
DHARMARATNE
vs
KUMARI

COURT OF APPEAL
WIMALACHANDRA, J.
CA LA 393/2003
D. C. KANDY 5934/D
MAY 14, AND
JULY 7, 2004

Civil Procedure Code, sections 755(1), 755(3), 755(1) (d) and 759(2) - Appeal by the defendant - In the notice of appeal plaintiff designated as plaintiff appellant - Is it fatal? - Materially prejudiced? - District Judge's powers.

The defendant filed notice of appeal followed by a petition of appeal. The plaintiff objected to the notice of appeal on the ground that the plaintiff had been named as the defendant-appellant when he should have been designated as the plaintiff-respondent and hence it was invalid as it was not in conformity with section 755(1) (d). The trial judge rejected the objection.

On leave being sought -

HELD

- (i) The District Judge has no power to reject a notice of appeal even though he may call upon the appellant to rectify any defect in the notice of appeal. The District Judge's function is merely to forward the notice of appeal and the petition of appeal to the Court of Appeal.
- (ii) It is open to the Court of Appeal to grant relief under section 759(2) if in the opinion of court the plaintiff respondent has not been materially prejudiced by the mistake.

Per Wimalachandra, J.,

"I am of the view that the court should discourage appeals against incidental decisions of this nature when it could conveniently and more expeditiously be dealt with in a final appeal."

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

Cases referred to :

1. *Nanayakkara vs Warnakulasuriya* - (1993) 2 Sri LR 289
2. *Sameen vs Abeywickrama* 64 NLR 553
3. *Vithana vs Weerasinghe* - (1981) - 1 Sri LR 52
4. *Naraluwa Hewage Edmond vs Dharmadasa Wanigaratne and two others* CA 774/90 - D.C. Galle 8406/P - CAM 23.02.01
5. *Anushka Wettasinghe vs Nimal Weerakkody and others* - (1981) 2 Sri LR 423
6. *Balasubramaniam vs Valliappar Chettiar* - 39 NLR 553

Geeshan Rodrigo for plaintiff petitioner.

Manohara R. de Silva for defendant respondents.

Cur. adv. vult

October 05, 2004.

WIMALACHANDRA, J.

The plaintiff-petitioner (hereinafter referred to as the plaintiff) instituted action for divorce on the ground of malicious desertion in the District Court of Kandy against the defendant-respondent (hereinafter referred to as the defendant). After the trial, the court delivered the judgement in favour of the plaintiff. Thereafter the defendant filed a notice of appeal followed by a petition of appeal. The plaintiff objected to the notice of appeal on the ground that the plaintiff had been named as the defendant-appellant, when he should have been designated as the plaintiff-respondent and hence it was invalid as it was not in conformity with the mandatory provisions of section 755 (1) (d) of the Civil Procedure Code. The learned District Judge rejected the plaintiff's objections and made order on 08.10.2003 accepting the notice of appeal. It is against this order, the plaintiff has filed this application for leave to appeal.

The question that arises for determination in this application is whether the order made by the learned District Judge is wrong in accepting the notice of appeal in which the plaintiff was described as the plaintiff-appellant.

The learned Judge has observed that in the petition of appeal, which followed the notice of appeal, the parties were correctly described.

Moreover, it is to be noted that the notice of appeal and the petition of appeal had been addressed to the Court of Appeal and not to the District Judge. The District Judge's function is merely to forward the notice of appeal and the petition of appeal. The effect of the notice of appeal is to inform the respondent that the jurisdiction of the lower Court will be suspended once the petition of appeal is filed and also to temporarily deprive the respondent of the fruits of his victory. The District Judge has no power to reject a notice of appeal even though he may call upon the appellant to rectify any defect in the notice of appeal.

In the case of *Nanayakkara Vs. Warnakulasuriya* ⁽¹⁾ it was held that ;

“The power of the Court to grant relief under section 759(2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.”

Kulatunga, J. at page 294 has also made the following observation ;

“Even though the District Court appears to have no power to reject a notice of appeal for failure to hypothecate security, it may perhaps call upon the appellant to rectify the defect where the non-compliance is observed at the stage when notice of appeal is given”.

The only exception to this rule is found in section 755(3) of the Civil Procedure Code which reads as follows :

“Provided that, if such petition is not presented to the original Court within 60 days from the date of the judgement or decree appealed against, the Court shall refuse to receive the appeal.”

Next I shall proceed to consider the main contention of the learned counsel for the defendant that the provisions of section 755(1) of the Civil Procedure Code is mandatory and it should be strictly adhered to. The

learned counsel submitted that the non-compliance with the mandatory provisions of section 755(1)(d) of the Civil Procedure Code, where the name of the appellant has been stated as plaintiff-appellant instead of the defendant-appellant, should necessitate the rejection of the notice of appeal and the petition of appeal. However, in the petition of appeal the names of the appellant and the respondent are correctly stated.

Now I turn my attention to section 759(2), which states as follows :

“In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections (other than a provision specifying the period within which any act or thing is to be done) the 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.”

It appears to me that it is open for this Court to grant relief under the provisions of section 759(2) if in the opinion of this Court the plaintiff-respondent has not been materially prejudiced by the mistake. .

In *Sameen Vs. Abeywickrema*⁽²⁾ the Privy Council held that in the case of a mistake, omission or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just. Therefore, the only limitation imposed by this section is that the Court has no power to do so, unless it is of opinion that the respondent has not been materially prejudiced.

In the instant case the defendant-appellant has only made the mistake of naming the plaintiff as the appellant in the notice of appeal. However, in the petition of appeal, the parties are correctly named as appellant and respondent.

In the case of *Vithana Vs. Weerasinghe*⁽³⁾ Wanasundara, J. discussed the applicability of section 759(2) of the Code to remedy any mistake, omission or defect occurring in the notice of appeal.

It appears to me that if such omission has not caused any prejudice to the respondent, relief could be granted in terms of section 759(3) of the Code.

In the case of *Vithana Vs. Weerasinghe (supra)* at 54, Wanasundara, J. said :

“It can now be said that the time is over when Courts were ready to uphold technical objections to the entertainment of appeals, unless it is a matter of some real substance. The law now contains clear indications for relief to be granted for lapses and the Courts are no longer prevented from doing justice in such cases.”

In the case of *Naraluwa Hewage Edmond Vs. Dharmadasa Wanigaratne and two others*⁽⁴⁾, T. B. Weerasuriya, J. held that the non-compliance with the mandatory provision in section 755(2)(b) of the Civil Procedure Code relating to the failure to name defendants as respondents in the notice of appeal could be remedied under section 759(2) if such omission has not caused prejudice to the defendant and the provisions of section 759(2) were intended to remedy an omission of the nature occurring in the notice of appeal.

In the instant case, I am of the view that no prejudice has been caused to the plaintiff merely because the plaintiff-respondent's name had been erroneously stated as the defendant-appellant, for the reason that in the petition of appeal which was filed soon after the notice of appeal the parties to the action were correctly described. Accordingly, the said mistake in the notice of appeal could be remedied under section 759(2).

The plaintiff-petitioner seeks leave to appeal against the order made by the learned Judge dated 08.10.2003. The issue involved in this application is an incidental order which could easily be dealt with in the final appeal which has already been made by the defendant, and in such a situation the plaintiff-petitioner's application should be rejected as premature.

In the case of *Anushka Wettasinghe Vs. Nimal Weerakkody and others*⁽⁵⁾ Soza, J. observed that :

“The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage.”

Similarly, Keuneman, J. held in *Balasubramaniam Vs. Valliappar Chettiar*⁽⁶⁾ that the Supreme Court is free to consider the points raised in an interlocutory appeal rejected for non-compliance with the requirements of the Stamps Ordinance in the final appeal.

In the circumstances I am of the view that this Court should discourage appeals against incidental decisions of this nature when it could conveniently and more expediently be dealt with in a final appeal.

For these reasons, there is no need for this Court to interfere with the order made by the learned District Judge of Kandy dated 08.10.2003 and accordingly, I refuse the plaintiff-petitioner's application for leave to appeal with costs fixed at Rs. 2,500.

Application dismissed.
