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

In the matter of an Application for Leave to Appeal from the Judgment of the High Court of Colombo dated 14.5.2012 made under and in terms of the Arbitration Act No. 11 of 1995.

SC (HC) LA 58/2012

HC Colombo Case No.
HC/ARB/1254/2002

Board of Investment of Sri Lanka
World Trade Centre,
West Tower, 15-17 Floors,
Echelon Square,
Colombo 1.

RESPONDENT-PETITIONER

-Vs-

Million Garments (Pvt) Ltd,
No. 14/7, Saparamadu Mawatha,
Nugegoda.
At present Head Office situated at:-
A/14/2/3/, Matha Para,
Narahenpita.

PETITIONER-RESPONDENT

BEFORE	:	Hon. S. Marsoof, P.C. J, Hon. K. Sripavan, J, and Hon. E. Wanasundera, P.C. J.
COUNSEL	**:**	Romesh de Silva, P.C. with Hiran de Alwis for Respondent-Petitioner. Gamini Marapana, P.C. with Navin Marapana for Petitioner-Respondent.
Argued On	**:**	29.1.2014
Written Submissions On	**:**	28.2.2014 (Respondent-Petitioner) 17.3.2014 (Petitioner-Respondent)
Decided On	**:**	24.10.2014

SALEEM MARSOOF, P.C. J,

When this application for leave to appeal against a Judgment of the High Court of Sri Lanka holden in the judicial zone of Colombo dated 14th May 2012, whereby the said High Court decided to file of record the arbitral award sought to be enforced and pronounced judgment and entered decree in terms of the said award as provided for in Section 31(6) of the Arbitration Act No. 11 of 1995, was mentioned before this Court on 2nd September 2013, learned President's Counsel for the Petitioner-Respondent (hereinafter

referred to as the "Respondent") gave notice of a preliminary objection intended to be taken up on behalf of the Respondent. The said preliminary objection was that insofar as the judgment of the High Court was pronounced on 14th May 2012, the lodging of the application for leave to appeal in the Registry of this Court on 26th June 2012, on the forty-third day after the pronouncement of the impugned judgment, was outside the time limit prescribed by law for making such an application, and that the application is therefore time-barred.

When the application seeking leave to appeal was thereafter taken up for support on 29th January 2014, the learned President's Counsel for the Respondent formally took up the said preliminary objection and made brief submissions thereon, and the learned President's Counsel for the Respondent-Petitioner (hereinafter referred to as the "Petitioner") also made brief submissions in regard to the objection. Both learned President's Counsel were also granted further time to file written submissions, and they have both filed written submissions as well.

Time limit for filing applications for leave to appeal under Section 37(2) of the Arbitration Act

In this context it is important to note that the only provisions in the Arbitration Act No. 11 of 1995 that deal with appeals are Sections 37 and 43(a) of the said Act. The first two sub-sections of Section 37 provide as follows:-

> "37 (1) Subject to subsection (2) of this section, no appeal or revision shall lie in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act.
>
> (2) An appeal shall lie from an order, judgment or decree of the High Court referred to in subsection (1) to the Supreme Court only on a *question of law* and with the *leave of the Supreme Court* first obtained."*(Emphasis added)*

It is noteworthy that the impugned judgment of the High Court was pronounced in terms of Section 31(6) of the Arbitration Act, which falls within Part VII of the Act within which the above quoted Section 37 too is found. Hence, undoubtedly, the impugned judgment is appealable, but Section 37(2) of the Act which confers the right to invoke the appellate jurisdiction of this Court by way of an application for leave to appeal, does not specify any time limit for the lodging of the application seeking leave to appeal. Of course, Section 43(a) of the Arbitration Act does empower this Court to make rules with respect to "any application or appeal made to any Court under this Act and the costs of such application or appeal", but no rules have so far been made by this Court in terms of Section 43(a) of the Arbitration Act prescribing any period of time within which any application for leave to appeal against any order, judgment or decree of the High Court may be lodged.

There are however certain rules made by the Supreme Court, which is empowered by Article 136 of the Constitution to *inter alia* make rules regarding all matters pertaining to appeals to the Supreme Court and the Court of Appeal, which include as specifically provided in sub-article (b) thereof, "the time which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules". Rules 2 to 6 of the Supreme Court Rules, 1990 which appear in Part 1 - A of

the said rules under the heading "Special Leave to Appeal", contain provisions regarding the manner of lodging applications seeking special leave to appeal to this Court from any order or judgment of the Court of Appeal, and Rule 7 thereof provides as follows:-

> "7. 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 application filed by the Petitioner is of course for leave to appeal against a decision of the High Court, and It is in these circumstances that learned President's Counsel for the Respondent has submitted that despite the absence of any express provision in the Arbitration Act or any rule made under Section 43(a) of the said Act, it would be reasonable to regard the six weeks period that is prescribed in Rule 7 of the Supreme Court Rules, 1990 for the filing of an application seeking special leave to appeal against an order or judgment of the Court of Appeal as being applicable to any application seeking leave to appeal under Section 37(2) of the Arbitration Act. Learned President's Counsel has referred to the decisions of this Court in *Tea Small Factories Ltd. v Weragoda* (1994) 3 SLR 353, *Mahaweli Authority of Sri Lanka v United Agency Construction* (2002) 1 SLR 8, *George Stuart & Co. Ltd. v Lankem Tea & Rubber Plantations Ltd.* (2004) 1 SLR 246 *Priyanthi Chandrika Jinadasa v Pathma Hemamali* (2011) 1 SLR 337, and *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya* SC HC/CA/LA No. 137/2010 SC Minutes of 4.10.2012 (unreported) in support of his submission that the application of the Petitioner in the instance case is time-barred.

Learned President's Counsel for the Petitioner responded to these submissions by pointing out that where there is no applicable law or rule setting out a mandatory time period for preferring an appeal, the matter of time-bar should be considered *sui generis,* and that it is clear from the decisions of this Court in *Mahaweli Authority of Sri Lanka v United Agency Construction* (2002) 1 SLR 8 and *George Stuart & Co. Ltd. v Lankem Tea & Rubber Plantations Ltd.* (2004) 1 SLR 246 that in such circumstances, a reasonable period of time should be permitted for such appeals, and that in determining whether any application for leave to appeal has been filed within a reasonable time, Court should consider the circumstances of the case. He also submitted that the purported arbitral award sought to be enforced in the instant case arose from a settlement reached before the arbitral tribunal and that the said purported award is tainted with fraud and is a nullity inasmuch as the amount sought to be recovered from the Petitioner is more than double the amount of the settlement reached, and that this is a material circumstance that may be taken into consideration in determining whether the application seeking leave to appeal has been lodged within a reasonable time. For this proposition, he relied additionally on decisions of this Court such as *Vithana v Weerasinghe* (1981) 1 SLR 52 and *Lanka Orix Leasing Company Limited v Pinto and Others* (2002) 2 SLR 115.

An important question that arises in this appeal is, given that there are no rules made by this Court as contemplated by Section 43(a) of the Arbitration Act, whether the period of six weeks (42 days) prescribed in Rule 7 of the Supreme Court Rules, 1990 for the filing of an application for special leave to appeal against an order, judgment, decree or sentence of the Court of Appeal, will apply to the application filed by the Petitioner seeking leave to appeal against the decision of the High Court under Section 37(2) of the Arbitration Act.

In this context, it is instructive to note that Part 1 of the Supreme Court Rules 1990, consists of three sub-parts which are headed respectively as A - Special Leave to Appeal, B – Leave to Appeal and C – Other Appeals, and that whilst applications to the Supreme Court seeking special leave to appeal from decisions of the Court of Appeal are dealt with in sub-part A, instances where the Court of Appeal has granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal are dealt with in Part 1– B. All miscellaneous types of appeals to the Supreme Court that do not fall within the purview of sup-parts A and B are governed Part 1 – C of the Supreme Court Rules, and there can be no doubt that the instant application filed by the Petitioner seeking leave to appeal falls within that part.

Part 1 – C of the Supreme Court Rules consist of only Rule 28, of which sub-rule (1) provides as follows:-

> "28 (1) Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal *or any other court or tribunal*."(*Emphasis added*)

It is noteworthy that whilst sub-rules (2) to (6) of Rule 28 set out in detail the procedure for the filing of proxy, notice of appeal and petition of appeal, tendering notices for service and subsequent steps to be taken in the Registry for preparing the appeal briefs, and filing of written submissions, rule 28(7) provides that "the provisions of rule 27 shall apply *mutatis mutandis* to such appeals". However, since neither Rule 27 nor Rule 28 contain any provision in the lines of Rule 7 which sets out a time limit for filing an application for leave to appeal, the question arises as to whether the Petitioner is free to invoke the appellate jurisdiction of the Supreme Court against the impugned judgment and decree *ad infinitum*, or whether the law imposes any constraints of time on the Petitioner's right to seek leave to appeal as contemplated by Section 37(2) of the Arbitration Act.

Learned President's Counsel for the Petitioner has contended that since neither the Arbitration Act nor any rule made in terms of under Section 43(a) of the said Act prescribe any mandatory time limit for presenting an application for leave to appeal, there can be no "automatic imposition" of a rule such as Rule 7 of the Supreme Court Rules to debar the application filed by the Petitioner. He has submitted that any limitation of time for preferring an application for leave to appeal under Section 37 of the Arbitration Act can only be lawfully imposed by a rule made by this Court in terms of Section 43(a) of the Arbitration Act, and that no rules have been made so far by this Court in accordance with this provision.

I have difficulty in agreeing with learned President's Counsel for the Petitioner because the application filed by the Petitioner seeking leave to appeal from a decision of the High Court does not fall within Part 1-A or 1-B of the Supreme Court Rules, 1990, and must necessarily be considered to fall within the purview of Part 1-C of the said Rules, which in the absence of any contrary legislative provision, will apply to all "other appeals" to the Supreme Court from "any order, judgment, decree or sentence of the Court of Appeal *or any other court or tribunal*." When conferring a limited rule-making power on this Court by the enactment of Section 43 of the Arbitration Act, the legislature was presumably aware that by Article 136 of the Constitution, an even wider rule-making power has been conferred on this Court, and that in the absence of any time limit for appeals in Section 37 of the Arbitration Act, the rules of wider import made

by this Court under Article 136 of the Constitution may be applied, if this Court does not chose to make any rules in terms of Section 43(a) of the said Act. I note that both in Article 136 of the Constitution and Section 43 of the Arbitration Act, the non-imperative and permissive language of "may" has been used, and it would be absurd to contend that since this Court has not made rules under Section 43(a), it cannot insist on compliance with the rules framed by it under Article 136 of the Constitution.

Furthermore, the question before this Court in this case is covered by ample authority both in the context of appeals under Section 37(2) of the Arbitration Act as well as in the wider context of "other appeals" falling within the purview of Part 1-C of the Supreme Court Rules. The learned President's Counsel for the Respondent has invited our attention to the decision of this Court in *Tea Small Factories Ltd. v Weragoda* (1994) 3 SLR 353 in which this Court had to deal with an application for leave to appeal from a judgment of the High Court for the Province filed in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950 as amended by Acts Nos. 32 of 1990 and 11 of 2003, where neither Section 31DD of the Industrial Disputes Act nor any other applicable law stipulated a period of time within which an aggrieved party may invoke the appellate jurisdiction of the Supreme Court. This Court held that in these circumstances, Rule 7 of the Supreme Court Rules 1990, which prescribed a period of six weeks for invoking the appellate jurisdiction of this Court, will apply despite the fact that neither Section 31DD of the said Act nor Part 1-C, Rule 28 of the Supreme Court Rules 1990 which was considered to be applicable to such an appeal, stipulated a period of time within which an aggrieved party may invoke the appellate jurisdiction of the Supreme Court.

More in point are the decisions of this Court in *Mahaweli Authority of Sri Lanka v United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 and *George Stuart & Company Limited v Lankem Tea and Rubber Plantation Ltd.* (2004) 1 SLR 246, which involved applications seeking leave to appeal filed against decisions of the High Court of Sri Lanka in terms of Section 37 of the Arbitration Act No. 11 of 1995. In the first of these cases, namely *Mahaweli Authority of Sri Lanka v United Agency Construction (Pvt) Ltd*, the application for leave to appeal was filed fifty-five days after the pronouncement of judgement, and this Court held that the application for leave to appeal fell within Part 1-C of the Supreme Rules. Since the Arbitration Act was silent on the question of the appealable period, and no rules had been framed under Section 43(a) of the said Act, this Court held that the appeal must be preferred within a reasonable time, and adverted by way of analogy to the time limit of six weeks specified in Rule 7 of Part I-A of these Rules. In *George Stuart & Company Limited v Lankem Tea and Rubber Plantation Ltd.*, this Court arrived at a similar decision where the application for leave to appeal had been lodged after 108 days of the order of the High Court under the Arbitration Act. This Court held that the application seeking leave to appeal has been filed after the expiry of an unreasonable period of time, and rejected the same.

Similarly, in *Priyanthi Chandrika Jinadasa v Pathma Hemamali* (2011) 1 SLR 337 and *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya* SC HC/CA/LA Appl. No. 137/2010 draft minutes of the Supreme Court dated 4.10.2012 (unreported), the time limit applicable for applications seeking leave to appeal against orders and judgments of the High Court of the Provinces established by Article 154P of the Constitution exercising civil jurisdiction was considered by this Court. In the first of these cases, the application seeking leave to appeal was filed forty-eight days after the pronouncement of the impugned judgment, and in the second, the application for leave had been filed on the fifty-sixth day after the delivery of the judgment. Section 5C(1) of the High Court of the Provinces (Special Provisions)

(Amendment) Act No. 54 of 2006, which conferred a right of appeal subject to leave of the Supreme Court first had and obtained, did not specify any time limit for lodging the application for leave to appeal, and this Court in those circumstances held that the application was time-barred since it fell within Part 1-C of the Supreme Court Rules and had to be filed within a reasonable time, which in the opinion of Court, could not exceed the period of six weeks prescribed in Rule 7 of the Supreme Court Rules. In the course of her judgment in *Priyanthi Chandrika Jinadasa,* her Ladyship Dr. Shirani A. Bandaranayake, CJ, (with whom P.A. Ratnayake, P.C., J. and Chandra Ekanayake, J. concurred) observed at page 346 that:-

> "The language used in Rule 7, clearly shows that the provisions laid down in the said Rule are mandatory and that an application for leave of this Court should be made within six weeks of the order, judgment, decree or sentence of the Court below of which leave is sought from the Supreme Court. In such circumstances it is apparent that it is imperative that the application should be filed within the specified period of six (6) weeks."

In my judgment in *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya, supra,* with which N.G. Amaratunge, J. and Chandra Ekanayake J. concurred, I arrived at the same decision adopting the reasoning of Edussuriya, J. (with whom Wadugodapitiya, J. and Yapa, J agreed) expressed so well in the below quoted passage from his judgment in *Mahaweli Authority of Sri Lanka v United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 at page 12:-

> "In my view, the clear inference is that the Supreme Court in making the rules did not consider it necessary to go beyond a maximum of forty-two days for making an application for special leave to the Supreme Court. In deciding on these periods within which such applications for leave to appeal should be made we must necessarily conclude that the Supreme Court fixed such periods as it was of the view that such periods were reasonable having regard to all relevant circumstances, and also that the Supreme Court acted reasonably in doing so."

In the light of the approach adopted in the aforementioned decisions of this Court, I am bound to hold that the application for leave to appeal filed in this case should have been filed within six weeks of the pronouncement of the impugned judgment and the entering of decree in terms of it. This is a mandatory time limit which knows no exceptions, and I see no merit in the submission of learned President's Counsel for the Petitioner the special circumstances of the case may be taken into consideration in permitting an application filed outside this time limit to be maintained. In my view, the decision of this Court in *Vithana v Weerasinghe* (1981) 1 SLR 52, cited by leaned Counsel for the Petitioner, has no application to this case as that decision was concerned with an appellant who had complied with Section 754(4) of the Civil Procedure Code and given notice of appeal within the prescribed period of 14 days but had failed to file the petition of appeal within 60 days as required by Section 755(3) of the said Code, and the Court found that the provisions of Section 759(2) of the Code wide enough to excuse the omission to file the petition in time. On the contrary, in cases which fall within mandatory time limits set by the Supreme Court Rules for the lodging of appeals or applications for leave to appeal, this Court has consistently refused to take into consideration special circumstances of the case as it did in its decisions in *L.A. Sudath Rohana v Mohomed Zeena and others* (SC HCCA LA 111/2010 – SC Minutes of 17.3.2011 (unreported), *Chandrika Jinadasa v Pathma Hemamali, supra* and *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya, supra.*

I am fortified in my decision that an application for leave to appeal challenging a decision of the High Court to file of record an arbitral award and pronounce judgment and enter decree accordingly has to be lodged within six weeks of the said judgment and decree, since the language of Section 37(1) of the Arbitration Act manifests a clear legislative intent to curtail appeals from orders and awards of arbitral tribunals with a view to giving full effect to the concept of party autonomy and maintaining the efficacy of the arbitral process. More so, because Section 37(2) of the said Act seeks to confine appeals to any order, judgment or decree of the High Court made under Part VII of the Act relating to the enforcement and setting aside of arbitral awards by limiting them to those involving a question of law and imposing the further requirement of obtaining the leave of the Supreme Court for proceeding with the same, with the same objectives in mind. To hold otherwise and hold that there is no time limit prescribed by law, or to apply a more flexible test of reasonableness that would vary from case to case would be to perpetrate the kind of mischief which her Ladyship Bandaranayake J (as she then was) adverted to in her judgment in *George Stuart & Company Limited v Lankem Tea and Rubber Plantation Ltd*. (2004) 1 SLR 246 at page 254 in the following words:-

> "……such a situation would lead to an absurdity if a 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. Such a situation would lead to an absurd system, where it would not be possible for the Arbitration Act to work as stipulated."

Having said that, I now come to the question whether the application for leave to appeal filed in this case time barred.

Computation of time

It is instructive to note that Rule 7 of the Supreme Court Rules, 1990 requires an application seeking leave to be filed "within *six weeks of the order, judgment, decree or sentence*." The following passage of Maxwell, *The interpretation of Statutes*, (12th Edt.) page 309, will apply with respect to the method of computation to be adopted in calculating the period of six weeks specified in Rule 7.

> "A "week" may according to context, be a calendar week beginning on Sunday and ending on Saturday or *any period of seven days*." *(Emphasis added)*

According to the Strouds Judicial Dictionary Vol. III page 2890 (6th Edt.) –

> "Though a "week" usually means any consecutive seven days, it will sometimes be interpreted to mean the ordinary notion of a week reckoning from Sunday to Sunday (*Bazalgette v. Lowe* 24 L.J. Ch. 368, 416). And, probably, a "week" usually means seven clear days…."

The above quoted passages, albeit from earlier editions, have 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 decision of the Supreme Court of India in *Shah v*

Presiding Officer, Labour Court, Coimbatore and Others AIR 1978 SC 12 at page 16 where Jaswant Singh, J observed that the term "week" has to be taken to "signify a cycle of seven days including Sundays."

When applying Rule 7 of the Supreme Court Rules, it may also be useful to refer to the following passage in Maxwell, *The interpretation of Statutes*, (12th Edition) page 309:-

> "Where a statutory period runs "from" a named date "to" another, or the statute 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"*. *(Emphasis added)*

Hence, the term "of" as used in the Rule 7 is synonymous with "from", and "six weeks *of* the order, judgement" etc., means the same as "six weeks *from* the order, judgment" etc. A similar view was adopted by this Court in *Kailayar v Kandiah* 59 NLR 117 in which Sinnetamby J. (with whom Weerasooriya J. concurred) held that the relevant period should be calculated by excluding the date of the judgment appealed from and including the date of filing the application for leave to appeal.

Applying these principles of computation, I have excluded from the count Monday, 14th May 2012, on which day the impugned judgment of the High Court was pronounced and decree entered, and counted from Tuesday, 15th May to Monday, 25th June 2012, on which day the period of six weeks prescribed by Rule 7 read with Rule 28 for the filing of the application for leave to appeal in terms of Section 37(2) of the Arbitration Act, would come to an end. In fact, Monday, 25th June 2012 is the 42nd day from the impugned judgment and decree. Accordingly, I hold that the lodging of the application seeking leave to appeal in the Registry of this Court on Tuesday, 26th June 2012 was clearly out of time.

Conclusion

For all these reasons, I uphold the preliminary objection raised by the learned President's Counsel for the Respondent and dismiss the application seeking leave to appeal. In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, P.C. J.

I agree.

JUDGE OF THE SUPREME COURT