

## VITHANA

v.

## WEERASINGHE AND ANOTHER

SUPREME COURT.

SAMERAWICKRAME, J., ISMAIL, J. AND WANASUNDERA, J.

S.C. 42/80—C.A. 143/78 (F)—D.C. MATARA 6267.

JANUARY 12, 1981.

*Civil Procedure Code, sections 754, 755, 759, 765—Petition of appeal filed out of time—Affidavit filed by Attorney that omission due to his illness—Power of Court to grant relief under section 759 (2)—Whether section 765 applicable to a case where petition of appeal is out of time.*

The appellant had complied with the provisions of section 754 of the Civil Procedure Code by giving notice of appeal within the prescribed period of 14 days but had failed to file the petition of appeal within 60 days. It had been filed one day late. The objection was taken that the appeal was out of time. The Attorney-at-law for the appellant filed an affidavit supported by other documents that the omission was due to his own illness and was a cause beyond the control of his client. The Court of Appeal upheld the objection and abated the appeal.

**Held**

The provisions of section 759 (2) of the Civil Procedure Code were wide enough to apply to the present case. Accordingly the record should go back to the Court of Appeal to enable it to consider whether or not the appellant should be granted relief in terms of section 759 (2).

*Per Wanasundera, J.*

"Section 765 makes provision for an appeal notwithstanding lapse of time. It empowers the Court of Appeal to entertain a petition of appeal, although the provisions of sections 754 and 756 have not been observed. The time limits in these two sections are in respect of, first the lodging of the appeal by giving notice of appeal and, second the filing of an application for leave to appeal. Although section 755 (3) also contains a time limit, there is no reference to that section in section 765. It seems clear therefore that section 765 is intended to apply to situations which are different from the present case. The present case is an instance of what I have termed the second stage in our appellate procedure. Section 765 however is limited to the first stage. In this view of the matter the omission of a reference to section 755 in section 765 has been a deliberate act on the part of the draftsman and can in no way be regarded as "an obvious mistake either by the draftsman or by the printer".

**Cases referred to**(1) *Wickremasinghe v. De Silva*, (1978-79) 2 Sri L. R. 65.(2) *Sameen v. Abeywickrema*, (1963) 64 N.L.R. 553; (1963) A.C. 597; (1963) 2 W.L.R. 1114; (1963) 3 All E.R. 382.

APPEAL from a judgment of the Court of Appeal.

*M. J. H. M. Sally, with Mohamed Hassim, for the plaintiff-appellant.*

*N. R. M. Daluwatte, for the 2nd defendant-respondent.*

*Cur. adv. vult.*

April 9, 1981.

**WANASUNDERA, J.**

This is an appeal from a judgment of the Court of Appeal abating an appeal filed by the appellant. The appellant, who was the plaintiff in a partition action, had objected to a scheme of partition submitted by the Commissioner appointed by Court. After inquiry the Court gave judgment against the appellant and ordered that a final decree be entered in terms of the scheme of partition. The appellant has purported to appeal from that judgment.

The present provisions relating to appeals are somewhat different from the provisions of the original Civil Procedure Code which has been amended in this respect by Act No. 20 of 1977. It now provides, in the first instance, for lodging an appeal by notice of appeal within 14 days of the date of the judgment. Section 755(3) provides for the presentation of a petition of appeal, embodying the grounds of appeal, within 60 days of the date of the judgment.

The appellant had duly complied with the provisions of section 754 by giving notice of appeal within the prescribed period of 14 days. The second step, namely, the filing of the petition of appeal has admittedly been done not within 60 days, but one day late. An objection has been taken that the appeal is out of time. The attorney for the appellant has taken the blame for this lapse. He has submitted an affidavit stating that this omission was due to his own illness and was a cause beyond the control of his client. He has annexed a medical certificate and other documents from the nursing home to support this averment.

The Court of Appeal, however, following a recent decision of that Court, upheld the objection and abated the appeal. The appellant has come before us and challenges these decisions.

An appeal under the earlier law was a one-step affair and involved the filing of the petition of appeal within ten days of the judgment. The other requirements related to the grant of security—*vide* section 756. Even the old Law contained provisions

for relief against lapses. Chapter LX, section 765, provided for entertainment of appeals notwithstanding lapse of time if the Court was satisfied that the appellant was prevented by causes not within his control. Section 756(3) permitted relief to be given in the case of mistake, omission or defect on the part of the appellant in respect of ancillary matters. Unfortunately, there was a tendency to interpret these provisions narrowly. In an effort to remedy this, the powers of court were further enlarged by the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960. It can now be said that the time is over when Courts were ready to uphold technical objections to the entertainment of appeals, unless it is a matter of some real substance. The Law now contains clear indications for relief to be granted for lapses and the Courts are no longer prevented from doing justice in such cases.

The Administration of Justice Law, No. 44 of 1973, which came into operation in 1974, made a radical change in the procedure of appeals. It is in fact the forerunner of the appellate procedure which obtains today. It introduced a new concept with the process of appealing, involving two stages. The first step contained in section 318 provides for the giving of notice of appeal to the original Court. This has to be done within 14 days—*vide* section 320. The second step for perfecting the appeal is contained in section 330, and this requires the appellant to lodge in the Supreme Court written submissions in writing within a specified number of days.

The Administration of Justice Law also enabled the Courts to grant relief for mistakes, omissions, defects and for non-compliance with the provisions relating to appeals. Such provisions not only applied to the first step but also embraced the second step in the process of appealing. In regard to the initial lodging of the notice of appeal, the proviso to section 320 enabled the original Court to admit and entertain a notice of appeal notwithstanding lapse of time if the Court was satisfied that the appellant was prevented, by causes not within his control, from complying with this provision. In regard to the second stage of filing written submissions, the appeal was deemed to be abated only if the appellant failed or neglected, without reasonable cause, to lodge his written submissions, in terms of the section.

Over and above these provisions, there was also section 353 of the Administration of Justice Law vesting further powers in the

Courts. The material portions of this section read as follows

“353. (1) Where there is any error, omission or default in complying with the provisions of this law relating to the lodging of an appeal, the original Court shall, notwithstanding such provisions, forward to the Supreme Court the notice of appeal together with all the papers and proceedings of the case relevant to the judgment appealed against.

(2) Subject to the provisions of section 330, the Supreme Court shall not exercise the powers vested in such Court by this Law 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 Law, unless material prejudice has been caused thereby to the respondent to such appeal.”

It has not been contended before us, nor has the Court of Appeal in either of the two cases referred to earlier taken the view, that an appellant who fails to comply with the provisions of section 755 (3) has been altogether denied a remedy. The Court of Appeal has, in both cases, taken the view that the appellant has only made a wrong choice and that the appropriate relief would be by way of Chapter LX, section 765—that is by application to appeal notwithstanding lapse of time—and not under section 759 (2) as was sought in this case. In the earlier case—*Wickramasinghe v. Magilin Nona de Silva* (1), the Court of Appeal said :

“It may be added that there is statutory provision for filing of petitions of appeals notwithstanding lapse of time. Perhaps the petitioner could advise himself as to whether he should proceed under Chapter LX. In our view subsection (2) of section 759 cannot be used to rescue the petitioner especially as the procedure set out in Chapter LX is available.”

The Court of Appeal, in the present case, sought to follow this reasoning. In seeking to apply this section, the Court of Appeal expressed the view that the omission in section 765 to mention section 755 while it specifically mentions sections 754 and 756 was the result of “an obvious omission either by the draftsman or the printer”:

Incidentally this approach of the Court of Appeal is, in my view, impermissible and not in accordance with the ordinary canons of

statutory interpretation. The Courts are not free to omit or add to the language contained in a statute; nor should a Court lightly presume a mistake or omission on the part of the draftsman or printer, save in exceptional circumstances where a mistake or omission is patent and obvious. It is certainly not so in the present case where the problem is a complex one requiring a consideration of the connected sections for one to arrive at the correct meaning.

Section 765 makes provision for an appeal notwithstanding lapse of time. It empowers the Court of Appeal to entertain a petition of appeal, although the provisions of sections 754 and 756 have not been observed. The time limits in these two sections are in respect of, first the lodging of the appeal by giving notice of appeal and, second the filing of an application for leave to appeal. Although section 755 (3) also contains a time limit, there is no reference to that section in section 765. It seems clear therefore that section 765 is intended to apply to situations which are different from the present case. The present case is an instance of what I have termed the second stage in our appellate procedure. Section 765 however is limited to the first stage. In this view of the matter the omission of a reference to section 755 in section 765 has been a deliberate act on the part of the draftsman and can in no way be regarded as "an obvious mistake either by the draftsman or by the printer".

If section 765 has no application, we have to turn our attention to the provisions of section 759 (2) which also enables relief to be given "in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections". It would be sufficient here to state that these provisions are wide enough to apply to the present case, without attempting to rule on the full scope of this section. This section bears a close similarity to section 756 (3) of the old Code on which there is a decision of the Privy Council. In *Sameen v. Abeywickrema* (2), after examining section 756 (3), the Lord Chancellor observed:

"The distinction sought to be drawn by the learned judge between 'a failure to comply with' and 'a mistake, omission or defect in complying with' is not, in their Lordships' opinion, a valid one. The failure to comply with a requirement may be due to a mistake or omission. An omission in complying with a requirement must, so it seems to their Lordships, involve a failure to comply with the requirement.

Their Lordships are accordingly unable to accept the learned judge's view as a correct interpretation of section 756(3). As their Lordships have said, that sub-section is expressed to apply in relation to the provisions of section 756 and there is no justification for saying that it applies to some and not to all the provisions of that section. It is also expressed to apply in relation to *any* mistake, omission or defect.

In their Lordships' view the Supreme Court is given by this sub-section the power to grant relief on such terms as it may deem just where there has been a failure to comply with an essential requirement of the section. The only limitation imposed by the sub-section is that the court has no power to do so unless it is of the opinion that the respondent has not been materially prejudiced."

The provisions we are called upon to consider, though similarly worded, are much wider in scope and are not limited to section 759 itself, but are expressed to apply to all the foregoing sections. On a parity of reasoning, I find that section 759(2) is adequate to deal with an application of this kind, and it is precisely to these provisions that a person such as the present appellant must look for relief.

There are other provisions in the Code, like sections 754(4) and 755(3) which were contrasted by counsel for the appellant and which seem to support the view expressed by me, but it is unnecessary to refer to them in view of what has been stated earlier. As regards the decisions cited by counsel on both sides, they deal essentially with the procedure that prevailed prior to 1974 and have little application to the particular provisions we are called upon to consider, which are admittedly different.

For these reasons I would allow the appeal. The record will go back to the Court of Appeal to enable it to consider whether or not the appellant should be granted relief in terms of section 759(2) of the Civil Procedure Code. The appeal is allowed with costs, fixed at Rs. 525 payable by the 2nd defendant-respondent.

**SAMERAWICKRAME, J.**—I agree.

**ISMAIL, J.**—I agree.

*Appeal allowed.*