

1957 Present: Basnayake, C.J., and L. W. de Silva, A.J.

SOPAYA PEIRIS and another, Appellants, and WILSON DE SILVA, Respondent

S. C. 137—D. C. Kalutara, 18,807

Appeal—Application for typewritten copies of record—Requirement that it should be accompanied by the prescribed fees—Impossibility of performance—Abatement of appeal—Procedure for complying with Civil Appellate Rules 1938 Rules 2 (1) and 4.

Although Rule 2 (1) of the Civil Appellate Rules 1938 requires, when an appeal is preferred, that the application for typewritten copies of the record should be accompanied by the fees prescribed in the Schedule, the administrative machinery of the Courts renders it impossible for the appellant to comply with it. In the circumstances the maxim *Lex non cogit ad impossibilia* would be applicable and the appeal will not be deemed to have abated under Rule 4.

Obiter: In the present state of the financial regulations, the procedure which an appellant should follow in complying with the Civil Appellate Rules should be as follows:—

(a) Where the Court is situated in a place in which there is a Kachchori or Treasury Office, the prescribed fees should be deposited in the Kachchori or Treasury Office and the receipt tendered along with the application under Rule 2 (1) for typewritten copies.

(b) Where the Court is situated in a place in which there is no Kachchori or Treasury Office the applicant should, along with the application for typewritten copies, tender a money order or postal order for the amount of the prescribed fees in favour of the Government Agent of the revenue district in which the Court is situated. The proper officer of the Court should then transmit the money order or postal order to the nearest Kachchori and obtain a receipt.

APPEAL from a judgment of the District Court, Kalutara.

H. V. Perera, Q.C., with *Neville Wijeratne*, for Respondent-Appellants.

Sir Lalita Rajapakse, Q.C., with *V. C. Gunatilaka*, for Substituted-Plaintiff Petitioner, Respondent.

Cur. adv. vult.

September 30, 1957. BASNAYAKE, C.J.—

A preliminary objection to the hearing of this appeal was taken by learned counsel for the respondent on the ground that the appeal has abated by operation of Rule 4 of the Civil Appellate Rules 1938, as the application of the appellants for typewritten copies of the record was not accompanied by the prescribed fees as required by Rule 2 (1) of those rules.

The relevant facts shortly are as follows: The appellants preferred their petition of appeal on 20th September 1955 and on the same day tendered an application for typewritten copies of the record and moved for an order to deposit the necessary fees. On that application the District Judge made order "Issue P. I. V. for Rs. 12".

On 26.9.55 the Proctors for the appellants filed Kachcheri Receipt for Rs. 12, the amount of the prescribed fees for the typewritten copies.

Learned counsel for the respondent submits that the procedure adopted by the appellants does not satisfy the requirement of Rule 2 (1) that the application for typewritten copies shall be accompanied by the fees prescribed in the Schedule. He submits that the fees should be tendered along with the application to the Judge or Commissioner of Requests and that thereafter the prescribed fees should be paid in cash to the Secretary or Chief Clerk, as the case may be, and a receipt obtained for the payment in the prescribed form as required by Rule 2 (3).

In view of the fact that the same objection was taken in a number of other appeals we caused the Registrar of this Court to ascertain by circular letter from the different courts the practice in each of them in regard to applications for typewritten copies of the record. The replies show—

- (a) that in no court does the applicant tender the prescribed fees along with his application to the District Judge or Commissioner of Requests,
- (b) that in no court situated in a town in which there is a Kachcheri or Treasury Office does the Secretary or Chief Clerk receive payment in cash as provided by Rule 2 (3),
- (c) that the procedure adopted in every court situated in a town in which there is a Kachcheri or Treasury Office is for the appellant or his Proctor to apply for a paying-in voucher and pay in the money to the Kachcheri or Treasury Office and obtain a receipt therefor,
- (d) that in thirteen of the courts the practice is for the appellant or his Proctor to obtain the paying-in voucher before making the application for typewritten copies and tender the Kachcheri or Treasury receipt along with the application for typewritten copies,
- (e) that in every court the practice is to file the Kachcheri or Treasury receipt before the time limited for the completion of the security for the respondent's costs of appeal,
- (f) that there is no uniformity of practice in regard to the tender of the prescribed fees in the courts situated in towns in which there is neither a Kachcheri nor a Treasury Office. In some a money order is tendered for the amount of the prescribed fees along with the application, and the money order is sent

by the Secretary or Chief Clerk by post to the Kachcheri and a receipt obtained therefor; in others cash is accepted by the Chief Clerk who obtains a money order and transmits it to the Kachcheri which sends a receipt,

- (g) that in no court is a deposit note as provided in the Payment into Court Order 1939 issued in respect of fees for typewritten copies,
- (h) that in all the courts the procedure prescribed in the Payment into Court Order 1939 which is also prescribed in the form of Financial Regulation 691 is regarded as applying only to suitors' deposits.

We also examined in this case the Secretary of the Kalutara District Court, and in two of the other cases the Secretaries of the Gampaha and Galle District Courts, all of whom confirmed that the Secretary or the Chief Clerk does not receive cash in respect of fees for typewritten copies because the Financial Regulations prohibit the acceptance of cash by the Secretary or the Chief Clerk. Such a prohibition is not necessary in the case of Judges as it has never been the practice for nor is it the function of Judges to receive fees or payments required by law to be paid into Court. They also confirmed that the practice of the Courts to which they have been attached in the course of their service is as stated above.

We are indebted to the District Judge of Matara for his helpful and informative reply to the Registrar's circular. He has referred to the relevant financial regulations which we find it necessary to reproduce in this judgment. The first of them is Financial Regulation 690 which reads as follows :—

“ 690. *Receipt of moneys by Court Officers.*

(i) Court officers are authorized to receive moneys in respect of the following only—

- (a) Fines and confiscations,
- (b) Court fees (under F. R. 1206),
- (c) Proceeds of sale of unserviceable articles and unclaimed effects;
- (d) Unclaimed property of patients dying in hospital,
- (e) Productions in criminal cases,
- (f) Cash securities in criminal cases,
- (g) Remittances from outside Ceylon.

(ii) Receipts shall be issued on the prescribed form for all moneys received under the above paragraph. Except in the case of court fees which are directly appropriated by Court Officers, all collections received at a Court shall be paid promptly into the nearest Kachcheri.

(iii) No Court officer shall accept any money except as provided in paragraph (i) of this regulation.

(iv) The public must be informed that payment to Court officers is so prohibited. Notices in English and in the vernaculars in Form Judicial C. F. 73 shall be posted up at prominent places in the Court-house and in the office of the Secretary in the case of District Courts,

or of the Chief Clerk in the case of Courts of Requests and Magistrate's Courts, informing the public of this restriction and stating how correct information can be obtained of the methods of making payment.

(v) When a demand is made by letter for payment of money into Court, a copy of the directions as to the manner of payment (Form Judicial C. F. 74) shall be forwarded with the letter.

(vi) If a remittance is received at a Court by post from a person residing in Ceylon, it shall be returned to him together with a Deposit Note for the amount of the remittance and a copy of the directions indicating the correct procedure for payment "into Court" (Form Judicial C. F. 74).

(vii) Under no circumstances shall a Kachcheri accept any money collected by Court officers in contravention of paragraph (iii) of this regulation."

The paying-in voucher procedure in regard to fees for typewritten copies furnished under the Civil Appellate Rules is prescribed in Financial Regulation 493 which reads :—

" 493. *Paying-in vouchers.*

(i) When a Government Department pays in money the amount must be accompanied by a paying-in voucher on form General 118* duly filled up and signed by the Head of the Department or other responsible officer, and his voucher will constitute the 'order to receive'.

(ii) Courts will use form Judicial C. F. 38, and Fiscals form Fiscal 11, as paying-in vouchers for suitors' deposits.

(iii) The voucher will first be taken to the Second Clerk who will see that it is correctly headed and otherwise in order, and then initial it. The sum to be paid, with the voucher, must then be taken to the Shroff who must at once enter the amount in his Cash Book and issue a receipt forthwith on form General 172 and hand it to the payer."

(* Except in the case of sums paid in for drafts,—*Vide F. R. 751*).

Fees for typewritten copies issued under the Civil Appellate Rules are treated by all courts as Miscellaneous Payments and are governed by Financial Regulation 693 as well. That regulation reads :

" 693. *Miscellaneous payments.* Miscellaneous payments other than money brought into Court, e.g., survey fees, may be signified to Court by the production of a Kachcheri receipt, or by the receipt of the person to whom the money is payable, and shall be recorded in the journal."

It is clear therefore that the administrative arrangements of the courts and the financial regulations of Government do not permit an appellant to tender to the Judge or the Secretary or the Chief Clerk as the case may be the fees for typewritten copies as required by Rules 2 (1) and 2 (3) of the Civil Appellate Rules. The procedure now adopted in all

or statutory rule and performance of that duty is impossible or impracticable without any fault on the part of the person on whom the duty is cast, then the law does not penalise him for non-performance of what is impossible of performance. The case of *Paradine v. Jane*¹ expresses the rule thus:

“Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him.”

Several instances in which performance of what is prescribed is not insisted upon the ground of impossibility of performance will be found in Maxwell.²

The South African case of *R. v. Mostert*³ shows that the Courts in that country have applied the maxim even to a case of non-observance of revenue laws.

The right of appeal is a valuable right specially conferred by statute and a person should not be deprived of that right merely because the administrative machinery is such that compliance with one of the requirements of a rule of procedure for the exercise of that right is impossible or impracticable.

The instant case is eminently one in which we should apply the maxim and hold that this appeal shall not be deemed to have abated. The appellant made application for typewritten copies within the prescribed time and complied with all the requirements of Rule 2 bar the only requirement which it was impossible for him to comply with. For failure to comply with such a requirement it will be wrong to penalise the appellant.

There is another aspect of the matter which needs consideration. Rule 4 provides that an appeal shall be deemed to have abated where the appellant fails to make application for typewritten copies in accordance with the requirements of the rules. A person who finds it impossible for no fault of his to comply with one of the requirements of a rule cannot in our opinion be said to have failed to do so.

We cannot part from this case without stating what in our opinion should be the procedure an appellant should follow in complying with the Civil Appellate Rules in the present state of the financial regulations. We think that—

- (a) where the Court is situated in a place in which there is a Kachcheri or Treasury Office the prescribed fees should first be deposited in the Kachcheri or Treasury Office and the receipt tendered along with the application under Rule 2 (1) for typewritten copies,
- (b) where the Court is situated in a place in which there is no Kachcheri or Treasury Office the applicant should along with the application for typewritten copies tender a money order or postal

¹ 82 English Reports 897.

² Maxwell on Interpretation of Statutes, 10th Edn., p. 385 et seq. *R. v. Leicestershire (1850) 15 Q. B. 38.*

Mayer v. Harding, (1866-1867) L. R. 2 Q. B. D. 410.

³ (1915) C. P. D. 266.

order for the amount of the prescribed fees in favour of the Government Agent of the revenue district in which the Court is situated. The proper officer of the Court should then transmit the money order or postal order to the nearest Kachcheri and obtain a receipt.

The procedure we have laid down above is in accordance with the practice that now obtains in the majority of the Courts.

The objection is overruled.

L. W. de SILVA, A.J.—I agree.

Preliminary objection overruled.
