DAVID
V.
CHOKSY

SUPEREME COURT.
G.P.S DE SILVA, C.J.
RAMANATHAN, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 114/95 - C.A. 297/94.
D. C. COLOMBO 99951/M.
28 JUNE AND 18 JULY, 1996.

Civil Procedure - Application for leave to appeal notwithstanding lapse of time under section 765 of the Civil Procedure Code - Notice of date of delivery of judgment - Duty of Court - Section 184 (1) of Civil Procedure Code - Prevented by causes beyond control from complying with sections 754 and 756 of Civil Procedure Code.

The duty imposed by section 184(1) of the Civil Procedure Code to pronounce judgment in open court either at once or on some future day, of which notice is given to the parties or their attorneys-at-law is a mandatory duty. The duty of pronouncing judgment according to law was on the court itself. There is no duty cast on the party to ascertain for himself the next date of judgment if such date has not been fixed in open court. The duty cast on the court to ensure that notice of the date of delivery of judgment is in fact given to the parties or their attorneys-at law is all the greater when there is an inordinate delay of 2 years and 8 months. The case had not been called for a period of about 2 years. In circumstances such as these it would not be easy for even the attorney-at-law to ascertain the actual date of delivery of judgment. There was the further significant fact that there was a crucial difference between the certified copy of the journal entry No. 22 of 15.06.93 issued to the defendant on 28.4.94 and the certified copy of the same journal entry issued to the plaintiff in March 1996. In the certified copy issued to the plaintiff there are the following additional words appearing in the margin on the left hand side, "Notice issued on the parties 18.6". These words do not appear in the certified copy issued to the defendant. The copy of the notice was however in the record.

There was no proof that the date of delivery of the judgment was notified either to the defendant or his attorney-at-law . The presumption arising from section 114 of the Evidence Ordinance is a rebuttable presumption.

It could rightly be said that the defendant was prevented from causes be-

yond his control from complying with the provisions of sections 754 and 756 of the Code.

APPEAL from judgment of the Court of Appeal.

Kanag-Iswaran P.C. with *M.A. Sumanthiran* for Defendant-Appellant.

Chula De Silva P.C. with *M.Maharoof* and *T. Ratnayake* for Plaintiff-Respondent.

Cur.adv.vult.

August 26, 1996.
G.P.S. DE SILVA, C.J.

The Defendant made an application under section 765 of the Civil Procedure Code to admit and entertain the petition of appeal from the decree notwithstanding lapse of time. The application was refused by the Court of Appeal on the ground that he failed to satisfy the Court that he "was prevented by causes not within his control" from complying with the provisions of section 754 and 756 of the Code. Hence the appeal to this court by the Defendant. Leave to appeal was granted only on the following question :- "Has the Appellant satisfied the court that the delay in appealing was due to causes not within his control within the meaning of section 765 of the Code."

Journal entry (J.E.) No. 20 of 19.10.90 shows that the parties tendered documents and written submissions and that delivery of judgment was fixed for 15.01.91. J.E. No. 21 of 8.03.91 states, "By a mistake the case was not called on 15.01.91 for delivery of judgment. Judgment is not ready. Call on 29.05.91 for judgment. J.E. No. 22 of 15.06.93 states that the case will be called on 30.07.93 to deliver judgment and "to notice parties for that date. 'At this point it is necessary to note a crucial difference between the certified copy of the journal entry No.22 of 15.06.93 issued to the Defendant on 28.4.94 and the certified copy of the same journal entry issued to the Plaintiff in March 1996. In the certified copy issued to the Plaintiff these are the following additional words appearing in the margin on the left hand side "Notice issued on the parties 18.6." The absence of these words in the certified copy issued to the Defendant is of the utmost significance for the purposes of the present appeal. The importance of this discrepancy will be referred to later in this judgment.

To continue with the journal entries, J.E. No. 23 of 30.07.93 states "Issue notices on the Attorneys-at-Law for the plaintiff and defendant for 10.8.93." J.E. No.24 dated 10.08.93 states "Plaintiff present, Defendant absent, notice Defendant for 17.9.93. Notice to Defendant issued through Fiscal, Colombo. The judgment to be placed in the safe." The next J.E. No. 25 dated 17.09.93 states that judgment has been pronounced.

The material part of section 184 (1) of the Civil Procedure Code provides : "The Court, ... shall, pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their proctors at the termination of the trial". There is no doubt that the provisions of section 184 of the Civil Procedure Code are mandatory. As stated by Atukorale, J., in *Gunawardena v Ferdinandis* [1] "They are so designed as to ensure that the parties to an action receive due notice of the date of pronouncing judgment so that they may avail themselves of the opportunity of exercising the rights which the law confers on them on the judgment being pronounced."

The question that arises for decision on this appeal is whether there is any evidence to show that notice of the delivery of the judgment on 17.09.93 was given to the defendant or his attorney-at-law. Mr. Chula de Silva for the Plaintiff submitted that there is ample evidence to establish that the court has complied with section 184 (1) of the Civil Procedure Code. Mr. de Silva relied strongly on the marginal note made in J.E. No. 22 of 15.06.93 which states, "notice issued to the parties". Counsel also placed much reliance on the copy of the notice sent by the Registrar of the District Court to the defendant dated 18.06.93. The copy of this notice remains in the record. Mr. de Silva also pointed out that the record does not show that the notice issued on the defendant has been returned undelivered. In support of his contention, Counsel referred us to the presumption under section 114 of the Evidence Ordinance, namely that the court may presume that judicial and official acts have been regularly performed. Finally, Mr. de Silva stressed that there is no affidavit from the attorney-at-law for the Defendant stating that he was not served with notice.

On the other hand, Mr. Kanag-Isvaran urged that there is no proof that notice of the date of delivery of judgment was despatched to or

received by the defendant or his attorney-at-law. The defendant in his affidavit has denied the receipt of a notice informing him of the date of delivery of the judgment. The absence of an affidavit from the attorney-at-law of the Defendant is no doubt a point in favour of the plaintiff.

In considering the rival contentions advanced on behalf of the parties, there is one salient and striking feature in this case, namely a delay of no less than 2 years and 8 months in delivering the judgment. Whatever may be the reason for this deplorable delay, it has an important bearing on the issue before us. As observed by Atukorale, J., in *Gunawardena v Ferdinandis* (*supra*) "The duty of pronouncing judgment according to law was on the court itself ..... There is in my view no duty cast on a party to ascertain for himself the next date of judgment if such date has not been fixed in open court." The duty cast on the court to ensure that notice of the date of delivery of judgment is in fact given to the parties or their attorneys-at-law is all the greater when there is an inordinate delay of 2 years and 8 months. In circumstances such as these, it would not be easy for even the attorney-at-law to ascertain the actual date of delivery of judgment. It would appear that the case has not been called for a period of about 2 years. There is the further significant fact that there is a discrepancy in the certified copies of J.E. No.22 dated 15.06.93 issued to the defendant and the plaintiff (and referred to above). In these circumstances I find myself unable to take the view that notice has in fact been despatched to the defendant despite the fact that a copy of notice remains in the record. J.E.No. 23 of 30.7.93, where the court made order to issue notice on the attorney-at-law for the Plaintiff and defendant rather suggests that the court itself was not satisfied that notice has gone out on the defendant. The next date on which the case was called was 10.08.93 and on this date the Plaintiff was present but not the Defendant. On a scrutiny of the material on record it seems to me that there is no proof that the date of delivery of the judgment was notified either to the Defendant or his attorney-at-law. The presumption arising under section 114 of the Evidence Ordinance is of course a rebuttable presumption.

The position then is that the court failed in its duty to give notice to the Defendant or his attorney-at-law of the date of delivery of judg-

ment as required by section 184(1) of the Civil Procedure Code. In this view of the matter it could rightly be said that the Defendant was "prevented from causes not within his control "from complying with the provisions of section 754 and 756 of the Code. Thus the Court of Appeal was in error in taking the view that the Defendant has failed to satisfy the court in regard to the condition set out in the first proviso to section 765 of the Code.

For these reasons, the appeal is allowed, the judgment of the Court of Appeal is set aside and the Court of Appeal is directed to "admit and entertain" the petition of appeal of the defendant and to take steps according to law.

In all the circumstances I make no order as to costs of appeal.

RAMANATHAN, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.