DONA CECILIANA AND OTHERS

v.

KAMALA PIYASEELI AND ANOTHER

COURT OF APPEAL,
S. B. GOONEWARDENE , J. , (P/CA) AND WEERASEKERA , J.
C. A. No. 221/92 — D. C. MATARA No. 4497/L.
NOVEMBER 1, 1989.

Appeal - Security for costs - Civil Procedure Code s. 754 (3), 755 (2) (a), 757 (1), 759 (2) - Rules under s. 15 of the Administration of Justice Law, No. 44 of 1973 - Failure to hypothecate deposit - Material prejudice.

Section 755 (2) of the Civil Procedure Code requiries that notice of appeal shall (unless waived by the respondent or dispensed with) be 'accompanied' inter alia by security for the respondent's costs of appeal. The word 'accompanied' has the effect of suggesting that the validity of the notice of appeal itself cannot be considered as affected by any shortcomings with respect to the providing of security.

As provided by section 757 (1) of the Code the security to be required from a party appellant in the case of money is by 'deposit and hypothecation of bond'. Merely depositing such money without hypothecation by bond would then amount to a performance of a part but not the whole of the act of furnishing security. In fact in every one of the modes of furnishing security it is the act of execution of the bond that provides the security as required by s. 755(2). Failure to hypothecate is fatal. Section 759 (2) does not enable the Court to grant relief in such a case.

In any event 759 (2) does not apply because - (1) there was no explanation for failure to hypothecate the money (2) the time factor involved is 7 years from the date of lodging the appeal (3) the record would have to go back to the District Court for the bond to be furnished, entailing further delay and (4) it can scarcely be said that the respondent will not be materially prejudiced.

Cases referred to :

(1) *Brooke Bond (Ceylon) Ltd. v. Gunasekera S. C. Appeal No. 40/87 - S. C. Minutes of 06. 06. 1989.*
(2) *Chelliah v. Selvanayagam 59 NLR 119*
(3) *Vithana v. Weerasinghe and Another [1980]1 Sri LR 52.*
(4) *Arulampalam v. Daisy Fernando (1986) 1 Colombo Appellate Law Reports 651.*
(5) *Thabrew v. Kosgoda Vajiragnana Thero C. A. No. 845/81 -Court of Appeal Minutes of 08. 06. 1989.*

PRELIMINARY OBJECTION to prosecution of appeal from judgment of the District Court.

Dr. H. W. Jayewardene Q. C. with *Miss. T. Keenawinna* and *H. Cabraal* for plaintiff-appellants.

Bimal Rajapakse with *K. S. Tillekeratne* for defendants - respondents.

Cur. adv. vult.

November 30, 1989.

S. B. GOONEWARDENE, J. (P/CA).

This order relates to a preliminary objection taken by Counsel for the defendants-respondents prior to the hearing of this appeal.

The plaintiffs-appellants who instituted this action in the District Court found the same dismissed by the District Judge by his judgment dated 5th May, 1982. Being dissatisfied with that result, on 19th May, 1982 they 'Lodged' an appeal by giving notice of appeal to the District Court as

provided for in section 754 (3) of the Civil Procedure Code (hereinafter referred to as the Code), within the prescribed period of fourteen days.

As required by section 755 (2) (*a*) of the Code the notice had inter alia to be accompanied by security (unless waived or dispensed with) for the respondent's costs of appeal in such amount and nature as is prescribed in the rules made under section 15 of the Administration of Justice Law, No. 44 of 1973. The rule under reference provides in the form of a schedule thus :

Where cause of action, title to land or property, value of estate or subject matter of action is.	Under Rs. 1500/=	Rs. 1500/=& under Rs. 5000/=	Rs.5000/=& under Rs. 10,000/=	Rs.10,000/= & over
Cash OR	Rs. 150/=	Rs. 250/=	Rs. 375/=	Rs. 750/=
Mortgage of immovable property or bond with surety or sureties	Rs. 300/=	Rs. 500/=	Rs. 750/=	Rs. 1500/=

It would therefore be seen that the security to be furnished in any particular case in the present state of the Law, is fixed and clearly ascertainable both in amount and in nature.

Along with the notice of appeal the plaintiffs filed a receipt in proof of deposit of a sum of Rs. 750/= as such security.

Section 757 (1) of the Code provides that the security to be required from a party appellant should take one of three forms namely (*a*) by bond with one or more good and sufficient surety or sureties or (*b*) by way of mortgage of immovable property or (*c*) by deposit and hypothecation by bond of a sum of money sufficient to cover the costs of appeal.

It was agreed during argument before us that in the instant case although there was a deposit in money of a sum of Rs. 750/= by the

plaintiffs, there was however no hypothecation of it and therefore the preliminary objection raised by Counsel for the respondents was based upon such admitted failure to hypothecate this money. He contended therefore as I understood him that the very notice of appeal contemplated by section 754(3) was defective and that there was thus no proper appeal before this Court capable of being heard.

On the other hand the rival contention of Counsel for the appellants was that this was clearly an instance in which relief should be granted under the provisions of section 759 (2) of the Code on the basis that no material prejudice has been shown to have been caused to the defendants-respondents and that therefore a constitutionally granted right of appeal must not be withheld from the plaintiffs for failure to comply with what he (Counsel) termed a more technical requirement.

Section 759 (2) of the Code reads thus "In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Supreme Court (here one must read Court of Appeal) may if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just".

I would be slow to go along with the argument of Counsel for the respondents that the notice of appeal itself was tainted by this defect of failure of hypothecation but at the same time I cannot agree that such failure to hypothecate was no more than a failure to comply with a technical requirement.

To advert first to the contention of Counsel for the respondents, as I have already pointed out section 755 (2) of the Code requires that the notice of appeal shall (unless waived by the respondent or dispensed with) be accompanied' inter alia by security for the respondent's costs of appeal. The word here used is 'accompanied' and this has the effect of suggesting to my mind that the validity of the notice of appeal itself cannot be considered as affected by any shortcomings with respect to the providing of security.

If the notice of appeal itself is thus unaffected what then is the result. In the instant case the plaintiffs elected to furnish such security whose nature was 'cash' or 'money ' and the amount whereof was Rs. 750/- as

fixed by the relevant rule. As I said earlier it is provided in section 757 (1) of the Code that " the security to be required from a party appellant "in the case of money is by 'deposit and hypothecation of bond'. Merely depositing such money without hypothecation by bond would then amount to a performance of a part but not the whole of the act of furnishing security. To elaborate, when section 755(2) requires that " the notice of appeal shall be accompanied by ..... security for the respondent's costs of appeal " and when section 757(1) demands that " the security to be required from a party appellant ..... shall be by ..... deposit and hypothecation by bond of a sum of money sufficient to cover the costs of the appeal ", upon any true reading of those provisions to say that security for the respondent's costs of appeal has been furnished by merely depositing a sum of money without hypothecation thereof would I think be to do violence to the language of these provisions.

The law envisages a completed act of depositing and hypothecation of the sum of money in question when that is the method adopted of providing security. If on the other hand the choice adopted is to provide security through a good and sufficient surety (or sureties) once again the act of providing such security is by bond. Yet again if the third method contemplated by section 757 (1) is the choice, that is by mortgage of immovable property, that also has to be by bond. In every one of these cases therefore it will be seen that it is the act of execution of the bond that provides the security as required by section 755 (2), and the impact of what I say will be seen if one considers a case where an appellant elects to furnish security adopting one of the other methods than depositing and hypothecation of money and there is a failure to execute the bond. Just as much as in that situation there would be no security furnished at all, here too although the money was deposited there was no security furnished.

As I read these provisions therefore the plaintiffs in effect have not furnished security as required and for all resulting purposes it is as though there had not been even a deposit of this sum of money. If therefore it is fatal to the continuance of an appeal in a case where there has been no security furnished at all, it is equally fatal if there has been no hypothecation, and that done before a point of time when the appeal is 'lodged' by giving notice of appeal which has to be accompanied by such security as contemplated by section 755 (3) of the Code.

In the case of *Brooke Bond (Ceylon) Ltd. v. A.M. Gunasekera* (1), Atukorale, J. in dealing with a question relating to execution proceedings pending appeal, had occasion to trace the history of certain aspects of changes in the law relating to appeals procedure. He pointed out that the Administration of Justice Law, No. 44 of 1973, repealed the provisions of the Civil Procedure Code relating to appeals procedure which were in force before it became law on 1st January, 1974, but that the Civil Procedure Code that had been replaced in its entirety by the Administration of Justice Law, No. 25 of 1975, was again revived and brought back into operation by the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977 which came into operation on 15th December, 1977, although on the same day the Civil Procedure Code (Amendment) Law, No. 20 of 1977, also became law and brought about changes in the Civil Procedure Code to embody the concept of preferring an appeal by lodging a notice of appeal, a concept contained in the Administration of Justice Law, No. 44 of 1973.

It would be useful perhaps at this point to refer, albeit very briefly, to the relevant provisions of the Civil Procedure Code as they stood on 31st December, 1973, that is before the change brought about by the Civil Procedure Code (Amendment) Law, No. 20 of 1977. The provisions before such amendment contemplated an appeal being made by presenting a written petition to the original Court within a period of 10 days of the date of delivery of the judgment or order appealed against in the case of an appeal from the District Court. (Section 754 (1)). By contrast with the present provisions with respect to security, the appellant was under those provisions (s.756 (1)) required forthwith to give notice to the respondent that he would on a date specified therein within a period of twenty days of the date of the delivery of the judgment or order (by a District Court) tender security for the respondent's costs of appeal which upon being accepted had to be given by bond. Atukorale, J. in *Brooke Bond (Ceylon) Ltd.* v. *A.M. Gunasekera* (supra) with respect to these provisions said as follows :-

> "Thus, in my view, under the 1973 Code an appeal was preferred against the judgment, decree or order of the District Court only upon compliance with the aforesaid provisions. There had, therefore, to be compliance with two time-limits before an appeal could be held to have been preferred to the Supreme Court, namely, the presentation of the petition of appeal within 10 days as required by s. 754 (2) and the

furnishing of security and the making of the deposit within 20 days as required by s. 756 (1). Both such periods were to be computed from the date when the decree or order appealed against was pronounced in the manner set out in these two sub sections. Hence a would-be appellant who complied initially with s. 754 (2) was allowed time up to a total period of 20 days for compliance with s. 756 (1). It is only when there had been compliance with both time limits that **notice of appeal** is ordered by Court to be served on the respondent. If there was compliance with s. 754 (2) but ' the petitioner' failed or omitted to comply with s. 756 (1) then ' the petition of appeal' must be held to have abated and no further steps were necessary - s. 756 (2). The scheme of the 1973 Code therefore shows that an appeal was preferred to the Supreme Court only where there was due compliance with the steps enumerated by sections 754 (2) and 756(1) within the periods of limitations prescribed therein".

These words with which I am in agreement show the requirement for providing security as an essential step in the process of preferring an appeal, a view expressed by Atukorale, J. notwithstanding the presence of the provision in section 756 (3), in terms identical with section 759 (2) of the present Code called in aid by Counsel for the appellant, permitting an appellate Court to grant relief in the case of any mistake, omission or defect, It also strikes me as significant that although the presence of this provision in the Code as it stood in 1973 permitted this relief to be granted by an appellate Tribunal when the appeal was before it, there was a direction in the provision just preceding it at section 756 (2) that if the person presenting the petition of appeal failed to give security the petition of appeal was to be held to have abated (by the District Court and before the record was sent up to the appellate tribunal). What is required to be noted is that with such an order of abatement the record will have remained in the District Court while relief if at all under section 756 (3) on the basis of any correctable mistake, omission or defect could have been granted by the appellate tribunal only when the record was before it in appeal, a position lending support to a view that the provisions of section 756 (3) had no application to a situation where the failure was to furnish security. This aspect of it is perhaps supportive of a view that has been taken with respect to the earlier provisions that the providing of security was an essential step in the appeals procedure (vide for example the case of *Chelliah v. Selvanayagam* (2) a view which I think has equal application to the present provisions.

I would therefore venture to say that at the time the plaintiffs presented their notice of appeal on 19th May, 1982, it should have been accompanied by security for the respondent's costs of appeal, that is in the instant case having regard to the choice adopted by the plaintiffs to deposit a sum of Rs. 750/=, with a hypothecation of that money and that the failure to do that was a failure to take an essential step in perfecting this appeal, it being too late now, over seven years after the notice of appeal was presented, to endeavour to do what should have been done on or before 19th May, 1982.

Much reliance was placed by Counsel for the appellants on the judgment of Wanasundera, J. in the case of *Vithana v. Weerasinghe and Another* (3) where there is a reference to the power of the Court to grant relief under section 759 (2) of the Code. I do not see anything there which with any degree of specificity, has the effect of saying that a failure to provide security as has happened in the instant case by non hypothecation is something correctable at a later stage when the appeal is before this Court.

To my mind the conclusion is inescapable that the failure to give security which is as I perceive the effect of **the failure to hypothecate the money deposited** as has happened in the instant case, is not something correctable at a later stage when the appeal is before this Court by the invocation of the provisions of section 759 (2) of the Code. If such is permissible, there is no step in the appeals procedure that would not be correctable under this provision. The view I thus take of these provisions is consonant with the view taken by this Court in the cases of *Arulampalam v. Daisy Fernando* (4) (1986) 1 Colombo Appellate Law Reports 651 and *Thabrew v. Kosgoda Vajiragnana Thera* (5).

Before I pass I would like to say something in regard to the practical effect of allowing an application of this kind. Counsel for the appellant contended that the Registrar of the District Court could be required to take a bond and forward it to this Court in hypothecation of the money deposited. To prepare and perfect such a bond demands that the Registrar must be in a position to examine the original record which thus requires that such record should go back from here to the trial Court, and that in the instant case after more than seven years. Apart from creating a bad precedent which would encourage this kind of conduct lacking in diligence on the part of appellants, and apart also from the injustice

caused to the respondent, at a time when we are faced with a living problem of the laws delays this is scarcely the kind of action that must be countenanced.

One final question I would wish to address my mind to. Assuming for that purpose that the provisions of section 759 (2) of the Code had application and that relief could have been granted to the plaintiffs, is there justification for doing so in the instance case ? I think not. Firstly there has been no explanation of any kind forthcoming for this **failure to hypothecate this money.** Secondly the time factor involved that it is sought to cure this defect over seven years later as I have pointed out. Thirdly permitting such an application would, as I have again pointed out, result in the record having to go back to the original Court for the bond to be perfected with the inevitable delay that process would involve in concluding this appeal. Fourthly it can scarcely be said that the respondent will not be materially prejudiced by allowing such a step. As Counsel for the respondent pointed out the continuance of a suit itself is irksome and therefore prejudicial and the very advantage to be gained by the respondents by the appeal being rejected would be lost to them which necessarily means that he will be materially prejudiced. I would therefore withhold this relief from the plaintiffs even if this Court had the power to grant it.

For these reasons I would sustain the preliminary objection taken and reject this appeal. The appellants will pay the respondents Rs. 315/= as costs in this Court.

WEERASEKERE, J. - I agree.

Preliminary Objections overruled.