

KITHSIRI
v.
WEERASENA

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 56/94
C.A. 286/87(F)
D.C. MATUGAMA NO. 110/RE
JUNE 21, AND JULY 5, 1995.

Civil Procedure Code – Failure to duly stamp the Notice of Appeal – Section 755(1) of the Code and Section 33 of the Stamp Duty Act – Power of the Court of Appeal to grant relief – Section 759(2) of the code.

The plaintiff presented the Notice of Appeal to the District Court within the period of 14 days set out in Section 754(4) of the Civil Procedure Code, but failed to duly stamp the Notice of Appeal as required by Section 755(1) of the Code. The required stamp fee was rupees ten. The deficiency in stamp was supplied by the plaintiff shortly after the expiry of the 14 days contemplated by Section 754(4) of the Code.

Held:

- (1) The provisions in section 755(1) of the Civil Procedure Code which requires the Notice of Appeal to be "duly stamped" is imperative. However, the Court of Appeal has jurisdiction to grant relief to the appellant in terms of Section 759(2) of the Code in respect of the "mistake" or "omission" in supplying the required stamp fee.
- (2) Section 759(2) of the Civil Procedure Code is much wider in its application than the corresponding Section 756(3) in the earlier Code. The special provisions of Section 759(2) which empowers the Court to grant relief must prevail over section 33 of the Stamp Duty Act.

Cases referred to:

1. *Salgado v. Peiris* – 12 NLR 379.
2. *British Ceylon Corporation Ltd., v. The United Shipping Board* – 36 NLR 225, 257
3. *Sameen v. Abeywickrema* – 64 NLR 560, 561, 562, 563 (PC)
4. *Martin v. Suduhamy* (1991) 2 Sri L.R. 279,306.
5. *Sandanan v. Jamaldeen* – 71 NLR 145, 150.
6. *Karunapejalage Bilindi v. Wellawa Attadassi Thero* – 47 NLR 7, 9

APPEAL from the judgment of the Court of Appeal

A. K. Premadasa, P.C., with T. B. Dillimuni for plaintiff-appellant.

N. R. M. Daluwatta, P.C. with D. P. Mendis for defendant-respondents.

Cur. adv. vult.

July 21, 1995.

G. P. S. DE SILVA, C.J.

The plaintiff instituted these proceedings on or about 16.6.82 for the ejection of the defendant from the premises in suit. After trial, the District Court delivered judgment on 2nd June 1987 dismissing the plaintiff's action. The plaintiff presented the notice of appeal to the District Court admittedly within the period of 14 days set out in section 754(4) of the Civil Procedure Code. However, the plaintiff failed to duly stamp the notice of appeal as required by section 755(1) of the Civil Procedure Code. This fact is not in dispute. The required stamp fee was rupees ten. The deficiency in stamps was supplied by the plaintiff shortly after the expiry of the period of 14 days contemplated by section 754(4) of the Civil Procedure Code.

At the hearing before the Court of Appeal, Counsel for the defendant-respondent took the preliminary objection that the appeal has to be rejected inasmuch as there is no valid notice of appeal. The Court of Appeal upheld the preliminary objection and rejected the appeal with costs. Against the judgment of the Court of Appeal the plaintiff has now preferred an appeal to this Court.

There is no doubt that the provision in section 755(1) of the Code which requires the notice of appeal to be "duly stamped" is imperative. Ever since the decision of the Full Bench in *Salgado v. Peiris* ⁽¹⁾, it was firmly established that a petition of appeal to the Supreme Court will be rejected if it is not sufficiently stamped and the Court has no power to allow it to be stamped after the time for appealing has expired. Garvin SPJ in *British Ceylon Corporation Ltd. v. The United Shipping Board* ⁽²⁾, stated:-

"It is well settled by the judgments of this Court that when it is found that a petition of appeal was not stamped or not duly stamped at the time it was presented, the appeal is not duly presented according to law and must be dismissed - such a

petition may not be stamped after the expiry of the appealable time (*Salgado v. Peiris*).

I therefore entirely agree with the submission of Mr. Daluwatta for the defendant-respondent that the provision in section 755 (1) of the present code which requires the notice of appeal to be "duly stamped" must be complied with. Mr. Daluwatta has also referred to section 33 of the Stamp Duty Act No. 43 of 1982 in support of his submission.

Notwithstanding the fact that it is imperative to duly stamp the notice of appeal, the true question that arises on this appeal is whether the Court of Appeal could have granted relief to the plaintiff-appellant. The relevant provision is contained in section 759(2) of present Civil Procedure Code. It reads thus:

"759 (2); In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just."

Prior to the re-enactment of the Civil Procedure Code in 1977, the earlier Code (Chapter 101 of the 1956 Revised Edition of the Legislative Enactments) contained a very similar provision to section 759(2) of the present Code. That was section 756(3) which read as follows:

"756(3); In the case of any mistake, omission or defect on the part of any appellant, in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just."

This section (i.e. 756(3)) arose for consideration in *Sameen v. Abeywickrema*²⁸, which is a decision of the Privy Council. This was a case where a preliminary objection was taken on the ground that the appellant had failed to comply with section 756(1) of the earlier Code; the point taken was "that the appellant's notice of security was bad in that it had not been filed with the Court "forthwith upon the petition of appeal being received by the court" (at page 557). Privy Council held that the appellant had failed to follow the "prescribed

procedure" and that unless the court granted relief in terms of section 756(3) of the Code (as it then stood) the appeal would abate.

The approach of the Privy Council in *Sameen's case (Supra)* to the power of the Court to grant relief "in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of **this section**" (i.e. Section 756 only) was refreshingly liberal and unfettered by undue technicality; it marked a significant departure from some of the previous decisions of the Supreme Court where the power of the Court to give relief to an appellant was construed narrowly and restrictively. In analysing section 756 (3) of the earlier Code the Privy Council emphasised the following matters:—

- (1) "It does not attempt to distinguish between substantial or more or less trivial mistakes, omissions, or defects, and the sub-section, in Their Lordships view, applies in relation not just to some, but to all, the provisions of section 756" (at page 560);
- (2) Section 756 (3) applies to "**any mistake; omission or defect.**" (at page 562);
- (3) "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 not the power to do so unless it is of the opinion that the respondent has not been materially prejudiced" (at page 562);
- (4) "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." (at page 563);
- (5) "Whether or not there was an excuse for non-compliance with requirement of the section is a material circumstance to be taken into account in deciding whether or not, the court should in the exercise of its discretion, grant relief. But the sub-section itself does not provide that the relief shall not be granted if there is no excuse for non-compliance and to

interpret it in this way is in Their Lordships opinion wrong." (at page 561).

It is relevant to note that the decision in *Sameen's case (Supra)* was fully discussed and cited with approval by my brother Kulatunga J., in *Martin v. Suduhamy*⁽⁴⁾.

Turning now to the provisions of section 759(2) of the present Civil Procedure Code, it is seen at once that these provisions are substantially the same as section 756(3) of the earlier Code. There is, however, one significant difference which is of decisive importance in the appeal before us. While the aforesaid section 756(3) is in terms applicable only to the provisions of that section, namely, section 756, the corresponding section in the present Code, that is section 759(2), is much wider in its application. Section 759(2) itself expressly enacts that it applies to the "provisions of the **foregoing sections**". It is thus clear that section 759(2) applies to section 755(1), which is the section which requires a notice of appeal to be "duly stamped".

The first question that then arises is whether in the instant case the Court of Appeal had jurisdiction to grant relief in respect of the "mistake" or "omission" in supplying the required stamp fee. What was required was a stamp fee of Rs. 10/-. This clearly is a matter which pertains to the revenue. Could it be reasonably said that the "omission" to supply the stamp fee had "materially prejudiced" the respondent in this case? The answer, I think, is emphatically in the negative. For, as observed by Kulatunga J., in *Martin v. Suduhamy (Supra)*, "What is required to bar relief is not any prejudice but material prejudice, i.e. detriment of the kind which the respondent cannot reasonably be called upon to suffer." In the instant case there is nothing to suggest that the respondent has been materially prejudiced. I accordingly hold that the Court of Appeal had jurisdiction to grant relief in terms of section 759(2) of the present Code.

The next question is whether the Court of Appeal in the exercise of its discretion ought to have granted relief. The non-compliance complained of is of a trivial nature and there is the additional circumstance that the deficiency in the stamp fee was supplied with reasonable promptitude. There is nothing whatever to suggest that the non-compliance was a deliberate act. On the contrary, the facts and circumstances suggest that it was a case of an inadvertent omission. I accordingly hold that this was a fit case for the Court of Appeal to have exercised its discretion in favour of the appellant.

The Court of Appeal took the view that case of *Martin v. Suduhamy* (*Supra*) was not relevant on the ground that it "refers to the question of hypothecation of the security for costs." In so doing, the Court of Appeal was in error; it was a case in which the meaning and scope of the provisions of section 759(2) directly arose for consideration; this court considered those provisions in the light of the analysis by the Privy Council of the analogous provisions in the earlier Code. The principles considered are of relevance and assistance to the issues arising in the appeal before us.

Mr. Daluwatta in his comprehensive written submissions placed reliance on the case of *Sandanayake v. Jamaldeen* ⁽⁶⁾. That case, was concerned with the question whether a deficiency in the stamping of an application for leave to appeal to the Privy Council is curable. It is therefore of little assistance in deciding the issue that arises on the present appeal. However, the approach adopted by H. N. G. Fernando, C.J., to the question of deficiency in stamping is not without relevance to the appeal before us. Said the learned Judge " . . . the somewhat technical objection taken in this case should not stand in the way of a conclusion which will further the ends of justice."

Mr. Daluwatta further submits that section 759(2) which refers to any mistake, omission or defect in complying with the provisions of the foregoing sections is subject to section 33 of the Stamp Duty Act No. 43 of 1982 which precludes a court from acting upon an instrument chargeable with stamp duty unless it is duly stamped; hence section 759(2) has no application where the notice of appeal is not duly stamped. It seems to me, however, that the special provisions of section 759(2) which empowers the court to grant relief must prevail over section 33 of the Stamp Duty Act, having regard to the maxim "*generalia specialibus non derogant*". This view is in accord with the true meaning and scope of section 759(2). It would not be tantamount to treating section 33 lightly, as submitted by Mr. Daluwatte.

Mr. Daluwatte next contends that in any event if the "stamping" is done after the appealable time, then the notice of appeal (so perfected) out of time; hence the appeal must be dismissed. I do not agree. The true position is that where a court grants relief under section 759(2) and thereby cures a defect in stamp duty, the notice of appeal filed within time is validated *ab initio*. Accordingly the question of the time bar does not arise.

Having regard to the nature of the preliminary objection that has been taken in the instant case, the observation of the Privy Council in *Karunapejjalage Bilindi v. Wellawa Attadassi Thero* ⁽⁶⁾ is of significance:-

"... it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to any one."

In my view, the objection is of a technical nature, and should not be allowed to thwart the course of justice.

The appeal is accordingly allowed, and the judgment of the Court of Appeal is set aside. The Court of Appeal is directed to hear this on its merits.

KULATUNGA, J, - I agree

RAMANATHAN, J, - I agree

Appeal allowed.
