EKANAYAKE
v
EKANAYAKE

COURT OF APPEAL
AMARATUNGA, J. AND
ABEYRATNE, J.
C.A.L.A. NO. 78/2003
D.C. POLONNARUWA 5341/L
JANUARY 19, 2003

Civil Procedure Code, sections 224, 323, 754(4), 755 (3), 761, 763 and 774 – Application for execution of decree – Is it after 14 days or 60 days of judgment? – Application for writ of execution – Is there a particular form?

Held:

(i) The application for execution of decree filed after the judgment debtor filed the notice of appeal is a valid application. The time allowed for the appealing from the appealable decree 14 days – section 754 (4) – time allowed for the giving of notice (appeal). The Brooke Bond case has put the matter beyond doubt. The Court of Appeal is bound to follow the said case.

(ii) Section 323 states that an application for execution of a decree may be made in the manner and according to the Rules prescribed for execution of decrees under Head (A) so far as the same are applicable. Reference to Head A brings in section 224.

What is required is substantial compliance with section 224 in so far as is necessary for the purpose of excuting a decree for the recovery of immovable property.

(iii) An application in Form 42 is a proper application. Absence of a petition and affidavit even if they are necessary is a mere technicality. What matters is not the form of the application but the particulars to be given in such an application.

Per Amaratunga, J.,

" Execution is a process for the enforcement of a decreed right, mere technicalities shall not be allowed to impede the enforcement of such rights in the absence of any prejudice to the judgment debtor".

APPLICATION for leave to appeal from the Order of the District Court of Polonnaruwa.

Cases referred to:

1. *Brooke Bond (Ceylon) Ltd.* v *Gunawardena* (1990) 1 Sri LR 71
2. *Arulampalam* v *Fernando* (1986) Vol 1 CALR 651
3. *Careem* v *Amarasinghe*, Vol I Sriskantha Law Reports 25

Sanath Jayatilake for petitioner.

Ananda Kasthuriarachchi for respondent.

Cur. adv. vult.

July 25, 2003

AMARATUNGA, J.

This is an application for leave to appeal against the order of 01
the learned District Judge of Polonnaruwa overruling two preliminary objections raised by the learned counsel for the defendant-petitioner to the application for execution of the decree pending appeal. The two objections related firstly to the time at which the plaintiff judgment creditor (hereinafter called the plaintiff) is entitled

to make an application under section 761 of the Civil Procedure Code (hereinafter called the Code) for execution of decree pending appeal and secondly to the form of such application.

In this case judgment was entered for the plaintiff by the District Court on 2/1/2001. The defendant filed a notice of appeal on 8/1/2001. In terms of section 755 (3) of the Code, the defendant had sixty days from the date of the judgment appealed against to file his petition of appeal. However the plaintiff made his application to Court for the execution on the decree on or about 29th of January, before the expiry of the said period of sixty days. Section 761 of the Code which deals with applications for execution of decree pending appeal is as follows.

> "No application for execution of an appealable decree shall be instituted or entertained until after the expiry of the time allowed for appealing therefrom. Provided, however, that where an appeal is preferred against such a decree, the judgment creditor may forthwith apply for execution of such decree under the provisions of section 763."

In terms of section 754(4) of the Code every appeal to the Court of Appeal against any judgment or decree of any original court has to be filed by presenting a notice of appeal within 14 days from the date on which the judgment or decree appealed against has been pronounced. Thereafter the appellant has to file the petition of appeal within sixty days from the judgment or order appealed against. (section 755(3) of the Code) The submission of the learned counsel was that the phrase 'time allowed for appealing' in section 761 includes the time limits prescribed for the filing of the notice of appeal and the petition of appeal. Therefore the appealable period expires after both steps have been completed within the prescribed period or after the expiry of sixty days or if notice of appeal has not been filed within 14 days, then after 14 days. If both steps have been completed before the expiry of sixty days, then, in view of the proviso to section 761, the application for execution can be made soon thereafter, Therefore the learned counsel's submission was that it was not open to the judgment creditor to file his application for execution before the petition of appeal was filed and accordingly the application was bad in law.

In this case notice of appeal has been filed within the period of 14 days prescribed by section 754(3). The application for execution of decree has been filed before the petition of appeal was filed. According to the argument of the learned counsel, this application is therefore bad in law.

The second objection raised by the learned counsel for the judgment debtor was that the application for execution of decree has to be made in accordance with section 224 of the Code and therefore in the absence of an application in Form No 42 of the First Schedule to the Code there was no proper application before Court. The learned District Judge has not dealt with this second objection in his order.

The learned District Judge, relying on the decision of the Supreme Court in *Brooke Bond (Ceylon) Ltd.* v *Gunasekera*(1) has rejected the contention that the application for execution had been filed before the period allowed for filing of an appeal. In the above case, Atukorale, J. having considered the provisions of the Civil Procedure Code relating to the filing of appeals against the judgments and decrees of original courts has held (with H.A.G. de Silva, J. and Bandaranayake, J. agreeing) that "for the purpose of section 761, the time allowed for appealing from an appealable decree is 14 days (the time allowed for the giving of notice of appeal) and that an appeal is preferred against such as decree upon the lodging of the notice of appeal within 14 days in terms of section 754(3)". (page 83)

According to this judgment the application for execution of decree filed after the judgment debtor filed the notice of appeal is a valid application and the learned District Judge was correct in overruling the preliminary objection. However in the written submissions filed in the District Court and in this Court and at the hearing before us the learned counsel for the petitioner has taken up the position that the judgment in the Brooke Bond case is not a judgment within the meaning of section 774 of the Civil Procedure Code and as such a court is not bound to follow that judgment as a precedent. The learned counsel has also submitted that the said decision has no validity as it is a decision given *per incuriam*. The learned counsel has cited excerpts from Chapter IV of Cross on 'Judicial Precedent' in support of his submission that the decision in the Brooke Bond case has no binding force as a precedent.

The learned counsel in his written submissions has not explained the reasons for his submission that the decision in the Brooke Bond case is not a judgment within section 774 of the Code. That judgment sets out the question of law to be decided in that case, the decision of Court thereon, the reasons for the decision and the relief the appellant was entitled to. Thus it has all the characteristics of a judgment. The learned counsel has not demonstrated how the excerpts from Cross cited by him fit into his submission that the decision in the Brooke Bond case is not a judgment.

Apparently the learned counsel's submission that it is not a judgment is linked to his other submission that the said decision has been given *per incuriam*. He has submitted that the question for decision in Brooke Bond's case was whether the petitioner who made the application for the execution of writ was entitled, at the time he made the application, 'to forthwith apply for execution', but instead of considering this question the Court has proceeded to discover the meaning of the words 'time allowed for appealing'. The word forthwith' in section 761 refers to the happening of an event, namely the filing of the appeal. Therefore in determining whether the petitioner was entitled to forthwith apply for execution, one has to find what is meant by the words 'time allowed for appealing'. Once the answer to that question is found, the answer to the other question logically and automatically follows. Thus Atukorale, J. has rightly considered the proper question of law to be considered in that case and accordingly I cannot accept the submission that His Lordship has considered an irrelevant question or that his judgment is *per incuriam*. I therefore hold that this Court is bound to follow the decision in the Brooke Bond case and that the order made by the learned District Judge following that case is correct in law and should be upheld.

The other objection raised by the learned counsel in the District Court was that there was no proper application before Court as the judgment creditor has not made the application in terms of section 224 of the Civil Procedure Code. Sections 761 and 763 of the Code do not specify a particular form for the application or state that it should be made in accordance with a particular section of the Code. The only mandatory requirement specified in section 763 is that the judgment debtor shall be made a respondent to

such application. In the instant case, the application has been made by way of petition and affidavit. In support of his submission that the application for execution of the decree pending appeal should be made under section 224 of the Code, the learned counsel has cited the decision in *Arulampalam* v *Fernando*[2] where Jameel, J. has stated as follows. "The application referred to in section 763 is the application made under section 224 and there is no requirement in either section that the application should be by way of petition and affidavit." Section 224 appears in Chapter 22 of the Code which relates to executions. Section 224 appears under Head A of that Chapter which relates to execution of decrees to pay money. The section sets out the particulars to be given in an application for the execution of a decree to pay money. Form No. 42 of the First Schedule to the Code requires the same particulars identical to those specified in section 224. Section 323 which deals with applications for the recovery of immovable property says that an application for execution of a decree for the recovery of immovable property may be made in the manner and according to the rules prescribed for execution of decrees under Head (A) so far as the same are applicable. The reference in this provision to Head (A) thus brings in section 224. The wording of section 323 permits the applicant to omit certain particulars [which solely relate to money decrees – such as particulars under section 224(e) to (h)] specified in section 224 from an application for the execution of a decree for the recovery of possession of immovable property. Therefore what is required is substantial compliance with section 224 in so far as is necessary for the purpose of executing a decree for the recovery of immovable property.

In *Careem* v *Amarasinghe*,[3] the application for execution had been made in Form No 42. It was contended that the application should have been made by petition and affidavit as the only way to comply with the requirement of making the judgment debtor a respondent is by making the application by petition supported by affidavit. G.P.S. de Silva, J. (as he then was) did not accept this argument. According to his reasoning the purpose of making the judgment debtor respondent to an application made under section 763 is to give him notice of the application and to enable him to be heard before an order is made. Form 42 contained all the material

particulars such as the names of the parties, the date of decree, whether any appeal has been preferred, previous applications, if any, the name of the person against whom decree is sought to be executed and the mode in which court's assistance is required. In that case a copy of the application in Form No. 42 had been served on the judgment debtor and he had appeared in Court and had opposed the application. The Court held that it was sufficient compliance with section 763. In that case G.P.S. de Silva, J. has stated that even if the argument that petition and affidavit is necessary is accepted, the absence of such petition and affidavit is a mere technicality which has in no way prejudiced the judgment debtor. (The aspect of this judgment has not been overruled by the Brooke Bond case which overruled the decision of *Careem* v *Amarasinghe* (*supra*) in so far as it related to the time allowed for appealing.)

According to the decisions of the two cases cited above, an application in Form No. 42 is a proper application. However both cases do not say that an application made by petition and affidavit is not a proper application. What matters is not the form of the application but the particulars to be given in such an application. If the application before Court contains the particulars required under section 224 (in so far they are applicable) and the name of the respondent, it is a proper application. Execution is a process for the enforcement of a decreed right. Mere technicalities shall not be allowed to impede the enforcement of such rights in the absence of any prejudice to the judgment debtor. The application made in this case contains all particulars necessary and the judgment debtor is in fact before Court. In the circumstances the Court should be allowed to decide the application on its merits.

For the reasons set out above I uphold the learned District Judge's order to proceed with the inquiry. Accordingly I refuse leave to appeal and dismiss this application with costs in a sum of Rs. 7500/.

ABEYRATNE, J. - I agree.

Application dismissed.