

BERUWELA HOLIDAY RESORTS LIMITED  
v.  
MEERA MOHIDEEN ABDUL CADER

COURT OF APPEAL.  
S. N. SILVA, J. AND  
EDUSSURIYA, J.  
C.A. APPLICATION NO. 634 OF 1989  
D.C. COLOMBO CASE NO. 90024/M  
FEBRUARY 25, 1993.

*Civil Procedure – Appeal notwithstanding lapse of time – Civil Procedure Code, S. 765.*

Owing to prevailing unrest in the country and statements by the Interpreter and farewell proceedings to the District Judge on his impending retirement, the appellant's attorneys were led to believe that the judgment would be delivered only on 14.09.1989 when in fact it was delivered on 07.07.1989.

**Held:**

The appellant was prevented by causes not within his control from complying with S. 754 and S. 756 of the Civil Procedure Code. The appellant had satisfied all conditions set out in S. 765.

**Application** for acceptance of appeal notwithstanding lapse of time.

*K. Kanag-Iswaran, P.C. with S. Mahenthiran and H. Cabral for the defendant-appellant.*

*P. A. D. Samarasekera, P.C. with R. Y. D. Jayasekera for plaintiff-respondent.*

*Cur adv vult.*

March 08, 1993.

**EDUSSURIYA, J.**

The defendant-appellant has made this application under S. 765 of the Civil Procedure Code seeking an order of Court admitting its petition of appeal notwithstanding lapse of time.

On the day on which judgment in this case was to be delivered, namely 7.7.89 all cases due to be called and for trial had been postponed for 14.9.89 apparently due to the troubled situation that

prevailed at that time and a notice had been displayed to that effect. Further, the Mudaliyar of the Court had also made an announcement to that effect.

It is the position of the appellant that when its attorney's assistant had come to Court on that day, and had become aware of the fact that the Mudaliyar had made an announcement regarding the postponement of cases, he had inquired from the Mudaliyar about the judgment in this case and on being told that the District Judge had not given any instructions regarding the delivery of the judgment in this case he had left in the belief that the delivery of the judgment in this case, too, had been postponed for 14th September, 1989 and then informed his senior of it.

In fact, that day being the last day on which District Judge Moraes had presided as District Judge of Colombo prior to retirement, there had been a special sitting of Court to bid him farewell, and immediately thereafter Court had adjourned. It is evident from the affidavit filed by Mr. J.C.T. Kotalawela, Counsel for the plaintiff-respondent that thereafter, he Mr. Kotalawela had inquired from the Mudaliyar about this case and had been told that a Supernumerary Judge would deliver the judgment and accordingly sometime thereafter a Supernumerary Judge had come on the bench and delivered the judgment written by the District Judge Mr. Moraes.

The appellant has explained in his affidavit the circumstances under which he later came to know that judgment had been delivered on 7.7.89.

Had the appellant's attorney's assistant been more vigilant and taken the trouble to read the notice that had been displayed he would have realised that the number of this case had not been included therein. He also would have realised that only cases due to be called on that day and cases fixed for trial had been referred to in the notice.

However, it is clear from Mr. Kotalawela's affidavit that no announcement had been made regarding the judgment in this case and Court had adjourned after the special sitting. It was only when

Mr. Kotalawela inquired from the Mudaliyar that he was informed that a Supernumerary Judge would deliver the judgment. Further, the fact that the Mudaliyar informed Mr. Kotalawela of this after the special sitting does not mean that the Appellant's attorney's assistant had affirmed to a falsehood, when he set out his affidavit that when he inquired from the Mudaliyar about the judgment in this case the Mudaliyar had told him that the District Judge had not given him any instructions regarding the judgment because it is seen from the assistant's affidavit that he had inquired from the Mudaliyar prior to the special sitting and it may well be that at that time the Mudaliyar had not been instructed by the District Judge regarding delivery of the judgment in this case.

Be that as it may, it is clear that 7.7.89 was not a normal working day and it appears that the appellant's attorney had fallen into the error of thinking that the judgment in this case too, had been postponed for 14.9.89 in view of the unusual situation that prevailed.

Due to the troubled situation that prevailed at that time, of which we are all aware, whatever work that was done during that time was attended to in an atmosphere of fear, anxiety and uncertainty, a situation which citizens in this country including lawyers had not experienced prior to that. In such a situation, an attorney-at-law could easily fall into the error which the appellant's attorney's assistant fell into, on 7.7.1989. In addition there was the special sitting as well.

For these reasons we are of the view that the several decisions of the Supreme Court cited to us by the Counsel for the plaintiff-respondent do not apply to the unusual circumstances of this case.

I may also mention that the judgment in this case had been pronounced by a Supernumerary Judge whilst Mr. Moraes, the District Judge was still holding office as District Judge, Colombo, since, according to Mr. Kotalawela's affidavit 7.7.89 was the last day on which Mr. Moraes presided as the District Judge. However, under S. 185 of the Civil Procedure Code, a Judge may pronounce a judgment **written by his predecessor**, but not pronounced.

For the reasons given hereinbefore we are of the view that the appellant was prevented by causes not within his control from complying with provisions of S. 754 and S. 756. We are also of the view that the appellant has satisfied all conditions set out in S. 765.

We therefore allow this application and direct the District Court to forward to this Court the record of the proceedings in this case.

**S. N. SILVA, J.** – I agree.

*Appeal accepted despite lapse of time.*

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