SANJEEWA AND ANOTHER
VS
PIYATISSA AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 480/2004 NWLT
DC KULIYAPITIYA 10590/L,
MARCH 28,2005

Civil Procedure Code, sections 754, 755, 756 and 765 - Appeal notwithstanding lapse of time- Prevented by causes not within his control?-Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939, section 51(d) - Revocation?- In what circumstances?- Statutory right to revoke.?

Held:

(i) A mistake or oversight on the part of the registered attorney-at-law is not a cause within the meaning of section 765.
(ii) Miscalculation of time or some other mistake or the failure being due to attorney's neglect are not causes within the meaning of section 765.

Held further:

(iii) The amending Ordinance to the Ordinance, No. 59 of 1939, has enacted a uniform rule requiring an express and not merely inferential renunciation of the right of revocation.

(iv) The renunciation must be effected in a particular way, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. The statutory right to revoke has to be exercised in a particular way.

APPLICATION for leave to appeal notwithstanding lapse of time from a judgment of the District Court of Kuliyapitiya.

Cases referred to :

1. *Rakira* vs. *Silindu* 10 NLR 376
2. *Julius* vs. *Hodgson* 11 NLR 25
3. *Ratnayake* vs. *Bandara* - (1990) 1 Sri LR 156

Sunil Cooray with *Shaminda Silva* for defendant petitioners
M. C. Jayaratne with *Sobha Adhikari* for plaintiff respondents.

Cur. adv. vult.

May 20, 2005
ANDREW SOMAWANSA, J. (P/CA)

This is a leave to appeal application nothwithstanding lapse of time seeking to set aside and vacate the judgment of the learned District Judge of Kuliyapitiya dated 02.08.2002 and the interlocutory decree entered in this action and for the grant of reliefs prayed for in the answer of the defendants - petitioners or a declaration that under Kandyan Law, irrevocable deeds of gift cannot be subsequently revoked and to stay all further proceedings and for the issue of an interim order staying the execution of the writ for ejectment.

Counsel for the plaintiffs - respondents did not file objections but at the hearing both parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

It is common ground that the judgment sought to be vacated by the defendants- petitioners is dated 02.08.2002 and the application for appeal notwithstanding lapse of time is dated 16.02.2004. In terms of Section 765 of the Civil Procedure Code the burden is on the defendants- petitioners to satisfy Court that the defendants-petitioners were prevented by causes not within their control from complying with the provisions of Sections 754 and 755 and that the defendants - petitioners have a good ground of appeal. The relevant Section 765 of the Civil Procedure Code reads as follows :

"It shall be competent to the Court of Appeal to admit and entertain a petition of appeal from a decree of any original court, although the provisions of sections 754 and 756 have not been observed.

Provided that the Court of Appeal 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 Court of Appeal 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".

It is common ground that the trial in the instant action commenced on 17.06.2002 with 4 admissions and 9 issues settled between the parties. The 1st plaintiff respondent testified to the fact that he revoked the deed of gift given in favour of the 1st defendant - petitioner as the 1st defendant - petitioner was unkind to him. With this evidence the plaintiffs-respondents closed their case.

It is the position of the defendants - petitioners that at the end of the 1st plaintiff-respondent's evidence a date was moved for on behalf of the defendants for the defence case. However as a practice in that Court at that period the learned District Judge refused to grant a date and accordingly the trial was concluded on the same day. The position of the defendants-petitioners is that the refusal of the adjournment sought by the defendants-petitioners from presenting their case was unreasonable and arbitrary and that they were thereby deprived of a reasonable opportunity of being heard on the defences which they have taken up in this action. However on an examination of the proceedings of 17.06.2002 the statement appears to be incorrect and a misrepresentation of facts as to what took place that day. The proceedings of that day reads as follows:

'එක්ස්', 'පැ1' සිට 'පැ 4' දක්වා ඉදිරිපත් කරමින් පැමිණිල්ලේ නඩුව අවසන් කරයි. මේ අවස්ථාවේ දී විත්තිකරුවන් අද දින අධිකරණයට පැමිණ නොමැති බැවින් විත්තිය වෙනුවෙන් සාක්ෂි කැඳවීම සඳහා නීතිඥ ඉණසිංහ මහතා දිනයක් ඉල්ලා සිටියි. නඩු වාර්තාව පරීක්ෂා කිරීමේ දී මෙම නඩුව අද දින 30 වැනි විභාග දිනට නියම කර ඇති බව පෙනේ. එමෙන්ම පසුගිය දිනයේ විත්තිකරුවන්ගේ නීතිඥ පෙන්දප්පෙරුම මහතා දී ඇති පෙරකලාසිය අවලංගු කිරීම හේතුකොට ගෙන විත්තිකරුවන්ට අධිකරණය විසින් නඩු විභාගය සඳහා අවසන් දිනයක් අද දිනට ලබා දෙන බවට ද, නියම කර ඇත. ඒ අනුව අද දිනට සාක්ෂිකරුවන් කැඳවා නඩු විභාගයට සූදානම් වීම විත්තිකරුවන්ගේ වගකීමකි.

විත්තිකරුවන්ගේ සාක්ෂි පහ ලේඛණ ලැයිස්තු ගොනුකර තිබුන ද අද දින විභාගය සඳහා සාක්ෂි කැඳවා කිසිදු සාක්ෂිකරුවෙකුට සාක්ෂි සිතාසි නිකුත් කරවා ගෙන ඇති බවක්, නොපෙනේ.

ඒ අනුව විත්තිකරුවන් වෙනුවෙන් සාක්ෂි කැඳවීමට නඩු විභාගය කල් තැබීමට වලංගු හේතුවක් ඉදිරිපත් වී නොමැති බවට අධිකරණය තීරණය කරයි. ඒ අනුව නඩු විභාගය කල් තබන ලෙස විත්තියෙන් කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කරමි.

විත්තිය වෙනුවෙන් සාක්ෂි කිසිවක් නොකැඳවයි.
ඒ අනුව නඩු විභාගය අවසන් කරමි.

තීන්දුව 2002.08.02 වෙනි දිනට. දෙපාර්ශ්වයට 2002.07.25 වැනි දින හෝ ඊට ප්‍රථම මෝසමක් මඟින් ලිඛිත දේශන ඉදිරිපත් කළ හැකිය."

I might also say that the record does not indicate that an application has been made to revise this order dated 17.06.2002 and I might observe that the learned District Judge cannot be faulted for making the aforesaid order which I think is a correct order, considering the circumstances explained by him.

It is also common ground that the judgment in the instant case was delivered on 02.08.2002 in favour of the plaintiffs-respondents and thereafter the defendants-petitioners filed a notice of appeal. However it is admitted that the defendants-petitioners did not file a petition of appeal. The reason given by the defendants- petitioners for their failure to tender a petition of appeal is that they did not contact their Attorney-at-Law thereafter on the belief that the appeal procedure had been completed with the filing of the notice of appeal. Accordingly no petition of appeal has been filed in this case and on 16.08.2002 the appeal had been referred to the Court of Appeal. In the circumstances applying the provisions of Section 765 of the Civil Procedure Code to the reasons adduced by the defendants-petitioners for failure to comply with the provisions in Section 755, my considered view is that the defendants-petitioners have failed to satisfy Court that the defendants - petitioners were prevented by cause not within their control from complying with the provisions in Section 755.

In the case of *Rakira vs. Silindu* [1] it was held :

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

Again in *Julius vs. Hodgson* [2] it was held:

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

The circumstances enumerated by the defendants-petitioners are not sufficiently unusual and compelling to satisfy that they were causes not within the defendants-petitioner's control. There was negligence, inaction and want of *bona fides* on the part of the defendants- petitioners.

For the foregoing reasons, the contention of the submission of the counsel for the defendants-petitioners that the defendants-petitioners have a very good case in appeal as they were not afforded a reasonable opportunity of being heard at the trial and that they were unable to file the petition of appeal because of reasons beyond their control is without any merit and has to be rejected.

In passing I might refer to another matter raised by the defendants-petitioners in that it is submitted by counsel for the defendants-petitioners that as per clause 9(c) of the Kandyan Law a deed of gift in which the right to revoke has been expressly renounced by the donor. Such deed of gift cannot be subsequently revoked. However this submission appears to be incorrect in view of the decision in *Ratnayake* vs. *Bandara* [3] which held :

" (1) The Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939 is an Ordinance to declare and amend the Kandyan Law. It seeks to amend the Kandyan Law and not to make a mere restatemet of the law as it was prior to 1939 when the intention to renounce the right to revoke was inferred or deduced from the particular words used. The amending Ordinance has enacted a uniform rule requiring an express and not merely inferential renunciation of the right of revocation. The words "expressly renounced" in s. 5(1) (d) of the Ordinance recognize a pre-existing right to revoke which every Kandyan donor had in Kandyan Law. What the Ordinance contemplates is an express and deliberate renunciation by the donor of his right to revoke. From the words " absolute and irrevocable" it may be implied that the Donor intended to revoke but such an expression would not constitute an express renunciation of the right to revoke.

There is a further requirement that the renunciation must be effected in a particular way, viz. by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning.

The Ordinance by s. 5(1) (d) has now vested in the Donor a statutory right to revoke and he is required to exercise that right in a particular way.

The words " absolute and irrevocable" are only an adjectival description of the gift but the essential requirement is a transitive verb of express renunciation. Words merely of further assurance are insufficient.

The use of the words " absolute and irrevocable" and "to hold the premises for ever" do not satisfy the requirement of s. 5(1)(d) of the Ordinance. Deed No. 8247 was revocable."

For the foregoing reasons, the application for leave to appeal notwithstanding lapse of time will stand dismissed with costs fixed at Rs.7500.

WIMALACHANDRA, J. — I agree.

Application dismissed.