KARAWITA
v.
DIAS

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 653/98
DC HOMAGAMA NO. 835
JULY 10 AND 31, 2001

Leave to appeal notwithstanding lapse of time – Ingredients – Civil Procedure Code – s. 754, s. 755, s. 184 (1), s. 182 (2), 765 – Judgment delivered in the absence of a party – Counsel taking notice.

The petitioner seeking leave to appeal notwithstanding lapse of time contended that although she was present in Court on 02. 04. 98, on which date the judgment was scheduled to be delivered, it was postponed for 25. 05. 98. Thereafter, she left Court but later had discovered that the judgment has been pronounced on 02. 04. 98, in the afternoon without notice and in her absence.

Held:

(1) The record clearly establish that at the time the judgment was pronounced the Counsel representing both the plaintiff and the respondent were present in Court and it was in the presence of both Counsel that the judgment had been pronounced, and the petitioner's Counsel had taken notice of the judgment when it was delivered on 02. 04. 98 in the afternoon.

(2) Though judgment should be pronounced in compliance with s. 184 (1) and s. 184 (2) as far as the instant case is concerned, the petitioner's counsel had taken notice of the judgment on behalf of the petitioner when it was pronounced.

(3) Taking notice of a judgment by an Attorney-at-Law is sufficient compliance with s. 184 and taking notice of a judgment by an Attorney-at-Law is same as receiving notice by a party in the case.

Per Nanayakkara, J.

> "If a client or an instructing Attorney is permitted to question or challenge the entries maintained by a Judge in the normal course of his official duties, on the basis that no authority, was given to the Counsel by the instructing Attorney to appear in the case it will not only jeopardise the professional career of the Counsel but also open the floodgate to impugn the orders made by Courts on this frivolous ground."

(4) In the absence of any evidence from the Counsel as to what happened on the day on which the judgment was delivered, this Court has to presume the Counsel was properly instructed by the instructing Attorney to appear in this case, and take notice of the judgment.

APPLICATION for leave to appeal from an order of the District Court of Homagama.

Cases referred to :

1. *Gunawardena v. Ferdinands* – 1982 1 SLR 256.
2. *David v. Choksy* – 1998 1 SLR 302.
3. *Shell Gas Company v. All Ceylon Commercial & Industrial Workers' Union* – 1998 1 SLR 122.
4. *Seebert Silva v. Aronona Silva and Others* – 60 NLR 272.
5. *A. B. N. Amro Bank v. Conmix (Pvt) Ltd. and Others* – 1996 1 SLR 4.

R. C. Gooneratne for the petitioner.

Harsha Soza for the respondent.

Cur. adv. vult.

September 21, 2001

NANAYAKKARA, J.

This application, by way of leave to appeal notwithstanding lapse of time, has been made by the defendant-petitioner (petitioner), under the provisions of the chapter LX of the Civil Procedure Code against a judgment delivered on 02. 04. 98 by the learned District Judge of Homagama. 1

The facts and circumstances which have given rise to this application, are briefly as follows:

The plaintiff-respondent (respondent) instituted action against the petitioner in the District Court of Homagama praying, *inter alia*, that the respondent be declared the owner of the premises in suit, that the deed conveying the premises in suit in favour of the petitioner be declared null and void, an enjoining order, damages and costs.

At the conclusion of trial, the learned District Judge had fixed the date of delivery of the judgment for 02. 04. 98. On this day the learned District Judge having called the case in Court in the morning had postponed the delivery of the judgment for 24. 05. 98. Having postponed the judgment for 24. 05. 98, the learned District Judge again on the same day had called the case in Court in the afternoon in the presence of the lawyers had delivered his judgment holding in favour of the respondent. It is against this judgment the petitioner has sought relief by way of leave to appeal in this application.

The petitioner's position in this case is that she was present personally in Court without the instructing Attorney in the morning of 2nd April, 1998, the day on which the judgment was scheduled to be delivered, and as the judgment was postponed for 29. 05. 98, she left the Court premises in the belief that the judgment would be delivered on 29. 05. 98 as indicated by Court earlier. Later she became aware that the judgment had been, in fact, delivered on the day (02. 04. 98) on which it was originally scheduled to be delivered at 1.10 p.m. in the afternoon, in her absence and without any notice to her. She has further stated that she had not instructed a lawyer to appear on her behalf on the date to take notice of the judgment. It was only when she appeared in Court on 29. 05. 98, and after perusing the case record that she discovered that the judgment had been delivered on 02. 04. 98 in the afternoon in her absence, without her knowledge and any notice. As a result she was prevented by causes beyond her control from complying with sections 754 and 755 of the Civil Procedure Code in preferring this application.

When this matter was taken up for argument on 07. 06. 2000 the learned Counsel for the petitioner submitted that as the judgment had been delivered in the absence of the petitioner without notice to her, there had been non-compliance with the provisions of sections 184 (1) and 184 (2) of the Civil Procedure Code which should have been observed in the delivery of a judgment. The procedure to be adopted in delivering a judgment is clearly set out in sections 184 (1) and 184 (2) of the Civil Procedure Code, and the compliance with the section is a mandatory requirement and the failure to observe its provisions had caused grave prejudice to the petitioner and resulted in her failure to refer this appeal within the time stipulated by section 755 of the Civil Procedure Code. In other words, Counsel submitted that she was prevented from causes beyond her control, complying with the sections 754 and 755 of the Civil Procedure Code.

He further submitted, that there is a duty cast on the District Judge to ensure compliance with the mandatory requirements of the provisions of sections 184 (1) and 184 (2) in pronouncing the judgment. As far as the instant case is concerned, the judgment was not pronounced in accordance with the provisions of this section and there is a failure on the part of the learned District Judge to give notice to the petitioner or to the registered Attorney as required by sections 184 (1) and 184 (2) in delivering the judgment.

The Counsel further submitted that the petitioner has a good and valid ground of appeal, and the documents and other relevant material filed by the petitioner will establish that the petitioner has a valid ground of appeal.

The learned Counsel referred us to the following authorities in support of this proposition:

Gunawardena v. Ferdinands[1] and *David v. Choksy.*[2]

Responding to the argument advanced by Counsel for the petitioner, the learned Counsel for the respondent submitted that the petitioner's failure to comply with the provisions of section 755 of the Civil Procedure Code remains unexplained and the circumstances which prevented the petitioner from preferring the appeal within the stipulated time should have been unequivocally and clearly set out in the petition.

Referring to the circumstances in which the Court is empowered to entertain a petition of appeal notwithstanding lapse of time. In spite of the fact that the provisions of sections 754 and 755 have not been observed, Counsel submitted the petitioner should have satisfied the following conditions before she becomes entitled to the relief claimed by her. They are briefly as follows: That the petitioner was prevented from appealing by causes not within her control, the petitioner had a valid ground of appeal, and that it is inequitable to disturb the decree. As these conditions have not been satisfied by the petitioner, she is not entitled to the relief prayed for in the petition.

Counsel further submitted, at the time the judgment was pronounced, Counsel representing both the petitioner and the respondent were present in Court, and it was in their presence that the judgment had been pronounced and now the petitioner cannot be heard to say that the judgment was delivered in her absence and without notice as required by sections 184 (1) and 184 (2).

The relevant entries in the case record in regard to the matter establish the factual position and the petitioner cannot now controvert what is stated in the record.

At this stage it is necessary to determine the question whether the petitioner is entitled to the relief that has been claimed in this application. The petitioner's main relief is that she be allowed to appeal, notwithstanding lapse of time. To determine the question whether the petitioner is qualified for the relief claimed, a careful analysis of the

petitioner's case in the light of submissions of the parties, and relevant authorities cited will be important.

The petitioner's main argument was that although she was present in Court on the day (02. 04. 98) on which the judgment was scheduled to be delivered, as the judgment was postponed for a subsequent date (25. 05. 98) she left the Court in the belief that the judgment would be delivered on that subsequent date. But, later she discovered that the judgment had been pronounced on 02. 04. 98 in the afternoon without notice and in her absence.

It should be mentioned at the outset that the position taken up by the petitioner in this case is not at all convincing and borne out by the entries that have been made in the case record. A careful perusal of the entries made in the record clearly establish that the actual position is far from what is made out by the petitioner in this case. There is a clear and unambiguous entry in the record to show that at the time the judgment was pronounced the Counsel representing both the plaintiff and the respondent were present in Court and it was in the presence of both Counsel that the judgment had been pronounced, and the petitioner's Counsel had taken notice of the judgment when it was delivered on 02. 04. 98 in the afternoon. Therefore, the petitioner cannot now be heard to say that the judgment was pronounced in her absence and without notice to her as required by sections 184 (1) and 184 (2) of the Civil Procedure Code.

I am in agreement with the learned Counsel when he says the judgment should be pronounced with notice to the parties or their registered Attorneys in compliance with sections 184 (1) and 184 (2) of the Civil Procedure Code. As far as the instant case is concerned, it is incontrovertible that Counsel Mr. Suwandaratne had taken notice of the judgment on behalf of the petitioner when it was pronounced in Court on 02. 04. 98 at 1.10 in the afternoon. Taking notice of a judgment by an Attorney-at-Law is sufficient compliance with the

section and taking notice of a judgment by an Attorney-at-Law is same as receiving notice by a party in the case. As such there is sufficient compliance with sections 184 (1) and 184 (2) of the Civil Procedure Code.

The petitioner states although it is recorded in the journal entry as the petitioner's Attorney-at-Law being present in Court neither the petitioner nor her instructing Attorney, Mrs. Sheila Jayawardena, was in fact, present in Court nor did they have notice of it at the time the judgment was pronounced subsequently in the afternoon of 02. 04. 98.

If that be the correct position, does it mean that the entries maintained by the learned District Judge is false and incorrect or does it mean that neither she nor her instructing Attorney-at-Law, Mrs. Jayawardena, did not authorise Counsel Mr. Suwandaratne to appear on her behalf or that Mr. Suwandaratne had appeared or taken notice of the judgment without instructions from the client or instructing Attorney. What is the implied suggestion that the petitioner is making. When she says, that she did not instruct any Counsel to appear in Court on the day on which the judgment was delivered. She impliedly suggests that Counsel Mr. Suwandaratne, has appeared in the case without instructions and taken notice of the judgment, when it was delivered on 02. 04. 98. If were to accept it as the correct position, it is bound to have a serious impact on the professional career of Mr. Suwandaratne, as the inevitable inference would be that he be guilty of an act of professional misconduct, and breach of professional ethics. Mr. Suwandaratne is the best person who can enlighten this Court on what exactly took place, in Court on that day, but the failure on the part of the petitioner to furnish this Court with some kind of evidentiary proof from Mr. Suwandaratne which would throw some light upon the matter, to say the least, is intriguing and puzzling. Perhaps Mr. Suwandaratne would have controverted the stance taken up by the petitioner and taken up a totally different position, had he been approached in regard to the matter. Therefore, in the absence of any

evidence from Mr. Suwandaratne as to what happened on the day on which the judgment was delivered, this Court has to presume that Counsel Mr. Suwandaratne was properly instructed by the instructing Attorney to appear in the case, and take notice of the judgment.

It should also be mentioned that when an instructing Attorney instructs another Counsel to appear on behalf of a client, the Court presumes that the Counsel has been properly instructed by the instructing Attorney to appear on behalf of the client. If a client or an instructing Attorney is permitted to question or challenge the entries maintained by a Judge in the normal course of his official duties, on the basis that no authority was given to the Counsel by the instructing Attorney to appear in the case it will not only jeopardize the professional career of the Counsel, but also open the floodgate to impugn the orders made by Courts on this frivolous ground. I have no doubt that Counsel Mr. Suwandaratne did appear and took notice of the judgment in this case with the full knowledge of the instructing Attorney and the petitioner when it was delivered on 02. 04. 98.

It should also be observed, that there is a presumption that all the official acts have been validly done, and the Court is entitled to presume that entries maintained by the Judge is in compliance with the requirements contemplated by section 92 of the Civil Procedure Code, it is only in exceptional circumstances and extreme situations that a correction of a journal entry made by Court can be challenged or impugned by a party. This position is clearly enunciated by Jayasuriya, J. in the case of *Shell Gas Company v. All Ceylon Commercial and Industrial Workers' Union*[3] at page 122. This position is also buttressed by the case of *Seebert Silva v. Aronona Silva & Others,*[4] and the case of *ABN Amro Bank v. Conmix (Pvt) Ltd. and Others.*[5] Therefore, the petitioner cannot now be permitted to impugn the correctness of the entries.

Mention should also be made of an affidavit filed by Mrs. S. Jayawardena, instructing Attorney. In her affidavit she merely states

she advised the petitioner to be present in Court on 02. 04. 98 and take notice of the judgment but does not specifically and unequivocally state that she did not instruct Mr. Suwandaratne to appear on 02. 04. 98 and take notice of the judgment. Therefore, her affidavit in this respect does in no way help this Court to resolve the matter in issue.

It is also apparent from the documents filed in this case by the parties, that pursuant to the judgment of the District Court the petitioner had been ejected from the property in suit, and the respondent had been restored to the possession of the property. It appears that after the restoration of the possession the respondent had been on the land for some time acted on the basis that his possession would thereafter be undistrubed and uninterrupted. Therefore, I am of the view that it is inequitable to disturb the decree at this stage.

There is another matter to which some reference should be made. It is that, some of the documents that have been filed along with this application are not certified and the petitioner himself concedes that the plaint and the answer filed along with the petition are uncertified. It is my view, on this ground alone, that this application should be rejected, as there is no sufficient compliance with the rules of procedure in preferring an application to this Court. It has been repeatedly held and emphasized in a series of cases by this Court that there should be sufficient compliance with the rules of procedure by petitioners. Moreover, the petitioner's non-compliance has not been explained.

Therefore in view of the above-mentioned reasons this application for leave is refused. The respondent is entitled to costs fixed at Rs. 5,000.

UDALAGAMA, J. – I agree.

Application for leave refused.