

The Municipal Council of Colombo

v.

Piyasena

COURT OF APPEAL.

RANASINGHE, J. AND ATUKORALE, J.

C.A. (S.C.) 519/78—D.C. COLOMBO 821/M.

JULY 30, 1980.

Civil Procedure Code, sections 755 (3), 759 (2)—Requirement that petition of appeal be filed within sixty days of judgment—Are Sundays and public holidays excluded from computation—Dies non—Application for relief by appellant—Circumstances when such application will be entertained—Holidays Act, No. 29 of 1971—Interpretation Ordinance (Cap. 2), section 8 (3).

Held

(1) In the computation of the period of sixty days from the date of judgment set out in section 755 (3) of the Civil Procedure Code for filing a petition of appeal, Sundays and public holidays are not excluded and accordingly a petition filed sixty-five days after the delivery of judgment is out of time.

(2) In the present case, the defendant-appellant's application to be given relief in terms of the provisions of section 759 (2) of the Civil Procedure Code was not entitled to succeed as no good and sufficient ground had been established for the granting of such relief. The defendant-appellant made no application for relief under this section until the present application made by the plaintiff-respondent that the appeal should be abated came up for hearing nor was any explanation preferred for the failure to present the petition of appeal within sixty days.

Effect of a day being declared a *dies non* discussed.

Cases referred to

- (1) *Kulantavepillai v. Marikkar*, (1918) 20 N.L.R. 471.
- (2) *Stephens v. Ghafoor*, (1925) 26 N.L.R. 493,
- (3) *Wickremasinghe v. de Silva*, (1978-79) 2 Sri L.R. 65.
- (4) *Sameen v. Abeywickrema*, (1963) 64 N.L.R. 553 ; 63 C.L.W.. 97 ; (1963) A.C. 597 ; (1963) 2 W.L.R. 1114 ; (1963) 3 All E.R. 382.
- (5) *Howard v. Badington*, (1877) 2 P.D. 203 ; 42 J.P. 6.

APPLICATION for an order of abatement of an Appeal.

J. W. Subasinghe, for the defendant-appellant.

M. M. K. Sabaratnam, for the plaintiff-respondent.

Cur. adv. vult.

September 8, 1980.

RANASINGHE, J.

This matter has come up before us on an application made on 05.07.79 by the plaintiff-respondent for an order from this court that the appeal of the 1st defendant-appellant has abated.

The judgment in this case was delivered by the District Court on 28.07.78. The notice of appeal was given on 10.08.78 ; and the

petition of appeal presented on 2.10.78. It is the position of the plaintiff-respondent that while the notice of appeal was given within the period of 14 days specified in section 754 (4), Civil Procedure Code the petition of appeal has not been presented within the period of 60 days specified in section 755 (3) of the said Code. The said petition of appeal has in fact been tendered—excluding the day on which judgment was delivered and the day on which the said petition of appeal was filed—65 days after the delivery of the judgment.

Learned counsel appearing for the first defendant-appellant has opposed this application on two grounds: that, in the composition of the period of 60 days all Sundays and Public Holidays should be excluded as they have been declared to be *dies non* by the provisions of the Holidays Act No. 29 of 1971: that, as there have been 13 such *dies non* between 28.08.78 and 02.10.78, the said petition of appeal has been presented well within the said period of 60 days: that in any event, the 1st defendant-appellant should be given relief in terms of the provisions of section 759 (2) of the said Code.

Section 2 of the Holidays Act, No. 29 of 1971, provides that every Full Moon Poya Day and every Sunday “shall be a public holiday, and” Section 3 provides that the several days specified in the First Schedule to the said Act should also be public holidays. Section 5 (1) of the said Act states that “every public holiday shall be a *dies non* and shall be kept as a holiday”.

The expression “*dies non*” has been considered by the Supreme Court in several cases. In the case of *Kulantaivelpillai v. Marikkar* (1) the Supreme Court considered the expression “*dies non*” as appearing in the Holidays Ordinance, No. 4 of 1886. Bertram, C.J. in the course of the judgment delivered in the said case, stated at p. 474:

“The effect therefore, in my opinion, of the declaration of a day as a public holiday and *dies non* by Ordinance 4 of 1886 is twofold. In the first place it excuses judicial officers and their subordinate ministerial officers from the necessity of attending Court, or of performing any judicial or ministerial acts on that day; in the second place, it protects any member of the public from being forced to attend Court, or to attend any judicial proceeding held elsewhere than in Court on that day. It does not, in my opinion, affect any judicial act or proceeding which may be validly done or taken in the absence of a party, and which consequently does not involve his personal attendance. Further it does not preclude a

judicial officer, or any of his ministerial subordinates from waiving his privileges if he so decides, and from doing any act or taking part in any judicial proceeding on a day declared to be a holiday. There is nothing either in the Ordinance or in the principles laid down by Voet which declares null and void any judicial act which a judicial officer voluntarily elects to do, and which does not involve the compulsory attendance before him of any party affected”.

Kulantavelpillai's case (supra) was followed in the case of *Stephens v. Ghafoor (2)*.

On a consideration of the interpretation placed on the expression “*dies non*” by the aforementioned judgment, it appears to me that the legal effect of a day being declared a “*dies non*” is that any judicial act or proceeding, which does not involve the appearance of a party done or held on such a day would not, on that ground alone, be invalid: that no party to any matter pending in a court, or any member of the public could be compelled to attend court on such a day. That being the only effect of a day being a “*dies non*” I do not think that such a day could on that ground alone, in the absence of any express provision to the contrary, be excluded in the computation of a limited period of time within which an act has to be done by a party to a proceeding before a court of law.

According to the provisions of the Interpretation Ordinance (Chapter 2) intervening Sundays or public holidays are to be excluded from the computation of a limited period of time, within which any act has to be done, only where such period does not exceed 6 days.

It has to be noted that, whilst the provisions of section 754(4) of the said Code specifically states that, in the computation of the period of 14 days set out therein, the day on which the order or decree appealed from was pronounced, the day on which the petition is presented to Court, and all intervening Sundays and public holidays should be excluded from such conclusion, no such exclusions are permitted in the computation of the period of sixty days set out in sub-section (3) of section 755 of the said Code.

Having regard to the foregoing matters, I am of opinion that, in the computation of the period of sixty days set out in section 755(3) of the said Code, Sundays and public holidays are not to be excluded and should be included in the calculation of the said period of sixty days.

The question whether the acts set out in section 754(4) of the said Code—the giving of notice of appeal—and in section 755(3) of the said Code, the presenting of the petition of appeal—should both be done within the respective periods of time set out in the said sections came up for consideration by this Court in the case of *Abeyratne Wickremasinghe v. Magilin Nona de Silva* (3) and it was held that both provisions of law are imperative and that not only must the notice of appeal be tendered within the time specified in section 754(4) of the said Code, but also the petition of appeal must be presented within the period of sixty days specified in section 755(3) of the said Code.

I am therefore, of opinion that the petition of appeal, which has been presented in this case, has been so presented to court after the expiry of the period of sixty days within which it had, according to the provisions of section 755(3) of the said Code, to be presented to the District Court.

The only question which remains to be considered is whether the defendant-appellant should be given relief in terms of the provisions of section 759(2) of the said Code: The provisions of section 759(2) of the said Code are identical with the provisions of section 756(3) of the Civil Procedure Code (Chapter 101) as it stood prior to the amendment of 1977. The provisions of the said section 756(3) were considered by the Privy Council in the case of *Sameer v. Abeywickrema* (4), and Their Lordships stated:

“In Their Lordships’ view the Supreme Court is given by this 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 said section.

The only limitation imposed by the sub-section is that the Court has not power to do so, unless it is of the opinion that the respondent has not been materially prejudiced”.
(p. 562).

“It does not follow that relief should be given even if the respondents have not been materially prejudiced but relief should not be lightly withheld for the effect of refusing relief may be to deprive a litigant of access to the Supreme Court, and if the original judgment is wrong, amount to a denial of justice.” (p. 563).

In the case of *Abeyratne Wickremasinghe v. Magilin Nona de Silva* (*supra*), the petition of appeal was filed 6 days after the expiry of the aforesaid period of 60 days. This Court in refusing

the appellant relief quoted with approval the observations of Lord Penzance, in the case of *Howard v. Badington* (5) that the continuation itself of a suit is a harm and does cause prejudice.

It must be noted that the present application has been made by the plaintiff-respondent seven months after the aforesaid petition of appeal was filed, and that up to the time of the said application, or for that matter even up to the date on which the said application was heard before the court—the 1st defendant-appellant has not made an application for relief under the provisions of the aforesaid section 759 (2). No explanation has been preferred for the failure to present the said petition of appeal within the said period of sixty days.

On a consideration of all these matters I am of opinion that no good and sufficient ground has been established for the granting of relief in terms of the provisions of the aforesaid section 759 (2) of the said Code, to the 1st defendant-appellant.

For these reasons, I make order refusing to receive the petition of appeal presented to the District Court by the 1st defendant-appellant on 03.10.78.

The appeal of the defendant-appellant is accordingly rejected with costs payable to the plaintiff-respondent.

ATUKORALE, J.—I agree.

Appeal rejected.
