COURT OF APPEAL

Thilagaratnam
V.
E.A.P. Edirisinghe

C.A. 1265/81 — CA — LA 50/81 — D.C. Colombo 32484/S

Cheque – Civil Procedure Code Sections 704. 705, 754, 755, 756, 759, 765 – Court can exercise revisionary powers even if Right of Appeal is available - exceptional circumstances.

Respondent instituted action against Petitioner for recovery of a sum of Rs.15,000/- due on a cheque dated 10.2.77 drawn by Petitioner. Petitioner moved to file answer unconditionally. After inquiry Judge made order giving leave to Petitioner to file answer on 10.5.81 on condition she deposited a sum of Rs.7,500/- Petitioner appealed against this order.

It was argued for the Respondent that application for leave to appeal against the order was out of time and that Petitioner could not move Court to act in revision.

It was further argued that though a copy of the cheque was not attached to the summons no prejudice was caused to the Respondent- Petitioner as the cheque leaf which was attached to the Plaint could have been inspected.

Petitioner argued that Judge should not have issued summons because there was an alteration on the face of the cheque.

Held 1) that section 759(2) gives the Court of Appeal the discretion to grant relief in appropriate cases in case of any mistake, omission or defect in complying with the provisions of Section 754 and 756.

2) Though the Appellate Courts' powers to act in revision were wide and would be exercised whether an appeal has been taken against the order of the original court or not such powers would be exercised only in exceptional circumstances.

3) That there were no exceptional circumstances in this case to justify exercise of the Court's powers of revision.

4) No prejudice was caused to Respondent by not attaching copy of cheque to summons as Cheque was annexed to plaint and could have been inspected.

5) Judge had addressed his mind to the fact of alteration and the allegation could not be sustained.

APPLICATION for leave to appeal from and revision of order of the District Judge of Colombo.

Before: L.H. De. Alwis, J & Seneviratne, J..
Counsel: N. Kanagasunderam for Petitioner.
S.A. Parathalingam for Respondent.
Argued on: 24th & 27th of November 1981.
Decided on: 15.1.1982

Cur. adv. vult.

L.H. DE ALWIS, J.,

These two applications were taken up together at the instance of counsel for the respective parties. C.A. - A.L. 50/81 filed on 21.4.1981, is an application by the petitioner for Leave to Appeal against the order of the District Court of Colombo dated 6th March 1981, "refusing an application for leave to appear and defend unconditionally" under Cap. LIII Civil Procedure Code, and is the first in point of time. Actually the order of the learned District Judge is that the Defendant, who is the petitioner, should deposit a sum of Rs 7,500/- in order to appear and defend the action.

C.A. Application No. 1265/81 is an application for revision of the same order of the District Court, Colombo dated 6th March 1981, and though the petition is dated 22.9.81 it has been filed, according to the date stamp on it, only on the 23rd October 1981.

Action No. 32484/S was instituted by the respondent in the District Court of Colombo, under Cap. 53 of the Civil Procedure Code, claiming a sum of Rs. 15,000/- on cheque No. A/45 - 769942 dated 10.2.77 drawn by the petitioner on the Bank of Ceylon, Borella. Summons was served on the petitioner on the 13th November 1980 and the petitioner moved to file answer unconditionally setting out the facts disclosing her defence. The matter was taken up for inquiry and on the 6th March 1981, the learned District Judge made order giving the petitioner leave to file answer on 15.5.81 on the condition that she deposits a sum of Rs. 7,500/-. This is the order that is being canvassed in these two applications.

Learned Counsel for the respondent raised a preliminary objection in the Leave to Appeal application No. 50/81, that it was out of time, and submitted further that this Court would not exercise its revisionary powers ex mero motu or in Application No. CA. 1265/81, to grant relief to the petitioner.

The Leave to Appeal application is clearly out of time. The order of the learned District Judge was made on the 6th March 1981, and in terms of the mandatory provisions of section 756 (4) of the Civil Procedure Code the application should have been made within 14 days thereof. But it was filed only on the 20th April 1981-nearly a month from the date of the expiration of the prescribed period.

The Leave to Appeal application first came up for hearing on 10.7.81 and on the application of counsel for the respondent it was re-fixed for hearing for the 5th August 1981. On that day it was put off for argument for 8th September 1981 and was again re-fixed for the 20th October 1981. It finally came up for hearing on the 24th November 1981. On the 23rd of September 1981, the Attorney-at-Law for the petitioner filed an affidavit and sought to explain the delay in filing the application. She stated that although a motion was filed for the issue of certified copies of several documents on 9.3.81, the certified copies were issued to her from time to time only from the 15th March to the 10th April '81. Incidentally the 15th March 1981 was a Sunday and an examination of the certified copies in the docket of the record LA 50/81 shows that the date stamp of the District Court of Colombo on P2, P3, P4 and the unmarked certified copy of the journal entries, is 16.3.81 and not 15.3.81. True enough there was unavoidable delay in obtaining the certified copy of the last document viz. the cheque till 10.4.81, but the certified copy of the Order, P5 was obtained on 7.4.81 so that there was no reason why the application could not have been filed before 21.4.81, considering that altogether only 14 days are allowed for the filing of the application and also taking into account the intervention of the Sinhala New Year public holidays.

The Attorney-at-Law for the respondent filed a motion in reply stating that the petitioner's Attorney-at-Law filed her affidavit only after it was pointed out by counsel for the respondent in open Court on 5.8.81, that the application for Leave to Appeal was out of time. The affidavit of the Attorney-at-Law of the petitioner was filed in

Court only on the 23rd September, 1981 in the Leave to Appeal application 50/81, while the application for revision No. CA 1265/81 bearing the same date as the affidavit, was filed much later on the 23rd October, 1981.

The Leave to Appeal application No. 50/81 as stated earlier, is admittedly out of time. Counsel for the petitioner however invited this Court to exercise its powers of revision ex mero motu or in application No. 1265/81 and grant the petitioner relief under section 759(2) of the Civil Procedure Code. Section 759(2) provides that :

> "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 Supreme Court 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."

Learned counsel for the respondent submitted that section 759(2) deals only with appeals from a final judgment of an original Court and not to applications for leave to appeal from an order of that Court and therefore this subsection was not applicable to the present case. In support of his contention he pointed out that the word 'appellant' used in that subsection refers to an appeal filed against a judgment. The 'appellant', he submitted, is a person who gives notice of appeal under section 754(4) against a judgment of an original Court and files his petition of appeal under section 755(3). Section 756(2) on the other hand relates to applications for leave to appeal against an order made in the course of a civil action and the person who makes the application, it is submitted, is called a 'Petitioner' and not an 'Appellant'. But that very subsection to section 756 does not support learned Counsel's contention. The last sentence of that subsection describes a person who applies for Leave to Appeal as an 'Appellant'. Similarly subsections 4 & 6 of section 756 refer to him an an 'Appellant'.

A plain reading of section 759(2) makes it abundantly clear that for the purposes of that subsection, no distinction is made between an appeal against a judgment of a Court or an application for leave to appeal against an order of a Court, Subsection (2) to section 759 gives the Supreme Court, now the Court of Appeal, the discretion to grant relief in appropriate cases, in the case of any mistake,

omission or defect made in complying with the provisions of the *foregoing sections,* (the emphasis is mine.) The foregoing sections of that chapter include both section 754, which deals with appeals from a judgment or a decree of an original Court, and section 756 which deals with applications for leave to Appeal.

Learned Counsel for the respondent next contended that section 759 could only be invoked if the appeal is filed in time. It was sought to argue that this subsection does not cure any failure on the part of an appellant to comply with the limitations as to time contained in sections 754(4), 755(3) and 756(4) of the Civil Procedure Code. But this argument is untenable in view of the decision of the Supreme Court in *Vitana Vs. Weerasinghe and another,* [1981] 1 S.L.R. Vol. I, S.C. Part II, page 52, which was a case of delay on the part of an appellant to file his petition of appeal within 60 days prescribed in section 755(3).

Wanasundera, J., said at page 56:

> "If section 765 has no application, we have to turn our attention to the provisions of section 759(2) which enables relief to be given 'in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections.' It would be sufficient here to state that these provisions are wide enough to apply to the present case, without attempting to rule on the full scope of this section."

Section 765 which deals with appeals notwithstanding lapse of time can only be invoked where the provisions of sections 754 and 756 have not been observed. In the present case where the application for leave to Appeal was out of time, the petitioner could have sought relief under section 765 of the Civil Procedure Code. Counsel for the respondent therefore contended that where a remedy is available by way of appeal, this Court would not exercise its revisionary powers in granting relief.

But the trend of recent decisions is that the Court of Appeal has the power to act in revision even though the procedure by way of appeal is available, in appropriate cases. In *Rustom Vs. Hapangama & Co.,* (1978-79, 2 S.L.R. Vol. II - C.A. Part VIII, page 225, it

was held that the powers by way of revision conferred on the appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependent on the facts of each case. See also *Fernando Vs. Fernando,* 72 N.L.R. page 749 and *Atukorale Vs. Samynathan,* 18 C.L.R. 200.

The question now is whether exceptional circumstances have been made out by the petitioner for the exercise by this Court of its revisionary powers.

Counsel for the petitioner submitted that there are blatant errors of law and procedure apparent on the face of the record and they amount to exceptional circumstances. He submitted that in the present case the copy of the cheque sued upon or its contents have not been furnished with the summons served on the petitioner, as provided for in form No. 19 issued under section 703 of the Civil Procedure Code. Form No. 19, requires that the instrument sued on be copied out and where it is a negotiable instrument and carries endorsements, the endorsements too should be set out. A certified copy of the summons was filed marked P1, and it does not reproduce the contents of the cheque sued upon with the endorsements made thereon.

The cheque is dated 10.3.1977. The figure '3' appears to be an alteration for '2'. There is an endorsement by the bank in red ink that the alteration in the date requires the drawer's confirmation. The endorsement made by the Bank places it beyond any doubt that the figure '2' has been altered into '3'. The cheque in question thus discloses an obvious alteration in regard to its date. The petitioner in her affidavit states that the cheque was dated 10.2.77 and that she gave it to her father for no consideration. Her father died on the 19th of August 1977 and she alleges that respondent altered the date of the cheque to 10.3.77 in order to enable him to present the cheque for payment within 6 months of the date of its making.

Learned counsel for the petitioner submitted that under section 705(2) of the Civil Procedure Code the learned District Judge had no jurisdiction to issue summons on the defendant-appellant when the cheque sued upon was open to suspicion by reason of the

alteration. Section 705(2) reads as follows:

> 'If the instrument appears to the Court to be properly stamped, and not open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the Court may in its discretion make an order for the service on the defendant of the summons above mentioned."

Learned counsel submitted that in view of the alteration in the date of the cheque which was apparent on the face of the cheque, the learned Judge's order in issuing summons on the petitioner was made without jurisdiction and is erroneous in law.

In *Sinnathangam Vs. Meeramohideen,* 60 N.L.R. 394, it was held that the Supreme Court possess the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some technical requirements in respect of the notice of security. T.S. Fernando, J,

said - "We do not entertain any doubt that this Court possess the power to set aside an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this Court by section 753 of the Civil Procedure Code."

In *Rustom Vs. Hapangama & Co.,* (supra) Vythialingam, J., said - "Where an order is palpably wrong and affects the rights of a party also, this Court would exercise its powers of revision to set aside the wrong irrespective of whether an appeal was taken or was available."

In *Central Union Insurance Company Limited Vs. Boteju,* 56 N.L.R. 149, it was held by the Supreme Court that a condition precedent to the issue of summons in an action by summary procedure on a liquid claim is that the document on which the action is based should be properly stamped, as required by section 705(2) of the Civil Procedure Code. In that case the document bore no stamp at all.

In the present case the learned Judge has given his mind to both matters urged by learned counsel for the petitioner. In his order he refers to the submissions of counsel for the defendant that the summons did not have a copy of the cheque annexed to it and to the submission of counsel for the plaintiff that the original cheque together with a photostat copy of it was annexed to the Plaint. The learned Judge has evidently come to the conclusion that the failure to annex the cheque or give its contents in the summons in form 19 is not a very material omission and I see no reason to disagree with him. For, the petitioner always had the opportunity of examining the cheque or the photostat copy of it annexed to the plaint after it had been filed in Court and could not have been prejudiced.

As regards the alteration in the date of the cheque the learned Judge has considered this matter also. In his order he states -

> "I examined the photostat copy of the cheque today in regard to the allegation that the date of the cheque had been altered. Attorney-at-Law Mr. Parathalingam states that the Defendant made the alteration and handed it over to the plaintiff. Attorney-at-Law Mr. Kanagasunderam states that the alteration must have been made by the plaintiff. I have examined the affidavit of the Defendant. The defendant does not state in her affidavit the reason why she gave the cheque to her father. On a consideration of the submissions made and the affidavit filed I have a reasonable doubt in my mind as regards the right of the defendant to put forward her defence."

What he no doubt meant to say was that he did not think the defence was prima facie sustainable. It is true that the learned Judge has examined the photostat copy of the cheque only at the later stage of the inquiry and has expressed no definite opinion on the alteration in the date of the cheque in his order. But the necessary implication from the order he subsequently made against the petitioner, is that the alteration was not open to suspicion. It was undoubtedly his duty to have examined the cheque itself and satisfied himself in regard to the matters referred to in section 705(2) before he decided to issue summons on the petitioner. But in this particular case his failure to do so has not prejudiced the substantial rights of the petitioner or occasioned a failure of justice since his ultimate view was impliedly that the cheque was not open to suspicion and he has

not refused the petitioner outright, leave to appear and defend the action. In the circumstances I do not think this is an appropriate case in which we should interfere with the order of the learned District Judge especially as the application for revision has been made very belatedly.

No exceptional circumstances thus have been made out by the petitioner as to why this Court should exercise its powers of revision ex mero motu. As regards the Revision Application No. 1265/81 itself, it has been made very belatedly. According to the motion dated 12.10.81 filed by the Attorney-at-Law for the respondent, it was pointed out by Counsel for the respondent in open Court on 5.8.81 that the application for Leave to Appeal was out of time. This statement has not been denied by the petitioner, so that even though the petitioner was well aware that her application for Leave to Appeal was out of time, she took no prompt steps to file an application for revision until the 23rd October, 1981. The order sought to be revised is dated 6.3.81 and in view of the inordinate delay of over seven months to file the application for revision No. 1265/81, it must be dismissed.

For the reasons given I dismiss both applications with costs fixed at Rs. 525/-

SENEVIRATNE,J. — I agree.

Applications dismissed.