

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

In the matter of a Special Leave to Appeal under
Article 128 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

1. Sumith Ediriwickrama
Competent Authority
Pugoda Textiles Lanka Ltd.
997/15, Sri Jayawardenapura Mawatha
Welikada Rajagiriya, and
Three Others.

2. Charitha Ratwatte
Secretary to the Treasury
The Secretariat
Colombo 01.

RESPONDENTS-APPELLANTS

SC Appeal No. 85/2004

SC (Spl.) Leave to Appeal No. 330/2003 -VS-

C.A. Application No. 1682/2002

1. W.A.Richard Ratnasiri
Pelpita, Pugoda, and
Two Thousand Sixty Two Others

PETITIONERS – RESPONDENTS

BEFORE:

Hon. Marsoof, PC, J,
Hon. Sripavan, and
Hon. Imam J

COUNSEL:

Y.J.W.Wijayatilake, PC, Solicitor General, with H.P.
Ekanayake, State Counsel for the Respondent-
Appellants

Upul Jayasuriya for the Petitioners-Respondents

ARGUED ON:

18.12.2012

SALEEM MARSOOF J:

On 28th November 2012, when this case was due to be resumed before this bench, learned Counsel for the Petitioners-Respondents (hereinafter referred to as the Respondents) moved to raise the following two preliminary objections, which had not been previously taken up by learned Counsel on any of the previous dates in this case. The said objections were based on-

(1) the alleged non-compliance with Rules 3 and 7 of the Supreme Court Rules, 1990 insofar as the appeal is time-barred; and

(2) the alleged non-compliance with Rule 8(3) of the aforesaid Rules insofar as the Appellant had failed to properly take out notices on the Respondents.

Before dealing with the said preliminary objections, it is useful to set out the material of this case.

This Court has on 9th December 2004 granted special leave to appeal against the judgement of the Court of Appeal dated 28th October 2003. However, although thereafter the case came up for hearing on 4th August 2005, 1st December 2005 and 9th September 2006 hearing was postponed due to various reasons. On 21st June 2006 when the case was again taken up for hearing, a formula for the amicable resolution for the dispute was suggested by learned Counsel for the Respondents-Appellants (hereinafter referred to as the Appellants), and learned Counsel for the Appellants wished to obtain instructions in regard to the said proposals. Thereafter, the case was mentioned on several dates and on 21st August 2006 learned counsel for the Appellants agreed to release a sum of Rs. 10 million for the purpose of partially settling the claim made on behalf of the Respondents, without prejudice to the final outcome of the appeal.

When all endeavours in working out an amicable resolution of the dispute failed, the case was ultimately fixed for hearing before this bench on 11th January 2010, before which learned Counsel made submissions. The hearing was thereafter resumed on 10th March 2010, 2nd September 2011 and on 11th March 2012. On 21st March 2012, learned counsel for the Respondents objected to the learned Solicitor General appearing for the Appellants in this case on the basis that no proxies had been filed, and since in fact no proxies were available in the original docket, the Registrar of this Court was directed to clarify the position and report to Court, and hearing was resumed for 28th November 2012.

When hearing was resumed on 28th November 2012, although due to the load of work on that day there was no time to hear learned Counsel any further on the merits, Court brought to the notice of the learned Counsel for the Respondents that the Registrar of this Court has reported to Court that in fact the proxies had been filed along with the applications, but had been kept in a separate file of documents due to their bulk, and the said proxies were made available to court

for its perusal. Learned counsel for the Respondents after satisfying himself that the learned Solicitor General was duly authorised to appear in the case, raised the aforesaid preliminary objections, and due to lack of time submissions on the preliminary objections were resumed for 18th December 2012, and learned Counsel agreed to file written submissions with respect to the preliminary objections.

On 18th December 2012, learned Counsel agreed that the said preliminary objections may be taken up for hearing before they are called upon to make further submissions on the merits, and the Court heard oral submissions of Counsel on the said preliminary objections, and reserved its determinations thereof. The two preliminary objections may be dealt with separately.

Non-compliance with Rules 3 and 7 – The Time Bar

In order to put the first preliminary objection relating to time-bar in its proper perspective, it may be mentioned that Rule 2 of the of the Supreme Court Rules, 1990 provides that every application for special leave to appeal to the Supreme Court filed in terms of Article 128(2) of the Constitution against a judgment or order of the Court of Appeal shall be made by a petition in that behalf together with affidavits and documents in support thereof as prescribed in Rule 6.

Rule 3 of the said Supreme Court inter-alia provides that the petition filed for the purpose of seeking special leave to appeal “shall contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted, *including the questions of law in respect of which special leave to appeal is sought*, and the circumstances rendering the case or matter fit for review by the Supreme Court.” *(emphasis added)*

Rule 7 of the Supreme Court Rules, 1990, provides that-

Every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought.

In essence, the first preliminary objection taken up on behalf of the Respondents was that the amended petition dated 30th November 2004 filed by the Appellant was filed outside the mandatory time limit of six weeks provided in Rule 7 for the lodging of an application for special leave to appeal, although the original petition dated 9th December 2003 was filed within time. It is common ground that the judgement of the Court of Appeal appealed from was pronounced on 28th October 2003, and that the six week period for filing applications for leave to appeal expired on 9th December 2003, but learned Counsel for the Petitioner, relying on Rules 3 and 7 of the Supreme Court Rules, 1990, submitted that the purported amendment was out of time.

In this case petition was filed seeking special leave to appeal by the Appellant on 9th December 2003. Thereafter, on 10th November 2004 an application was made by the learned Solicitor-General to file an amended petition, and Court granted him permission to do so subject to any

objections that may be taken up on behalf of the Respondents to the amended petition. An amended petition was thereafter filed on 30th November 2004.

The order of the Supreme Court granting special leave to appeal was made on 9th December 2004 and the order of court is reproduced below:

09/04/12

*Before: S.N. Silva, CJ,
Shiranee Tilakawardena J,
Raja Fernando J*

Y.A.W. Wijethileke, DSG, for Petitioner

Upul jayasuriya for Respondents

Special Leave to Appeal is granted. Written Submissions according to rules.

List for hearing on 5.5.2005.

From this order it appears that no objection was taken to the amended petition by learned Counsel for the Respondents, but it is not specifically stated in the said order as to on what questions of law special leave was in fact granted.

It is necessary to explain at this stage the context and the importance of this preliminary objection to the Respondents. The main remedy granted by the Court of Appeal to the Respondents was a writ of mandamus against the Appellants to compel them to pay the Respondents the balanced components of their salaries arrears as claimed by them for the period May 1997 to 31st December 1999. In the original petition of appeal dated 9th December 2003, the jurisdiction of the Court of Appeal to grant such relief was not sought to be challenged. The three substantial questions of law set out in paragraph 14, on the basis of which special leave to appeal had been initially sought were as follows:-

- (a) Did the Court of Appeal misinterpret the provisions of Section 3(4) of the Rehabilitation of Public Enterprises Act No. 29 of 1996?*
- (b) Did the Court of Appeal err in law and in fact in not considering that the Petitioners had accepted the Voluntary Retirement Scheme as a full and final settlement of all duties, including wages, due to the Petitioners?*
- (c) Did the Court of Appeal err in law and in fact in not considering that the Petitioners had accepted the compensation under the Voluntary Retirement Scheme as a full and final settlement of all dues, including wages, due to the Petitioners?*

However, it appears from paragraph 15 of the amended petition dated 30th November 2004, that the substantial questions on which leave was sought differed significantly, in that though question (a) was identical from the corresponding question in the original petition and question (b) was in substance re-designated as question (c), question (b) was altogether new and read as follows:-

(b) Did the learned Judge of the Court of Appeal err in law by issuing a writ of mandamus to enforce a monetary claim against the State?

Learned Counsel for the Respondents in the course of his submissions before this Court, strongly objected to question (b) which sought to challenge the jurisdiction of the Court of Appeal to grant a writ of mandamus in the circumstances of the case, mainly on the basis that it had neither been raised in the pleadings nor in the submissions of Counsel in the Court of Appeal, or even in the original application seeking special leave to appeal dated 9th December 2003. He stressed that he was willing to concede that the Appellants were not prevented by Rule 3 from setting out in their petition seeking special leave to appeal, any questions of law without taking them up in the Court of Appeal, but what he was objecting to was the inclusion of such questions for the first time in an amended petition, well outside the time limit for filing the application seeking special leave to appeal. He stressed that his objection was to the raising of fresh questions of law including those pertaining to the jurisdiction of the Court of Appeal outside the mandatory time limit prescribed for lodging applications for leave to appeal which has to be strictly complied with to avoid the opening of flood gates at the will and fancy of reckless litigants and their respective legal advisors.

In particular, learned Counsel for the Respondent invited the attention of Court to Section 39 of the Judicature Act which provides that any objection to jurisdiction must be taken at the first available opportunity in the relevant court, which in this instance was the Court of Appeal, and they cannot be raised for the first time on appeal, an objection to jurisdiction which had not been taken up in the pleadings filed in the Court of Appeal or even the initial petition filed in this Court.

Responding to these submissions, learned Solicitor General has submitted that the original application seeking special leave to appeal was filed in the Registry of this Court on 9th December 2003, within the time-limit prescribed in Rule 3 for such applications, and that the amendment to the petition was filed on 30th November 2004 after obtaining the permission of this Court on 10th November 2004. He submitted that insofar as the amended petition had been filed with the prior permission of this Court, the Appellants have not violated Rules 3 and 7 of the SC Rules 1990. He has further submitted that no prejudice has been caused to the Respondents by the said amendment to the petition of appeal.

Section 39 of the Judicature Act provides as follows:-

Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled

to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.

The above provision is similar but not identical with the provisions of its predecessors, Section 43 in the Administration of Justice Law No. 44 of 1973 and Section 71 of the Courts Ordinance No. 1 of 1889, and they have from time to time been interpreted and applied by our courts.

This Court has granted special leave to appeal against the judgement of the Court of Appeal dated 28th October 2003 presumably on the substantial questions of law set out in paragraph 15 of the amended petition subsequently filed by the Appellant, despite it being filed outside the time period of 6 weeks permitted by Rules for filing of applications for special leave to appeal. Since no objections had been taken to the said amended petition on 28th October 2003, or on any of the other dates this case had been heard, and in fact this preliminary objection has been raised by learned Counsel for the Respondent only on 28th November 2012 when hearing was due to be resumed after several previous dates of hearing when learned Counsel had made submissions on the merits, it is my opinion that it is too late to raise an objection of this nature as a preliminary objection. Hence, the said preliminary objection is overruled.

Non-compliance with Rule 8(3) – Failure to take out Notices on all the Respondents

The second preliminary objection taken up by the learned Counsel for the Respondents is that this appeal warrants to be dismissed in *limine* as the Appellants have not complied with Rule 8(3) of the Supreme Court Rules 1990, since the Appellants have failed to tender the notices to be served on all Respondents. It is the position of the learned Counsel for the Respondents that notice had been served only on one or two of the thousands of respondents. He has submitted that it has been time again held by this Court that the tendering of the required number of notices to the Registrar of Court is a mandatory Rule of Court and non compliance of the same warrants the dismissal of such appeal or application in *limine*.

Rule 8(3) of the aforesaid SC Rules is quoted below:

The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any, of the attorney-at-law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars.

It is further submitted by the learned Counsel for the Respondents that this Court has in *A.H.M. Fowzie v Vehicles Lanka (Pvt) Ltd* (2008) BLR 127 and in the very recent case of *Tissa*

Attanayake v The Commissioner General of Election and Others [S.C. (Spl.) L.A. No. 55/2011 C.A. Writ Application No. 155/2011 – decided on 21.07.2011], dismissed the relevant special leave to appeal applications, after dealing carefully with the said Rule, its application, authorities. This Court has, in interpreting the law on the Rule, held that the procedure laid down in the Supreme Court Rules of 1990 cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections, (copy of judgement annexed X1). He submits that in this case too the application of the Appellants should be dismissed in *limine*.

Responding to these submissions, the learned Solicitor General has submitted that the Appellants filed the instant application for special leave to appeal in time, and that after receiving notice, all the Respondents have tendered their Caveats together with their proxies on 10th February 2004. The said Respondents were represented by Counsel throughout the hearing for special leave to appeal, and even after the granting of special leave to appeal. He has further submitted that at no time during the pendency of the said special leave to appeal application, the Counsel for the Respondents raised any preliminary objection that notices have not been tendered according to the provisions laid down in Rule 8(3) of the said Rules, and the Counsel for the Respondents is raising the said objection nearly ten years after the said special leave to appeal application was filed in court and special leave to appeal was granted by this Court. He submits that hence no prejudice has been caused to the Respondents at all as the Respondents were represented in Court by Counsel and in fact the Respondents and the Appellants made several attempts at setting this case. He said that with the object of reaching a settlement, the Appellants, without prejudice to their case, had released a sum of money to the Respondents that was available, as an *ex gratia* payment, strictly on compassionate grounds. He submits that by reason of their acquiescence, the Respondents are precluded in law from raising the said preliminary objections at this stage as it is not only belated but the Respondents are estopped by law from doing so.

I am inclined to accept the said submissions of learned Solicitor General in view of the belated nature of the raising of this preliminary objection. This Court is inclined to highlight and apply in the special circumstances of this case the objective of achieving smooth functioning of this Court, and it will not be correct at this stage to do otherwise despite the decisions referred to by learned Counsel for the Respondents which were made when the objections were taken at the appropriate stage. Accordingly, this preliminary objection, too, is overruled.

Conclusions

Accordingly, the preliminary objections taken up by learned Counsel for the Respondents is overruled. I do not make any order for costs in all the circumstances of this case.

In view of the fact that the hearing of this case has been delayed due to taking up frivolous objections by learned Counsel for the Respondents, who even went to the extent of challenging the status of learned Solicitor General to appear in this case, it has become necessary to have it

fixed for hearing as expeditiously as possible before a Bench to be nominated by Hon. Chief Justice in such a manner that the two other members of this Bench who will remain after the retirement of Hon. Imam J, will be members of the Bench before which this case will be taken up for hearing on a date that is convenient to Court.

JUDGE OF THE SUPREME COURT

SRIPAVAN J

I agree

JUDGE OF THE SUPREME COURT

IMAM J

I agree

JUDGE OF THE SUPREME COURT