

**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 from the judgment of the Provincial High Court of the Western Province

Hiranya Surantha Wijesinghe
Thuduwa Road, Madapatha, Piliyandala

Applicant

SC/Spl/LA/159/2017

HC (ALT) No. 53/2014

LT Maharagama 33/1000/2011

Vs.

Tenderlea Farms (Pvt) Limited
No. 5A, Thuduwa Road, Madapatha,
Piliyandala

(office Now at)

No. 31, First Lane, Ratmalana

Respondent

AND BETWEEN

Tenderlea Farms (Pvt) Limited
No. 5A, Thuduwa Road, Madapatha,
Piliyandala
(Office now at)
No. 31, First Lane, Ratmalana

Respondent-Appellant

Vs.

Hiranya Surantha Wijesighe
Thudawa Road, Madapatha, Piliyandala.

Applicant-Respondent

AND NOW BETWEEN

Hiranya Surantha Wijesinghe
Thuduwa Road, Madapatha, Piliyandala

Applicant-Respondent-Petitioner

Vs.

Tenderlea Farms (Pvt) Limited
No. 5A, Thuduwa Road, Madapatha,
Piliyandala
(Office now at)
No. 31, First Lane, Ratmalana

Respondent-Appellant-Respondent

Before: Priyantha Jayawardena, PC, J
Murdu N.B. Fernando, PC, J
S. Thurairaja, PC, J

Counsel: Kaushali Rubasinghe with Kushani Harischandra for Applicant-Respondent-Petitioner

Viran Corea with Sarita de Fonseka instructed by DN Associates for Respondent-Appellant-Respondent

Argued On: 12th February, 2019

Decided On: 17th September, 2020

Priyantha Jayawardena, PC, J

Facts of the case

This is an application seeking for special leave to appeal (hereinafter referred to as “the instant application”) against the judgment of the High Court holden in Colombo (hereinafter referred to as “the High Court”) setting aside a Labour Tribunal Order which held that the termination of employment of the workman was illegal and unjustified.

The applicant-respondent-petitioner (hereinafter referred to as “the workman”) was employed as the Farm Manager of the respondent-appellant-respondent Company (hereinafter referred to as “the employer”). He filed an application in the Labour Tribunal claiming compensation for the alleged unlawful termination of services and gratuity from the employer.

In his answer, the employer stated that the termination was due to ‘frustration’ of the contract of employment as the farm in which the employer worked was closed down as it was not feasible to continue with its operations.

After the conclusion of the inquiry, the Labour Tribunal delivered its Order granting a sum of Rs. 276,980/- as compensation for the wrongful termination of employment. Further a sum of

Rs.138,490/- was granted as gratuity since the employer had less than fifteen employees at the time of the alleged termination of the services of the workman.

Being aggrieved by the Order of the Labour Tribunal, the employer appealed to the High Court to have the Order of the Labour Tribunal set aside.

Having heard the parties, the High Court allowed the appeal and set aside the Order of the Labour Tribunal.

Being aggrieved by the judgment of the High Court, the workman preferred an application for special leave to appeal to this court on the following questions of law;

- i. Is the said Judgment of the Learned High Court contrary to law and against the submissions made?
- ii. Is the said Judgment of the Learned High Court Judge contrary to the decisions in the cases relating to depositing securities, specifically the case of *Wimalasiri Perera and others v Lakmali Enterprises Diesel and Petrol Motor Engineers and others (2003) 1 SLR 62*?
- iii. Is the said Judgment of the Learned High Court Judge contrary to the decisions in the cases related to compensation for loss for employment within the context of closure of business?
- iv. Is the said Judgment of the Learned High Court Judge contrary to decision in the cases related to granting gratuity at the termination of employment?
- v. Is the said Judgment of the Learned High Court Judge not considered the material questions involved and ignored the facts on ground of justice and equity?
- vi. Has the said Judgment of the Learned High Court Judge failed to justify the termination on balance of probability?
- vii. Has the said Judgment of the Learned High Court Judge made a finding which is inconsistent with the evidence and contradictory of it?
- viii. Are the findings in the said Judgment of the Learned High Court Judge rationally possible and perverse with regard to the evidence on record?

When the application was first taken up for support, the learned Counsel for the employer had moved to re-fix the application for support to obtain instructions. Accordingly, the application was re-fixed for support.

However, when this application was taken up for support for the second time, the learned Counsel for the employer raised a Preliminary Objection stating that the workman had not complied with Rule 2 read with Rule 6 of the Supreme Court Rules of 1990 (hereinafter referred to as the “Supreme Court Rules”) and moved for a dismissal of the application *in limine*.

Preliminary Objection raised by the Employer

The Counsel for the employer submitted that, although the workman, in his petition of appeal, had specifically pleaded that the entire Appeal Brief of the case No. HC/ALT/53/2014 had been annexed, none of the documents produced before the High Court, except for the judgment, were produced in court and no reason was given for such omission. Further, the workman had not sought the permission of the court to produce the said documents at a subsequent date.

Moreover, it was submitted that almost a month after the said Preliminary Objection was raised, the workman had filed, by way of motion several documents without assigning any reason for the delay and/or inability to have tendered the said documents along with the petition. The documents that were tendered by the workman along with the said motion are as follows:

- (a) the statement of objections dated 24th April, 2015 filed by the workman in the High Court,
- (b) the affidavit filed along with the statement of objections of the workman dated 24th April, 2015 filed in the High Court,
- (c) the written submissions of the workman dated 28th August, 2015 filed in the High Court,
- (d) the written submissions of employer dated 14th July, 2015 filed in the High Court, and
- (e) the written submissions of employer dated 5th October, 2015 filed in the High Court.

Submissions of the Employer

The Counsel for the employer submitted that the workman has not given any reasons for failing to file the aforesaid documents with the petition. In the circumstances, this court would not be

able to consider the questions of law set out in the application for special leave to appeal without considering the said material and the arguments placed before the High Court.

In support of his submission, the Counsel for the employer cited the case of *Ceylon Electricity Board v Ranjith Fonseka* (2008) 1 SLR 337.

It was further submitted that where the failure to comply with the Rules of the Supreme Court has not been explained, non-compliance should not be excused.

It was contended that such non-compliance could be excused only where the workman has proved due diligence on his part to obtain the documents and that the default was due to circumstances beyond his control, but not otherwise.

The Counsel for the employer cited the case of *Aaron Senerath v The Manager, Moray Estate and another* (SC/SPL/LA/231/2015) SC Minutes 19th January, 2017 which held:

“I am of the view that the Petitioner has failed to comply with the Rules of the Supreme Court when he failed to annex the material documents required by Rule 2 and Rule 6. The Petitioner in his Petition did not seek permission of the Court to file the documents subsequently. He had failed to give reasons for noncompliance.

In terms of Rule 2 of the Supreme Court Rules 1990 the Petitioner could be excused only if it is proved that he had exercised due diligence to obtain the documents and the default was due to circumstances beyond his control, but not otherwise, that he shall be deemed to have complied with the provisions of this rule.

In the foregoing circumstances, it was submitted that the workman has failed to comply with Rule 2 read with Rule 6 of the Supreme Court Rules 1990, by failing to submit material documents considered by the High Court. Thus, the instant application for special leave to appeal ought to be dismissed *in limine* with costs.

Submissions of the Workman

In response to the said objection, the learned Counsel for the workman submitted that in terms of Rule 2 read with Rule 6 of the Supreme Court Rules, documents have to be annexed where the

application contains allegations of fact which cannot be verified by reference to the judgment or Order in respect of which special leave to appeal is sought.

He further submitted that the impugned judgment of the High Court and the appeal brief of the High Court that were tendered with the petition are sufficient to consider all the questions of law contained in the petition and therefore, it is not necessary to file the documents referred to above, to support the application for special leave to appeal. Moreover, it was submitted that no prejudice has been caused to the rights of the employer or the administration of justice due to the non-availability of those documents.

Furthermore, the Counsel for the workman submitted that the aforementioned documents referred to by the Counsel for the employer in his Preliminary Objection, were tendered by way of motion on 18th December, 2017 after the Preliminary Objection was raised, but prior to the inquiry in respect of the said Preliminary Objection.

Moreover, it was submitted that the employer filed a motion along with the Proxy and Caveat without raising any objections to the maintainability of the special leave to appeal application. Further, when the application was taken up for support for the first time, no objection was raised on the maintainability of the application. However, the objection regarding non-compliance was raised only when the matter was taken up for support for the second time.

Furthermore, it was submitted that the employer has not followed the proper procedure in raising the Preliminary Objection. In support of his submission, the Counsel for the workman cited the judgment decided in *S. J. Sirisena and Others v A. A. Gunawardane and 5 others* (SC/SPL/LA No. 133/2015) SC Minutes 2nd August, 2017.

Is there a material breach of Rule 2 read with Rule 6 of the Supreme Court Rules 1990?

Rule 2 of the Supreme Court Rules states as follows:

“Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the, Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and a certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits documents, and judgment or order shall also be filed;

Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule.” [Emphasis added]

Further, Rule 6 of the Supreme Court Rules reads as follows:

“Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court of tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant’s belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit.” [Emphasis added]

The above shows that, Rule 2 read with Rule 6 specifies the documents that are required to be annexed to an application for special leave to appeal, if allegations of facts referred to in such an application cannot be verified by reference to the judgment in respect of which special leave to appeal is sought.

The application is filed along with a certified copy of the High Court brief which contained the following documents: the petition of appeal filed in the High Court, application to the Labour Tribunal, answer, replication, amended application, amended answer and the amended

replication, written submissions of the workman and the employer filed in the Labour Tribunal, proceedings in the Labour Tribunal, Order of the Labour Tribunal (hereinafter referred to as the “appeal brief”). Further, the impugned judgment of the High Court was filed along with the said application.

In terms of Rule 3 of the Supreme Court Rules, every application for special leave to appeal shall contain a plain and concise statement of all facts and matters that are necessary to enable the court to determine whether special leave to appeal should be granted, including the questions of law in respect of which special leave to appeal is sought, and the circumstances rendering the case or matter fit for review by the Supreme Court.

In the instant application, the workman had reserved the right to tender further documents. However, even though the workman filed the appeal brief of the High Court and the impugned judgment of the High Court along with the application for special leave to appeal, the documents referred to in the Preliminary Objection stated above were filed after the said objection was raised.

Non-compliance with the Supreme Court Rules does not necessarily result in depriving a party seeking redress from this court. It is the discretion of court to consider whether such documents are necessary to consider the application for granting special leave to appeal.

Further, the court would have to consider whether the non-compliance is fatal to the maintainability of an application or whether it is just a failure or omission which should not affect the administration of justice or whether the defect can be cured in the interests of justice without adversely affecting the rights of the other parties.

This position was held in *Kiriwanthe and Another v Navaratne and Another* [1990] 2 SLR 393, Fernando, J held:

“The weight of authority thus favours the view that while all these Rules must be complied with the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule.” [Emphasis added]

In the circumstances, it is necessary to consider whether the documents that have not been filed along with the application for special leave to appeal are fatal to the maintainability of the instant application.

The Counsel for the employer submitted *inter alia* that the objections and affidavit that were filed in the High Court by the workman have not been produced in this court along with the instant application.

There is no provision requiring the filing of objections in an appeal. Hence, the statement of objections and the verifying affidavit filed by the workman before the High Court are not necessary to consider the instant application.

The other documents that have not been filed, are the written submissions filed by the workman and the employer before the High Court.

Upon perusal of the questions of law raised, it is evident that there are no allegations of fact which cannot be verified by reference to the impugned judgment and the appeal brief. Hence, I am of the opinion that the said documents are not material documents to consider granting of special leave to appeal in the instant application.

Thus, the case of *Aaron Senerath v The Manager, Moray Estate and another* (SC/SPL/LA/231/2015) SC Minutes 19th January, 2017 cited by the Counsel for the employer has no relevance to the instant application as the material documents are provided along with the petition in the instant application.

A close examination of the instant application shows that the impugned judgment of the High Court and the appeal brief filed in the High Court annexed to the said application are sufficient to consider the questions of law that are set out in the application for special leave to appeal.

Further, the Counsel for the employer cited the case of *Ceylon Electricity Board v Ranjith Fonseka* (2008) 1 SLR 337 in support of his Preliminary Objection. However, it has no relevance to the application, as the said appeal had been decided mainly on the defects in the caption of the petition and affidavit filed in court, and not on the failure to file written submissions that were filed in the lower court by the parties.

In the circumstances, the instant application can be considered by referring to the impugned judgment of the High Court and the appeal brief of the High Court produced along with the said application.

Thus, I am of the opinion that there is no material breach of Rule 2 read with Rule 6 of the Supreme Court Rules on the part of the workman and substantial compliance with the Supreme Court Rules has been observed in filing the instant application. In any event, no prejudice has been caused to the employer.

Has the employer followed the proper procedure for raising the aforementioned Preliminary Objection?

The employer filed a motion along with its Proxy and Caveat without raising any objections for the alleged breach of the Supreme Court Rules.

Further, when the instant application came up for support, the employer had made an application to re-fix the application for support without raising any objection as to the maintainability of the instant application. The Preliminary Objection was raised for the first time when the instant application was taken up for support for the second time.

If an application for special leave to appeal does not comply with the Supreme Court Rules, a party who wishes to raise an objection for the non-compliance of the Rules, shall do so in terms of Rule 10 by filing a motion and moving court for the rejection or dismissal of the said application.

Rule 10 reads as follows:

“(1) A single Judge of the Supreme Court, sitting in Chambers, may refuse to entertain any application for special leave to appeal on the ground that it discloses no reasonable cause of appeal, or is frivolous or vexatious, or contains scandalous matter, or is preferred merely for the purpose of causing delay, or that such application does not comply with these rules.

(2) Where a Judge refuses to entertain an application for special leave to appeal under the provisions of the preceding sub-rule, the petitioner may appeal, by

way of motion, to the Supreme Court against such refusal.” [Emphasis added]

The correct procedure for raising an objection for non-compliance of Supreme Court Rules was discussed in detail in *S. J. Sirisena and Others v A. A. Gunawardane and 5 others* (SC/SPL/LA No. 133/2015) SC Minutes 2nd August, 2017 where it was held:

“Rule 10(1) stipulates the consequences of non-compliance with the Supreme Court Rules. I am of the view that the correct procedure for raising an objection of non-compliance of the Supreme Court Rules is to move the Court by filing a motion seeking for the rejection of the application. However, in this instance, the Respondents had failed to invoke the Rule 10(1) prior to raising the preliminary objection. Thus, the Respondents are not entitled to raise the said preliminary objection at a later stage.”

However, in the instant application, the employer has failed to comply with the procedure set out in Rule 10 of the Supreme Court Rules in respect of raising a Preliminary Objection. Hence, the employer is not entitled to raise the Preliminary Objection stated above.

Thus, I am of the opinion that the employer has not followed the proper procedure in raising the Preliminary Objection by not complying with Rule 10 of the Supreme Court Rules of 1990.

Conclusion

In the circumstances, due to the reasons stated above, the Preliminary Objection raised by the employer is overruled.

I order Rs. 25,000/- as costs. The costs should be paid to the workman on or before 30th September, 2020.

Judge of the Supreme Court

Murdu N.B. Fernando, PC, J

I agree

Judge of the Supreme Court

S. Thirairaja, PC, J

I agree

Judge of the Supreme Court