

Present : Fisher C.J., Garvin, Lyall Grant, Drieberg,
and Akbar JJ.

1929.

BOYAGODA *v.* MENDIS *et al.*

182—D. C. Colombo, 19,574.

*Appeal—Time limit—Period of ten days—Exclusion of the last day—
Civil Procedure Code, s. 754.*

Where a judgment sought to be appealed from was delivered on August 2, and a petition of appeal was presented on August 16, there being an intervention of two Sundays and a public holiday,—

Held, that the petition of appeal had been filed within the period of time prescribed by section 754 of the Civil Procedure Code.

Where an enactment concerning procedure has received a certain interpretation, which has been recognized by the Courts for a long period of years, the practice based upon such interpretation should be followed.

CASE referred under section 54A of the Courts Ordinance for decision by a Bench of Five Judges.

The question involved was whether a petition of appeal had been filed within the period of time prescribed by section 754 of the Civil Procedure Code. The section runs as follows :—

The petition of appeal shall be presented to the Court of first instance for this purpose by the party appellant or his Proctor within a period of ten days, or where such Court is a Court of Requests, seven days, from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the Court to which the petition is so presented shall receive it and deal with it as hereinafter provided.

The judgment sought to be appealed against was delivered on August 2 and the petition of appeal was presented on August 16. August 15 was a public holiday and there were two Sundays intervening.

E. W. Jayewardene, K.C. (with *Koch* and *Ameresekere*), for respondent, raised the objection.

Under section 754 the appeal has to be filed " within " ten days, exclusive of the day of filing of the appeal.

1929.
Boyangoda
v.
Mendis

Rules 8 (1), (2), (3) of the Rules and Orders under the Charter of 1833 employed the words "in which"; and by the use of the word "within" in section 754 the Legislature merely used other words to convey the same idea.

When the word "within" was used, it was not quite certain whether the two terminal days were excluded or included. It was in that state that the section was framed.

The effect of the section, in practice, is to give so many "clear" days.¹

"Within" excludes the first day and includes the last day, subject to any exception in the Statute.²

As Sundays and public holidays are not to be counted, they are not "days" within the meaning of the section.

This section has been so interpreted by authoritative usage, and usage has the authority of law. Long established usage cannot be lightly overruled.³

The section must be so construed that all the words are given their full meaning. The interpretation placed upon it in the above two cases makes it possible to do so.

The judgment of this Court in S. C. 325, D. C. Matara, 2,288 (S. C. Minutes of February 28, 1929), defeats the intention of the Legislature and gives no effect to a part of the section.

H. V. Perera, for the appellant, adopted the authorities cited by Counsel for respondent. Counsel submitted, further, that because the section excludes the day of the filing of the petition of appeal, the legal effect is that the filing of the petition at any moment of the eleventh day, is referred back to the last moment of the tenth day and so it is filed "within" the ten days. The day of the actual filing of the appeal has no time value in law.

March 18, 1929. FISHER C.J.—

The question we are called upon to decidé arises from a preliminary objection to the hearing of an appeal. The objection is based on the second paragraph of section 754 of the Civil Procedure Code, which provides, so far as is necessary to set it out, that "The petition of appeal shall be presented within a period of ten days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays"

The judgment sought to be appealed against was pronounced on Thursday, August 2, and the petition of appeal was presented on Thursday, August 16. Owing to the intervention of two Sundays

¹ 2 C. L. R. 96 (*Babapulle v. Domingo*); S. C. 428, C. R. *Keyalla*, 6812 (S. C. Mins. of March 11, 1907).

² (1914) *Yearly Practice*, p. 1031.

³ 27 *Hals.*, s. 266.

the tenth day of the period prescribed by the section was Tuesday, August 14. August 15 was a public holiday, and on the next day the first available day after the date of the expiration of the period prescribed, the petition was presented.

If we were called upon to decide this question merely from a consideration of what is the true construction of the words in question I should feel constrained to allow the preliminary objection. I do not think that the words "exclusive of the day of that date itself" which are relied upon to modify what on the face of it is the plain meaning of the words "within a period of ten days" can have the effect contended for. It is contended that the effect of those words is that notwithstanding the express direction that the petition of appeal shall be presented within a period of ten days this provision must be read as permitting the presentation of the petition on the day after the expiration of the period, or on the first available day after the expiration of the period. The effect of this contention would be that the day, on which the thing which is directed to be done within a period of ten days is done, is not to count in reckoning the period. That would, in my opinion, make the provision self-contradictory, and if the intention of the Legislature was that the words should be construed so as to expand the period of ten days in such a way that something done after the period had expired was to be deemed to have been done within it, it has failed to give expression to its intention. There may be ways of giving effect to the words relied upon without giving them the effect which is contended for, but any such interpretation could not be in a direction which would assist the contention which has been put forward. In my opinion the true construction of the paragraph involves that once the period of ten days has begun to run, the exclusions must be limited to days which intervene during the currency of the period and that the presentation of a petition of appeal when that period has come to an end, is out of time.

There is, however, another aspect of the question which has been brought before us on the hearing of this reference. It is quite clear that for many years it has been the practice of the District Courts to receive petitions of appeal and to treat them without question as if they had been presented in accordance with the terms of the section when they are presented on the day after the expiration of the ten days, or on the first available day for presenting them after the expiration of the ten days. A case decided in 1892 was brought to our notice (*Babapulle v. Domingo*¹), where in applying the section in question to a matter arising under section 8 of the Ordinance No. 11 of 1882 Mr. Justice Lawrie, with the approval of Mr. Justice Withers, gave a decision recognizing this practice. It was further recognized and endorsed by Chief Justice Wood Renton, then

1929.
 FISHER C.J.
 Boyagoda
 v.
 Mendis

1929. Mr. Justice Wood Renton, in an unreported case S. C. 428—C. R. FISHER. C.J. Kegalla, No. 6,812 (S. C. Minutes of March 11, 1907). Under these circumstances another consideration arises, namely, whether where as here, an enactment concerning procedure has been acted upon Boyagoda for a long period of years; probably ever since the enactment came v. into force, in accordance with a construction which has been Mendis accepted and recognized by judicial authority this Court should hold that a different construction ought now to be put upon the enactment. There is the authority of a decision of the Privy Council for saying that this should not be done. In the case of *Migneault v. Malo*¹ it was held by the Privy Council that inasmuch as for a long period of years the Canadian Courts had acted on a construction of a law relating to jurisdiction which the learned Judges thought was not the true construction of the law "they ought not to advise Her Majesty that a different construction ought now to be put on the law." In my opinion, especially having regard to the fact that this is a question which arises in connection with a purely technical matter of procedure, we should follow the course adopted by the Privy Council.

In my opinion, therefore, on that ground the preliminary objection should be overruled, and I would make no order as to the costs of the hearing before us.

GARVIN J.—

The question referred under section 54A of the Courts Ordinance for determination by a Bench of Five Judges relates to a preliminary objection to the hearing of Appeal No. 182, District Court (Interlocutory), Colombo, No. 19,574, upon the ground that the petition of appeal in that case was not presented to the Court of first instance within the period of time prescribed by section 754 of the Civil Procedure Code. That section is as follows :—

The petition of appeal shall be presented to the Court of first instance for this purpose by the party appellant or his Proctor within a period of ten days, or where such Court is a Court of Requests, seven days, from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the Court to which the petition is so presented shall receive it and deal with it as hereinafter provided. If those conditions are not fulfilled it shall refuse to receive it.

The party appellant is required to file his petition of appeal within a period of ten days from the date when the order or decree appealed against was pronounced. The Legislature has further provided that in the ascertainment of that period the day upon

¹ (1872) L. R. 4, P. C. 123.

which the judgment was pronounced shall be excluded, and that there shall also be excluded the day when the petition is presented and Sundays and public holidays. The first day to be reckoned in ascertaining this period of ten days is not the day of the judgment but the first day after the judgment, and the second day to be so reckoned is the second day after the judgment; assuming that the next day is Sunday, the provisions of law to which I have drawn attention require that it should be excluded from the reckoning. The third day, therefore, of the period of ten days would be the fourth day after the judgment, and in this way the tenth day is reached.

In the particular case under consideration judgment was delivered on the 2nd of the month; the 3rd of the month was, therefore, the first day of this period of ten days, the 4th of the month was the second day. The 5th was a Sunday and consequently must be excluded; so that the 6th of the month was the third day, and in this way we find that the eighth day of the period was the 11th of the month. The next day was a Sunday; the ninth day of the period was, therefore, the 13th of the month, and the 14th of the month the tenth day. The day following was a public holiday and the petition of appeal was actually filed on the 16th. The period of ten days in this particular case, therefore, is made up of the following days:—3rd, 4th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, and 14th. It is urged, however, that a petition of appeal filed on the 16th is in time, for the reason that the words "exclusive of the day when the petition is presented" have the effect of giving a party appellant the right to file his petition upon the day following the tenth day. That day would be the 15th, but inasmuch as in this instance the fifteenth day was a public holiday, the act done on the sixteenth day was for all purposes as effective as if it had been done on the 15th.

The main contention is that section 754 does in effect give an appellant ten clear days for the filing of his petition. It is well settled law that in a case where a number of clear days is allowed for the doing of an act, that act is done in time if it is done on the day next after the expiry of the last day—the effect being to give an additional day for the performance of the act. And on this basis it is urged that a petition of appeal presented to Court on the eleventh day is in time.

I am unable to place such a construction upon the language of section 754, which does not give ten clear days in terms, but on the contrary expressly requires that the petition shall be presented within a period of ten (not eleven) days. The circumstance that the day when the petition is presented is one of the days which the section declares shall be excluded in computing the period of ten days is the sole foundation for the contention.

1929.
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 GARVIN J
 ———
 Boyagoda
 v.
 Mendis

1929.
 GARVIN J.
 Boyagoda
 v.
 Mendis

If as is suggested, it was the intention of the Legislature to give ten clear days, it seems to me that such an intention is not expressed in the language it has used. It is quite possible to give effect to the words "exclusive of the day when the petition is presented." A petition of appeal presented on any day before the tenth day is reached in the ascertainment of the period can be excluded, though it is difficult to see what practical advantage that can be, since if the petition be filed on the tenth or any day before that day is within the period prescribed.

In regard to a petition filed after the period of ten days, e.g., on the eleventh or some subsequent day, the words "exclusive of the day when the petition is presented" can be of no avail for it is impossible to exclude in the ascertainment of a period of ten days from a specified event a day which had not come into existence till that period had expired, even as it is impossible to exclude from a defined area that which is not within it. Once the tenth day is reached, computing from the day following the judgment after excluding the days, which are required to be excluded, as they occur in the course of the reckoning, no further exclusion is possible.

Where the object and intention of the Legislature has been clearly manifested in an enactment, but the language of certain of its provisions creates difficulty in giving effect to that intention, it has been found possible to give the language a special interpretation other than its ordinary meaning so that the intention of the Legislature may be carried into effect.

This is not such a case. We have here a single section which does not clearly manifest the intention of the Legislature and no other indication of its intention. If we are to indulge in conjecture it is possible to ascribe other intentions to the Legislature than the one suggested. In my judgment the correct construction of the section is that given to it by Fisher C.J. and Akbar J. in the case of *Deonis v. Thiselhamy*.¹

But on the other hand there can be no question that for a third of a century and more it has been the practice to treat an appeal as in order if it is presented on the day after the expiration of the ten days, or if that day be a Sunday or a public holiday on the first available day thereafter. It is suggested that this practice dates back to the days when the procedure in our Civil Court was regulated by rules and orders. In 1892 soon after the Civil Procedure Code came into operation, the matter appears to have been considered by the Supreme Court in the case of *Babapulle v. Domingo*² when a Bench of two Judges delivered a judgment which recognizes and approves of this practice. In the year 1907, the point appears to have been expressly taken before Wood Renton C.J. in S. C. No. 428,

¹ S. C. No. 325, D. C. Matara, No. 2,288; S. C. Mins., February 28, 1929.

² 2 C. L. R. 96.

C. R., Kegalla, No. 6,812 (S. C. Mins. of March 11, 1907), who took the same view. This is, therefore, a case in which a practice based upon a certain interpretation of this section has been in existence for a very long period of years, and has been approved and been recognized by this Court so far back as 1892 and subsequently in 1907. The point in itself is a highly technical one, though its consequences are far-reaching. In the special circumstances of this case I prefer to adopt the course taken in *Migneault v. Malo*¹ and hold that we should not now give to the section a different interpretation to that which it has borne even though our own opinion is that that interpretation is incorrect.

I agree with the Chief Justice, whose judgment I have just perused.

LYALL GRANT J.—

On the interpretation of section 754 of the Civil Procedure Code I incline to the view taken by Lawrie J. and by Wood Renton J. that the intention of the Legislature was to allow ten clear days, exclusive of Sundays and public holidays, between the date of the decree and the day of presenting the petition of appeal.

I agree, however, with the rest of the Court that this intention is not clearly expressed and that this reading of the section fails to give full effect to the word “within”.

The alternative reading seems to me not to give effect to the words “exclusive of the day when the petition is presented.” It is difficult to understand why these words were inserted, unless it was for the purpose of allowing an extra day.

I prefer, however, to rest my judgment on the ground proposed by my Lord the Chief Justice and agreed to by the rest of the Court, that there has been a *contemporanea expositio* of the meaning of the section by a long continued and apparently unbroken practice which has received some judicial sanction.

DRIEBERG J.—

I agree with the judgment of my Lord the Chief Justice.

AKBAR J.—

I agree with the judgment of my Lord the Chief Justice.

1929.
GABVIN J.
Boyagoda
v.
Mendis

¹ (1872) L. R. 4, P. C. 123.