KARUNADASA

v.

WIJESINGHE

SUPREME COURT.
WANASUNDERA, J., RANASINGHE, J. AND L. H. DE ALWIS, J.
S.C. APPEAL 61/85.
D.C. NEGOMBO 2750/L.
NOVEMBER 14, 1985.

Appeals–S. 184, s. 754 and s. 765 of Civil Procedure Code as amended by Laws Nos. 19 and 20 of 1977–Orders and Judgments–Petition of Appeal notwithstanding lapse of time–Provisos.

Where the question was whether the provisions of s.765 of the Civil Procedure Code as amended by Laws Nos. 19 and 20 of 1977 relating to the powers of the Court of Appeal to admit and entertain petitions of appeal notwithstanding lapse of time apply only to appeals preferred in terms of subsection (1) of s. 754 (Judgments) of the said Code or whether they apply also to appeals preferred in terms of the provisions of subsection (2) of s. 754 (Orders).

Held–

(1) Upon a reading of the provisions of both the main enactment of s.765 (Civil Procedure Code) and of the two provisos, in particular the second of the provisos, together the intention of the Legislature was to grant the relief, set out in the provisions of s. 765 of the Code, not only to "judgments" falling within the provisions of s. 184 of the said Code but also to "Judgments" and "Orders" as defined in subsection 5 of s. 754 of the said Code.

(2) The general rule in regard to the construction of provisos is that they are not to be taken absolutely in their strict literal sense but are of necessity limited in their operation to the ambit of the section which they qualify. If however the language makes it plain that they were intended to have an operation more extensive than that of the provision which they immediately follow, they must be given that effect. If a proviso cannot really be construed otherwise than as contradicting the main enactment then the proviso will prevail on the principle that it speaks the last intention of the maker.

Case referred to:

Vithane v, Weerasinghe and Another [1981] 1 SLR 52.

APPEAL from order of Court of Appeal.

Lalanath de Silva for plaintiff-respondent-appellant.

R. K. W. Goonesekera with *Ranjan Mendis* for defendant-appellant-respondent.

Cur. adv. vult.

December 10, 1985.

RANASINGHE, J.

The question which arises for determination in this appeal is:

> Whether the provisions of sec. 765 of the Civil Procedure Code (Chap. 101), as amended by Laws Nos. 19 and 20 of 1977, (referred to hereinafter as "the Code") relating to the powers of the Court of Appeal to admit and entertain petitions of appeal notwithstanding lapse of time, apply only to appeals preferred in terms of the provisions of subsection (1) of section 754 of the said Code, or whether they apply also to appeals preferred in terms of the provisions of subsection (2) of the said section 754.

The provisions of the said sec. 765 are 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 756 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".

The main submission made in support of the contention that the provisions of sec. 765 cannot be called in aid of appeals filed under the provisions of sub-sec (2) of sec. 754 is that the provisions of sec. 765 speak only of a petition of appeal from "a decree" of an original court. The references made in the 2nd proviso of sec. 765 and in section 766 to a "judgment creditor", the requirement, as set out in sec. 767, that applications made under sec. 765 be upon summary procedure, are relied upon as circumstances indicative of the intention of the legislature to confine the relief contemplated by sec. 765 only to petitions of appeal from decrees of original courts. It has also been contended that the provisos cannot control the provisions of the main enactment.

The relief given by the main enactment–sec. 765– which deals with appeals notwithstanding lapse of time, is extended to the petitions of appeal referred to therein because of their failure to observe the provisions of secs. 754 and 756.

Secs. 754 and 756 both appear in Chapter 58 which deals with both Appeals and Revisions. Sec. 754 sets out the mode of preferring an appeal. Whilst in subsection (1) the said section 754 provides for an appeal from a "judgment" pronounced by an original court, it provides, in subsection (2), for appeals from "orders" made by original courts. Subsection (4) refers to both decrees and "orders". Subsection (5) defines, for the purposes of the said chapter, the terms "judgment" and "order". sec. 756 sets out the procedure in respect of appeals and applications for leave to appeal. Whilst subsec. (1) of sec 756 relates to a petition of appeal, all the subsequent subsections, (2) to (7), deal with an application for leave to appeal against an order of a District Court. The provisions of secs. 754 and 756 deal not only with appeals filed as of right against a "judgment" of a District Court, but also with applications for leave to appeal against an "order" made by a District Court.

The term "decree" has been defined in sec. 5 of the Code; and, in accordance with such definition, the decree of a District Court would be the formal expression of an adjudication by such court upon any right claimed or defence set up in such court when such adjudication decides, as far as such court is concerned, the action in such court. Sec. 188 of the Code requires a formal decree, either in Form 41 of the First Schedule or to the like effect, to be drawn up as soon as may be after a judgment is pronounced specifying in precise words the order which is made out by the said judgment. The word "judgment" appearing in this Chapter XX will only have the meaning set out in the interpretation section 5. It will not attract to itself the special meaning assigned to it by sub-paragraph (5) of sec. 754, which said meaning, as already stated, is so given only for the purposes of the chapter (viz. Chapter LVIII) in which sections 754 and 756 both appear. Hence a decree will relate only to a judgment, as defined in sec. 5. An "order having the effect of a final judgment", included in the definition of a "judgment" set out in sub-section (5) of sec. 754, will not, therefore, be covered by a decree.

The reference in sec. 765 to not only a decree, but also to sections 754 and 756, both of which relate not only to judgment but also to orders as defined in that chapter, raises a question as to the reach and scope of the said section – whether only judgments, as defined in sec. 5, are intended, or whether relief was intended to be given also to appeals against "orders" which are also referred to in both sections 754 and 756.

It has been contended that relief, in the form of permitting an appeal notwithstanding the fact that it is out of time, has not been extended to Orders, which have to be appealed against only with the leave of the Court of Appeal, because there would still be another opportunity of raising any grievances against such Orders; namely, at the stage of an appeal against the judgment, to be pronounced in the case in terms of sec. 184 of the Code. Even if that be so in regard to such Orders made before judgment, yet such an opportunity would not be available to such Orders as are often made after the judgment is pronounced. Furthermore, such an opportunity will also not be available to orders "having the effect of a final judgment" as such orders, whether made before or after the judgment in the case is pronounced, do not have the benefit of a decree set out in sec. 188 of the Code.

The provisions of the aforesaid sec. 765 of the Code, as amended and revived by Laws Nos. 19 and 20 of 1977, and the provisions of the corresponding section, also numbered 765, in the Civil Procedure Code, as it stood prior to its repeal, in 1976, by the provisions of Law No. 25 of 1975 (which said Code will be referred to as "the earlier Code"), are identical.

The procedure for the institution of appeals from the District Court set out in the earlier Code was also contained in sections 754 and 756 of the said earlier Code. The requirement that an appeal should be initiated by the tendering of a notice of appeal within 14 days and that a petition of appeal should thereafter be filed within a period of sixty days from the date of the judgment appealed against was not known to the said earlier Code. What was then required was the filing of a petition of appeal within a period of 14 days, the perfection thereafter, also within a specified time, of the security for the costs of appeal of the respondents, and the issuance of, after the acceptance of such security, notice of appeal, along with a copy of the petition of appeal, on the respondents. Even though two forms of appeal – one as of right and the other with leave of the appellate court – were also unknown to the earlier Code, yet, two categories of appeals, known as Final and Interlocutory Appeals, were recognized and available under the earlier Code too. The procedure to be followed to lodge and perfect appeals falling into each of the two categories was one and the same – the procedure laid down by sections 754 to 756 of the said earlier Code. Under the said earlier Code the relief set out in section 765 thereof was available to such Interlocutory appeals also.

The procedures set out in regard to appeals under the earlier Code and the Code now in force were compared and contrasted in the case of *Vithane v. Weerasinghe and Another* where the Supreme Court considered the question whether the relief set out in sec. 765 of the Code could be available where the petition of appeal, which had to be presented within sixty days from the date of the judgment or decree appealed against, had been filed one day late. Wanasundera, J., writing the judgment of the Court, took the view: that the process of appealing now set out in the Code involves, as was the position under the Administration of Justice Law, No. 44 of 73, "two stages": that the time limits set out in sections 754 and 756 of the Code are in respect firstly of the lodging of an appeal by giving notice of appeal and secondly of the filing of an application for leave to appeal: that the case under consideration was an instance of the "second stage" in the appellate procedure: that the provisions of sec. 765 are limited to the "first stage": that, although sec. 755(2) of the Code also contains a time limit, there is no reference to that section in sec. 765: that, therefore, no relief by way of sec. 765 could be granted.

Sec. 765 also contains two provisos, the second of which sets out the subject-matter, in respect of which the relief intended to be granted by the main enacting provision is to apply, as being appeals not only from decrees but also from "orders". The contents of the proviso leave no room for doubt that the relief so set out could be invoked in respect of appeals both from decrees entered, and orders made by the District Court. How far this proviso could influence the construction of the provisions of the main enactment is the question which would now arise for consideration.

The general rule in regard to the construction of provisos is: that they are not to be taken "absolutely in their strict literal sense:" a proviso "is of necessity.... limited in its operation to the ambit of the section which it qualifies": that if, however, the language makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows it must be given such wider effect: that if a proviso cannot really be construed otherwise

than as contradicting the main enactment, then the proviso will prevail, on the principle that "it speaks the last intention of the makers" – (Maxwell–12th Ed.–pp. 189-191): "the terms of an intelligible proviso may throw considerable light on the ambiguous import of the statutory words": a proviso may be a useful guide in the selection of one or otherof two possible constructions of words in the enactment or to show the scope of the latter in a doubtful case– (Craies–7th Ed. – p. 218): that, if the main provision is not clear, the proviso cannot be deemed to be a surplusage and can be properly looked into for ascertaining the meaning and the scope of the main provision, and, if the language is susceptible to the interpretation which is consistent with the proviso, the latter may be called in aid: that the proviso must be construed harmoniously with the main enactment – (Bindra–6th Ed.–pp. 65-68).

Upon a reading of the provisions of both the main enactment of sec. 765 and of the two provisos, in particular the second of the two provisos, together on the basis of the principles referred to above, it seems to me that the intention of the Legislature was to grant the relief, set out in the provisions of sec. 765 of the said Code, not only to a judgment falling within the provision of sec. 184 of the said Code, but also to both "Judgments" and "Orders" as defined in sub-sec. (5) of sec. 754 of the said Code.

It also seems to me that, in construing provisions dealing with the right of appeal, a court ought to place such a broad construction as would operate to preserve to a party aggrieved such a right.

For these reasons, the Order of the Court of Appeal, dated 28.9.84, is affirmed; and the appeal of the plaintiff-respondent-appellant is dismissed. Costs of this appeal are to abide the final decision; but the plaintiff-respondent-appellant will not be entitled to the costs of this appeal to this Court in any event.

WANASUNDERA, J. – I agree.

L. H. DE ALWIS, J. – I agree.

Appeal dismissed.

Order of Court of Appeal affirmed.