SRI LANKA STATE TRADING (CONSOLIDATED EXPORTS) CORPORATION

v.

DHARMADASA

SUPREME COURT.
SHARVANANDA, C. J.,
ATUKORALE, J., AND H. A. G. DE SILVA, J.
S. C. No. 38/87,
C. A. No. 189/78 (F),
D. C. COLOMBO, No. 75948/M.
JULY 09, 1987.

Appeal–Notice of appeal–Computation of time–Civil Procedure Code, Section 754(4)–Interpretation of similar language in statutes.

Where judgment was pronounced on 31.05.1987 and notice of appeal was presented on Monday 19.06.1987 and in the 18 days that lay between these two terminal dates there was no public holiday but 4th and 11th June were Sundays while 16th June was a Friday and 17th June a Saturday and a non-working day and 18th June a Sunday–

Held–

Notice of appeal was not within the time limit of fourteen days permitted by s. 754(4) of the Civil Procedure Code because allowing for the fact that the date of judgment and date of filing of notice are not counted and the 2 Sundays (4th and 11th June) had to be excluded, there was time to file the notice of appeal only until 16th June (Friday).

Cases referred to:

(1) *Boyagoda v. Mendis–[1929] 30 NLR 321.*
(2) *Mohideen Natchia v. Ismail Marikar–(D.B.) S.C. minutes of 11.10.1982.*
(3) *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.–[1933] AC 402.*
(4) *Royal Crown Derby Porcelain Co. v. Russel–[1949] 1 ALL ER 749, 755.*
(5) *Haigh v. Charles W. Ireland–[1983] 1 ALL ER 1137, 1350.*
(6) *R. v. Chard–[1983] 3 ALL ER 637, 643, 644.*

APPEAL from judgment of the Court of Appeal.

H. L. de Silva, P.C. with *Gomin Dayasiri* for plaintiff-appellant.

Dr. H. W. Jayewardene, Q.C., with *Ifthikar Hassine* and *Miss T. Keenawinne* for the defendant-respondent.

Cur. adv. vult.

July 28, 1987.

SHARVANANDA, C. J.

The plaintiff-appellant filed this action against the defendant-respondent for the recovery of a sum of Rs. 380,819.96. The defendant filed answer denying the claim of the plaintiff and prayed for the dismissal of the plaintiff's action. After trial the District Judge by his judgment dated *31.05.1978* dismissed the plaintiff's action. The plaintiff gave notice of appeal to the District Court on *19.07.1978* and thereafter filed his petition of appeal.

At the hearing of the appeal before the Court of Appeal, counsel for the Defendant raised, *inter alia,* the preliminary objection that the notice of appeal was not given within the time prescribed by law and moved to have the appeal rejected. The Court of Appeal upheld the objection and rejected the appeal. The plaintiff-appellant has preferred this appeal from the said order of rejection.

Section 754(3) and (4) of the present Civil Procedure Code provides as follows:

Section 754 (3) "Every appeal to the Supreme Court from any judgment or decree of any original court, shall be lodged by giving notice of appeal to the original court within such time and in the form and manner hereinafter provided."

(4) "The notice of appeal shall be presented to the court of first instance for this purpose by the party appellant or his registered attorney *within a period of fourteen days from the date when the decree or order appealed against was pronounced,* exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the court shall refuse to receive it."

The following dates and facts are relevant to the resolution of the question whether notice of appeal was given by the plaintiff to the District Court within the time provided by law:

The judgment appealed from was pronounced on 31.05.1978;

The Notice of Appeal was presented to the District Court on 19.06.1978;

4th and 11th June 1978 were Sundays that intervened.

There was no public holiday within the period.

16th of June was a Friday.

17th of June was a Saturday and was a non-working day in the courts and their offices in terms of the Fuel Conservation Act No. 11 of 1978 were not open.

18th of June was again a Sunday.

19th of June was a Monday, a working day.

Counsel for the plaintiff-appellant contended that filing of the notice of appeal on 19.6.78 was within time. He submitted that section 754(4) permitted fourteen clear days for a party to lodge a notice of appeal and that the Court of Appeal had erred in the calculation of the said fourteen days. The computation of the relevant period of fourteen days by counsel for the appellant proceeded as follows:

The two days viz: 31.5.1978 and 19.6.1978 (the respective dates of judgment and of the presentation of the notice of appeal) should be excluded. Then from the eighteen days that lay between these two terminal dates, the two Sundays viz: 4th and 11th June, have to be excluded, then the appellant, being entitled to fourteen clear days for the presentation of his Notice of Appeal, would have

time till the midnight of 16th June to do so and hence he could file the notice on the following day i.e. 17th. Since 17th June was a Saturday and was a non-working day and the court-office remained closed, the notice could not have been presented to court on that day nor on the following day: 18th June as it was a Sunday. In the circumstances, in terms of the provisions of section 8(1) of the Interpretation Ordinance, the notice could properly be filed on Monday, the 19th of June,

Counsel for the appellant submitted that this mode of calculation was warranted by the Divisional Bench decision in *Boyagoda v. Mendis*, (1) which upheld the practice of the District Courts to receive petitions of appeal and to treat them as if these had been presented in accordance with the terms of the unamended section 754 (2) of the Civil Procedure Code which required the petitions of appeal to be presented, within a period of ten days from the date of the decree appealed from when they are presented on the day after the expiration of the ten day's or on the first available day for presenting them after the expiration of the ten days as if they had been presented in accordance with the terms of the section. In that case the judgment appealed against, was delivered on August 2, and the Petition of Appeal was presented on August 16. August 15 was a public holiday and there were two Sundays intervening. Preliminary objection was raised that the appeal was not filed within the stipulated period of ten days. In disposing of the preliminary objection Fisher C.J., with whose judgment the other four Judges agreed said–

"If we were called upon to decide this question merely from a consideration of what is the true construction of the words in question I should feel constrained to allow the preliminary objection. I do not think that the words "exclusive of the day of that date itself" which are relied upon to modify what on the face of it is the plain meaning of the words "within a period of ten days" can have the effect contended for. It is contended that the effect of those words is that notwithstanding the express direction that the petition of appeal shall be presented within a period of ten days this provision must be read as permitting the presentation of the petition on the day after the expiration of the period or on the first available day after the expiration of the period. The effect of this contention would be that the day, on which the thing which is directed to be done, within a period of ten days is done, is not to be counted in reckoning the period. That would, in my opinion make the provision

self-contradictory, and if the intention of the Legislature was that the words should be construed so as to expand the period of ten days in such a way that something done after the period had expired was to be deemed to have been done within it, it has failed to give expression to its intention. There may be ways of giving effect to the words relied upon without giving them the effect which is contended for, but any such interpretation could not be in a direction which would assist the contention which has been put forward. In my opinion the true construction of the paragraph involves that once the period of ten days has begun to run, the exclusions must be limited to days which intervene during the currency of the period and that the presentation of a petition of appeal when that period has come to an end, is out of time."

In the above Divisional Bench case, the court unanimously held that, though on a proper construction of the legal proviso of 754(2) of the Civil Procedure Code, the appeal should be held to have been filed out of time, yet it would recognise and uphold the long standing practice of treating an appeal to be in order if it is presented on the day after the expiration of the ten days or, if that day be a Sunday or a public holiday on the first available day thereafter, and admit the appeal to have been filed within time, on the principle that where an enactment concerning procedure had received a certain interpretation, which has been recognised by the courts for a long period of years, the practice based upon such interpretation should be followed and that a different construction even though it be the correct construction, ought after such a long passage of time, not be put on the law.

Thus it would appear that, according to what was conceived to be in law the correct construction of the relevant section by the Divisional Bench, on the facts of the instant case, the permitted fourteen days for giving notice of appeal ended on 16th June. It is to be noted that section 754(4) excluded Sunday and public holidays only in the computation of the fourteen days and not Saturdays even though they are non-working days or dies non. It was held by this court in the unreported judgment in *S. Mohideen Natchia v. Ismail Marikar*,(2) that Saturdays should be included in computing the fourteen days prescribed by amended section 756(4) of the Civil Procedure Code as that section mandates that only Sundays and public holidays should be excluded in the computation of the fourteen days. The rule for including Saturdays in calculating the fourteen days stipulated by

section 756(4) of the Civil Procedure Code applies equally well to the inclusion of Saturdays in the computation of the fourteen days prescribed by 754(4), Civil Procedure Code. On this basis of calculation, when the appellant lodged his notice of appeal on the 19th June, it was out of time, outside the fourteen days prescribed by section 754(4) of the Civil Procedure Code, as the permitted fourteen days had ended on Friday 16th June, after the exclusion of 31st May and 19th June, the day of judgment and the day of presentation of the notice of appeal and the two intervening Sundays viz: 4th and 11th June. Section 8(1) of the Interpretation Ordinance will not avail the appellant since the last day for presenting the notice of appeal to court was 16th June, a Friday, a day on which the office was not closed. Had the last day been Saturday the 17th, then the notice of appeal could validly have been filed on the Monday the 19th June, when the court was open. But in the absence of similar long practice, as referred to in 30 N. L. R. 321, in connexion with the presentation of petition of appeal, any notice of appeal not filed by Friday, the 16th June, was not on the construction of the law in order.

Counsel for the appellant invoked in his aid the mode of computing "within a period of ten days" which was sanctioned by the decision of the Divisional Bench in 30 N.L.R. 321 and urged that construction which had been adopted by the practice of the District Courts should also be adopted in calculating "within a period of fourteen days" stipulated by section 754(4) of the Civil Procedure Code. I am unable to accept the validity of the proposition.

The sole ground of justification for adopting the construction of the law relating to the jurisdiction of the District Court to accept *petitions of appeal* which had been presented on the day after the prescribed ten days or on the first available day for presenting them after the expiration of the ten days, in the 30 N.L.R. case, even though the Judges thought that it was not the true construction of the law was that such construction was acted upon for a long period of years and that a different construction ought not *now* be put on the law. That justification for adopting of an incorrect construction cannot exist in the case of a new provision of law relating to the new jurisdiction of court to accept a *notice of appeal.*

Counsel invoked the principle of construction that where the legislature uses in an Act a legal term, that has received judicial interpretation, it must be assumed that the term is used in the sense in

which it has been judicially interpreted–vide the speech of Viscount Buckmaster in *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.* (3) But this doctrine must be applied with caution. With reference to this principle Lord Denning said: "I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it." *Royal Crown Derby Porclaim Co. v. Russel* (4); and Lord Diplock in *Haigh v. Charles W. Ireland* (5) said "It is not to be presumed that Parliament in any Act of Parliament dealing with a related but not identical subject-matter has taken account of and adopted as correct all judicial pronouncements as to the meaning of ordinary English words appearing in statutory instruments." With reference to this canon of construction Lord Scarman said in *R. v. Chard* (6):

> "I respectfully agree with my noble and learned friend (Lord Diplock) that it would be wrong to extract from the speeches of their Lordships in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.*, (1933) AC 402, an inflexible rule of construction to the effect that where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts and the legislature has repeated them without alteration in a subsequent statute, the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them. Viscount Buckmaster clearly thought that such a rule existed and that it was salutary and necessary (see (1933) AC 402 at 412 (1933) All ER Rep. 52 at 55); but others of their Lordships took a different view, notably Lord Blanesburgh and Lord MacMillan (see [1933] AC 402 at 414, 446-447 [1933] All ER Rep. 52 at 56, 72). Lord MacMillan, for, as I respectfully think, compelling reasons, treated the rule not 'as a canon of construction of absolute obligation' but as a presumption in circumstances where the judicial interpretation was well settled and well recognised; and even then his Lordship thought the rule must yield to the fundamental rule that in construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless it leads to some absurdity, repugnance or inconsistency. This view accords with modern principles of statutory interpretation and should, in my opinion be preferred to that adopted by Viscount Buckmaster."

Further, notice of appeal is a new component of appeal procedure introduced by Amendment No. 20 of 1977. A cursus curiae relating to petition of appeal does not get tacked to the new jurisdictional step

of notice of appeal. It is also to be noted that, while prior to 1977, applications for execution of decree could be made immediately on the entering of a decree, section 761 as amended by Law No. 20 of 1977 bars any such application being instituted or entertained of an appealable decree until after the expiry of the time allowed for appealing therefrom. Hence, the correct computation of the time allowed for taking steps to appeal is of importance to the judgment-creditor to entitle him to make application for execution. The construction contended for by Counsel for the Appellant will debar the judgment-creditor taking execution proceedings beyond the time which the correct interpretation of law, as enunciated by the Divisional Court in 30 N.L.R. 321, would warrant. For these reasons the construction urged by Counsel for the Appellant cannot be adopted.

I agree with the Court of Appeal that the Defendant had failed to give notice of appeal within the time provided for by Section 754(4) of the Civil Procedure Code.

Counsel for the appellant finally referred to the provisions of amended section 759 of the Civil Procedure Code and prayed for grant of relief on the plea that there–

> "was mistake, omission or defect on the part of the appellant in complying with the provisions of the foregoing sections."

But the power of this court to grant relief under section 759 does not extend to a case where the provisions of section 754(4) relating to the time within which notice of appeal should be given has not been complied with. That section specially enacts that "if such conditions are not fulfilled the court shall refuse to receive it" (notice of appeal). The section is mandatory. A party appealing does not acquire the status of an appellant if the court is directed to refuse to receive the notice of appeal.

I dismiss the appeal with costs fixed at Rs. 1500

ATUKORALE, J.–I agree.

H. A. G. de Silva, J.–I agree.

Appeal dismissed.