

UNION CULLING KNIT GARMENTS (PVT) LTD AND OTHERS
v
HABIB BANK LTD

SUPREME COURT
AMERASINGHE, J.
BANDARANAYAKE, J. AND
YAPA, J.
SC APPEAL 64/2000.
SC SPL LA 217/2000.
CA (REV,) 827/97.
D.C. COLOMBO 16588/MB.
JULY 3, 2001.

Civil Procedure Code, sections 755(1) and 759(2) – Petition of Appeal rejected on the ground that the registered attorney had not signed the notice

of appeal – Application under section 759(2) to set aside the rejection of the notice of appeal – Application rejected – Special leave to appeal refused by the Supreme Court – Application in revision in the Court of Appeal to review judgment – Could the Court of Appeal act in revision? – Exceptional circumstances.

The District Court action instituted by the respondent Bank was dismissed. The appeal lodged was rejected on the basis that the notice of appeal has not been signed by the registered attorney of the appellant. The application made under section 759(2) was rejected by the Court of Appeal. The Supreme Court refused special leave to appeal to the Supreme Court.

The plaintiff-appellant thereafter moved in revision against the judgment. The defendant-petitioner raised a preliminary objection that the Court of Appeal is bound by the previous decisions of the Court of Appeal and the Supreme Court.

The Court of Appeal overruled the preliminary objection. The defendant-petitioner moved the Supreme Court and contended that the Court of Appeal ought to have upheld the objection raised.

Held:

- (1) Revision is an extraordinary remedy and has to be exercised only in exceptional circumstances.

Per Shirani Bandaranayake, J:

“The affidavit of the registered attorney clearly establishes that there was only a mistake or an omission in the notice that was filed in Court. The fact that in dismissing the appeal the court did not warrant the application of section 759(2) amounts to a denial of justice.

That is certainly an exceptional circumstance which warrants due administration of justice.”

- (2) There was no mention that the appellant was in any way prejudiced by the mistake or omission made by the registered attorney of the respondent.
- (3) The failure of the Court of Appeal to grant relief to the respondent in terms of section 759(2) in itself amounts to a denial of justice which could be regarded as an exceptional circumstance which warrants the exercise of revisionary jurisdiction.

APPEAL from an order of the Court of Appeal.

Cases referred to:

1. In the matter of the Insolvency of *Harryman Thornhill* (1895)2 NLR at 105-106
2. *Rasheed Ali v Mohamed Ali and others* 1981 1 Sri LR 262
3. *Thilagaratnam v Edirisinghe* 1982 1 Sri LR 56
4. *Hotel Galaxy (Pvt) Ltd and others v Mercantile Adds Management Ltd* 1987 Sri LR 56
5. *Attorney General v Gunawardene* 1996 2 Sri LR 149
6. *Wijesinghe v Tharmaratnam Sri Kantha's* LR VOL IV 47 at 49
7. *Nanayakkara v Warnakulasuriya* 1993 2 Sri LR 289
8. *Sameed v Abeywickrama* 1963 64 NLR 553
9. *Martin v Suduhamy* 1991 2 Sri LR 279
10. *Kithsiri v Weerasena* 1997 1 Sri LR 70

Romesh de Silva, PC with *G.G.Arulpragasam* and *Palitha Kumarasinghe* for appellants.

R.K.W. Goonesekera with *Prasanna Jayawardene* for respondent.

Cur.adv.vult.

November 15, 2001.

SHIRANI BANDARANAYAKE, J.

The plaintiff-petitioner-respondent (hereinafter referred to as ⁰¹ the respondent) instituted action against the defendants-respondents-appellants (hereinafter referred to as the appellants) for the recovery of a sum of Rs. 39,685,757/96 upon the Mortgage Bonds Nos. 2161 and 2162 dated 06.10.1987 attested by K. Kandiah, Notary Public. The respondent also filed another action, bearing No. 16587/MB on the identical grounds claiming a different sum of money on a different Mortgage Bond over the same property in question.

By judgment dated 07.10.1996 the learned Additional District ¹⁰ Judge dismissed the first case. The 2nd connected case too was dismissed by the learned District Judge, Colombo. The respondent appealed against the said judgment dated 07.10.1996 and the Court of Appeal by its order dated 13.02.1997 rejected the appeal stating that the notice of appeal had not been signed by the respondent's registered attorney (K). Thereafter the respondent

made an application under section 759(2) of the Civil Procedure Code to set aside the said rejection of the notice of appeal and to restore the said appeal to the appeal roll (L). On 30.05.1997, the Court of Appeal rejected the said application for special leave to appeal against the said order to the Supreme Court. On 11.09.1997 the Supreme Court refused to grant special leave to appeal. Thereupon on 24.10.1997, the respondent made an application to the Court of Appeal to review the judgment dated 07.10.1996 made by the Additional District Judge of Colombo. The Court of Appeal issued notice on the appellants. When the matter was taken up for hearing before the Court of Appeal, the appellants raised several preliminary objections and moved that the application of the respondent for revision be rejected, *in limine*. By judgment dated 08.09.2000, the Court of Appeal overruled the preliminary objections of the appellants. The appellants thereafter sought special leave to appeal against the said order of the Court of Appeal, from the Supreme Court. This Court granted special leave to appeal on the question whether the **“Court of Appeal erred in holding that it was entitled to exercise the jurisdiction in revision.”**

At the hearing learned President’s Counsel for the appellants took up several grounds in support of his argument that the Court of Appeal has erred in the decision in rejecting the preliminary objections raised on behalf of the appellants. Learned President’s Counsel for the appellants submitted that the Court of Appeal is bound by the previous decisions of the Court of Appeal and the Supreme Court and that there are no exceptional circumstances in this case which would permit the appellate court to exercise its revisionary jurisdiction.

The central point that has to be decided in this matter, relates to the requirements regarding the notice of appeal. Section 755(1) of the Civil Procedure Code deals with the notice of appeal and reads as follows:

“Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Such notice shall also contain the following particulars:-

- a. the name of the court from which the appeal is preferred;
- b. the number of the action;
- c. the names and addresses of the parties to the action;
- d. the names of the appellant and respondent;
- e. the nature of the relief claimed.

60

As submitted by the learned counsel for the respondent, in a situation as presented in this case, namely when there has been a failure to sign the notice of appeal, court could grant relief under section 759(2) of the Code. Section 759(2) of the Civil Procedure Code reads as follows:

“In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done) the Court of Appeal 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.”

70

The first order by the Court of Appeal was made on 13.02.1997 and was in the following terms:

“The notice of appeal has not been signed by the attorney-at-law of the appellant. The appeal is rejected. The Registrar is directed to return the Record to the DC.”

The respondent made an application against this order to restore 80 this appeal to the appeal roll of the Court of Appeal. On 30.05.1997 learned Judge of the Court of Appeal dismissed the said application for relisting.

It would appear that the Court of Appeal, by its order dated 30.05.1997 had rejected the respondent's appeal without considering the provisions in section 759(2) of the Code. When the respondent made an application to the Court of Appeal to exercise

the powers enumerated under section 759(2) of the Code and to restore the application to the appeal roll, the Court of Appeal dismissed the application which was considered as an application for "re-listing". The Supreme Court had to consider the grant of special leave to appeal on the dismissal of a re-listing application and not against the order rejecting the appeal by the Court of Appeal. ⁹⁰

Paragraph C of the prayer to the petition dated 04.07.1997, of the respondent is to "set aside the order dated 30.05.1997" and that was the order which rejected the application of the respondent for re-listing.

When the Supreme Court on 11.09.1997, refused to grant special leave to appeal, against the order of the Court of Appeal dated 30.05.1997, the respondent made an application on 24.10.1997, invoking the revisionary jurisdiction of the Court of Appeal which is a separate application from the aborted appeal. ¹⁰⁰

Guiding principles relating to the revisionary jurisdiction of the appellate court have been discussed in several judgments of the Supreme Court and the Court of Appeal. Bonser, C.J. *In The matter of the Insolvency of Harryman Thornhill* ⁽¹⁾ at pp 105-106 referred to the revisionary powers of the appellate court and stated that,

"the object at which this court aims in exercising its powers of revision, is the due administration of justice....."

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In Rasheed Ali v Mohamed Ali and Others ⁽²⁾, it was held that the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies.

A series of cases which considered the powers of the appellate courts to act in revision, had emphasised the fact that the revisionary power could be exercised only in exceptional circumstances. In *Thilagaratnam v Edirisinghe* ⁽³⁾, it was held that 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. In *Hotel Galaxy (Pvt) Ltd., and Others v Mercantile Hotels Management* ⁽⁴⁾, it was held that ¹²⁰

it is settled law that the exercise of the revisionary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention.

Revision no doubt is an extra ordinary remedy and has to be exercised only in exceptional circumstances. What such exceptional circumstances are, would have to be decided by the appellate court in exercising its powers of revision, on the facts and 130 circumstances of each case. In *Attorney General v Gunawardena* ⁽⁶⁾ the court was of the view that revision, like an appeal is directed towards the correction of errors, but it is supervisory in nature and its object is the due administration of justice and not primarily or solely the relieving of grievances of a party. Jameel, J. in *Wijesinghe v Tharmaratnam* ⁽⁶⁾ was of the view that,

“Revision is a discretionary remedy and will not be available unless the application discloses circumstances which ‘shocks the conscience of the court’.”

140

It is not disputed that in the case before us the only defect of the appeal was that the notice of appeal was not signed by the registered attorney of the respondent. However, the notice of appeal was in conformity with the provisions of sections 754 and 755 of the Civil Procedure Code. The registered attorney for the respondent had sworn in an affidavit, dated 02.07.1997, in which she has averred:

“It now appears that on 10th October 1996, the plaintiff Bank’s attorneys-at-law having prepared several copies of the Notice of Appeal for the purposes of filing in court and for dispatching to the parties and for record purposes, an unsigned Notice of Appeal has been inadvertently filed in court by mistake or omission on the part of the plaintiff’s Attorneys-at-law.”

150

The applicability of section 759(2) of the Civil Procedure Code was extensively discussed in *Nanayakkara v Warnakulasuriya* ⁽⁷⁾. Referring to the decisions in *Sameen v Abeywickrema* ⁽⁸⁾, and *Martin v Suduhamy* ⁽⁹⁾, Kulatunga, J., stated that:

160

“The powers of the Court to grant relief under section 759(2) of the Code is wide and discretionary and is subject to such terms as the court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming.”

It was held in Nanayakkara’s case (supra at 293) that,

“In an application for relief under section 759(2), the rule that the negligence of the attorney-at-law is the negligence of the client does not apply as in the cases of default curable under sections 86(2), 87(3) and 771. Such negligence may be relevant, but it does not fetter the discretion of the court to grant relief where it is just and fair to do so.”

170

In *Kithsiri v Weerasena* ⁽¹⁰⁾, the plaintiff presented the notice of appeal to the District Court within the period of 14 days set out in section 754(4) of the Code, but failed to duly stamp the Notice of Appeal as required by section 755(1) of the Civil Procedure Code. The deficiency in stamp was supplied by the plaintiff shortly after 180 the expiry of the 14 days contemplated by section 754(4) of the Code. G.P.S. de Silva, C.J., held that ‘the provisions in section 755(1) of the Civil Procedure Code which requires the Notice of Appeal to be “duly stamped” is imperative’. It was further held that ‘the Court of Appeal however, has the jurisdiction to grant relief to the appellant in terms of section 759(2) of the Code in respect of the “mistake” or “omission” in supplying the required stamp fee.’

In *Kithsiri v Weerasena* (supra), G.P.S.de Silva, C.J., was of the view that, the objection of a technical nature should not be allowed to thwart the course of Justice. The basis on which the 190 appeal was rejected was purely of a technical nature. The affidavit of the registered attorney clearly establishes that there was only a mistake or an omission in the notice that was filed in court. The fact that in dismissing the appeal the court did not warrant the application of section 759(2) of the Code amounts to a denial of justice. That is certainly an exceptional circumstance which warrants due administration of justice. I am of the view, that the

facts of this case should have been considered more carefully by the Court of Appeal at the time it first came up on appeal. The facts no doubt warranted the exercise of jurisdiction of the Court of Appeal in terms of section 759(2) of the Code and granting relief to the respondent by entertaining the appeal. There was no mention that the appellant was in any way prejudiced by the mistake or omission made by the registered attorney of the respondent. The failure of the Court of Appeal to grant relief to the respondent in terms of section 759(2) in itself amounts to a denial of justice which in my view could be regarded as an exceptional circumstance which warrants the exercise of revisionary jurisdiction.

For the aforementioned reasons, the appeal is dismissed and the judgment of the Court of Appeal, dated 08.09.2000 which rejected the preliminary objections raised and directed the case to be fixed for inquiry is affirmed.

There will be no costs.

AMERASINGHE, J. - I agree.

YAPA, J., - I agree.

Appeal dismissed.