.