

**SRI LANKA GENERAL WORKERS UNION
V.
SAMARANAYAKE**

SUPREME COURT.
FERNANDO, J.
DR. AMERASINGHE, J.
S.N. SILVA, J.
S.C. 93/94.
HCA 561/92.
L.T. NO. 1/147/91.
NOVEMBER 16, 1995.

Industrial Disputes Act - Amending Act 32 of 1990 - section 31D - Appeals to High Court - Section 31D(6) - Accompanied by certificate that security is furnished - Directory or Mandatory.

On 16.7.92 the Labour Tribunal made an order awarding the Applicant Respondent - Appellant a sum of Rs. 86,400/- as compensation; on 28.7.92 the Respondent - Appellant Respondent lodged a Petition of appeal; the certificate re-security under section 31D(6) was neither annexed to or filed simultaneously with the petition of appeal, the security was deposited 7 days after the period of 30 days specified by section 31D(6).

The preliminary objection that the appeal should be rejected because a sum of Rs. 86,400/- had not been deposited by way of security at the time the appeal was filed was overruled by the High Court. On appeal.

Held :

(1) Failure to deposit the security in time is not necessarily fatal. section 31(D) does not specify a time limit for the deposit of security in the case of an application in Revision or a writ application. However the certificate is required to accompany a writ application (section 31D(B)) indicating that security can be deposited shortly before the application is made. There is no similar requirement in the case of a revision application; but undoubtedly, in dealing with a revision application the Court will exercise its discretion to require a Petitioner to deposit the security required by section 31D(4) but in all such cases the deposit will generally be made more than 30 days after the impugned order. This suggests that the legislature did not consider that in every case whether appeal revision or writ the security should be deposited within 30 days of the impugned order.

Per Fernando, J.

"If thirty days is not mandatory for writs and revision, for what reason should be mandatory in the case of an appeal, this is some indication although not conclusion, that the legislature did not regard the 30 days requirement as mandatory.

"Thus in a variety of contents, terms and conditions relating to the preferring of an appeal have been held to be Directory, in the absence of compelling language, I hold that the time limit of 30 days for the deposit of security laid down by section 31D is not mandatory.

AN APPEAL from the High Court:

Cases referred to:

1. *Karunadasa v. Wijesinghe* 1986-1-SLR 358, 364.
2. *Kiriwanthie v. Navaratne* - 1990-2-SLR 393.
3. *Sameen v. Abeywickrema* (1963) 64 NLR 553.
- 4(1). *Edirisinghe v. Navaratnam* 1985-1-SLR 100.
- 4(2). *Edward v. de Silva* 46 NLR 342.
5. *Abdul Cader v. Sittinisa* (1951) 52 NLR 536.
6. *Tillekeratne v. Wijesinghe* (1908) 11 NLR 270.
7. *Kadiragamadas v. Suppiah* (1958) 56 NLR 172
8. *Sandanam v. Jamaldeen* (1969) 71 NLR 145.
9. *Bilindi v. Attadassi Thera* (1945) 47 NLR 7 (PC).
10. *Murugesu v. Arumugam* (1936) 16 CLR 228.
11. *Martin v. Suduhamy* 1991-2 SLR 279.

V.C. Motilal Nehru, P.C. with *Ms. P. Joseph* for Applicant-Respondent- Appellant.

Chula de Silva, P.C. with *M. Jayawardane, Lyn Amarasuriya* and *M. Maharoo* for Respondent-Appellant-Respondent.

Cur.adv.vult.

November 27, 1995.

FERNANDO, J.

The question of law that arises in this appeal involves the interpretation of section 31D of the Industrial Disputes Act, introduced by the amending Act No. 32 of 1990, the relevant provisions of which are as follows:

(4) Every employer who -

(a) appeals to a High Court against an order of a labour tribunal or makes an application in revision against any such order. or

(b) makes an application for the issue of an order in the nature of a writ in respect of an order made by (the President of a Labour Tribunal).

shall furnish to such labour tribunal, security in cash

(b) The President of every Labour Tribunal shall cause all moneys furnished as security under subsection (4) to be deposited in an account bearing interest, in any approved bank in Sri Lanka.

(6) Every petition of appeal shall bear uncanceled stamps to the value of five rupees and in every case where the applicant (*sic*) is required to furnish security, be accompanied by a certificate issued under the hand of the President of the Labour Tribunal to the effect that the appellant has furnished such security. The petition of appeal shall be filed in the High Court within a period of thirty days reckoned from the date of the order from which the appeal is preferred.

(8) Every application referred to in paragraph (b) of subsection (4) shall be accompanied by a certificate issued under the hand of the President of the Labour Tribunal to the effect that the applicant has furnished the security he is required to furnish by that subsection.

It is common ground that on 16.7.92 the Labour Tribunal made an order awarding the Applicant-Respondent-Appellant (the Appellant) a sum of Rs. 86,400/- as compensation; that on 28.7.92 the Respondent-Appellant-Respondent (the Respondent) filed a petition of appeal that the certificate referred to in section 31D (6) was neither annexed to, nor filed simultaneously with, the petition of appeal; that a sum of Rs. 86,400/- was required as security was deposited seven days after the period of thirty days specified by section 31D(6).

When the appeal was taken up for hearing, the High Court considered a preliminary objection taken by the applicant; that the appeal should be rejected because a sum of Rs. 86,400/- had not been deposited by way of security at the time the appeal was filed, and that the petition of appeal was a nullity because it was not "accompanied by" the certificate. The High Court overruled this objection.

In the application for special leave. and in the Applicant's written submissions. the question for decision was stated to be whether the High Court had erred in holding that the provisions of section 31D(6) are directory and not mandatory; and that being mandatory the appeal should have been rejected.

No other issue was raised. Special leave was granted upon the question whether furnishing security within thirty days and tendering the certificate, in terms of section 31D(6), are mandatory.

The High Court held that these requirements were plainly directory that the legislature intended that the Court should have a discretion in the matter; that the matter could not be determined mechanically, but after taking into account the nature of the irregularity, the circumstances under which it occurred, and the prejudice to the other party; and that "accompany" also meant to "supplement" to remedy deficiencies by adding a thing or a part later. Mr. Nehru, P.C. who appeared for the

Applicant, conceded that there had been no inquiry or argument in regard to the circumstances of the delay, and that no alternative submission had been made that the appeal should be rejected because the Respondent had failed to establish facts which would justify the delay condoned or excused.

Mr. Nehru contended that there was no valid petition of appeal unless all the requirements of section 31D(6) were satisfied the petition had to be filed within thirty days, it had to bear uncanceled stamps to the value of five rupees, security had to be deposited within thirty days, and the certificate had to "accompany" (in the sense of being annexed to or filed simultaneously with) the petition. If any of these requirements was not satisfied, there was no valid invocation of the jurisdiction of the High Court, which therefore had no option but to reject the appeal.

These provisions have to be interpreted in the light of the purpose of the amending Act of 1990. There can be no doubt that the legislative intention was to ensure that at the conclusion of the appellate proceedings, however lengthy, there would be a fund available to satisfy the workman's entitlements; and, by providing for interest, to ensure that the lapse of time and inflation would not unduly erode those entitlements (see section 31D(6), which provides for the disposal of the amount deposited as security). It was pointed out to Mr. Nehru that an Appellant might file his appeal the day after the Tribunal made its order, and deposit the security on the 29th day; or that after depositing the security, he might find that the President of the Tribunal was on leave, or had some administrative difficulty in issuing the certificate, or, to take an extreme case, was wrongfully withholding the certificate; or that the certificate had been stolen after it was obtained. He was unable to cite any authority, or to give any compelling reason, justifying the view that these provisions were so strict as to require compliance to the very letter, even where the object of the provisions had been achieved.

Further, as Ranasinghe, J. (as he then was) observed in *Karunadasa v. Wijesinghe*⁽¹⁾ in construing provisions dealing with the right of appeal, a Court ought to prefer a broad construction which would preserve to an aggrieved party that right, rather than a strict construction which might abridge it.

In my view, while the primary meaning of the phrase "be accompanied by" is "shall have annexed to it" or "shall be filed simultaneously with", that phrase is wide enough to permit the petition of appeal to be perfected, or "supplemented", within the prescribed time, and taking the purpose of the amendment into consideration, this wider interpretation must necessarily be preferred. Similar language occurs in Rule 46 of the Supreme Court Rules, 1978; that a petition must "be accompanied by" certain material documents, Rule 46 was considered by me in *Kiriwanthie v. Navaratne*⁽²⁾ where I held that strict or absolute compliance was not essential.

". it is sufficient if there is compliance which is substantial - this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied.

Similarly, in *Sameen v. Abeywickrema*⁽³⁾ the Privy Council held that the requirement that notice of security be tendered "forthwith" did not mean that it should be given the same day. I hold that the High Court does not have any discretion to reject an appeal, where there is compliance with all the requirements, even if not simultaneous, within the prescribed period. The purpose of section 31D(6) is not only to ensure the availability of an interest - bearing fund, but to compel the Appellant to create that fund not more than thirty days after the impugned order. So long as that object is achieved, it matters not that the appeal is filed before security is deposited, or the certificate is filed after the petition.

If a requirement is not complied with within the prescribed time, different considerations arise. Where the requirement goes to jurisdiction, it is, unquestionably, mandatory. The failure to invoke the jurisdiction of a Court or tribunal within the prescribed time limit generally results in the Court or tribunal lacking the power to deal with the matter. But even this is subject to exceptions. Thus where the maxim *lex non cogit ad Impossibilia* is applicable, this Court will entertain fundamental rights application even though not filed within the time limit of one month fixed by Article 126 of the Constitution; *Edirisinghe v. Navaratnam*⁽¹⁾ in my view, although the petition of appeal must be filed within thirty days, the other requirements of section 31D (6) relate only to form, and not to the invocation of the jurisdiction of

the High Court. In *Edward v.de Silva*,⁴⁽²⁾ *Soertez, ACJ.* made the distinction clear;

"Some of those rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve exercise of it in irregularity".

Thus the failure to join a necessary party was held to be a fatal defect. The failure to affix a five rupee stamp on the petition of appeal cannot be regarded as a defect which is necessarily incurable after the expiry of the appealable period. So also the failure to tender the certificate, if the security has in fact been deposited in time - because that defect does not prevent the fulfilment of the purpose of section 31D (6) as in *Sameen v. Abeywickrame and Kiriwanthie v. Navaratne.* (*supra*)

However, the failure to deposit the security in time is undoubtedly more serious, but in my view it is not necessarily fatal, for several reasons.

Section 31D does not specify a time limit for the deposit of security in the case of an application in revision or a writ application. However, the certificate is required to accompany a writ application (of section 31D (B)) indicating that security can be deposited shortly before the application is made. There is no similar requirement in the case of a revision application, but undoubtedly, in dealing with a revision application, the Court will exercise its discretion to require a Petitioner to deposit the security required by section 31D(4). But in all such cases the deposit will generally be made more than thirty days after the impugned order. This suggests that the legislature did not consider that in every case - whether appeal, revision or writ - the security should be deposited within thirty days of the impugned order. If thirty days is not mandatory for writs and revision, for what reason should it be mandatory in the case of an appeal? In my view, this is some indication,

although not conclusion, that the legislature did not regard the thirty day requirement as mandatory.

Further, a person who has a genuine difficulty in furnishing security within thirty days may, without appealing move in revision, and attempt to justify invoking the revisionary jurisdiction on the basis that this was a good reason why he could not appeal indeed, it would seem that in the appeal itself he could ask the court to act in revision. Thus in *Abdul Cader v. Sittinisa* ⁽⁵⁾ a party had deposited only Rs. 20/- instead of Rs.25/-, as fees for typewritten copies: while declaring the appeal to have abated, Gratiaen, J acted in revision and granted relief, observing: ". until the present rule is relaxed I see no reason why the revisionary powers of this Court should not be exercised in appropriate cases".

It is at least arguable therefore that the High Court could have dealt with the merits of this appeal in the exercise of its revisionary powers, treating the delay in depositing security as not being a bar to revision proceedings: revision being a discretionary remedy, the Court would have had to consider the nature of the default, the circumstances in which it occurred, the prejudice to the other party, and the need to avoid a miscarriage of justice.

In *Tillakeratne v. Wijesinghe*,⁽⁶⁾ a preliminary objection was taken that the petition of appeal was not duly signed; although it purported to be signed by the appellant proctor, the proxy in his favour (filed at the institution of the action) had never been signed by the client. Hutchinson, C.J., held that the mistake could be rectified by the Appellant signing the proxy, and that such signature would operate as a ratification of all the acts done by the proctor in the action. This was followed by Gunasekera, J. in *Kadiragamadas v. Suppiah*⁽⁷⁾ where the petition of appeal had been filed by a proctor who did not hold a proxy; this irregularity was cured by the filing of a proxy after the appealable period.

Apart from the purpose of the provision, it is necessary to consider whether its language compels the view that it is mandatory. Two decisions dealing with stamping suggest the proper approach. In *Sandanam v. Jamaldeen*,⁽⁸⁾ at 146, Fernando, CJ referred to several decisions dealing with section 755 of the Civil Procedure Code (which

then provided that "any party desirous to appeal may within the time limited for presenting a petition of appeal, and upon his producing the proper stamp, be allowed to state viva voce his wish to appeal") which had held that this was a special statutory provision of appeal. But in regard to an application for leave to appeal to the Privy Council, he held that there was no special statutory provision concerning the time of stamping, and that a petitioner could be allowed time to supply the deficiency. He cited Lord Goddard's observations in *Bilindi v. Attadassi Thero*.⁽⁹⁾

". 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 anyone"

Of course, thereafter a party cannot expect further indulgence. In *Murugesu v. Arumugam*⁽¹⁰⁾ 228, Fernando, AJ. held that where the Court had allowed a party time to perfect his appeal, but the party failed to comply within that time, then his appeal had to be rejected. Similarly, in *Martin v. Suduhamy*⁽¹¹⁾ party who had intentionally refused to comply, after becoming aware of the defect, was refused relief.

Martin v. Suduhamy (supra) dealt with non. compliance provisions requiring security for costs, in civil proceedings. There is a difference, in that section 759(2) of the Civil Procedure Code expressly confers power to give relief. However, the deposit of security (whether in respect of an award, or for the costs of appeal) is not a matter upon which the jurisdiction of the Court depends but a term or condition relating to its exercise.

Thus in a variety of contents, terms and conditions relating to the preferring of an appeal have been held to be directory, in the absence of compelling language. I hold that the time limit of thirty days for the deposit of security, laid down by section 31D is not mandatory.

That does not mean that the time limit can be ignored. Where the objection is taken, the burden is on the Appellant to satisfy the High Court that it should exercise its discretion to entertain the appeal, after considering the nature of the default, the circumstances, in which it occurred, and the prejudice to the other party.

Mr. Nehru contended that the Respondent in this case had failed to discharge that burden. However, the preliminary objection that was taken was limited in scope; that the time limit was mandatory, and for that reason alone the appeal should be rejected. And that was the only question on which special leave was sought and granted. The objection was never taken that the Respondent had failed to prove facts and circumstances justifying the exercise of the discretion of the Court in his favour. We accordingly did not permit the Applicant to raise that matter for the first time in appeal.

I affirm the order of the High Court in regard to the preliminary objection, and dismiss the appeal. Having regard to the circumstances in which this question of law of general importance arose for decision, I make no order for costs. The record will be sent back to the High Court immediately.

AMERASINGHE, J. – I agree.

SILVA, J. – I agree.

Application dismissed.