

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

SC Appeal No. 109/2009  
SC (SPL) LA No. 87/2009  
CALA No. 504/2006

D.C. Horana No. 2533/L

Surendra Das,  
No. 6/57 Sri Dharmarama  
Mawatha,  
Rathmalana  
Presently at  
“Epic Designers (VN)  
Limited”  
Dag Khoi Street  
“Tan Tilep Ward”  
Bientloa City,  
Dong Nai Province,  
Vietnam

Represented by his  
Attorney  
T.S.U. Das,  
No. 6/57 Sri Dharmarama  
Mawatha, Rathmalana.

**Plaintiff**

**Vs**

1. G. Jeevananthan  
David,  
(Liquidator of Perfect  
Fit International  
(Private) Limited, the  
3<sup>rd</sup> Defendant),  
Of SJMS Associates,  
No.2 Castle Street,  
Colombo 4.
2. P.E.A. Jayawickrama,  
(Liquidator of Perfect  
Fit International  
(Private) Limited, the  
3<sup>rd</sup> Defendant),  
Of SJMS Associates,  
No. 2 Castle Street,  
Colombo 4
3. Perfect Fit International  
(Private) Limited

No 36/8 Seelananda  
Lane,  
Pinwatte,  
Panadura.

**Defendants**

**AND**

1. G. Jeevananthan  
David,  
(Liquidator of Perfect  
Fit International  
(Private) Limited, the  
3<sup>rd</sup> Defendant),  
Of SJMS Associates,  
No.2 Castle Street,  
Colombo 4.
2. P.E.A. Jayawickrama,  
(Liquidator of Perfect  
Fit International  
(Private) Limited, the  
3<sup>rd</sup> Defendant),  
Of SJMS Associates,  
No. 2 Castle Street,  
Colombo 4

**Defendants – Petitioners**

**Vs.**

Surendra Das,  
No. 6/57 Sri Dharmarama  
Mawatha, Rathmalana  
Presently at  
“Epic Designers (VN)  
Limited”  
Dag Khoi Street  
“Tan Tilep Ward”  
Bientloa City,  
Dong Nai Province,  
Vietnam

Represented by his  
Attorney  
T.S.U. Das,  
No. 6/57 Sri Dharmarama

Mawatha, Rathmalana.

**Plaintiff – Respondent**

**AND NOW BETWEEN**

Surendra Das,  
No. 6/57 Sri Dharmarama  
Mawatha, Rathmalana  
Presently at  
“Epic Designers (VN)  
Limited”  
Dag Khoi Street  
“Tan Tilep Ward”  
Bientloa City,  
Dong Nai Province,  
Vietnam

Represented by his  
Attorney  
T.S.U. Das,  
No. 6/57 Sri Dharmarama  
Mawatha, Rathmalana.

**Plaintiff – Respondent –  
Petitioner – Appellant**

**Vs**

1. G. Jeevananthan  
David,  
(Liquidator of Perfect  
Fit International  
(Private) Limited, the  
3<sup>rd</sup> Defendant),  
Of SJMS Associates,  
No.2 Castle Street,  
Colombo 4.

2. P.E.A. Jayawickrama,  
(Liquidator of Perfect  
Fit International  
(Private) Limited, the  
3<sup>rd</sup> Defendant),  
Of SJMS Associates,  
No. 2 Castle Street,

Colombo 4

**Defendant – Petitioners -  
Respondents**

Before: Tilakawardane J.  
Ekanayake J.  
Suresh Chandra J.

Counsel:

Gamini Marapana PC with Samantha Vithana and Navin Marapana for the  
Plaintiff – Respondent - Petitioner - Appellant

G. Alagaratnam PC with Suren Fernando and H.Mannanayake for the Defendant  
– Petitioners - Respondents

Argued on : 28.10.2011

Decided on : 05.03.2012

Suresh Chandra J,

This is an appeal from an Order of the Court of Appeal dated 27<sup>th</sup> March 2009 refusing an application made by the Petitioner – Respondent –Petitioner – Appellant (hereinafter referred to as the Appellant) to the Court of Appeal by raising a Preliminary Objection that the Defendant- Petitioners – Respondents (hereinafter to referred to as the Respondents) had not averred in their Petition that they have not previously invoked the jurisdiction of the Court of Appeal in respect of the subject matter of the application before the Court of Appeal and further that the Respondents had not filed certain material documents with its Petition nor reserved the right to tender the said documents at a later stage.

The Learned District Judge of Horana made an order dated 30<sup>th</sup> November 2006 to issue an interim injunction restraining the Defendants from selling, transferring, mortgaging or leasing the property described in the schedule to the plaint of the said action in the District Court and being aggrieved by the said order the respondents filed an application for leave to appeal to the Court of Appeal to set aside the said order of the Learned District Judge.

At the hearing of the application for Leave to Appeal the Learned Presidents Counsel appearing for the Appellant raised a preliminary objection that the Defendants have failed to aver in their petition that they have not previously invoked the jurisdiction of the Court of Appeal and to produce material documents namely Motion dated 31.05.2006 and journal entries 9 and 10 which would contravene against Rule 3(1) (a), 3 (1) (b) and 3(2) read with Rule 3(15) of the Court of Appeal (Appellate Procedure) Rules, 1990, and that the application of the Respondents should be dismissed in limine. Written submissions were tendered by both parties in relation to the said preliminary objection and the Court of Appeal delivered the Order overruling the Preliminary Objections. The Court of Appeal followed the decision in Caderamanpulle and Others v Caderamanpulle and Others (2005) 1 SLR 397 where Amaratunga J held that Rules 3(1) (a) and 3(1) (b)

do not apply to leave to appeal applications and that the procedure to be followed in relation to leave to appeal applications are laid down under Sections 757 and 758 of the Civil Procedure Code. The Court of Appeal further held that Rule 3 (2) of the Court of Appeal (Appellate Procedure) Rules, 1990 only governs applications made in terms of Articles 138 and 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka which would necessitate the requirement of an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter in the petition.

Being aggrieved by the said Order of the Court of Appeal the Appellant made an application for Special Leave to Appeal to this Court against the said order of the Court of Appeal and leave was granted to the Appellant on the following question of law:

- (i) Do the provisions of the Court of Appeal (Appellate Procedure) Rules, 1990 apply to Leave to Appeal applications filed in the Court of Appeal?

Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 states that “Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a Petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application.”

Rules 3(1) (b) states that

“ Every application by way of revision or restitution integrum under Article 138 of the Constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of first instance, tribunal or other institution which such application relates.”

Rule 3 (2) goes on to state that

“The Petition and affidavit, except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter . If such jurisdiction has previously been invoked the Petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed.”

Considering the above mentioned rules it is clear that the above applications mentioned are in relation to those under Articles 138, 140 and 141 of the Constitution and that the said rules relate to the procedure to be followed when making an application to the Court of appeal under these articles.

Rule 3(15) of the states that

“These rules shall also apply, mutatis mutandis, to applications made to the Court under any provision of law, other than Articles 138, 140 and 141 of the Constitution, subject to any directions as may be given by the Court in any particular case.”

The Learned Presidents Counsel for the Appellant in his submission stated that by virtue of Rule 3(15), Leave to Appeal applications also fall under the Court of Appeal

(Appellate Procedure) Rules 1990 and that all applications to the Court of Appeal would have to be in accordance with the said rules. He further emphasized on the words "mutatis mutandis" and stated that the focus should be on these words which would enable the interpretation of Rule 3(15) to include Leave to Appeal applications as well.

The Learned Presidents Counsel for the Respondent in his submissions used a twofold path, that the Court of Appeal Rules 1990 were not applicable to the said application and if it was held to apply in the present context the rules were not contravened by the Respondent and that dismissal of the action for a failure to adhere to the Rules would be inconsistent with the wording of the said rules. As per the Learned Judge of the Court of Appeal in his order the Respondent based his submission on the judgment by Amaratunga J. in *Caderamanpulle & Others v Caderamanpulle & Others* where Amaratunga J. looked into the Court of Appeal Rules and its application in significant detail and concluded that its application is limited only to applications made to the Court of Appeal as of right and does not include Leave to Appeal applications.

Considering the judgment in *Caderamanpulle & Others v Caderamanpulle & Others* Amaratunga J went on to look into the provisions of s.757 and s.758 of the Civil Procedure Code and stated

" Section 757 of the Civil Procedure Code sets out the procedure for filing an application for leave to appeal. Such application must be made;

(a) by duly stamped petition, containing the particulars required by section 758, signed by the aggrieved party or his attorney-at-law, and

(b) shall be supported by affidavit; and

(c) shall be presented to the Court of Appeal within the period of 14 days prescribed in section 757(1).

When a leave to appeal application is presented in the manner set out in section 757(1), the section says that "the Court of Appeal shall receive it and deal with it as hereinafter provided ...". Section 758 of the Civil Procedure Code specifies the particulars to be set out in an application for leave to appeal (as well as in a petition of appeal). Sub paragraph (e) of section 758 is as follows. The petition of appeal shall contain :

(e) "a plain and concise statement of the grounds of objection to the judgment, decree or order appealed against such statement to be set forth in duly numbered paragraphs."

It is significant to note that in sections 757 and 758 of the Civil Procedure Code, there is no requirement that copies of documents must be annexed. On the other hand section 776 of the Civil Procedure Code which provides for applications for leave to appeal notwithstanding lapse of time, there is a requirement that the "petition shall be accompanied by a certified copy of the decree or the order appealed from and of the judgment on which it is based, as well as by such affidavits of facts and other materials as may constitute *prima facie* evidence that the conditions precedent to the petition of appeal being entertained which are prescribed in the last section are fulfilled."

When a leave to appeal application is filed there is no provision to file a statement of objections. When the application comes up before this Court in the first instance *inter partes*, *the task of the Court of Appeal is to consider whether the question of law set out in the application for leave to appeal is a matter fit to be considered by the Court of Appeal by way of an interlocutory appeal*. If the Court grants leave to appeal the Registrar shall inform the original Court that leave has been granted and *the original Court shall then forward to the Court of Appeal all the papers and proceedings in the case, relevant to the matter in issue* [section 757(5)]. Thus when leave is granted the relevant parts of the entire record of the original Court are before the Court of Appeal and this obviates the necessity to file copies of documents at the time when the appeal

is heard. In considering an application for leave to appeal notwithstanding lapse of time the Court's task is wider. In such a situation the *Court has to consider whether the petitioner has a good ground of appeal*. For this purpose the Court has to go beyond the grounds of appeal set out in the petition and satisfy itself that good grounds of appeal in fact exist. For this purpose the Court may need the judgment and even the proceedings including the evidence. This is the reason for specifying the documents to be produced along with an application for leave to appeal notwithstanding lapse of time.”

Amaratunga J further went on to state that the maxim ‘Inclusio unius exclusion alterius’ which means inclusion of one excludes the other and as pointed out in Bindra Interpretation of Statutes 8<sup>th</sup> Ed p.154 which states that the above maxim is used when the natural association of ideas contrast between what is provided and what is left out leads to an inference that the latter was intended to be excluded. Amaratunga J using the said maxim goes on to emphasize that “...the reason for the absence of any reference to leave to appeal applications in Rule 46 and Rule 3(1) is the existence of specific provisions in the Civil Procedure Code prescribing the manner in which leave to appeal applications are to be made. If there is any doubt about this, the application of the auxiliary rule of construction expressed in the maxim 'Inclusio unius exclusio alterius' puts the matter beyond doubt and the conclusion is that Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990 is, and Rule 46 of the Supreme Court rules of 1978 was, not applicable to applications for leave to appeal.”

I agree with the detailed analysis of Amaratunga J. in relation to the fact that the reason for leaving out Leave to Appeal applications in Rule 3(1) of the Court of Appeal rules was with the clear intention of having it not fall under the said regime since the procedure to be followed is clearly set out in s.757 and s.758 of the Civil Procedure Code and the intention of the Legislature would have been for it to be governed by the Civil Procedure Code.

Considering the issue raised by the Learned Presidents Counsel for the Appellant where he states that the interpretation of the words *mutatis mutandis* in rule 3(15) of the Court of Appeal rules would include leave to appeal applications as well. A closer look at the wording of rule 3(15) is required to ascertain the rationale behind the words *mutatis mutandis* in the said rule. *Mutatis mutandis* is described in Black's Legal Dictionary as “all necessary changes having been made; with necessary changes.” When looking at the plain meaning of rule 3(15) it seems to me to suggest that what the legislature actually tried to fulfill was to give the discretion to the judge in relation to making an order as to the procedure required for applications which do not fall under Articles 138, 140 and 141 of the Constitution. This would simply suggest that wherever an application comes to court which is not specifically mentioned under the court of appeal rules the judge would have the discretion to give any directions as to the procedure to be followed and if such directions are not given the normal course in relation to the procedure would be followed. The phrase *mutatis mutandis* must be read along with the words at the end of rule 3(15) which states “subject to any directions as may be given by the Court in any particular case” to come to a conclusion which would give us a justifiable interpretation of the said rule.

Considering the present case it is clear that considering the interpretation of Rule 3(15) it would suggest that since the Learned Judge did not make any specific directions as to the procedure needed to be followed the normal procedure for Leave to Appeal applications would have to have been followed which would mean that it would have had to be in accordance with s.757 and s.758 of the Civil Procedure Code which provides the normal procedure to be followed for any leave to appeal application. The Rule of exclusion as stated in Bindra Interpretation of Statutes 10<sup>th</sup> edition at pg 427 provides the rationale for the above interpretation of Rule 3(15) as it is clear that what

has been left out was left out clearly with the intention of leaving it out of the scope of the said provision.

The wording of Rule 3(2) of the Court of Appeal Rules suggests that even when the party makes a false or incorrect averment in relation to whether the jurisdiction of the court being previously invoked the Court would still have a discretion as to whether it should dismiss the application or not. Considering the repercussions of such a situation and when looking in to a situation where the party fails to mention that they have not previously invoked the jurisdiction of the court, it would suggest that it would be a grave injustice if there would be a mandatory dismissal of the application due to such an omission. It would be in the interests of justice for the judge to be given the discretion as to the course of action needed to be taken in such a situation as stated in Rule 3(2) for situations of a false or incorrect averment being mentioned in the Petition. This would suggest that even if such a Leave to Appeal application is required to be made under the procedure laid down in accordance with the Court of Appeal Rules, in such a situation the failure to adhere to Rule 3(2) alone would not warrant a mandatory dismissal of the application.

Considering the issue as to the filing of certified copies of documents it would be necessary to consider the procedure to be followed under the Civil Procedure Code in relation to Leave to Appeal applications supra. The procedure to be followed under the Civil Procedure Code under s.757 and s.758 makes no mention as to filing of any documents apart from the Petition of Appeal and Affidavit by the Petitioner. This would clearly suggest that there is no mandatory requirement to file certified copies of documents in Leave to Appeal applications when following the normal procedure laid down under the Civil Procedure Code. The judge using his discretion under Rule 3(15) of the Court of Appeal Rules may require parties to file any such documents as required or follow the procedure laid down under the Court of Appeal Rules but in neither situation would a mandatory dismissal of an application be permissible for failing to submit certified copies of documents to the court.

It is extremely clear that the relevant procedure to be followed by the courts in relation to Leave to Appeal applications under the normal procedure would be under the Civil Procedure Code and that the Courts should follow a uniform approach in dealing with such applications.

It should also be noted as held by this court in **SC Appeal No. 50/2008, delivered on 28<sup>th</sup> June 2011** that “the delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law.”

The question of law referred to above on which leave was granted by this Court is answered in favour of the Respondents. In the above circumstances the Respondents would be entitled to pursue their application for Leave to Appeal in the Court of Appeal under the procedure set out in the Civil Procedure Code. The Order of the Court of Appeal is affirmed and the appeal is dismissed with costs fixed at Rs. 31,500.

**JUDGE OF THE SUPREME COURT**



**TILAKAWARDANE J.**

**I agree.**

**JUDGE OF THE SUPREME COURT**

**EKANAYAKE J.**

**I agree.**

**JUDGE OF THE SUPREME COURT**