

**NANAYAKKARA**  
**v.**  
**WARNAKULASURIYA**

SUPREME COURT.  
G. P. S. de SILVA, C.J.  
KULATUNGA, J. AND  
WIJETUNGA, J.  
S.C. APPEAL NO. 34/93.  
C.A. NO. 348/82 (FINAL).  
D.C. HATTON NO. 912 DE.  
OCTOBER 14, 1993.

*Civil Procedure – Failure to hypothecate money deposited as security for costs of appeal – Section 759 (2) of the Civil Procedure Code.*

The power of the Court to grant relief under s. 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. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

Where notice of appeal was given accompanied by security for respondent's costs of appeal as required by Section 755 (2) (a) but there was failure to hypothecate the sum deposited as security by bond as required by s. 757 (1) (and petition of appeal was filed in terms of s. 755 (3) and the court ordered the record to be forwarded to the Court of Appeal as required by s. 755 (4)), the negligence of the attorney in not hypothecating 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. The rule that negligence of attorney-at-law is the negligence of the client does not apply.

*Per Kulatunga, J.*

\* Even though the District Court appears to have no power to reject a notice of appeal for failure to hypothecate security, it may perhaps call upon the appellant to rectify the defect where the non-compliance is observed at the stage when notice of appeal is given. If this were done, it may help in reducing the volume of incidental proceedings before the Court of Appeal resulting from the failure to hypothecate security by bond \*.

**Cases referred to :**

1. *Sameen v. Abeywickrema* 64 N.L.R. 533 P.C.
2. *Martin v. Suduhamy* (1991) 2 Sri L.R. 279.
3. *Mendis v. Jinadasa* 24 N.L.R. 188.

APPEAL from order of the Court of Appeal.

*R. K. W. Goonasekera with Upali Ponnampereuma* for defendant – appellant.

Faiz Musthapha, P.C. with Hemasiri Withanachchi for the plaintiff-respondent.

*Cur. adv. vult.*

November 11, 1993.

### **KULATUNGA, J.**

This is an appeal against the judgment of the Court of Appeal dismissing the defendant's appeal on a preliminary objection that he had failed to hypothecate the sum of Rs. 150 deposited as security for the respondent's costs of appeal. The Court held that the appellant had failed to tender an explanation for his lapse and hence no relief could be granted in terms of s. 759 (2) of the Civil Procedure Code.

The power of the Court to grant relief under s. 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. However, relief cannot be granted if the Court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed. The principles applicable to the exercise of this power have been clearly laid down, particularly in *Sameen v. Abeyewickrema*<sup>(1)</sup> and in the recent decision of this Court in *Martin v. Suduhamy*<sup>(2)</sup>.

Whether or not relief may be granted in a particular case will depend on its facts and circumstances. It would, therefore, be necessary to examine the facts of the case before us.

The plaintiff sued the defendant who was the tenant of the premises in suit for ejectment and damages on the ground that the premises had deteriorated owing to acts committed by the defendant, to wit, making structural alterations thereto and the demolition of a wall for that purpose, without the plaintiff's permission. On 20.07.82 the learned District Judge gave judgment for the plaintiff for ejectment of the defendant and damages in a sum of Rs. 750 and further damages at the rate of Rs. 50 per month from 01.11.80 until the plaintiff is restored to possession of the premises.

R. R. Sivalingam was the registered Attorney for the defendant on record until 24.11.87. He gave notice of appeal under s. 754 of the Civil Procedure Code on behalf of the defendant on 03.08.82 which was accompanied by security (in a sum of Rs. 150) for the respondent's costs of appeal, as required by s. 755 (2) (a). However, he failed to hypothecate the said sum by bond as required by s. 757 (1). Thereafter, the petition of appeal in terms of s. 755 (3) was filed on 09.09.82 ; whereupon the District Judge ordered that the record be forwarded to the Court of Appeal as required by s. 755(4).

The plaintiff then applied to the District Court for execution of the decree pending appeal. This was settled and of consent the Court ordered stay of execution of the decree on condition that the defendant deposited cash security to the credit of the action in a sum of Rs. 5000. This sum was deposited. Those proceedings were concluded on 17.02.83. The record shows that Mr. Sivalingam had been appearing for the defendant up to that date.

On 06.12.84, the Registrar of the Court of Appeal sent a letter to Mr. Sivalingam calling upon him to deposit a sum of Rs. 125 for preparation of the brief. This was replied by Miss Damayanthi Fernando, Attorney-at-Law who forwarded a money order for that sum and requested that the brief be sent to the defendant personally. We next have a bank receipt dated 29.10.87 for the payment of balance fees for the brief. According to this receipt a sum of Rs. 115 had been " received from Mr. Sivalingam, Attorney-at-Law ". However, on 06.11.87 Mr. A. W. Leelaratne, Attorney-at-Law made a written request to the Registrar to issue to him " Mr. Sivalingam's " copy of the brief. Acting on this request, the Registry has handed over the defendant's brief personally to Mr. Leelaratne who is described in the note made in the Court of Appeal record as " the Attorney-at-Law attending to the appeal " .

On 24.11.87 D. Nanayakkara, Attorney-at-Law filed a fresh appointment as registered Attorney for the defendant-appellant in place of Mr. Sivalingam for the reason that the latter had left Sri Lanka. On 08.01.91 (the first date of hearing) President's Counsel appeared for the parties and the Court has made order that the case stand out, to be listed in due course. On 01.02.91 an application was filed on behalf of the defendant-appellant (supported by his affidavit) seeking relief under s. 759 (2) for failure to hypothecate

security by bond. The explanation given for non compliance is that the appellants had paid the requisite sum to Mr. Sivalingam which he has deposited ; however, there is no bond hypothecating that sum in the record ; the appellants themselves cannot remember whether they signed a bond and were unable to verify the facts as Mr. Sivalingam had left the Country during the ethnic disturbances in 1983.

The said application was finally argued on 29.03.93 after which the Court of Appeal by its judgment dated 02.04.93 refused to grant relief and dismissed the appeal, upholding the preliminary objection by Counsel for the plaintiff-respondent. The Court cited several of its own decisions and said :

" all the cases show that relief can be granted if the lapse is explained "

The Court distinguished the decision in *Mendis v. Jinadasa* <sup>(3)</sup> on the ground that relief was granted there as the omission was not deliberate but due to an oversight.

The Court of Appeal makes no reference to the decision in *Martin v. Suduhamy* (Supra) (cited in the written submissions of the plaintiff-respondent) where this Court cited with approval the Lord Chancellor's dicta in *Sameen v. Abeywickrema* (Supra) that relief may be granted even if no excuse is forthcoming, though the existence of an excuse is relevant.

Learned Counsel for the defendant-appellant submitted that the Court of Appeal has refused relief arbitrarily, as a matter of course and failed to apply the principles reiterated in *Martin v. Suduhamy* (Supra) ; and that in granting relief under s. 759 (2) the fault of the registered Attorney should not have been held against the appellant.

The learned President's Counsel for the plaintiff-respondent argued that the failure to hypothecate security was due to gross negligence or carelessness of the registered Attorney and hence the Court of Appeal had correctly exercised its discretion against the application for relief, which was made 9 years after the lapse.

Negligence of the Attorney-at-Law (but not a mere mistake or inadvertence) will defeat an application for relief against ex-parte orders of the District Court entered by reason of default of parties, curable by showing "reasonable grounds" therefor. Relief will also not be granted for default in prosecuting an appeal attributable to such negligence curable by adducing "sufficient cause". Such preconditions for granting relief are expressly provided by Sections 86 (2), 87 (3) and 771 of the Civil Procedure Code. *Packiyathan v. Singarajah*. In an application for relief under s. 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.

There is nothing in the facts of this case to show that the failure to hypothecate security was deliberate. Mr. Sivalingam appears to have been negligent in failing to hypothecate security by bond or at least to verify whether this had been done, before the record was forwarded to the Court of Appeal. However, the available material indicates that Mr. Sivalingam had disappeared in 1983; the fact that other Attorneys-at-Law had been attending to his matters after 17.02.83 supports the averment that he had left the country in or about 1983. As such, the person who could have best explained the lapse is not available, for reasons which are beyond the control of the defendant-appellant.

I am of the opinion that the plaintiff-respondent has not been materially prejudiced by the omission to hypothecate security and that in all the circumstances relief should be granted under s. 759 (2), subject however, to an order for the payment of costs. The evidence of the defendant-appellant shows that he is carrying on business and owns a shop in Nuwara Eliya. Accordingly, I allow the appeal, set aside the judgment of the Court of Appeal and direct that the defendant-appellant be permitted to furnish a bond hypothecating the sum deposited and thereafter the appeal be heard on the merits, subject however to the condition that the defendant-appellant pays the plaintiff-respondent a sum of Rs. 7500 (Rupees Seven Thousand Five Hundred) as costs on or before 15.01.94. In the event of non compliance with this order as to payment of costs, the defendant-appellant's appeal to the Court of Appeal will stand dismissed.

Before concluding this judgment, I wish to make an observation. Even though the District Court appears to have no power to reject a notice of appeal for failure to hypothecate security, it may perhaps call upon the appellant to rectify the defect where the non-compliance is observed at the stage when notice of appeal is given. If this were done, it may help in reducing the volume of incidental proceedings before the Court of Appeal resulting from the failure to hypothecate security by bond.

**G. P. S. DE SILVA C.J.** – I agree.

**WIJETUNGA J.** – I agree.

*Appeal allowed.*

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