

1938

Present : Poyser S.P.J. and Koch J.

THEVANAI *et al.* v. SINNAPPU.*Application for Leave to Appeal, D. C., Jaffna, 7,163.**Leave to appeal notwithstanding lapse of time—Failure to tender correct stamp for judgment in appeal—Not a cause beyond the control of applicant—Civil Procedure Code, s. 765.*

Where an appeal was dismissed on the ground that the proper stamp for the judgment in appeal had not been tendered and an application for leave to appeal in the case, notwithstanding lapse of time, was made under the provisions of section 765 of the Civil Procedure Code.

Held, that the appellant was not entitled to have leave to appeal, notwithstanding lapse of time.

THIS was an application for leave to appeal notwithstanding lapse of time.

N. Nadarajah, for petitioner.—The appeal in this case was dismissed originally on the ground that the proper stamp for the certificate in appeal had not been tendered. On the ground that a certain amendment of The Stamp Ordinance had not been brought to the notice of the Supreme Court, the case was listed again for argument, when it was discovered that the stamp for the certificate in appeal was correct, but that there was a deficiency of three rupees in respect of the stamp for the judgment of the Supreme Court ; and the previous order dismissing the appeal was therefore affirmed. If the Supreme Court itself and the lawyers were not sure what the correct stamp was, how much more should the petitioner not have known it. That the stamp was deficient is a cause not within his control. On the facts, the grounds of appeal are *ex facie* good. In *Peiris v. Silva*¹, the full Bench held that appeal notwithstanding lapse may be granted even if the regular appeal has been dismissed on some technical ground. *Nagappa Chetty v. Kretser*² followed that decision.

L. A. Rajapakse, for the respondent.—The jurisdiction of the Supreme Court to allow leave notwithstanding lapse of time under section 765 exists, where the provisions of section 754 and section 756 have not been observed. It has no application to cases where the appeal has been dismissed because the proper stamp has not been tendered.

¹ (1918) 20 N. L. R. 318.² 4 Bal. Notes 98.³ 3 C. L. R. 21.

The question of the correct stamp is referred to in the Stamp Ordinance, No. 22 of 1909. That it is an imperative requirement has been held in *Attorney-General v. Karunaratne*¹.

The cases relied on by the petitioner support my contention. *Peiris v. Silva* (*supra*) and *Nagappa Chetty v. Kretser* (*supra*). Both show that it is only where there is a non-compliance with the provisions of section 754 and section 756 that the Supreme Court will entertain an application for leave notwithstanding lapse. In an unreported decision—Application notwithstanding lapse, D. C. Galle, 31,407, S. C. Minutes of April 7, 1936 (Revision cases), a similar application, where the proper stamp for the decree in appeal had been tendered a few days later, was refused.

Ignorance of the law with regard to what is the correct stamp cannot possibly be said to be a cause beyond his control.

Cur. adv. vult.

March 28, 1938. POYSER S.P.J.—

This is an application under section 765 of the Civil Procedure Code for leave to appeal notwithstanding lapse of time in D. C. Jaffna, No. 7,163. This case came up before my brother Soertsz and myself early last year. The case was listed for dismissal on the ground that the petition of appeal had been insufficiently stamped, the point being whether a claim in respect of property valued at Rs. 500 and a claim for damages for two months was a claim for an amount exceeding Rs. 500. We held that it was and the appeal was accordingly dismissed. Subsequently, on September 28, 1937, it appeared that we, in adjudicating in that case, had not considered the latest amendments to the Stamp Ordinance. We however decided that that fact did not affect the decision in this case, although it did affect the decision in another case in which the appeal had been dismissed for similar reasons. The affidavit in this application was made some two months after, namely, on November 30, 1937.

I do not think this application can be granted. In the first place section 768 provides that "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 sections 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". The failure to stamp a document correctly cannot be said, in my opinion, to be a cause not within the control of the appellant. Those words, in my opinion, refer to such matters as illness or other circumstances which would prevent a litigant from complying with the provisions of sections 754 and 756. I do not think such words were intended to apply to questions of stamp duty. It has been argued that as section 754 provides for the filing of a petition of appeal and that such appeal must necessarily be stamped, that the provisions of these sections do include stamp duties. On the other hand, it is clear in my opinion that the whole question of stamp duties is contained in the Stamp Ordinance and not in the Civil Procedure Code.

Apart from this view of the scope of section 765, the point that arises on this application has already been decided when this case first came

¹ 37 N. L. R. 57.

before my brother Soertsz and myself. In our judgment which is reported at 39 *New Law Reports*, p. 121, there occurs this passage:—"There is one further point, viz., whether this appeal must be dismissed or whether the defect can now be cured. There seems no doubt that the court must dismiss the appeal and this point is settled by authority". The authorities referred to were the cases of *Salgado v. Peiris*¹, and *Hurst and another v. The Attorney-General*². In those cases it was held that where a petition of appeal was insufficiently stamped that there was no power to allow it to be properly stamped after the time for appealing had expired and that the appeal must necessarily be dismissed. It was further pointed out in those cases that section 36 of the Stamp Ordinance prohibited the court from acting upon the instrument. Consequently in this case if we were to accede to this application, we would in effect be ignoring the stringent provisions of section 36 of the Stamp Ordinance.

The application is refused with costs.

Koch J.—I agree.

Application refused.