

**SILVA**  
**v.**  
**SANKARAM AND OTHERS**

COURT OF APPEAL  
DISSANAYAKE, J. AND  
SOMAWANSA, J.  
CA NO. 876/91 (F)  
DC COLOMBO NO. 99730/M  
AUGUST 22, 2000  
MARCH 26, 2001 AND  
SEPTEMBER 14, 2001

*Civil Procedure Code – Amended by Act No. 79 of 1988, s. 754, s. 760A – Appeal – Computation of the period of 60 days – Within 60 days – 60th day falling on a Sunday – Can the petition of appeal be lodged on Monday? Interpretation Ordinance – s. 8 (1) – Holidays Act, No. 29 of 1971.*

The appellant lodged the petition of appeal on Monday, the 61st day, as the 60th day fell on Sunday, a public holiday.

It was contended that, the appeal is out of time.

**Held:**

- (1) A strict compliance is imperative and non-compliance is fatal to the appeal.
- (2) The words 'within 60 days' in section 755 (3) restrict the right of the appellant to file the petition of appeal beyond the time frame of 60 days given.
- (3) The provisions of s. 8 (1) Interpretation Ordinance do not apply.

*Per* Dissanayake, J.

"There is no need for the appellant to wait until the 60th day which fell on a Sunday and then complain that he should be allowed to file his petition of appeal on the 1st working day after such Sunday."

**APPEAL** from the judgment of the District Court of Colombo.

**Cases referred to :**

1. *State Trading Corporation v. Dharmadasa* – 1987 2 SLR 235.
2. *Keerthiratne v. Udeni Jayaratne* – 1990 2 SLR 346.
3. *Peter Singho v. Costa* – 1992 1 SRI LR 49.
4. *Boyagoda v. Mendis* – 30 NLR 321.
5. CA No. 1475/93 (F) DC Kurunegala No. 2330/P – CAM 25. 10. 2000.
6. *Wickramanayake v. De Silva* – 1978-79 2 SRI LR 65.
7. *Selenchina v. Mohamed Marikkar and Others* – 2000 3 SRI LR 100.
8. *Nirmala de Mel v. Seneviratne and Others* – 1982 2 SRI LR 569.

*Rohan Sahabandu* for defendant-appellant.

*S. Mahenthiran, PC, with A. Premalingam* for plaintiff-respondent.

*Cur. adv. vult.*

November 02, 2001

**DISSANAYAKE, J.**

Learned President's Counsel appearing for the plaintiff-respondent<sup>1</sup> took up the position that the appeal of the defendant-appellant is filed out of time.

Learned counsel appearing for the defendant-appellant submitted that the judgment in this case was delivered by the learned District Judge on 10. 07. 1991. The defendant-appellant duly tendered the notice of appeal. The petition of appeal was due to be tendered on the 8th of September, 1991, which was the 60th day. Since the 8th of September, 1991, fell on a Sunday, the petition of appeal was tendered by the defendant-appellant on 9th September, 1991, the<sup>10</sup> following Monday which happened to be the next working day. Learned counsel appearing for the defendant-appellant contended that the law permitted such a course of action.

Learned counsel appearing for the defendant-appellant submitted that under the Holidays Act, No. 29 of 1971 all public holidays and

Sundays are '*dies noh*' and are named as holidays. He contended, therefore, tendering of the petition of appeal on 8th of September, 1991, is not possible as the District Court is closed on Sundays.

It was contended by him that under section 8 (i) of the Interpretation Ordinance in such a situation the petition of appeal could be tendered on the following first working day. He cited the decision of the Supreme Court in *State Trading Corporation v. Dharmadasa*<sup>(1)</sup> where His Lordship Sharvananda, C.J. observed that "section 8 (i) of the Interpretation Ordinance will not avail the appellant since the last date for presenting the notice of appeal to Court was 16th June, a Friday – a day on which the Court was not closed. Had the last being Saturday, the 17th then the notice of appeal could validly have been filed on the Monday the 19th, when the Court was open.

The judgment of His Lordship Sharvananda, C.J. in *State Trading Corporation v. Dharmadasa* (*supra*) was pertaining to tendering of the notice of appeal and not the petition of appeal.

The matter for decision in the instant case is the time limit for tendering of the petition of appeal under section 755 (3) of the Civil Procedure Code.

Section 755 was further amended by Act No. 79 of 1988. Section 755 (3) provides that the petition of appeal shall be tendered within 60 days from the date of the judgment or decree appealed against and the proviso to the section states that if such petition is not presented to the original Court within 60 days from the date the judgment or decree appealed against, the Court shall refuse to receive the appeal.

Under section 754 (4) a notice of appeal has to be tendered by an appellant within 14 days of the date when the decision or order appealed against was pronounced. In computing the 14 days date on which the decree or order was pronounced and the date of filing of the notice of appeal and all Sundays and public holidays are excluded.

However, there is no such exclusions under section 755 (3). The phrase “within 60 days from the date of judgment or decree”, encompasses a limited time span. In Black’s *Law Dictionary* the word<sup>50</sup> within “when used in relation to time, has been defined as meaning anytime before, at or before, at the end of, before the expiration of, not beyond, not exceeding, not later than. The use of the word “within” as a time or limit, or degree or space, embraces the last day or degree or entire distance covered by the time fixed.

In Stround’s *Judicial Dictionary of Words and Phrases*, it is more frequently used to delimit a period inside which certain events may happen.

Where something is to be done “within” stated time “before” a stated date that means that it is to be done at some time during the course<sup>60</sup> of stated time immediately preceding the stated date.

In the case of *Keerthiratne v. Udeni Jayaratne*<sup>(2)</sup> at 347 H. W. Senanayake, J. stated thus :

“The provisions of section 755 (3) of the Civil Procedure Code requires the appellant to present to the original Court a petition of appeal within 60 days. This is mandatory. The filing of a notice of appeal must be followed, with the petition of appeal, both steps being mandatory and imperative in lodging an appeal.”

In *Peter Singho v. Costa*<sup>(3)</sup> at 52 Ananda Coomaraswamy, J. stated thus :

70

“. . .The Court of Appeal was considering section 755 (3) of the Civil Procedure Code relating to the petition of appeal. According to this provision the petition of appeal must be filed within 60 days from the date of the judgment . . .”

"The provisions relating to petitions of appeal is entirely a new one, in the new Civil Procedure Code. Therefore, the decision of *Boyagoda v. Mendis*<sup>(4)</sup> is not applicable to cases falling under the new Civil Procedure Code and the decision in *Sri Lanka State Trading Consolidated Export Corporation v. Dharmadasa* (*supra*) is applicable, *mutatis mutandis*, to the petition of appeal. 80 Accordingly, the petition of appeal presented in this case is clearly out of time."

In a more recent case<sup>(5)</sup> *Wigneswaran, J.* stated thus :

". . . The words within 60 days in the said section restricts the right of the appellant to file the petition of appeal beyond the time frame of 60 days given. As stated by Soza, J. in *Wickramanayake v. De Silva*<sup>(6)</sup> at 71 – "Parties should not wait till the last moment and then complain when they are caught out of time."

In the case of *Wickramanayake v. De Silva* (*supra*), it was held 90 by Soza, J. that provisions of section 755 (3) of the Civil Procedure Code which requires the petition of appeal to be filed within 60 days from the date of judgment are mandatory.

Accordingly, where a petition had been filed after the period of 60 days had lapsed, the learned District Judge was correct in rejecting such petition. The notice of appeal too lapses for want of compliance with the subsequent requirement and should be rejected. This also was not a case in which relief should be given under the provisions of section 759 (2), specially as there was no averment regarding material prejudice to the respondent in the petition and as 100 the procedure set out in chapter LX of the Civil Procedure Code was available to the petitioner.

At page 68 Soza, J. discussing the effects of enactments regulating the procedure in Courts has stated as follows :

“Enactments regulating the procedure in Courts are usually construed as imperative – See Maxwell on the *Interpretation of Statutes*, 11th ed. (1962), p. 367 the rule is explained thus :

“If, for instance, a right of appeal from a decision be given with provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognisances, or transmitting documents within a certain time, a strict compliance <sup>110</sup> would be imperative and non-compliance would be fatal to the appeal.”

Learned counsel appearing for the defendant-appellant relied on the decisions of the following cases to buttress his contention that if the 60th day fell on a Sunday or a public holiday the appellant was entitled to present the petition of appeal on the following first working day :

(a) *Boyagoda v. Mendis (supra)*.

(b) *Selenchina v. Mohamed Marikkar and Others.*<sup>(7)</sup>

(c) *State Trading Corporation v. Dharmadasa (supra)*. <sup>120</sup>

(d) *Nirmala De Mel V. Seneviratne and Others.*<sup>(8)</sup>

The decision in the case of *Boyagoda v. Mendis (supra)* has been delivered on 18th March, 1929 and aforesaid decision dealt with section 754 of the Civil Procedure Code that was in force then, which is substantially different from section 755 (3) of the Civil Procedure Amending Act, No. 79 of 1988. According to the provisions of the old Civil Procedure Code the petition of appeal has to be furnished within 10 days of the date of judgment. The date the judgment was pronounced and the date of filing of the petition of appeal are excluded. Therefore, the facts of the aforesaid case are different to <sup>130</sup> the facts of the instant case before us.

The matters decided in the case of *Selenchina v. Mohamed Marikkar and Others (supra)* were with regard to section 754 (4) which provides the time frame within which the notice of appeal has to be filed.

The facts of the case of *The State Timber Corporation v. Dharmadasa (supra)* were also based on section 754 of the Civil Procedure Code before it was amended by the amending Act No. 79 of 1988. The matter that came up for decision in the aforesaid two cases were with regard to presenting of the notice of appeal.

The facts that came up for decision in the case of *Nirmala De Mel v. Seneviratne and Others (supra)* were based on the appellant having obtained leave to appeal from the judgment of the Court of Appeal, tendering his appeal to the Supreme Court which was out of time. According to the Supreme Court rules, the period within which the appeal should have been tendered was 30 days from the date leave to appeal was granted.<sup>140</sup>

Learned counsel appearing for the defendant-appellant cited to us the following observations of His Lordship Sharvananda, J. at page 572 of the said case : “section 8 (1) of the Interpretation Ordinance is relevant to such an instance and on the application of the rule of interpretation it would appear that the petition of appeal filed in Monday the 16th February, 1981, which was the next working day was within time”. It is to be observed that the judgment of *Nirmala De Mel v. Seneviratne (supra)* was delivered on 2nd August, 1982. The Interpretation Ordinance came into the statute book on 3rd December, 1901.<sup>150</sup>

It is of interest to examine section 8 (1) of the Interpretation Ordinance at this stage. I set down below section 8 (1) of the Interpretation Ordinance :

“Where a limited time from any date or from the happening<sup>160</sup> of any event is appointed or allowed by any written law for the

doing of any act or the taking of any proceeding in a Court or office, and the last day of the limited time is a day on which the Court or office is closed, then the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next day thereafter on which the Court or office is open."

Sections 754 to 760A of Amending Act No. 79 of 1988 which was certified on 18. 12. 1988 replaced the provisions in the old Civil Procedure Code relating to notice of appeal and petition of appeal, etc. Under section 755 (3) of the amended Civil Procedure Code, the petition of appeal shall be presented to the original Court, within 60 days from the date of judgment or decree appealed against. Under the proviso to subsection 3, if such petition is not presented to the original Court within 60 days from the date of judgment or decree appealed against, the original Court is empowered to refuse to receive the said appeal. <sup>170</sup>

Section 759 (2) provides for the Court of Appeal to grant relief to an appellant, where there was a mistake, omission or defect in complying with the provisions relating to the notice of appeal and the petition of appeal (other than provisions specifying the period within which any act or thing to be done), if it was of opinion that the respondent has not been materially prejudiced. <sup>180</sup>

It is to be observed that any mistake or omission with regard to the time frames within which any act or thing is to be done has been excluded from matters where the Court of Appeal could grant relief.

It is well to be borne in mind that the proviso to subsection 3 of section 755 of the Civil Procedure Code, and the exclusion of the time frames within which any act or thing is to be done, for grant of relief by the Court of Appeal under section 759 (2) the Civil Procedure Code, in respect of any mistake, error or omission in complying any provisions in respect of the notice of appeal and the petition of appeal were not there in the Civil Procedure Code, before it was amended by amending Act No. 79 of 1988. <sup>190</sup>

The opinion expressed at page 327 by Maxwell on the *Interpretation of Statutes* (1962) 11th ed. is very relevant to arrive at a conclusion that can be arrived at when an enactment regulating procedure in Courts is breached.

The author at page 327 has expressed the view that enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. He has stated further that in a case of right of appeal from a decision be given with provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognisances, or transmitting documents within a certain time, a strict compliance would be imperative and non-compliance would be fatal to the appeal.<sup>200</sup>

Therefore, I am of the view that the provisions of section 8 (i) of the Interpretation Ordinance do not apply to the facts of the instant case.

In terms of section 755 (3) of the amended Civil Procedure Code an appellant is given 60 days, which is a substantial period of time, to tender the petition of appeal. There is no need for the appellant to wait until the 60th day which fell on a Sunday and then complain that he should be allowed to file his petition of appeal, on the 1st working day after such Sunday. The words "within 60 days" in section 755 (3) of the Civil Procedure Code, restrict the right of the appellant to file the petition of appeal beyond the time frame of 60 days given.<sup>210</sup>

Thus, the petition of appeal of the defendant-appellant is tendered out of time.

The appeal of the defendant-appellant is rejected without costs.

**SOMAWANSA, J.** – I agree.

*Appeal rejected.*