

NOORDEEN LEBBE
v.
MOHAMADU AMEER AND OTHERS

COURT OF APPEAL,
PALAKIDNAR, J. AND SENANAYAKE, J.,
C. A. No. 205/81 (F) : D.C. KEGALLE No. 18724/P,
SEPTEMBER 19, 1990.

Failure to deposit security and hypothecate it by bond – Section 759(2) of the Civil

Money for security should be by deposit and hypothecation by bond. Failure to do this is fatal to the appeal. The defect cannot be cured by invoking S. 759 (2) of the Civil Procedure Code

Cases referred to :

Dona Sisiliyana V. Kamala Piyaseeli [1990] 1 Sri L. R. 226

PRELIMINARY OBJECTION to appeal

Faiz Mustapha, P.C. for defendant-appellant.

C. R. Gunaratne, P.C. with *A. A. de Silva* for plaintiff-respondent.

M. S. A. Hasson for 6 th defendant-respondent.

September 21, 1990

PALAKIDNAR, J.

At the hearing of this appeal a preliminary objection was taken that the bond for the security for costs was not hypothecated. Section 757 of Civil Procedure Code relating to this matter states that the money for security should be by deposit and hypothecation by bond. If the hypothecation is not done the full requirement of this Section is not met and therefore the compliance is incomplete. The failure to comply with the requirement of Section 755 (2) is fatal to the appeal and it has been held repeatedly by this court that it cannot be cured by Section 759 (2) of Civil Procedure Code. In *Dona Sisiliyana v. Kamala Piyaseeli* (1) Gurfawardana, J. held that it was not possible to invoke Section 759 (2) to cure the defect. The facts in this case pertaining to this objection show that no explanation for the failure to hypothecate of the money has been given. The appeal itself was filed in 1981. Therefore if this case were to be sent back to rectify this defect great prejudice will be caused by considerable delay involved in such a step.

We therefore uphold the preliminary objection and reject this appeal. The appellant will pay the respondent Rs. 315 as costs.

SENANAYAKA, J. – I agree.

Preliminary objection upheld.
