

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

SC Special LA No. 21/2011

HC Chilaw Appeal No. HCA 28/2008

MC Marawila No. 10777/C

Mapa Mudiyanseleage Deepthi
Lakmali

C/O, H.A. Manjula Shiromani

455, Lake Road

Wennappuwa

Applicant

Vs

Warnakulasuriya Mahamandadige
Antony Janakasiri Fernando

Silver Sands Park

Ranaviru Mahesh Mawatha

Pahala Katuneriya

Katuneriya

Respondent

And Between

Mapa Mudiyanseleage Deepthi
Lakmali

C/O, H.A. Manjula Shiromani

455, Lake Road

Wennappuwa

Applicant - Appellant

Vs

Warnakulasuriya Mahamandadige
Antony Janakasiri Fernando

Silver Sands Park

Ranaviru Mahesh Mawatha

Pahala Katuneriya

Katuneriya

Respondent - Respondent

And Now Between

Warnakulasuriya Mahamandadige
Antony Janakasiri Fernando

Silver Sands Park

Ranaviru Mahesh Mawatha

Pahala Katuneriya

Katuneriya

**Respondent – Respondent –
Petitioner**

Vs

Mapa Mudiyansele Deepthi
Lakmali

C/O, H.A. Manjula Shiromani

455, Lake Road

Wennappuwa

**Applicant – Appellant -
Respondent**

Before: Ratnayake PC, J.

Suresh Chandra J.

Dep PC, J.

Counsel:

Nuwan Dissanayake for the Respondent – Respondent - Petitioner

Ms. Thushani Machado for the Applicant – Appellant - Respondent

Argued on : 14.02.2012

Decided on : 15.06.2012

Suresh Chandra, J

This is an application for special leave to appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with s.9 of the High Court of Provinces (Special Provisions) Act No.19 of 1990. When this application was taken up for support a preliminary objection was raised by Counsel for the Respondent as to the maintainability of the application in view of s.14(2) of the Maintenance Act No.37 of 1999 . Both parties made oral submissions and thereafter filed written submissions regarding the preliminary objection that was raised.

The Respondent had made an application in the Magistrates Court of Marawila against the Petitioner seeking maintenance for herself in the sum of Rs. 20,000 per month. Thereafter she had amended her application and sought an increased amount of maintenance of Rs.60,000 per month. After inquiry by the learned Magistrate, the Petitioner was ordered to pay Rs.5,000 per month as maintenance. Thereafter the Respondent appealed against the said order of the Magistrates Court to the High Court of Chilaw seeking a variation of the Order. The High Court after hearing submissions of the parties varied the Order of the learned Magistrate by increasing the maintenance to be paid by the Petitioner to the Respondent to Rs.25,000 per month. It is against this

judgment that the Petitioner has filed the present application to this Court seeking Special Leave to Appeal.

The preliminary objection raised by the Respondent requires a consideration of the provisions of the Maintenance Act No.37 of 1999.

S. 14(2) of the said Act states as follows

“Any person dissatisfied with an Order made by the High Court in the exercise of its Appellate jurisdiction under this section, may prefer an appeal therefrom to the Supreme Court, on a question of law, with the Leave of the High Court, **and where such leave is refused**, with the Special Leave of the Supreme Court, first had and obtained.” (emphasis added)

The submission of Counsel for the Respondent was to the effect that before seeking special leave from the Supreme Court a party aggrieved by the decision of the High Court regarding the Appeal from the Magistrates Court should in the first instance seek such leave from the High Court, and it is only on a refusal of such an application that an application for leave could be made to the Supreme Court.

It would be relevant to consider the provisions of S.9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 which states that

“Subject to the provisions of this Act or any other law, a person aggrieved by –

- (a) A final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involved a substantial question of law, may appeal therefrom to the Supreme Court if the

High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings :

Provided that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment , decree or sentence made by such High Court , in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of the Article 154P of the Constitution or section 3 of this Act, or any other law where such High Court has refused to grant leave to appeal to the Supreme Court , or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance; ...”

Counsel for the Petitioner has admitted that the application of the Petitioner is one preferred under s.9 (a) referred to above on the basis that the said section provides for such an application where in the opinion of the Supreme Court the case or matter is fit for review by the Supreme Court.

The said submission of the petitioner fails to take into account the provisions of the Maintenance Act No.37 of 1999 which is a later Act than the High Court of the Provinces (Special Provinces) Act No.19 of 1990. The said Maintenance Act has a special provision relating to appeals to the High Court and Appeals to the Supreme Court in s.14(2) as stated above. The application for maintenance by the Respondent was under the provisions of the Maintenance Act as was the appeal to the High Court from the decision of the Magistrates Court. In such a situation an application for leave to appeal to the Supreme Court from the decision of the High Court should also be in terms of the provisions of the said Maintenance Act. According to s.14(2) as submitted by Counsel for the Respondent there is a difference in the procedure for invoking the appellate powers of the Supreme Court in a matter relating to maintenance. Unlike in any other case where an application for leave to appeal can be made directly to the Supreme Court against the judgment or Order of the High Court, no such direct

application can be made to the Supreme Court in respect of an application for maintenance against the Judgment of the High Court. Such an application should be preceded in a maintenance matter by first having recourse to the High Court itself in seeking leave to appeal to the Supreme Court and could apply to the Supreme Court only on a refusal of such application. In the present case no such application for leave to appeal to the Supreme Court had been made by the Petitioner to the High Court of Chilaw.

A comparison of the provisions of the Industrial Disputes Act No.43 of 1950 as amended by Act No.11 of 2003 relating to appeals to the Supreme Court from the High Court would also show that there is a difference in the procedure relating to appeals from High Courts in relation to maintenance matters as stated above. S.31DD(1) of the Industrial Disputes Act as amended states

“Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by law or in the exercise in its revisionary jurisdiction vested in it by law in relation to an order of a Labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained.” (emphasis added)

According to this section an aggrieved party has the option in invoking the appellate powers of the Supreme Court by either (a) making an application for special leave to the Supreme Court by making the application to the High Court itself or (b) making an application for special leave to appeal directly to the Supreme Court. Thus it would be seen that the option is made available by the use of the disjunctive word ‘**or**’ whereas in the Maintenance Act there is no such option as the operative word used is the conjunctive word ‘**and**’.

The maxim ‘**generalia specialibus non derogant**’ when applied to the present instance would also show that the general provision for appeals from High Courts to the Supreme Court as provided for by s.9 of the High Court of Provinces (Special

Provisions) Act No.19 of 1990 has no application where a special provision is made in a specific statute such as the provision in s.14(2) of the Maintenance Act No.37 of 1999 which was also enacted after the introduction of the general provision in Act No.19 of 1990.

S.14(2) of the Maintenance Act in fact sets out a condition precedent to the invocation of the Appellate powers of the Supreme Court from the judgment of a High Court in that an application for special leave to the Supreme Court should be made to the High Court in the first instance and only on the refusal of such an application can an application for special leave be made to the Supreme Court.

Maxwell on Interpretation of Statutes 12th Edition pg.328 referring to 'conditions precedent to jurisdiction' states that

“ Where an act or thing required by statute is a condition precedent to the jurisdiction of a tribunal, compliance cannot be dispensed with and, if it be impossible, the jurisdiction fails. It would not be competent to a court to dispense with what the legislature has made the indispensable foundation of its jurisdiction.”

The submission made by Counsel for the Petitioner that the Supreme Court Rules by providing for Appeals from the High Court of Provinces allows direct appeals to be made to the Supreme Court is devoid of any merit as the Rules provide the procedure to be followed in invoking the appellate powers of the Supreme Court and does not provide substantive law relating to Appeals specially when there are specific provisions in statutes granting rights to appeal to the Supreme Court.

In the above circumstances the preliminary objection raised by the Respondent that the present application of the Petitioner for special leave to appeal to the Supreme Court cannot be maintained is upheld and the application of the Petitioner is dismissed without costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

DEP PC, J.

I agree.

JUDGE OF THE SUPREME COURT