IN THE SUPREME COURT OF SRI LANKA

In the matter of an application for Special Leave to Appeal under an in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC SPL / LA NO. 122-123/2011
CA (WRIT) No. 878-879/08

1. The Municipal Council of Moratuwa,
2. His Worship Lord Mayor Moratuwa,
3. The Municipal Commissioner,
All are of Moratuwa Municipal Council,
Galle Road, Moratuwa.

Respondent – Petitioners

Vs.

Weerahennadige Shian Hiresh Fernando,
No. 04, De Vos Avenue,
Colombo 04.

Petitioner – Respondent

BEFORE : Hon. Saleem Marsoof, P.C., J.
Hon. Chandra Ekanayake J.
Hon. Priyasath Dep, P.C., J.

COUNSEL : Rasika Dissanayake for the 1st, 2nd and 3rd Petitioners
Chrismal Wanasuriya with Sanjaya Wilson Jayasekera for the Respondent.

Argued on : 5.10.2011
Written Submission on : 5.11.2011
Decided on : 31.10.2012

SALEEM MARSOOF J.

When these applications for special leave to appeal from judgments of the Court of Appeal were taken up for support, learned Counsel for the parties agreed that they may be dealt with together as they are connected applications. Learned Counsel for the Petitioner-Respondent (hereinafter referred to as the Respondent) also took up three preliminary objections to each of the said applications, namely:-

(a) that the application has been filed out of time in violation of Rule 7 of the Supreme Court Rules, 1990;

(b) that there is a violation of Rule 2 of the said Rules as no affidavits supporting the averments in the petition have been annexed; and

(c) that Rule 6 of the said Rules has been violated as paragraphs 14, 15 and 16 of the petition contained material outside or external to the judgment of the Court of Appeal sought to be impugned, and there are no affidavits in support of those averments.

Since the learned Counsel for the Respondent has in paragraph 05 of his written submissions dated 5th November 2011 indicated that he does not intend to pursue the aforesaid preliminary objection (b), Court has only to rule on the preliminary objections set out in paragraphs (a) and (c) above.

Failure to File Timely Application for Leave to Appeal

Preliminary objection (a) raises the question whether the petitions filed by the Petitioners seeking special leave to appeal were filed in time. To put the question in context, 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 7 of the Supreme Court Rules 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.” (*emphasis added*)

The question that arises for determination in the context of preliminary objection (a) is whether the petitions of the Respondent-Petitioners (hereinafter referred to as the Petitioners), seeking special leave to appeal against the impugned judgments, have been lodged in the Registry of this Court in compliance with Rule 7. Admittedly, it is a mandatory requirement of law that all applications for special leave from a decision of the Court of Appeal have to be filed within the time limit prescribed in Rule 7 of the Supreme Court Rules, namely, within six weeks of the order, judgment, decree or sentence of the Court of Appeal.

There is no controversy as regards the date of lodgement by the Petitioners of their petitions seeking special leave to appeal in the Registry of this Court, as it appears clearly from the date stamp placed on the original of the said petitions that they were lodged on 24th June 2011.

What is actually disputed by the parties in this case is the date from which the running of the six week period permitted by Rule 7 for lodging an application for special leave to appeal should commence, and the final date prior to which the applications for special leave should have been made in terms of the said rule. The journal entries of the Court of Appeal, a certified copy of which has been made available by the Petitioners, clearly reveal that the cases were originally set for judgment on 12th May 2011, but no judgement was delivered on that date and was re-fixed for delivery the very next day, namely on 13th May 2011, on which date the judgments were in fact pronounced in open Court by the then President of the Court of Appeal.

Both on 12th May 2011 and 13th May 2011 parties were represented by learned Counsel. For the purpose of determining the first preliminary objection raised on behalf of the Respondent, it is crucial to decide whether for the purpose of computing the period of six weeks stipulated in Rule 7, the impugned judgments be regarded as judgments of 12th May 2011, which date appears on the face of the said judgments, or as judgments of 13th May 2011, which is the date on which they were actually pronounced.

Learned Counsel for the Petitioners has contended strenuously that Courts have always been guided by the date that appears on the face of the judgment, since that is the date *ex facie* of the judgment and not any other subsequent date on which in fact it may have been "read in Court" or "delivered in public". He has submitted that any other construction would lead to absurdity and be inconsistent with the language use in Rule 7. On the other hand learned Counsel for the Respondent submitted that it is the actual date of pronouncement or delivery of the judgment that should be taken into consideration in computing the six weeks within which the application for special leave has to be made, particularly in the context that both parties were represented in Court by Counsel on the date the judgments were pronounced.

Neither of the learned Counsel was able to refer us to any case law on the question, and my researches too did not lead to any decision in point from Sri Lanka or other jurisdictions. In my considered opinion, what is crucial to the ultimate ruling on the time-bar that is raised by way of a preliminary objection in this case, is the language of Rule 7 of the Supreme Court Rules, 1990, where the key words on which it is necessary to focus in the context of the question at hand are: "*within six weeks of the order, judgment, decree or sentence* of the Court of Appeal" Since the applications for special leave to appeal are against judgments of the Court of Appeal, it is pertinent to consider the meaning of the term "judgment" that appears on Rule 7 of the Supreme Court Rules. This word has been defined in Stroud's Judicial Dictionary of Words and Phrases (6th Edition), pages 1368 to 1369, as follows:

> A 'judgment' is *the sentence of the law pronounced by the court* upon the matter contained in the record (see hereon Co. LLITT.39 A, 168 A); and the decision must be one obtained in an ACTION (*Ex p. Chinery,* 12Q.B.D.342, cited FINAL JUDGMENT; *Onslow v. Inland Revenue,* 25 Q.B.D. 465, cited ORDER). See further DECREE; BALANCE ORDER. In a proper use of terms the only judgment given by a court is the order it makes. The reasons for judgment are not themselves judgments though they may furnish the court's reasons for decision and thus form a precedent (*R.v.Ireland* (1970) 44 A.L.J.R.263). See also *Lake v. Lake*, para. (8) *infra*."

It is clear from the above definition that *pronouncement by the court* is an essential characteristic of a judgment, and in fact, it is trite law that a decision of the judge or judges that constitute a court in written form acquires legal sanctity only when it is pronounced or delivered by the court. Put in another way, without pronouncement or delivery by the judge or judges who constitute a court, the previously written text of the judgment would not have any judicial sanctity.

Thus it is plain as day, that when on 12th May 2011, the Court of Appeal postponed the cases for 13th May for the purpose of pronouncement of judgement, even if the documents which were later delivered as the judgements of the court may have existed, with or without the signatures of one or more of the judges who had heard the cases, they had no judicial sanctity, and that the said documents became the judgements of the court only when they were pronounced on 13th May 2011 by the President of the Court of Appeal.

If is also necessary for the purposes of this decision to consider the interpretation of the word "of" that precedes the words "the order, judgment......" in Rule 7. Learned Counsel for the Petitioners has invited our attention to the *Wharton's Law Lexicon* (15th Edition) page 1190, which states –

> "Of, may denote 'novice', such as origin or existence. It is also defined as meaning 'belonging to, pertaining to, connected with or associated with'. It is also defined as meaning '*from*, among, by, concerning in, or over'. It also means 'owned or manufactured by' or it may mean residing or resident in, Corpus Juris Secundum (Vol.67, p.85)" (*italics supplied*)

What is relevant for our purpose is that the term "of" is synonymous with "from", and that "six weeks *of* the order, judgement etc" means the same as six weeks *from* the order judgment etc. The following passage of Maxwell, *The interpretation of Statutes*, (12th Edition) page 309, will apply with respect to the method of computation to be adopted in computing the period of six weeks specified in Rule 7 as the outer limit for applications for filing special leave appeal to applications in this Court:

> "Where a statutory period runs "from" a named date "to" another, or the statatute prescribes some periods of days of weeks or months or years within which some act

> has to be done, although the computation of the periods must in every case depend on the intention of Parliament as gathered from the statute, *generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included"*.

The above quoted passage has been cited with approval in several decisions of this Court including the judgments of Kulatunga J. in *Tea Small Factories Ltd. v. Weragoda* [1994] 3 SLR 353 and *Sitamparanathan v. Premaratne and Others* [1996] 2 SLR 202. In the *Tea Small Factories Ltd* case the Supreme Court relied on the decisions in *Shah v. Presiding Officer, Labour Court Coimbatore* AIR 1978 SC 12, 16 and *Kailayar v. Kandiah* 59 NLR 117 in holding that the six weeks period should be computed by excluding the date of the judgment appealed from and including the date of filing the application for leave to appeal. The same reasoning was followed in *Sitamparanathan v. Premaratne and Others, supra.* The *dicta* of Sarath N. Silva CJ. in *Selenchina v Mohamed Marikkar and Others* (2000) 3 SLR 100 at 102, which is relied upon by learned Counsel for the Respondent to suggest a contrary interpretation has to be viewed in the context of Section 754(4) of the Civil Procedure Code which expressly excluded "the date of the order or decree appealed from, *the day when the notice of appeal is presented* and of Sundays and public holidays in the computation of the time limit of 14 days", which express words are not found in Rule 7.

Accordingly, since the judgments of the Court of Appeal in the instant cases were pronounced on 13th May 2011, that date should be excluded from the count of six weeks or 42 days and the date of lodgment of the applications for special leave to appeal, namely 24th June 2011, should be included. It will then be seen that the applications for special leave to appeal have been filed on the 42nd day, or within six weeks from 14th May 2011.

For the aforesaid reasons, I am of the opinion that it is manifest that the applications for special leave to appeal have been filed within the period of six weeks specified in Rule 7 of the Supreme Court Rules, 1990. I therefore hold that the said applications for special leave to appeal are not time barred, and preliminary objection (a) must necessarily be overruled.

Inclusion of Extraneous Material Unsupported by Affidavits

This brings me to the next preliminary objection, namely objection (c), which simply is (as formulated by learned Counsel) insofar as paragraphs 14, 15 and 16 of the petition contain material outside or external to the judgments of the Court of Appeal sought to be impugned, and in the absence of any affidavit in support of the averments of those paragraphs, the petitions seeking special leave to appeal do not comply with Rule 6 of the Supreme Court Rules. Rule 6 is as follows:-

> "Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which Special Leave to Appeal is sought, the Petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the Original Court or tribunal). *Such affidavit may be sworn to or affirmed by the Petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts.* Every affidavit by a Petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statements of such facts as the declarant is able of his own knowledge and observation to testify to: provided that statement of such declarant's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit." (*italics added*)

It is noteworthy that the applications filed in this Court have been supported by two affidavits, the first of which is from the 2nd Respondent-Petitioner and the second of which is from the 3rd Respondent-Petitioner, who are respectively the Mayor and the Commissioner of the Moratuwa Municipal Council, which is a juristic person sighted as the 1st Respondent Petitioner to the said applications. Learned Counsel for the Petitioners has submitted that the 2nd and 3rd Respondent Petitioners who have deposed to the said affidavits are respectively the Chief Executive officer and the Chief Administrative officer of the said Municipal Council, and possess personal knowledge of the matters included in the said affidavits.

I note that although in formulating the preliminary objection in question, learned Counsel for the Respondent has referred to paragraphs 14, 15 and 16 of the petitions of the Petitioners, in fact, the reference appears to be to paragraphs 14, 15 and 16 of the

affidavits of the 2nd and 3rd Petitioners, which in fact are paragraphs 13, 14 and 15 of the petition, and which are reproduced below:

> 13. Being aggrieved by the said judgment dated 12.05.2011 of their Lordships' of the Court of Appeal in the Writ application bearing No. C.A. (Writ) 879/08, the Petitioners beg to appeal to Your Lordships' Court with Special Leave obtained at the first instance on the following substantial questions of law among other matters which will be urged by the Counsel for the Petitioners at the hearing of this Special Leave to Appeal Application,
>
> (i) Whether the said judgment of their Lordships' of the Court of Appeal is contrary to the law and materials placed before the Court?
>
> (ii) Whether the said judgment of their Lordships' of the Court of Appeal cannot stand in law whereas the same is *ex-facie* contrary to the provisions of the Municipal Council Ordinance?
>
> (iii) Whether their Lordships Judges of the Court of Appeal have erred in law by failing to appreciate the fact that the circumstances do not warrant the issuance of a Writ of Mandamus as prayed for in the petition of Petitioner-Respondent?
>
> (iv) Whether their Lordships Judges of the Court of Appeal have erred in law by failing to appreciate the fact that the Petitioner-Respondent is not entitled for the discretionary remedies by way of writs as he had failed to name the necessary parties as Respondents who are directly affected by the issuance of a Writ of Mandamus as prayed for in the petition of Petitioner-Respondent?
>
> (v) Whether their Lordship Judges of the Court of Appeal have erred in law by failing to appreciate the fact that the Petitioner-Respondent is not entitled for the discretionary remedies by way of writs merely because their Lordships have come to a conclusion that the affidavits of the Respondent-Petitioners are defective?

(vi) Whether their Lordship Judges of the Court of Appeal have erred in law by failing to appreciate the fact that there was not an iota of evidence placed before the Court to establish the fact that the constructions sought to be demolished are unauthorised constructions?

(vii) Whether their Lordship Judges of the Court of Appeal have erred in law by failing to appreciate the fact that there is no statutory duty cast upon the Petitioners to demolish the purported constructions situated in the Respondent's private land?

(viii) Whether their Lordship Judges of the Court of Appeal have erred and/or misconceived in law in refusing the affidavits of the 2nd and 3rd Respondent-Petitioners whereas there were no defects and/or errors in the said affidavits?

(ix) Whether their Lordship Judges of the Court of Appeal have erred and/or misconceived in law by issuing a writ of mandamus without considering the merits of the Respondent's Application for a Writ?

(x) Whether their Lordship Judges of the Court of Appeal have erred and/or misconceived in law by issuing a writ of mandamus without considering the fact that the Respondent has not come to the court with clean hands?

14. The Petitioners state that the matters referred to in the above paragraph are of public and general importance and the matters referred to above involve substantial question of law which are fit to be reviewed by Your Lordship's Court.

15. The Petitioners seek indulgence of Your Lordships' Court to tender any other documents if so required and specifically plead that they have already applied for a Certified copy of the entries case record of the Writ Application bearing No. CA (Writ) 879/08 and seek the permission of Your Lordships' Court to tender the same as soon as it is obtained.

In my opinion, in all the circumstances of this case, the 2nd and 3rd Petitioners were within their rights in affirming to affidavits in support of the above quoted paragraphs of the

petition, and the preliminary objection is devoid of merit. In any event, learned Counsel for the Respondent has submitted that of the several questions set out in paragraph 14 (should be paragraph 13) of the petition, only questions (i), (ii),(viii) and (ix) can ever be supported by the said Petitioners, and that the other questions would require further support by way of affidavit, as they are not confined to *"allegations of fact which can be verified by reference to the judgment..."* of the Court of Appeal. Paragraphs 14 and 15 contain very formal averments, and were not specifically referred in the submissions of the learned Counsel.

In my view, preliminary objection (c) in the manner in which it has been formulated would not prevent this matter being considered for grant of special leave to appeal, as learned Counsel for the Respondent himself concedes that questions (i), (ii),(viii) and (ix) can be supported by the said Petitioners without traversing outside the judgment of the Court of Appeal.

I accordingly overrule preliminary objection (c). The question whether there is sufficient material to support the matters raised as substantive questions in the petitions filed in this Court has to be determined in dealing with the application for special leave to appeal at the support stage.

Conclusions

Preliminary objections (a) and (c.) are hereby overruled, with costs fixed at Rs. 15,000.00 payable by the Respondent to the Petitioners in each of the cases on or before the next date for support. Both applications will now have to be supported on a date to be fixed when this judgment is pronounced, or on a subsequent date on which this case may be called for fixing a date for support.

JUDGE OF THE SUPREME COURT

HON. CHANDRA EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. PRIYASATH DEP, J.

I agree.

JUDGE OF THE SUPREME COURT