IN THE SUPREME COURT OF SRI LANKA

In the matter of an application for Leave to Appeal from the judgement of the High Court of the Criminal Province Holden in Kandy dated 15-03-2010.

Karunawathie Wickramasinghe Samaranayake,

SC HC CA LA 137/10 No. 1, Lady Mc Callum Drive, Nuwara Eliya.

SC HC CA LA 137/10 **Plaintiff**

CP/HCCA/775/2006

D.C. Nuwara Eliya Case No. 575/L

Vs

Ranjani Warnakulasuriya,

No. 2, Lady Mc Callum Drive,

Nuwara Eliya.

Defendant

BEFORE : Hon. N.G. Amaratunga, J.,
Hon. Saleem Marsoof, P.C., J. and
Hon. C. Ekanayake, J.

COUNSEL : Hiran de Alwis with C. Jayamaha for the Defendant-Respondent-Petitioner
Harsha Soza, PC with N. Jayasena for Plaintiff-Appellant-Respondent

Written Submissions on : 01.06.2011 (Respondent); 04. 07.2011 (Petitioner)

Argued on : 11.7.2011

Decided on : 04.10. 2012

SALEEM MARSOOF J.

The only question that arises at this stage in this case is whether the application filed by the Defendant-Appellant-Petitioner (hereinafter referred to as the "Petitioner"), seeking leave to appeal

from a judgement of the High Court of the Central Province holden in Kandy exercising civil jurisdiction, has been lodged out of time.

It appears from the petition filed by the Petitioner in this court that the Plaintiff-Appellant-Respondent (hereinafter referred to as the "Respondent") had instituted action in the District Court of Nuwara Eliya against the Petitioner for the recovery of possession of a State land which he held under an annual permit and for damages, but the action had been dismissed by the said District Court. The Respondent thereafter filed an appeal to the High Court of the Province holden in Kandy, which had by its judgement dated 15th March, 2010, set aside the decision of the District Court and granted relief to the Respondent as prayed for in the plaint.

The Petitioner has filed this application seeking leave to appeal from the said judgement of the High Court of the Province in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, which is quoted below:

> "(1)An appeal shall lie directly to the Supreme Court from any judgement, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by section 5A of this Act, *with leave of the Supreme Court first had and obtained*. The leave requested for shall be granted by the Supreme Court, where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.
>
> (2)The Supreme Court may exercise all or any of the powers granted to it by paragraph (2) of Article 127 of the Constitution, in regard to any appeal made to the Supreme Court under subsection (1) of this section." *(emphasis added)*

When this application came up for support on 24th February 2011, a preliminary objection was raised by learned President's Counsel for the Respondent in regard to the maintainability of the application on the basis that it had been filed outside the time limit of "six weeks" (42 days) specified in Rule 7 of the Supreme Court Rules, 1990, made under Section 136 of the Constitution. Learned President's Counsel submitted that as the judgement of the High Court was delivered on 15th March, 2010 and the petition seeking leave to appeal from the Supreme Court dated 8th May, 2010 was lodged in the Registry of this Court on 10th May, 2010, on the fifty-sixth day after the pronouncement of the judgement, the application for leave to appeal is time-barred.

Since the learned Counsel for the Petitioner did not concede that the application filed for leave to appeal is time-barred, both parties were given time to file written submissions on the question, and oral submissions were heard thereafter on 11th July 2011. Learned President's Counsel for the Respondent has submitted at the hearing that as there is no express provision in the High Court of the Provinces (Special Provisions) (Amendment) Act of 2006 imposing any time limit for filing an application for leave to appeal from the High Court, the time limit applicable for preferring an application for special leave to appeal from an order or judgement of the Court of Appeal should also apply to an order or judgement of the High Court of the Province exercising civil jurisdiction. He contends that the legislature has in the High Court of the Provinces (Special Provisions)

(Amendment) Act No. 54 of 2006, sought to equate the High Court of the Province to the Court of Appeal, and the time limit of six weeks specified in Part I-A Rule 7 of the Supreme Court Rules, 1990 therefore applies to an application for leave to appeal preferred in the Supreme Court from an order or judgement of the High Court of the Province.

On the other hand, learned Counsel for the Petitioner submits that the preliminary objections raised by learned President's Counsel should be overruled in view of the fact that no specific time limit is laid down in Section 5C(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006, which only provides for the filing of an appeal to this Court with "leave of the Supreme Court first had and obtained". He has stressed that although Article 136(1) of the Constitution, empowers the Chief Justice and any three Judges of the Supreme Court to make rules regulating the practice and procedure of Court including rules pertaining to the time within which the jurisdiction of the Supreme Court may be invoked, no rules have been made dealing expressly with the time limit for applications for leave to appeal from the High Court of the Province exercising civil jurisdiction. It is his submission that Part I-A of the Supreme Court Rules, 1990 including Rule 7 thereof, has no application to an application seeking leave to appeal made under Section 5C(1) of the said Act against a order or judgement of the High Court.

In this context, it is important to observe that prior to the enactment of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006, a party aggrieved by a judgement of the District Court was entitled to appeal to the Court of Appeal, and that an appeal would lie from the Court of Appeal to the Supreme Court on a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court in terms of Article 128(1) of the Constitution, or the Supreme Court grants special leave to appeal as contemplated by Article 128(2) of the Constitution. It is noteworthy that the High Court of the Province, which was established in 1988 under Article 154P of the Constitution introduced by the Thirteenth Amendment to the Constitution, and which was vested with an appellate and revisionary jurisdiction in respect of convictions, sentences, and orders imposed by Magistrate Courts and Primary Courts within the Province and with jurisdiction to issue, writs of *habeas corpus*, *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* in regard to matters set out in the Provincial Council List, was also empowered to exercise in terms of Article 154P (3)(c) of the Constitution, "such other jurisdiction and powers as Parliament may, by law, provide."

It is in the exercise of the power vested on Parliament by the aforesaid provision of the Constitution that certain new provisions including Section 5A was introduced by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 seeking to confer an appellate and revisionary jurisdiction on the High Court of the Province with respect to civil matters. In view of its importance to the question in issue, the two sub-sections of Section 5A are reproduced below in their entirety:

> "(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgements, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.

(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, *shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution* for a Province and any person aggrieved by any judgement, decree or order of a District Court or a Family Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:

Provided that no judgement or decree of a District Court or of a Family Court, as the case may be, shall be reversed or varied by the High Court on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice." *(emphasis added)*

It is clear that as submitted by learned President's Counsel for the Respondent, Section 5A(2) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 has sought to equate the jurisdiction conferred on the High Court of the Province by Section 5A(1) of the said Act to the civil appellate jurisdiction enjoyed by the Court of Appeal. The legislative intention of equating the High Court of the Province to the Court of Appeal is particularly manifest from the provision in Section 5A(2) that any provision of any written law applicable to the exercise of the jurisdiction referred to in that section "shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province". Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 carries the process of legislative equation of the two courts even further, and has been formulated substantively in the same lines as Article 128 of the Constitution, which does not specify any time limit for making the application for leave to appeal.

Although the submission of learned President's Counsel is in harmony with the legislative scheme adopted in the High Court of the Provinces (Special Provisions) (Amendment) Act of 2006 for conferring a civil appellate jurisdiction on the High Court of the Provinces, I note that this Court has adopted in a number of decisions a different approach in regard to this matter. This approach is reflected in the judgement of Justice (Dr.) Shirani A. Bandaranayake (as she then was) in *L.A. Sudath Rohana and Another v. Mohamed Zeena* S.C. H.C. C.A. L.A. No.111/2010 draft Minutes of the Supreme Court dated 14.07.2010 (unreported), a case which involved the question of the mode of preferring appeals and applications for leave to appeal to the Supreme Court, rather than the question of time bar. In this judgement Her Ladyship took note of the difference in language between Article 128(2) of the Constitution which refers to "special leave to appeal" and Section 5C (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act of 2006 which refers to the "leave of the Supreme Court first had and obtained", and after subjecting the Supreme Court Rules, 1990 to close scrutiny, noted that –

"Part I of the Supreme Court Rules 1990, refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst

> applications for special leave to appeal are from the judgements of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in section C of Part I of the Supreme Court Rules are described in Rule 28(1)..."

It is noteworthy that Rule 28(1) makes provision for all appeals which do not fall under the categories of special leave to appeal (Part I-A of the Rules) and leave to appeal (Part I-B of the Rules), and expressly provides as follows:

> "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, judgement, decree or sentence of the Court of Appeal *or any other court or tribunal*."

However, it is significant that Part I-C of the Supreme Court Rules, 1990, only contains provisions relating to the manner of filing 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, and does not contain any provision in the lines of Rule 7 which sets out a time limit for filing an application for special leave to appeal.

The question whether Rule 7 of the Supreme Court Rules 1990 stipulating six weeks for preferring an application to this Court for special leave to appeal against an order or judgement of the Court of Appeal will also apply to applications for leave to appeal from a judgement of the High Court for the Province in terms of Section 31 DD of the Industrial Disputes Act No. 43 of 1950 as subsequently amended, particularly by Acts Nos. 32 of 1990 and 11 of 2003, was considered by this Court in *Tea Small Factories Ltd. v. Weragoda* 1994 (3) SLR 353, in which this Court applied the time limit of six weeks stipulated in Rule 7, as neither Part I-C Rule 28 of the Supreme Court Rules, which was considered to be applicable to such an appeal, nor Section 31 DD of the Industrial Disputes Act, provides for the period within which an aggrieved party may invoke the appellate jurisdiction of the Supreme Court. Kulatunga J. (with whom G.P.S de Silva CJ., and Ramanathan J concurred) applied Rule 7, but after carefully examining its provisions, overruled the objection taken by the respondent to that case that the application seeking leave of the Supreme Court had been filed out of time.

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, this Court considered the question of the time limit applicable for lodging an application for leave to appeal in the context of applications for leave to appeal from decisions of the High Court of Sri Lanka filed in terms of Section 37 of the Arbitration Act No. 11 of 1995. In the first of these cases, which related to an application for leave to appeal filed fifty-five days after the pronouncement of judgement, Edussuriya, J. (with whom Wadugodapitiya, J. and Yapa, J. agreed) held that the application for leave to appeal fell within Part I-C of the Supreme Rules under which the appeal must be preferred within a reasonable time though no express time limit is imposed, but adverted by way

of analogy to the time limit of six weeks specified in Rule 7 of Part I-A of these Rules and observed as follows 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."

On this basis this Court concluded that the period of fifty-five days from the date of the order of the High Court taken by the petitioner to file his application for leave to appeal in that case cannot be considered to be a reasonable period and accordingly rejected the application for leave to appeal. In *George Stuart & Company Limited v. Lankem Tea and Rubber Plantation Ltd.* (2004) 1 SLR 246, which involved a similar application made 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.

The question of the time limit applicable for an application seeking leave to appeal against a order or judgement of the High Court of the Province exercising civil jurisdiction was considered by this Court for the first time in *Jamburegoda Gamage Lakshman Jinadasa v. Pilitthu Wasam Gallage Pathma Hemamali and Others* S.C. H.C. C.A. L.A. No.99/2008 draft Minutes of the Supreme Court dated 07.07.2011 (unreported). In this case, the application for leave to appeal had been filed forty-eight days after the date of the judgement of the High Court of the Province, and in analysing the legal position, the Supreme Court took the view that the application fell within Part I-C and not Part I-A of the Supreme Court Rules, and went on to hold that the application was time barred. Her Ladyship Dr. Shirani A. Bandaranayake, CJ, (with whom P.A. Ratnayake, P.C., J. and Chandra Ekanayake, J. concurred) observed 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, judgement, 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.

Although the reason for applying in such as case the time limit set out in Rule 7 in the context of its finding that such an application falls within Part I-C and not Part I-A of the Supreme Court Rules, is not explained in the judgement of Bandaranayake, CJ, the rationale for the decision may be inferred from the earlier judgement of Edussuriya, J in *Mahaweli Authority of Sri Lanka v. United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 at 12 quoted above, where His Lordship in the absence of any provision setting out a time limit for making an application for leave to appeal in a case falling under Part I-C, applied the notion of "reasonableness" for arriving at the conclusion that the time limit

specified in Rule 7 was reasonable and should be applied. As her Ladyship Bandaranayake J (as she then was) observed in the course of her judgement in *George Stuart & Company Limited v. Lankem Tea and Rubber Plantation Ltd*. (2004) 1 SLR 246 at page 254, it would lead to absurdity "if a party who was successful in the High Court.....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".

Accordingly, in the light of the reasoning adopted in the aforementioned decisions of this Court, I am inclined to hold that an application for leave to appeal filed in the Supreme Court from an order of a High Court of the Province exercising civil jurisdiction has to be filed within six weeks of the pronouncement of the order or judgement appealed from, irrespective of whether it is considered to fall within Part I-A or Part I-C of the Supreme Court Rules.

Learned Counsel for the Petitioner has urged before Court certain circumstances to be considered in regard to the question whether the application has been filed within a reasonable time. He has submitted that the Petitioner resides in Nuwara Eliya, situated outside the district of Kandy and quite some distance away from the place where the relevant Provincial High Court is situated, his application may be considered to have been filed within a reasonable period of time from the date of the pronouncement of the judgement sought to be appealed from, and has stressed that in any event, this Court has entertained his application and has issued notices to the Respondent accordingly. However, I note that the time limit of six weeks set out in Rule 7 has been held consistently by this Court to be mandatory and must be strictly complied with, and even if the "reasonable test" applied by Edussuriya J in *Mahaweli Authority of Sri Lanka v. United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 is adopted, the circumstances urged by learned Counsel for the Petitioner are insufficient to permit the application to stand.

For the reasons set out above, I hold that the application filed by the Petitioner seeking leave to appeal is time-barred, and accordingly, the preliminary objection taken up by the Learned President's Counsel for the Respondent is upheld. I therefore make order dismissing this application for leave to appeal, but in all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

HON. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT