IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for leave to appeal under and in terms of Section5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, read with chapter LVIII of the Civil Procedure Code and provisions of the Constitution.

Case No. SC (CHC) LA

Application No. 37/13

HC Case No. CHC 531/2011/WR

Ranjith Wagaarachchi

No. 246, Thissa Road,

Wali Ara, Netolpitiya.

PLAINTIFF

Vs.

Union Assurance P.L.C

Union Assurance Centre

No. 20, St Michal Road,

Colombo 03.

DEFENDANT

AND NOW BETWEEN

Ranjith Wagaarachchi

No. 246, Thissa Road,

Wali Ara, Netolpitiya.

PLAINTIFF - PETITIONER

Union Assurance P.L.C

Union Assurance Centre

No. 20, St. Michal Road,

Colombo-03.

DEFENDANT- RESPONDENT

BEFORE: WANASUNDERA, PC, J

MARASINGHE, J

ALUWIHARE, PC, J

COUNSEL: Ian Fernando with Saman Liyanage for the Plaintiff-Petitioner.

S.A. Parathalingam, PC with N. Parathalingam for the Defendant-Respondent.

ARGUED ON: 31-03 -2014

WRITTEN SUBMISSIONS- 30th - 04-2014 and 30th -05 -2014

DECIDED ON: 17-07-2014

ALUWIHARE PC, J

When this Leave to Appeal application was taken up for support on 31st March 2013, the learned Counsel for the Defendant Respondent(hereinafter the Respondent) raising a preliminary objection, contended that the Plaintiff Petitioner (hereinafter the Petitioner) has filed this application 'out of time' and therefore this application should be dismissed *in limine.*

As directed by this court, both parties have tendered written submissions stating their respective positions regarding the preliminary objection raised by the Respondent.

The Petitioner has filed this application to have set aside an interlocutory order made by the learned High Court judge of the Western Province exercising civil jurisdiction.

In view of the fact that the objection raised is purely technical in nature and has no bearing whatsoever on the facts of the matter to which this application relates, I do not wish to dwell on them.

The Respondent contends that the time period stipulated by law to file an application of this nature is fourteen days and the respondent takes up the position that the petitioner has filed this application in the Supreme Court, thirty days after the pronouncement of the interlocutory order of the learned Judge of the High court and therefore the appeal is clearly out of time.

The certified copy of the impugned order (annexed marked A5 to the affidavit of the petitioner) indicates that the order of the High Court had been delivered on the 7th of May 2014 and the present application has been lodged with the registry of this court on the 10th of June 2014 according to the date stamp affixed by the Supreme Court registry. It is evident that the instant application had been filed thirty three days after the delivery of the order of the learned High Court judge.

Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 0f 1996 (hereinafter the 1996 Act) lays down that:-

> *"Any person who is dissatisfied with any order made by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2 in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such Order for the correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained"*

Whilst Section 6 of the said Act stipulates:-

> *"Every appeal to the Supreme Court and every application for leave to appeal under Section 5 shall be made* ***as nearly as may be*** *in accordance*

with the procedure prescribed by Chapter LVIII of the Civil Procedure Code". (emphasis added).

The applicable provision under Chapter LVIII of the Civil Procedure Code is Section 757 (1) of the Code which is reproduced below for convenience:

"Every application for leave to appeal against an order of court made in the course of any civil action, proceeding or matter shall be made by petition duly stamped, addressed to the Court of Appeal and signed by the party aggrieved or his registered attorney. Such petition shall be supported by affidavit, and shall contain the particulars required by section 758, and ***shall be presented to the Court of Appeal by the party appellant or his registered attorney within a period of fourteen days from the date when the order appealed against was pronounced****, exclusive of the day of that date itself, and of the day when the application is presented and on Sundays and public holidays, and the Court of Appeal shall receive it and deal with it as hereinafter provided and if such conditions are not fulfilled the Court of Appeal shall reject it. The appellant shall along with such petition, tender as many copies as may be required for service on the respondents". (emphasis added)*

It is the contention of the Petitioner that, as opposed to the word "shall" in Section 5 (3) of the 1996 Act, the use of the words ***"as nearly as may be"*** in Section 6 of the Act makes it optional whether or not to follow the procedure prescribed by Chapter LVIII of the Civil Procedure Code in making appeals to the Supreme Court and thereby that it is not obligatory for a party appealing or filing a leave to appeal application under section 5 of the Act of 1996 to strictly follow the provisions of Chapter LVIII of the Civil Procedure Code.

In considering this issue, it would be pertinent to examine the intention of the

legislature in enacting the provisions embodied in Sections 5 and 6 of the 1996 Act.

A close scrutiny of the provisions in Chapter LVIII of the Civil Procedure Code makes it abundantly clear that the provisions in the said chapter deal with the procedure relating to the referring of Appeals and Revisions to the Court of Appeal arising from decisions of the District Courts. In terms of Sections 5 and 6 of the Act of 1996, the provisions in Chapter LVIII were also made applicable to appeals to the Supreme Court from the decisions of the High Courts exercising civil jurisdiction. In my view, by the use of the words "as nearly as may be" in Section 6, the legislature, only intended to permit the parties to make whatever changes that are necessary to the prescribed formats and to the procedure so as to satisfy compliance with the Rules applicable to the Supreme Court and no more. Thereby a party who wishes to invoke the jurisdiction of the Supreme Court under Sections 5 and 6 of the 1996 Act is strictly required to adhere to the provisions of Chapter LVIII of the civil procedure Code. Parties certainly are not at liberty to deviate from the procedure in Chapter LVIII of the Civil Procedure Code.

The Supreme Court observed, in an application for leave to appeal under Section 5 (2) and 6 of the 1996 Act, "that an application for leave to appeal to the Supreme Court ***shall be made as nearly as practicable*** in the manner provided by chapter LVIII of the Civil Procedure Code[1].

In considering this very issue, Justice Sripavan observed[2]

> *" Thus, Act No. 10 of 1996 in Section 6 provides the procedure for appeal to the Supreme Court and when enacted for the public good and for advancement of justice an expression which appear to belong to the*

[1] Haji Omar Vs. Wickramasinghe & Others 2001 3 S.L.R 61
[2] Kamkaru Sevana and others V.Kingsly Perera and others SC. H.C.(L.A) 86/ 12

permissive language like 'may' must be construed to have a compulsory force……. It is no doubt true that the rule of interpretation permits the interpretation of the word 'may' in certain context as 'shall' and vice versa, namely permits the interpretation of 'shall' as 'may'.

In the case referred to above, the Supreme Court having considered Sections 5 (2) and 6 of the 1996 Act held that an application for leave to appeal should be lodged within a period of fourteen days as stated in section 757 (1) of the Civil Procedure Code. On the other hand, if the position taken up by the petitioner is upheld, that, it is not obligatory to follow the procedure prescribed by Chapter VLIII of the Civil procedure Code then there is no prescribed time limit within which to file an application for leave to appeal.

Dr. Bandaranayke J (as she then was) observed[3] *"……if the contention of the petitioner is upheld, there is no time limit for an application for leave to appeal to be lodged, then such applications could even be made after 10 years from the date of the order of the High Court,….. I wish to add further that such a situation would lead to an absurdity in that, the party who was successful in the High Court in the action for the enforcement of the award, will have to wait for an unknown period not knowing whether there would be a leave to appeal application made by the other party to the Supreme Court…"*

It is abundantly clear that the period of fourteen days prescribed by Section 757 is mandatory and time should run from the date of the order which is 7th May 2013. Any delay in my view has to be justified by the application of the principle *"lex non cogit ad impossibillia".* The Petitioner, however, has not offered any explanation for the undue delay in filing the instant application.

[3] George Stuart &Co.Ltd Vs. Lankem tea & Rubber Plantations Ltd 2004 1 S.L.R 246

I hold therefore that the Petitioners' application for leave to appeal was filed long after the expiry of the period of time prescribed in Section 757(1) of the Civil Procedure Code. The preliminary objection raised by the learned President's Counsel for the Respondents is upheld. The application is, accordingly dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

Wanasundera PC, J

I agree.

JUDGE OF THE SUPREME COURT

Marasinghe, J

I agree.

JUDGE OF THE SUPREME COURT.