Wickremasinghe
v.
de Silva

COURT OF APPEAL.
SOZA, J. AND ATUKORALE, J.
C. A. APPLICATION NO. 909/78—D.C. BALAPITIYA L/1.
SEPTEMBER 18, 1978.

Civil Procedure Code, sections 754 (4), 755 (3), 759 (2)—Petition of appeal filed out of time—Provisions of section mandatory—District Court has no power to extend time—Whether relief could be given under sections 759 (2) or 765.

Held

The provisions of section 755 (3) of the Civil Procedure Code which requires the petition of appeal to be filed within sixty days from the date of judgment are mandatory. Accordingly where a petition had been filed after the period of sixty days had lapsed the learned District Judge was correct in rejecting such a petition. The notice of appeal, too, lapses for want of compliance with the subsequent requirement and should be rejected. This was also 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 the procedure set out in Chapter LX of the Civil Procedure Code was available to the petitioner.

Cases referred to

(1) *Liverpool Borough Bank v. Turner, (1860) 2 De G.F. & F. 502; 30 L.J. Ch. 379.*
(2) *Howard v. Bodington, (1877) 2 P.D. 203; 42 J.P. 6.*
(3) *Barker v. Palmer, (1881) 8 Q.B.D. 9; 45 L. T. 480; 51 L.J.Q.B. 110.*
(4) *Fox v. Wallis, (1876) 2 K.B.D. 45; 35 L.T. 960.*
(5) *Aspinall v. Sutton, (1894) 2 Q.B.D. 349.*
(6) *Secretary of State for Defence v. Warn, (1968) 3 W.L.R. 609; (1968) 2 All E.R. 300; 52 Cr. App. R. 336.*
(7) *Chalonona v. Weerasinghe, (1967) 70 N.L.R. 46.*
(8) *Sameen v. Abeywickrema, (1963) 64 N.L.R. 553; 63 C.L.W. 97; (1963) A.C. 597; (1963) 3 All E.R. 382; (1963) 2 W.L.R. 1114.*
(9) *De Silva v. Seenathumma, (1940) 41 N.L.R. 241; 16 C.L.W. 105.*

APPLICATION to revise an order of the District Court, Balapitiya.

B. Bodinagoda, for the defendant-petitioner.
N. R. M. Daluwatte, for the plaintiff-respondent.

Cur adv. vult.

October 27, 1978.
SOZA, J.

This is an application for revision of the order made by the learned District Judge refusing to accept the petition of appeal filed by the petitioner in this case. Judgment had been delivered on 11th May, 1978. On 23rd May, 1978, the petitioner who was the second defendant in the case filed notice of appeal. The last date for filing the petition of appeal was 11th July, 1978, but the petition was filed only on 17th July, 1978.

Under section 754 (4) of the Civil Procedure Code notice of appeal should be presented within a period of 14 days from the date when the decree or final order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and all Sundays and public holidays. If these conditions are not fulfilled, the Court is obliged to refuse to receive the appeal. Subsection (3) of section 755 states that the appellant shall within 60 days from the date of the judgment or decree appealed against present to the original Court a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against. No provision has been included for the District Judge to extend the time for filing the petition of appeal. Subsection (4) states that upon the petition of appeal being filed, the Court shall forward it to the Supreme Court. Therefore it is argued that a petition filed out of time cannot be forwarded.

It is submitted that the second defendant-petitioner was prevented by circumstances beyond his control from filing the petition of appeal within the period stipulated by section 755 (3) because his Attorney-at-Law Mr. Asoka de Silva was hospitalised in the General Hospital, Colombo, with a serious injury sustained as a result of a gunshot. The petitioner also relies on section 759 (2) which states that in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the sections going before it 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.

The main question for determination is whether the provisions of subsection (3) of section 755 of the Civil Procedure Code are directory or mandatory. Subsection (3) of section 755 confers private rights and it is a widely accepted canon of interpretation that statutes conferring private rights are in general imperative. As Bindra states in his work *Interpretation of Statutes*, 6th ed., 1975 at p. 599:

> "Statutes conferring private rights are in general construed as being imperative in character and those creating public duties are construed as directory".

It must however be recognised that there are no inflexible tests by which one may distinguish imperative provisions from directory provisions. As Lord Campbell pointed out in *Liverpool Borough Bank v. Turner* (1) :

"No universal rule can be laid down for the construction of statutes; as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed".

It would be useful in this connection to refer to the case of *Howard v. Bodington* (2) where this question was considered. This was a case under the Public Worship Regulation Act 1874. This statute provided that a bishop to whom a representation of the acts or omissions of any incumbent within his diocese has been sent, should, unless he be of opinion after considering all the circumstances of the case that proceedings should not be taken on the representation, within twenty-one days of the receipt of the representation transmit a copy thereof to the person complained of, and the representation itself to the archbishop, who had forthwith to require the Judge to hear the matter of the representation. Lord Penzance delivering the judgment of the Court of Arches in this case went on after referring to Lord Campbell's dictum to lay down some guidelines at page 211:

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that respect decide whether the matter is what is called imperative or directory".

In the case under reference the person complained of had received his copy after a delay of a month after the lapse of 21 days.

Lord Penzance said with reference to this at page 213:

"If we desert the twenty-one days the question arises how long may the matter hang over the head of the respondent?"

On the scope of the enactment His Lordship stated as follows at page 214:

"I think nobody can doubt that of all the important steps in the suit there is no step so important as that which regards the service of the first proceedings on the respondent".

His Lordship observed that the legislature had chosen to prescribe the particular steps which should be taken and minutely to tie the parties down to a particular time. Of these the service was the very first step that really gave life and vigour to the suit. The respondent had to be brought into Court at the time within which the statute says he shall be brought into Court. The statute had prescribed a particular time and the Court is not at liberty to cast the time mentioned aside upon any speculation as to the possible reason why that particular provision was adopted. If the Court takes the view that the time could be extended it would be very difficult to know where to stop in future and very difficult to work the Act in the way in which the legislature intended it to be worked.

These points made in *Howard v. Bodington* apply with equal force to the case before us. If the time is to be extended, at what point do we stop ? Of the steps in procedure laid down for filing appeals the petition is just as important as the notice. It is the petition of appeal in fact that gives the appeal its flesh and blood. It is on the substance of the appeal that the respondent has to get ready to meet his adversary.

Enactments regulating the procedure in Courts are usually construed as imperative—see Maxwell on the Interpretation of Statutes, 12th ed. (1969), p. 320. In 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 would be imperative and non-compliance would be fatal to the appeal ".

The interpretation of a statutory provision in regard to time came up in the case of *Barker v. Palmer* (3). This case concerned Order VIII, rule 7 of the County Court Rules 1875 which ran as follows :

> " The summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof ".

The summons however was delivered to the bailiff thirty-nine clear days, and the bailiff served it upon the defendant thirty-eight clear days, before the return day. Thus the delivery of the summons was out of time by one day while the service of the summons was within time. Grove, J. stated as follows at pages 10 and 11:

> "The rule is that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court and there is no such power here".

Grove, J. went on to point out that the word "shall" was used with respect both to the time of delivery to the bailiff and of the service on the defendant and held that the words of the rule were peremptory, and gave no more discretion with respect to the delivery to the bailiff than with respect to the service of the summons.

In another case, that of *Fox v. Wallis* (4), the Court of Appeal held that a notice of motion of appeal from a decision in chambers given on the eighth day after the date of the decision was out of time as according to the statute the notice had to be given so that the motion could be heard within eight days after the decision appealed against was made. In the case of *Aspinall v. Sutton* (5) it was held that as the statute governing the matter stated that upon an appeal by way of a case stated against a decision of justices, the appellant must, within three days after receiving the case, transmit it to the Court and there had been a delay of one day in lodging the case at the Crown Office, the appeal should be rejected. In the case of *Secretary of State for Defence v. Warn* (6) the House of Lords held that procedural sections are usually mandatory.

On the question whether the provisions of subsection (3) of section 755 are imperative or not I was referred by learned counsel for the respondent to the unreported case S.C. No. 382/77 (F), D.C. Matara No. 8585/P where the Supreme Court rejected an appeal on the ground that notice of appeal had been filed one day out of time. Learned counsel for the petitioner submitted that in that case not only was the appeal filed out of time but security for costs in the appeal had not been deposited within the prescribed time. Nor had the bond to prosecute the appeal been perfected. It was because of these reasons that the Court had rejected the appeal. On behalf of the petitioner it has been pointed out that the appeal was rejected only because the notice of appeal had been filed out of time. In this case the point was not argued and we will therefore not rely on it.

In the case of *Chalonona v. Weerasinghe* (7) the appeal had been filed one day late. Holding that the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, enabled relief to be granted only to appeals filed within the prescribed time, Tambiah, J. rejected the appeal.

Subsection (3) of section 755 of the Civil Procedure Code which requires the appellant to present to the original court a petition of appeal within sixty days in couched in imperative terms. This is a new provision and is clearly mandatory. The filing of the petition of appeal is an essential concomitant of the filing of the notice of appeal. Both steps are mandatory and imperative steps in lodging an appeal. Until these steps are taken as directed by the Civil Procedure Code the Judge cannot comply with subsection (4) of section 756. The learned District Judge was therefore right in rejecting the petition of appeal. The notice of appeal too lapses for want of compliance with the subsequent requirements and should now be rejected.

We will turn to the question whether it is open to this Court to grant relief under the provisions of subsection (2) of section 759. This subsection is substantially similar in terms to subsection (3) of section 756 of the Civil Procedure Code as it stood on 31st December, 1973 before the Administration of Justice Law, No. 44 of 1973, became operative. Section 759 (2) however refers to mistakes, omissions and defects in complying with the provisions of the 'preceding sections', that is, section 755 to 758 while subsection (3) of section 756 refers to mistakes, omissions or defects, in complying with the provisions of section 756 itself.

Subsection (3) of section 756 was engrafted into the Civil Procedure Code by the amending Ordinance No. 42 of 1921 and was the subject of conflicting interpretations down the years. The interpretation may be regarded as having been finally settled by the decision of the Privy Council in *Sameen v. Abeywickrema* (8). In the judgment of the Board delivered by the Lord Chancellor subsection (3) was held to apply to all the provisions of section 756 in relation to *any* mistake, omission or defect—see page 562. At the same page the Lord Chancellor stated as follows :

"In their Lordship's view the Supreme Court is given by this subsection the power to grant relief on such terms as it may deem just where there has been a failure to comply

> with an essential requirement of the section. The only limitation imposed by the subsection is that the court has not the power to do so unless it is of the opinion that the respondent has not been materially prejudiced".

In view of the permissive word 'may' used in the section it should be observed that the discretion to refuse relief is still in the Court even if there is material prejudice.

In the petition before us there is nothing alleged regarding material prejudice to the respondent though in the written submissions there is reference to this. As Lord Penzance said in *Howard v. Bodington* (*supra*) the continuance itself of a suit is a harm and does cause prejudice. The disabilities of the petitioner are not what the court is called upon to consider when applying this subsection but material prejudice to the respondent.

As Soertsz, J. speaking of the imperative and peremptory procedural requirements of section 756 said in the Divisional Bench case of *de Silva v. Seenathumma* (9) :

> "Such requirements must be put before the interests of individuals and Courts have no power to absolve from them".

It may be added that there is statutory provision for filing of petitions of appeals notwithstanding lapse of time. Perhaps the petitioner could advise himself as to whether he should proceed under Chapter LX. In our view subsection (2) of section 759 cannot be used to rescue the petitioner especially as the procedure set out in Chapter LX is available.

The learned District Judge has quite rightly interpreted his functions under subsections (3) and (4) of section 755 of the Civil Procedure Code. Neither he nor we have power to extend the liberal time the legislature has fixed for filing the petition of appeal. Parties should not wait till the last moment and then complain when they are caught out on time.

We dismiss the application with costs.

ATUKORALE, J.—I agree.

Application dismissed.