

**SAMARASEKERA**

**v**

**INDRANI**

COURT OF APPEAL  
EKANAYAKE, J.  
SRISKANDARAJAH, J.  
CALA 74/2003  
DC GALLE RE 440/98

*Civil Procedure Code – Section 754(4), Section 757 – Amendment No. 79 of 1988 – Section 765– Leave to Appeal notwithstanding lapse of time – Bona fide mistake in noting down the date by party and his Attorney-at Law – Cause not within his control?*

**Held:**

- (1) A mistake or oversight on the part of the Attorney-at-Law or a party to a suit is not such cause within the meaning of Section 765 as would enable such party to the relief under the said provision – Section 765.
- (2) 'Noting down the wrong date' cannot be considered as a ground that falls within the purview of 'causes' not within his control'.

**APPLICATION** under Section 765 of the Civil Procedure Code.

**Cases referred to:**

- (1) *Rankira v Silindu* – 10 NLR 376
- (2) *Julius v Hodgson* – 11 NLR 25

*S.F.A. Cooray* for defendant-petitioner  
*Hemasiri Withanachchi* for plaintiff-respondent.

January 31, 2007

**CHANDRA EKANAYAKE, J.**

The defendant-petitioner (hereinafter sometimes referred to as the defendant) by his petition dated 11.03.2003 (supported by an affidavit) in addition to other interim reliefs had moved for leave to appeal from the judgment of the learned Additional District Judge of the Galle pronounced on 07.02.2003 in D.C. case Galle No. 140/98/RE, that this appeal be admitted notwithstanding the lapse of time, that the judgment of the District Court pronounced on 07.02.2003 be set aside and that this action of the plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) be dismissed. 01

The plaintiff had instituted the above styled action against the defendant by her plaint dated 10th June 1998 seeking a declaration that the plaintiff is the owner of an undivided 1/10 share of the premises described in the schedule to the plaint, ejectment of the defendant from the said premises and recovery of damages as prayed in sub paragraph (c) of the prayer to the plaint. The basis of the plaint had been that the plaintiff who was one of the 10 children of one Albert who had become the owner of the subject matter in 1986 and the said Albert had died in 1990, leaving his 10 children as intestate heirs. The plaint had averred that the defendant was in forcible and wrongful possession of the subject matter since 23.10.1990 (the date of death of said Albert). 10 20

The defendant by his answer whilst praying for a dismissal of plaintiff's action had moved for judgment in his favour on the claim in reconvention averred therein. The defendant further took up the position in the answer that he originally came into occupation of the premises in suit in 1969 as the tenant of one Harriet Wijeratne Jayaratne to whom he paid monthly rental until May 1979 against whom the defendant also had obtained relief from the Rent Board in respect of effecting necessary repairs to the premises in suit and thereafter the defendant being informed that the said Harriet Wijeratne Jayasekera had gifted the premises to her niece one Lakshmi Wickremasinghe, who had had refused to accept the monthly rent and therefore the defendant had to deposit the same in the Galle Municipal Council until 1999. Further it was averred that on or about April 1980 the defendant having learned that the said Harriet 30

Wijeratne Jayasekera had sold the premises in suit to one Viola Avery when the defendant was preparing to purchase the same and that he was not called upon either by the seller or the buyer to pay the rent to the new purchaser and further it was contended that different persons in turn having bought the premises over the head of the defendant tenant and thereafter only that same had been purchased by the said Albert on 23.10.1990. It had been specifically averred by the defendant in his answer that the said premises was governed by the Rent Act No. 7 of 1972 (as later amended) and at no stage the said Albert or the plaintiff had requested the defendant to attorn to them. The basis of the claim in reconvention of the defendant had been that since the plaintiff had instituted the above action in order to harass the defendant in the absence of accrual of any cause of action against him.

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The trial having commenced in the District Court after leading evidence by both parties the learned trial Judge by his judgment pronounced on 07.02.2003 had granted the reliefs in favour of the plaintiff and had dismissed the claim in reconvention of the defendant.

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The basis of the present petition is that after conclusion of the trial the learned trial Judge before whom the said trial was taken up had been transferred from Galle and the delivery of the judgment was delayed. On 11.01.2002 judgment was fixed for 10.05.2002 and the same being not ready on that date also it was postponed for 26.07.2002. As it was not ready on 26.7.2002 also same was postponed for 06.09.2002 and on 06.09.2002 also it was postponed for 29.11.2002. As averred in paragraph 16 of the petition the petitioner has contended that when the case was called for the purpose of pronouncing the judgment on 29.11.2002 the defendant and his registered Attorney (Ms. Saroja Mendis) were both present in court and since the judgment was not ready same was postponed, and both the defendant and the above registered Attorney noted the next date for judgment as 27.02.2003. On 27.02.2003 both defendant and the said registered Attorney were present in Court on 27.02.2003 expecting delivery of the judgment, as this case was not called and after making inquiries as to why the case was not called the said Attorney-at-Law had found that the case had been called on 07.02.2003 and the judgment had been delivered on that date granting the reliefs in favour of the plaintiff.

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Being aggrieved by the said judgment the defendant wished to appeal therefrom to this Court and he was advised on 27.02.2003 that the period allowed by law for filing of notice of appeal had expired on 26.02.2003 and as such papers have to be filed directly in this Court. However the defendant had filed the notice of appeal in the District Court on 28.02.2003 against the aforesaid judgment and a copy of the said notice of appeal has been annexed to the petition marked X12 with a copy of the bank receipt for the deposit of Rs. 750/- as security for costs of appeal (X11), true copy of the bond hypothecating the said sum in favour of the Registrar of the said Court (X13) and a true copy of the registered postal article receipt in proof of posting, a copy of the notice of appeal to the plaintiff and to her registered Attorney (X14) and those are pleaded as part and parcel of the petition amongst other documents. Being aggrieved by the said judgment delivered on 07.02.2003 the defendant has made this application for leave to appeal notwithstanding the lapse of time of this Court on the grounds urged by sub paragraphs 23(a) to (i) of the present petition. Further the defendant has urged that on the aforesaid facts (which were supported by an affidavit of his registered Attorney-at Law Mrs. Saroja Mendis), that he was prevented due to causes not within his control from complying with the provisions of Section 754(4) of the Civil Procedure Code by duly filing a notice of appeal and further he is advised that he has good grounds of appeal. In the aforesaid premises he has moved for the reliefs prayed by the prayer to the present petition.

Having supported the above application made by the said petition after receiving notice the plaintiff by her statement of objections dated 26th March 2003 (supported by an affidavit) whilst denying the averments contained in the petition had moved for a dismissal of the defendant's application.

At the hearing before this Court Counsel who represented both parties after concluding their oral submissions have rendered written submissions as well.

Since this appears to be an appeal made under and in terms of section 765 (as amended) of the Civil Procedure Code it would be pertinent to consider the provisions of the above section. Thus section 765 (as amended by Act No. 79/1988) reads as follows:

"It shall be competent to the Supreme Court to admit and entertain a petition of appeal from a decree of any original court, although the provisions of section 754 and 755 have not been observed;

Provided that the Supreme Court is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions; and

Provided also that it appears to the Supreme Court that the petitioner has a good ground of appeal, and that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment-creditor that the decree or order appealed from should be disturbed."

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Plain reading of the above section would reveal that, it shall be competent to admit and entertain a petition of appeal from a decree of any original Court, although the provisions of section 754 and 755 have not been observed on the Court being satisfied of the two requirements namely;

- (1) that the petitioner was prevented by causes not within his control from complying with those provisions and
- (2) that the petitioner has a good ground of appeal, and nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment creditor that the said decree or order should be disturbed.

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The position of the defendant is that he was unable to comply with provisions of section 754(4) and to prefer an appeal by lodging a notice of appeal within the time frame stipulated therein, due to the *bona fide* mistake made by the defendant and his registered Attorney-at-Law (Mrs. S. Mendis) in noting down the next date 27.02.2003 given for judgment (when in fact the date given had been 07.02.2003).

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Whether the defendant has satisfied the requirements of the 1st proviso to section 765 of the Civil Procedure Code; that is whether he was prevented by causes not within his control from filing the notice of appeal has to be considered. In this regard necessity would arise

to consider the affidavit of the registered Attorney-at-Law for the defendant Mrs. Saroja Mendis marked as X21. This affidavit has been affirmed on 11.05.2003. Present petition of the defendant is a petition dated 11.03.2003 and the supporting affidavit had been affirmed on the same day (11.03.2003). The date stamp placed on the said petition and the motion with which the same were filed would established that the date of filing was 12.03.2003. Thus it is clear that the defendant's registered Attorney-at-Law's affidavit had not been filed along with the said petition and affidavit but filed subsequently when filing the counter affidavit. 150

What is left for consideration now is the supporting affidavit of the defendant filed along with the present petition, wherein he has taken up the position that (vide paragraphs 18 and 19 of the affidavit) he too maintains a diary and on 29.11.2002 when the delivery of judgment was postponed he made a note of it in his pocket note book and later an entry was made in his diary for 29.11.2002 to the effect that the judgment had been postponed for 27.02.2003. Further it is stated that he having obtained a diary for the year 2003, under the date 27.02.2003 he noted that the judgment in this action was due on that date. According to paragraph 19 it is stated that he and his registered Attorney-at-law were both present on Court on 27.02.2003 expecting the delivery of the judgment since this case was not called on investigating as to why the same was not called his Attorney-at-Law had found that it had been called on 07.02.2003 and judgment had been delivered on that day in favour of the plaintiff and he wished to prefer an appeal against the same. 160 170

It is seen from paragraph (20) of the affidavit that his position had been on all previous dates the judgment was due to be pronounced the only day he was not present was the 07.02.2003, as he was unaware of the said date (07.02.2003) having mistakenly heard and noted down on 29.11.2003 the next date as 27.02.2003. The defendant's position that he and the defendant's registered Attorney-at-Law both were present on 29.11.2002 is contradicted by the Journal Entry No. 3 of the above date. This Journal Entry does not reflect anything else other than the fact that the judgment was due from the predecessor and to inform the date to him. The above Journal Entry bearing the date 29.11.2003 is to the following effect: 180

"නින්දුව පූර්වගාමී විනිසුරුතුමාගෙන් නියමිතයි.  
දිනය පූර්වගාමී විනිසුරු තුමාට දක්වා යවන්න"  
නැඳවන්න 7/2/2003 "

This alone cast a doubt with regard to the defendant's position that he and his registered Attorney-at-Law both were present in Court on 29.11.2002 and the next date was mistakenly read and noted down as 07.02.2003. Even assuming that they were present and they defendant having heard the next date as 07.02.2003, what has to be now considered is whether it would amount to 'a cause not within his control' from complying with the provisions of Sections 754 and 755 of the Civil Procedure Code. In the case of *Rankira v Silindu*<sup>(1)</sup> was held that:

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"A mistake or oversight on the part of the proctor of a party to a suit is not such cause within the meaning of section 765 of the Civil Procedure Code as would enable such party to the relief of leave to appeal notwithstanding the lapse of the time."

In the instant case the notice of appeal had been filed out of time solely on the ground that having mistakenly noted down the wrong date by the defendant and the registered Attorney-at-Law. In this context it would also be pertinent to consider the decision in *Julius v Hodgson*<sup>(2)</sup> by which the following principle was offered:

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"The practice is not to give leave to appeal where the only ground relied on is that the applicant or his proctor made some miscalculation of time or some other mistake, or that the failure was due to the proctor's neglect."

In the case at hand same mistake is said to have committed by the defendant and the Attorney-at-Law both to wit: 'noting down the wrong date'. When the above principles are applied a mistake with regard to taking down of the wrong date (for delivery of the judgment) by a party and his Attorney-at-Law cannot be considered as a ground that falls within the purview of 'causes not within his control'. Furthermore in the present case Vide the relevant Journal Entry neither the defendant nor his registered Attorney-at-Law was present on the relevant date (29.11.2002) and a doubt has arisen with regard to the defendant's alleged position of writing down the wrong date on 29.11.2002.

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In this Court with the motion dated 12.05.2003, when filing the counter affidavit the defendant had tendered documents marked as X 19 to X 21. 220

X20 being an affidavit sworn by another Attorney-at-Law Ms. Nandanie Arumahannadi bears the fact that on 07.02.2003 she moved for postponements in cases of Attorney-at-Law Saroja Mendis and this number was not included in that list of cases. The position of the defendant and his Attorney-at-Law Mendis also was that both did not appear on 07.02.2003. (the date of the delivery of the judgment) So, this affidavit (X20) too confirms nothing but the position that the defendant's registered Attorney-at-Law Ms. Mendis had not appeared in Court on 07.02.2003. The affidavit of the defendant's registered Attorney-at-Law Ms. S. Mendis also confirms the above position and all what is stated is that she was unaware of the date 07.02.2002 in this case. 230

In the foregoing circumstances I am unable to conclude that the circumstances enumerated as above by the defendant in this case could be considered as causes not within his control from complying with section 754 and 755 of the Civil Procedure Code. However, the question with regard to whether the defendant has a good ground of appeal has to be examined. Having examined the judgment, I am unable to assert that there is a good ground of appeal. 240

For the above reasons I am inclined to dismiss the present application of the defendant-petitioner and same is hereby dismissed. In all circumstances no order is made with regard to costs.

**SRISKANDARAJAH, J.**                      -                      I agree.

*Appeal dismissed.*