

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

In the matter of 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 Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD(1) of the Industrial Disputes Act.

SC Spl LA No. 86/2020

HC Colombo No. HCALT 81/2018

LT Ratmalana No. 32/RM/31/2014

D.H. Waruna Priyanka,
No. 03, Sri Naga Vihara Road,
Pagoda, Nugegoda.

Applicant

vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razik Fareed Mawatha, Colombo 01.

Respondent

And between

D.H. Waruna Priyanka
No. 03, Sri Naga Vihara Road,
Pagoda, Nugegoda.

Applicant – Appellant

vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razik Fareed Mawatha, Colombo 01.

Respondent – Respondent

And now between

D.H. Waruna Priyanka,
No. 03, Sri Naga Vihara Road,
Pagoda, Nugegoda.

Applicant – Appellant – Petitioner

vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razik Fareed Mawatha, Colombo 01.

Respondent – Respondent – Respondent

Before: E.A.G.R. Amarasekara, J
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Shammil J. Perera, PC with Lahiru Abeysekera and Duthika Perera for the
Applicant – Appellant – Petitioner

Uditha Egalahewa, PC with Vishva Vimukthi for the Respondent –
Respondent – Respondent

Supported on: 5th September 2022

Written Submissions: Tendered on behalf of the Applicant – Appellant – Petitioner on 20th
September 2022

Tendered on behalf of the Respondent – Respondent – Respondent on
20th September 2022

Decided on: 12th December 2022

Obeyesekere, J

This order relates to the preliminary objection raised by the learned President's Counsel for the Respondent – Respondent – Respondent [*the Respondent*], that this application of the Applicant – Appellant – Petitioner [*the Petitioner*] seeking leave to appeal in terms of Article 128 of the Constitution against the judgment of the Provincial High Court of the Western Province holden in Colombo has been filed out of time, and moving that this application be dismissed *in limine*.

The facts of this matter very briefly are as follows.

The Petitioner had joined the Respondent on 19th March 1990 as a Clerk. In September 2012, while serving as the Manager of the Kirulapona Branch of the Respondent, the Petitioner had been served with a charge sheet containing twenty charges relating to incidents that had occurred during the period the Petitioner served as the Manager of the Nattandiya Branch. Pursuant to being found guilty of all such charges at a domestic inquiry, the services of the Petitioner were terminated by the Respondent on 24th January 2014.

The Petitioner had thereafter filed an application before the Labour Tribunal against the said termination of his services as provided for by Section 31B(1) of the Industrial Disputes Act. After a lengthy inquiry where the Petitioner too had given evidence, the Labour Tribunal by its order dated 6th July 2018 had dismissed the said application. Aggrieved by the said order, the Petitioner had filed an appeal before the Provincial High Court as provided for by Section 31D(3) of the Act. By its judgment delivered on 25th February 2020, the High Court had dismissed the said appeal of the Petitioner.

Section 31DD(1) of the Industrial Disputes Act, as amended stipulates that, “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 of 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.”

This application seeking leave of this Court has accordingly been filed by the Petitioner on 29th June 2020.

While provisions relating to applications for special leave to appeal to the Supreme Court from judgments of the Court of Appeal are contained in Part 1A of the Supreme Court Rules (1990) made under Article 136 of the Constitution, provisions relating to leave to appeal applications from other Courts including the High Court are found in Part 1C thereof.

Rule 7, which comes under Part 1A, stipulates that, *“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.”* However, Part 1C of the aforementioned Rules, which applies to this application, does not specify a time period for the filing of leave to appeal applications. An issue similar to what has arisen in this application arose in **Asia Broadcasting Corporation (Private) Limited vs Kaluappu Hannadi Lalith Priyantha** [SC/HC/LA No. 50/2020; SC Minutes of 7th July 2021], where an objection that the application from the High Court had been filed out of time was sought to be resisted on the basis that the impugned application was seeking leave to appeal from a judgment of the Provincial High Court and that as it was an application made under Part 1C, Rule 7 and the time period stipulated therein, had no application.

Surasena, J, having considered the long line of cases where this Court has held that the time period specified in Rule 7 would nonetheless apply in respect of a leave to appeal application filed in terms of Part 1C and Section 31DD(1) of the Industrial Disputes Act, held that, *“... notwithstanding the fact that the instant application for leave to appeal from the judgment of the Provincial High Court would come under section C in Part I namely ‘Other Appeals,’ the provisions in Rule 7 of the Supreme Court Rules 1990 would apply to decide the time frame within which such an application must be filed before this Court.”*

It was therefore the position of the learned President's Counsel for the Respondent that any application seeking leave to appeal must be filed within six weeks of the judgment of the High Court. He submitted further that with the judgment of the High Court having been delivered on 25th February 2020, this application ought to have been filed in the Registry of this Court on or before 7th April 2020. As I have noted earlier, this application had been filed only on 29th June 2020, which, *on the face of it*, is clearly outside the six-week time period stipulated in Rule 7 of the Supreme Court Rules.

The learned President's Counsel for the Respondent, relying on the judgment of this Court in **Priyanthi Chandrika Jinadasa v Pathma Hemamali and Others** [(2011) 1 Sri LR 337] submitted that the time period of six weeks is mandatory and that failure to file the application within the said period of six weeks means that the application must be dismissed *in limine*. In **Jinadasa**, Chief Justice Bandaranayake, having considered the provisions of Rule 7, had held as follows at page 346:

“As clearly stated in L.A. Sudath Rohana v Mohamed Zeena and Others [SC HC CA LA No. 111/2010 – SC Minutes of 17.3.2011] Rules of the Supreme Court are made in terms of Article 136 of the Constitution, for the purpose of regulating the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure, which guides the Courts of civil jurisdiction, the Supreme Court Rules regulates the practice and procedure of the Supreme Court.

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.”

The learned President's Counsel for the Petitioner did not dispute the applicability of Rule 7 to this application and that the time period allowed for the filing of a leave to appeal application from the High Court is six weeks. Neither did he dispute the fact that, *on the face of it*, this application has been filed out of time. He however drew the attention of

this Court to paragraph 19 of the petition, where the Petitioner has stated that he “*was unable to file the petition within the stipulated time due to situation prevailed in the country and also the delay in obtaining a certified copy of the judgment marked P3.*”

It is common ground that the entire country was under a lockdown owing to the Covid-19 pandemic for almost six weeks from 16th March 2020. While Courts across the country, including this Court, did not function during that period, the sittings of this Court resumed on 11th May 2020. It was therefore clear that a large group of litigants would suffer irreparable harm unless the above period was excluded, thereby granting an extension of the time periods available for the filing of legal proceedings, pleadings etc.

As a solution to those applications to which Rule 7 applied, His Lordship the Chief Justice and three other Judges of this Court, acting in terms of Article 136 of the Constitution, issued the Supreme Court (Temporary Provisions) Rules 2020, which were published in the Extraordinary Gazette No. 2174/4 dated 6th May 2020.

Rule 2 thereof provided that:

“Notwithstanding anything to the contrary in Rule 7 of the Supreme Court Rules 1990 published in the Gazette Extraordinary No. 665/32 of June 7, 1991, the period beginning with March 16, 2020 and ending on May 18, 2020 shall not be taken into account in computing the period of six weeks referred to in Rule 7.”

A similar rule was made in respect of (a) the period beginning with 24th October, 2020 and ending on 31st January, 2021 – *vide* Supreme Court (Temporary Provisions) Rules, 2021 published in the Extraordinary Gazette No. 2211/56 dated 21st January 2021, and (b) the filing of appeals and application from the High Court to the Court of Appeal.

Thus, with the period between 16th March 2020 to 7th April 2020 [i.e., the balance period of time that was available for the Petitioner to file this application at the time the lockdown was imposed] having been excluded by Rule 2, the six-week time period available to the Petitioner for the filing of this leave to appeal application stood extended until 10th June 2020, with the result that the Petitioner had time until 10th June 2020 to

file this application in the Registry of this Court. It is admitted that the Petitioner failed to do so, with this application having been filed only on 29th June 2020. It is in these circumstances that the learned President's Counsel for the Respondent submitted that in spite of the exclusion of the time period between 16th March 2020 to 18th May 2020 in terms of Rule 2, this application is still out of time.

As I have already observed, the lockdown resulting from the pandemic affected not only the timely filing of those applications to which Rule 7 applied but the filing of all other actions, petitions, legal proceedings etc. that were due to be filed in other Courts and Tribunals, the time periods for which were regulated by the provisions of the Civil Procedure Code or the Prescription Ordinance. The solution to curing any delay arising due to the pandemic in respect of the latter category of cases was provided by the Legislature by way of the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Act No. 17 of 2021 [the Act], which was certified on 23rd August 2021.

Section 2(1) of the said Act reads as follows:

*“Where any court, tribunal or any other authority established by or under any law is **satisfied** that, a person was prevented from –*

- (a) instituting or filing any action, application, appeal or other legal proceeding, as the case may be, within the period prescribed by law for such purpose; or*
- (b) performing any act which is required by law to be done or performed within a prescribed time period,*

*due to any Covid-19 circumstance, **it shall be competent for such court, tribunal or any other authority established by or under any law to allow, admit or entertain an action, application, appeal, other proceeding or act, referred to in paragraph (a) or (b), notwithstanding the lapse of the time period prescribed by law for such purpose and subject to the provisions of section 9, the period within which such person was subject to such Covid-19 circumstance shall be excluded in calculating the said prescribed time period”** [emphasis added].*

Section 8 of the Act has defined a Covid-19 circumstance “to include – (a) Covid-19; or (b) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a).”

Thus, while all applications to this Court to which Rule 7 applied were provided with an automatic exclusion of time from 16th March 2020 to 18th May 2020, a party who had failed to institute legal proceedings in any Court within the period prescribed by law due to a Covid-19 circumstance was required by Section 2(1) to satisfy that Court that he was prevented from acting in terms of the law due to a Covid-19 circumstance, and seek that such period be excluded in calculating the prescribed time period.

Section 6 of the Act clearly specified that the burden of proving that a person was prevented from complying with the prescribed time period was due to any Covid-19 circumstance shall be on the party making such application. Section 7(1) provided further that, “Any guideline, direction, circular, notice or decision whether in the printed or electronic form, made by the Government in relation to any Covid-19 circumstance shall be admissible as prima facie evidence in any action, application, appeal or other legal proceeding instituted or made under this Act, without further proof.”

The learned President’s Counsel for the Petitioner presented two arguments to support his position that the Petitioner is entitled to a further exclusion of time to file this application, and that this application is therefore not liable to be rejected *in limine*.

The first argument was that the Petitioner is entitled to further time in terms of Section 2(1) of the Act. Although the Petitioner had not filed with his petition any material permitted by Section 7 to satisfy this Court that he was in fact prevented by a Covid-19 circumstance, the Petitioner, having obtained permission of Court, had tendered together with his written submissions, copies of circulars and news releases in support of his position.

The question that I must consider in relation to the first argument is whether the provisions of Section 2(1) would apply to this application. The answer to this question is found in Section 2(2) of the Act, which reads as follows:

*“Any relief granted under subsection (1) **shall not apply** in relation to any application or appeal –*

(a) to which the following rules apply –

(i) the Supreme Court (Temporary Provisions) Rules, 2020 published in the Gazette Extraordinary No. 2174/4 of May 6, 2020;

(ii) the Supreme Court (Temporary Provisions) Rules, 2021 published in the Gazette Extraordinary No. 2211/56 of January 21, 2021;

(iii) the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) (Temporary Provisions) Rules, 2020 published in the Gazette Extraordinary No. 2175/2 of May 12, 2020; or

(iv) the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) (Temporary Provisions) Rules, 2021 published in the Gazette Extraordinary No. 2211/56 of January 21, 2021;

*(b) to which any Supreme Court Rule or Court of Appeal Rule as **may be made** under Article 136 of the Constitution within the period of operation of this Act, granting any exclusion of time period as a relief in respect of any Covid-19 circumstance, apply” [emphasis added].*

It was common ground that no further Rules granting an exclusion of time for the purpose of filing applications to this Court where Rule 7 applied have been made, as provided for by Section 2(2)(b).

It is clear from Section 2(2) that it acts as an exception to Section 2(1). The intention of the Legislature as reflected by Section 2(2) is that a person prevented from instituting legal proceedings due to a Covid-19 circumstance shall be entitled to relief either under Section 2(1) or Section 2(2), but not both. Thus, while in respect of applications falling under Section 2(1), the period of exclusion that could be granted is within the discretion

of the relevant Court, subject to that Court being satisfied on the facts and circumstances of that case that an exclusion of time should be granted, no such discretion is available to this Court in respect of applications that fall within Section 2(2)(a)(i) or (ii), as the period of the exclusion has been specified by way of Rules made under Article 136. I have already observed that the Petitioner was entitled to an exclusion of time in terms of the Rules published in the Gazette of 6th May 2020, and therefore, I am of the view that the Petitioner is not entitled to seek any further exclusion of time in terms of Section 2(1).

The second argument of the learned President's Counsel for the Petitioner was that the Petitioner is entitled to the granting of an exclusion of the time period under and in terms of Section 2(2)(b) of the Act. Any entitlement to further time in terms of the said Section is a matter that must be decided by His Lordship the Chief Justice and three other Judges of this Court by way of Rules promulgated under and in terms of Article 136 of the Constitution. Section 2(2)(b) does not provide for this Court exercising jurisdiction under Article 128 of the Constitution to exclude any period of time within which this application should have been filed.

To do so would be to disregard the words of the Act when they are, and by extension the Legislature's intention, is amply clear. Even if one were to look at the purpose behind the Act, it was, as per its long title, to "*make temporary provisions in relation to situations where persons were unable to perform certain actions required by law to be performed within the prescribed time periods due to Covid-19 circumstances ...*". In its wisdom, the Legislature in Section 2(2) has decided that such temporary provisions "*shall not apply*" if Rules have already been made to achieve the same objective. One cannot argue that the long title should be considered in a vacuum to discern the purpose of the Act, and that Section 2(2) is not indicative of its purpose. Taking both together, the natural conclusion is that the Act intended to provide for an exclusion of time if Rules had not already been made with the same aim in mind.

Although the learned President's Counsel for the Petitioner pleaded that a purposive interpretation should be adopted, as pointed out in Singh's **Principles of Statutory Interpretation** [14th ed., 2020], which cites **Shri Ram Saha v State** [AIR 2004 SC 5080 at page 5089]:

"In applying a purposive construction a word of caution is necessary that the text of the statute is not to be sacrificed and the court cannot rewrite the statute on the assumption that whatever furthers the purpose of the Act must have been sanctioned."

This issue was in fact addressed in the Determination of this Court in the **Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill** [SC SD Application No. 24/2021] where, referring to the said provision, it was held as follows:

"However, we observe that this sub-clause is an integral part of Clause 2(2) of the Bill. It specifically ensures that the relief granted with regard to exclusion of the time limits under Clause 2(1) shall not apply in relation to any application or appeal for which the Supreme Court Rules and the Court of Appeal Rules (more fully referred to in Clause 2(1)(i) to (iv) of the Bill) have already been formulated (by virtue of Article 136 of the Constitution) and relief granted. The said Supreme Court and Court of Appeal Rules refer to the time periods, 16.03.2020 to 18.05.2020 and 24.10.2020 to 31.01.2021 only.

Clause 2(2)(b) of the Bill, on the other hand makes provision for further exclusion of time periods by way of Supreme Court or Court of Appeal Rules to be formulated, under Article 136 of the Constitution but within the period of the operation of the Act, as relief to a party affected in respect of any 'Covid-19 circumstances.' This provision in our view, only ensures further grant of relief to a party affected, by way of exclusion of time, in addition to the periods referred to in the Supreme Court and Court of Appeal Rules already promulgated and more fully referred to in Clause 2(1) of the Bill."

In the above circumstances, I am of the view that:

- (a) Where an application falls within Section 2(2)(a)(i) of the Act, the relief available under Section 2(1) is not available;
- (b) The Petitioner cannot seek further exclusions of time in terms of Section 2(2)(b) of the Act;
- (c) Even after granting the Petitioner the full benefit of the exclusion of the time period stipulated in Rule 2, this application has been filed outside the time period set out in Rule 7 and this application must therefore be rejected *in limine*.

I therefore uphold the preliminary objection raised by the learned President's Counsel for the Respondent that this application has been filed outside the time period stipulated in Rule 7 of the Supreme Court Rules. Leave to appeal is accordingly refused and this application is dismissed. I make no order with regard to costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT