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

SC/HC/LA/ 22/2014
Commercial High Court Colombo
Case No: 267/2009/MR

In the matter of an appeal in terms of Part 1C of the Supreme Court Rules 1990.

V.V. Ramanathan & Company (Pvt) Ltd.
Hospital Circular Road,
Vavunia.

PLAINTIFF

Vs.

1. National Housing Development Authority
   No. 34, Sir Chittampalam A. Gardiner
   Mawatha, Colombo 2.

2. The Attorney General
   Attorney General' Department
   Colombo 12.

DEFENDANTS

AND BETWEEN

National Housing Development Authority
No. 34, Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

DEFENDANT-PETITIONER

Vs.

V.V. Ramanathan & Company (Pvt) Ltd.
Hospital Circular Road,
Vavunia.

PLAINTIFF-RESPONDNET

AND NOW

National Housing Development Authority
No. 34, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

DEFENDANT-PETITIONER-PETITIONER

V.V. Ramanathan & Company (Pvt) Ltd.
Hospital Circular Road,
Vavunia.

PLAINTIFF-RESPONDNET-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Shavindra Fernando P.C., Senior A.S.G. with
Ravindra Pathirana D.S.G. for the Defendant-Petitioner-Petitioner

S. Mithrakrishnan with N. Mahendra
for Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

31.03.2016 – By the Plaintiff-Respondent-Respondent
20.04.2016 – By the Defendant-Petitioner-Petitioner

ARGUED ON: 27.04.2016

DECIDED ON: 22.09.2016

GOONERATNE J.

This was an action filed in the Commercial High Court, Colombo, based on a construction contract between the Plaintiff-Respondent-Respondent and the Defendant-Petitioner-Petitioner, the National Housing Development Authority. The plaint filed in the High Court indicates that on completion of the construction certain part payments had been made by the Defendant-Petitioner-Petitioner but action was filed on the balance sums due with interest as pleaded in the plaint. On the trial date (09.01.2012) the Defendant-Petitioner-Petitioner was absent and unrepresented. Accordingly the learned High Court Judge fixed the case for ex-parte trial and thereafter Judgment was entered against the Defendant-Petitioner-Petitioner on 30.03.2012. Inquiry was held to purge default in the High Court but after inquiry the learned Commercial High Court Judge by his Order X10 of 28.02.2014 refused to set aside the ex-parte Judgment.

The Defendant-Petitioner-Petitioner filed a Leave to Appeal Application in the Supreme Court. (bearing S.C. seal dated 11.04.2014). When this matter was taken up for support on 24.02.2016, the learned counsel for the Plaintiff-Respondent-Respondent raised a preliminary objection before the Supreme Court, as in the Journal Entry of 24.02.2016. However I would prefer

to examine the several journal entries prior to considering the preliminary objection. In a chronological order, the record bears the following.

1. Motion dated 10.11.2014 indicates the Attorney-at-Law for Respondent-Respondent-Petitioner's request to mention case on 27.05.2014, 23.05.2014 and 02.06.2014 to enable Deputy Solicitor General to support this application for Special Leave to Appeal.
2. 22.04.2014

   notice not tendered by Attorney at law for Petitioner

3. 27.05.2014

   Defendant-Petitioner-Petitioner and Plaintiff-Respondent-Respondent absent and unrepresented. Court makes no Order.

4. 05.08.2014 (minute to listing Judge)

   Refers to 'no Order' of court and moves to list the case on 10.06.2014, 08.06.2014 and 15.06.2014. Listing Judge makes Order to support with notice on 15.07.2014

5. 15.07.2014

   Senior counsel for Respondent not available D.S.G submits that his main complaint is from the refusal to vacate the ex-parte Order. Attorney on record was in fact hospitalised and seriously ill, as stated as an excuse.

   Court urges counsel for Respondent to consider a settlement of Petitioners proposal to pay a sum of Rs. 1.6 million as a settlement - matter fixed for support on 29.08.2014.

6. 29.08.2014

Both counsel moves for time to reach a settlement. Support on 31.10.2014

7. 31.10.2014

If settlement is reached parties agree to file a joint motion on

31.01.2015

8. 31.01.2015

Both counsel move to have this matter re-fixed. Support on 20.05.2015.

9. 20.05.2015

Counsel for Petitioner indisposed. Re-fixed for support on 23.07.2015

10. 23.07.2015

learned D.S.G moves for further time to consider an adjustment. Support on 04.11.2015

11. 04.11.2015 (Single Judge sitting)

No settlement. Re-fixed for support. A.S.G submits he needs to file amended caption. Support on 24.02.2016.

24.02.2016

The learned counsel for the Plaintiff-Respondent-Respondent raised the following preliminary objection.

"Is the Defendant-Petitioner's application misconceived in law in that the order in respect of which this application is made is a Judgment from which a direct appeal lies in terms of Section 88(2) of the Civil Procedure Code".

One month granted to file written submissions for both parties

Inquiry on 27.04.2016

27.04.2016

Order reserved.

A decision need to be made whether the said order is a Judgment from which a direct appeal lies or an order which requires to obtain Leave to Appeal from the Supreme Court. Both parties have filed written submissions on this point, and this court is mindful of such submissions.

The material made available to court no doubt indicates that an ex-parte Judgment (X6) was entered by the High Court. Thereafter the Defendant-Petitioner-Petitioner moved the High Court to purge the default and vacate the ex-parte Judgment. The High Court after inquiry made order (X10) refusing to set aside the ex-parte Judgment. At this point, I wish to observe that there is a growing tendency within the legal profession to contest and challenge orders and Judgments of courts by putting it in issue as to whether the pronouncement made by a court is an Order or Judgment. Perhaps clever counsel who serve his client would naturally attempt to do so to achieve the best result for his client notwithstanding the fact that the law is more or less settled and time tested. This has led to considerable confusion and hardship. Whatever it may be preliminary objection/question had been raised that Leave to Appeal is not available in the context and circumstances of the case in hand and more

particularly where default had occurred. It is necessary to examine the following provisions of the Civil Procedure Code in this regard, though such procedural law is very much familiar to those involved in civil litigation.

Section 88(1) and (2) reads thus:

No appeal against judgment for default but order setting aside or refusing to set aside judgment appealable.

(1) No appeal shall lie against any judgment entered upon default.

(2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal.

Section 754(1) to (5) reads thus:

Mode of Preferring appeal.

(1) Any person who shall be dissatisfied with any judgment pronounced, by any original Court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by any original Court in the course of any civil action, proceeding or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

(3) Every appeal to the Court of Appeal from any judgment or decree of any original Court, shall be lodged by giving notice of appeal to the original Court within such time and in the form and manner hereinafter provided.

(4) The notice of appeal shall be presented to the Court of first instance for this purpose, by the party appellant or his registered Attorney within a period of fourteen 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 notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the Court shall refuse to receive it.

(5) Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter –

"judgment" means any judgment or order having the effect of a final judgment made by any civil Court; and

"order" means the final expression of any decision in any civil action, proceeding or matter which is not a judgment.

The proceedings before the High Court no doubt came to an end. High Court delivered an ex-parte Judgment. Thereafter the party concerned took steps to vacate the ex-parte order unsuccessfully. The last Order of the High Court Judge was the Order refusing to vacate the ex-parte Judgment (X10). As such the ex-parte Judgment and Order X10 stands, until set aside by a Superior Court. The Appellate procedure is a separate procedure which is a procedure governed by the Civil Procedure Code, High Court of the provinces (Special Provisions) Act and the Constitution of the country. As such order X10 is a final Order of the High Court which permits the ex-parte Judgment to stand as a Judgment of the High Court. In these circumstances Leave to Appeal is not available and the Order complained of is an appealable Order where the Civil Procedure Code requires the filing of Notice of Appeal and Petition of Appeal

within the stipulated time period as contained in the provisions of the Civil Procedure Code.

I would further emphasis that even the provisions contained in the High Court of the provinces (Special Provisions) Act No. 10 of 1996 contain similar provisions as in the Civil Procedure Code as stated above and X10 order should be deemed to be a Judgment in terms of Section 88(2) of the Civil Procedure Code. (Section requires that order shall be accompanied by a Judgement) Sections 5 & 6 of Act No. 10 of 1996 support my views and the appeal is a direct appeal to the Supreme Court. I note the following Sections of Act No. 10 of 1996.

5. (1) Any person who is dissatisfied with any judgment pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgment, for nay error in fact or in law.

(2) 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.

(3) In this section, the expressions “judgment” and “order” shall have the same meanings respectively, as in section 754 (5) of the Civil Procedure Code (Chapter 101).

6. 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 (Chapter 101).

It is very clear and there is no doubt that Section 88(2) of the Code provides that the said order shall be accompanied by a Judgment adjudicating upon the facts, specifying the grounds upon which it is made and shall be liable to an appeal. Direct appeal lies to the Supreme Court from Order X10 which should follow from a Notice of Appeal filed within 14 days and a Petition of Appeal within 60 days from Order X10 dated 28.02.2014. Section 6 of Act No. 10 of 1996 fortify this position. It provides that every appeal and every application for Leave to Appeal shall be made as nearly as may be in accordance with the procedure contained in Chapter LVIII of the Civil Procedure Code. As such the preliminary objection is upheld.

It is very unfortunate to observe that even the time period specified by all the above statutes have also not been adhered to by the party concerned even if the court was to accept the argument of the Defendant-Petitioner-Petitioner. This court in any event is compelled to reject the application for Leave to Appeal as relief sought is misconceived. I have to add that several decided cases settled the question as regards a direct Appeal to the Appellate Court, vide *Wijeyanayake Vs. Wijeyanayake, Sriskantha's Law Reports Vol. V pg. 28; Bank of Ceylon Vs. Sirisena Fernando and Indrani Fernando. CA (LA) 125/80;*

A.S. Sangarapillai & Bros Vs. Kathiravelu, Sriskantha's Law Reports Vol. II Pg. 99; Leelawathie Vs. Ekanayake 2006 (3) SLR 155.

In all the above facts and circumstances the application for Leave to Appeal is rejected as application sought is misconceived. As such application is dismissed without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree

JUDGE OF THE SUPREME COPURT

Nalin Perera J.

I agree

JUDGE OF THE SUPREME COURT