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

In the matter of an application for Leave to Appeal to the Supreme Court under and in terms of Section 5 (c) 1 of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

Illangakoon Mudiyanselage
Gnanathilaka Illangakoon,
Bulupitiya, Uhumeeya,
Kurunegala.

Plaintiff-Respondent-Petitioner

S.C.H.C. C.A. L.A. 277/11
C.P/HC/CA/15/2009
D.C. Matale Case No. 3773/L.

Vs.

Anula Kumarihamy
Lenawela,
Lenawela

Defendant-Appellant- Respondent

BEFORE : K. Sripavan, J.
S. Hettige, P.C.,J.
P. Dep, P.C., J.

COUNSEL **:** S.K. Sangakkara for the Plaintiff-Respondent-Petitioner
Riad Ameen for the Defendant-Appellant-Respondent

ARGUED ON : 21.01.2013

WRITTEN SUBMISSIONS
FILED : By the Plaintiff on 05th February 2013
By the Defendant on 12th February 2013

DECIDED ON : 05.04.2013

SRIPAVAN, J.

The Plaintiff-Respondent- Petitioner (hereinafter referred to as the "Plaintiff") being dissatisfied with the judgment pronounced by the High Court established by Article 154P of the Constitution preferred a leave to appeal application dated 21.07.11 to this Court to have the said judgment set aside on various grounds set out in paragraph 12 of the Petition of Appeal.

When the said leave to appeal application was taken up for support, the Learned Counsel for the Defendant-Appellant-Respondent (hereinafter referred to as the "Defendant") took up a preliminary objection to the maintainability of the application on the basis that the Plaintiff has failed to comply with the mandatory requirements set out in Rules 28(2) and / or 28(5) of the Supreme Court Rules, 1990 and therefore the application filed by the Plaintiff should be dismissed in limine.

The Plaintiff filed his Plaint dated 21.04.86 in the District Court naming the following four Defendants :

Illangakone Mudiyanselage Gnanathilaka Illangakone

Plaintiff

Vs.

1. Kalinga Seneviratne Kumarasinghe Bandaranayake Mudiyanse Ralahamilage William Bandara Lenawala,
2. Kalinga Seneviratne Kumarasinghe Bandaranayake Mudiyanse Ralahamilage Thilakaratne Bandara Lenawala
3. Anula Kumarihamy Lenawala
4. Hetitiarachchige Don Lootus Leelartne

Defendants

When this application came up for hearing before this Court on 25.05.2012, Learned Counsel for the third Defendant informed Court that he would be taking up a preliminary objection that the leave to appeal application should be rejected in limine for failure to make the necessary parties as Defendants. The inquiry into the preliminary objection was fixed for 18.09.2012. However, on 07.09.2012, the written submissions of the Plaintiff was filed and he took up the following matters, moving that the preliminary objections be rejected.

1. Paragraph (2) -

   The first and the second defendants died after filing the answers, but before the trial and their legal representatives were substituted as 1A and 2A Defendants.

2. Paragraph (3) -

On the date of the trial the second and the third Defendants were alive. Only the 3rd Defendant appeared at the trial; the Court ordered ex-parte trial against all the other Defendants and entered judgment against the 3rd Defendant.

3. Paragraph 4 -

Before the appeal was heard by the High Court and after the ex-parte decree was served on the 4th Defendant H.D.L. Leelaratne, he met the Plaintiff and requested him to execute Deed No. 264 dated 19th January 2011 in order to avoid ejectment from the portion he occupied pertaining to the decree in the case.

4. Paragraph 6 -

As the Court had already ordered ex-parte trial against the 4th Defendant H.D.L. Leelaratne and no final judgment has been entered against him he will not be bound by the Order of this Court. Thus, there was no need to make the 4th Defendant as a party respondent to this leave to appeal application.

5. Paragraph 7(a)

The Provincial High Court failed to issue any notice on the substituted Defendants thereby deprived their rights to be present at the hearing and to exercise their rights under Section 772 of the Court Procedure Code.

6. Paragraph 7(b)

The judgment of the Provincial High Court does not bind the substituted Defendants and the Defendants who have died.

It is on the abovementioned basis the Plaintiff submitted that except Anula Kumarihamy Lenawala, others had not been made parties in the appeal preferred to the Supreme Court.

The petition of appeal dated 21.07.11 filed in this Court did not contain any of the matters now referred to in the written submissions . Rule 28(2) mandatorily requires that the appeal should contain, inter alia, a plain and concise statement of the facts and the grounds of objection to the judgment appealed against. The Plaintiff has now produced Deed No. 264 dated 19th January 2011 and other evidence of fact for the first time along with the written submissions. The aforesaid Deed was not even produced in evidence before the District Court. The position now taken up in the written submissions of the Plaintiff is irrelevant and cannot be considered at this stage. It is also noted that the written submission filed is teamed with mistakes and irregularities. While in paragraph 2, the Plaintiff states that the second Defendant died after filing the answer, in paragraph 3, he states that the second Defendant was alive, on the date of the trial.

Learned Counsel for the Defendant argued that in the application for leave to appeal, only the Plaintiff and the Defendant were made parties whereas the proceedings before the High Court indicate the following three more parties as Defendants-Defendants:

2. Kalinga Seneviratne Kumarasinghe Bandaranayake
   Mudiyanse Ralahamilage William Bandara Lenawala,

Udupihilla, Matale.

2. Kalinga Seneviratne Kumarasinghe Bandaranayake Mudiyanse Ralahamilage Thilakaratne Bandara Lenawala, Lenawala.

3. Hettiarachchige Don Lootus Leelaratne, No. 28, Siyambalagastenna Road, Kandy.

Thus, Counsel submitted that the application for leave to appeal has excluded the aforesaid Defendants-Defendants in its title thereby violating Rule 28(2) and/or Rule 28(5) of the Supreme Court Rules, 1990.

Learned Counsel for the Plaintiff on the other hand submitted that no Rules have been enacted under Article 136 of the Constitution in respect of matters relating to leave to appeal from a High Court established by Article 154P of the Constitution to the Supreme Court and that Rule 28(2) did not specify any requirements as to how a leave to appeal application be drafted when invoking the appellate jurisdiction of the Supreme Court. It is on this basis Counsel contended that the preliminary objection raised by the Learned Counsel for Defendant regarding the application of Supreme Court Rules, 1990 cannot be accepted.

The Plaintiff has filed this application seeking leave to appeal from the judgment 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 reads as follows :-

"5c (1) *An appeal shall lie directly to the Supreme Court from any judgment, 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.

It may be relevant to note that in the case of *L.A. Sudath Rohana and another* Vs. *Mohamed Cassim Mohammed Zeena* S.C.H.C. C.A. L.A. No. 111/2010 (S.C. Minutes of 14.07.2010) this Court had the occasion to consider the mode of preparing appeals and applications for leave to appeal to the Supreme Court. In this judgment Justice (Dr.) Shirani A. Bandaranayake (as she then was) observed 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 No. 54 of 2006 which refers to the "leave of the Supreme Court First had and obtained" and after subjecting the Supreme Court Rules, 1990 to a close critical examination 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 judgments 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, judgment, 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) which is 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, judgment, decree or sentence of the Court of Appeal <u>*or any other Court or tribunal"*</u> *(emphasis added)*

The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules, 1990 thus enabling the fact that Section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces".

In the case of *Jamburegoda Gamage Lakshman Jinadasa* vs. *Pilitthu Wasana Gallage Pathma Hemamali and others* S.C. H.C. C.A. L.A. No. 99/2008 (S.C. Minutes of 8.11.2010), the Supreme re-iterated that

an application for leave to appeal from the judgment of the High Court of the Province , would fall within Section C of Part I and not Section A of Part I of the Supreme Court Rules.

It is therefore incorrect to state that there are no rules made by the Supreme Court that would be applicable to applications for leave to appeal from the High Court of the Provinces, to the Supreme Court.

Since the preliminary objection is based on Rule 28(2) of the Supreme Court Rules, 1990, the said Rule is reproduced below for convenience.

> 28(2)*"Every such appeal shall be upon a petition in that behalf lodged at the Registry by the appellant, containing a plain and concise statement of the facts and the grounds of objection to the order, judgment, decree or sentence appealed against, set forth in consecutively numbered paragraphs, and specifying the relief claimed. Such petition shall be type-written, printed or lithographed on suitable paper, with a margin on the left side, and shall contain the full title and number of the proceedings in the Court of Appeal or such other Court or tribunal,* ***and*** *the full title of the appeal. Such appeal shall be allotted a number by the Registrar.."(*emphasis added)

Learned Counsel for the Defendant contended that the requirement of "full title" referred to in Rule 28(2) is unique only for Section C of Part I of the Supreme Court Rules, 1990 relating to "Other Appeals", and must be complied with. He argued that Rule 28(2) requires the

"full title" of the Court below has to be mandatorily set out in the petition of appeal..

It is therefore evident that the words "full title" necessarily has to include all the persons cited as parties in the proceedings below. It is not disputed that before the District Court and the High Court there were three other parties apart from the Plaintiff and the Defendant. Admittedly, the petition of appeal does not contain the "full title" of the Court below and the failure to set out the "full title" is a fatal irregularity and this application be dismissed on that ground alone for no-compliance with the mandatory rule of this Court. Counsel also relied on Rule 28(5) of the Supreme Court Rules, 1990 which reads as follows:

> 28(5) "*In every such petition of appeal and notice of appeal, there shall be named as Defendants, all parties in whose favour the judgment or order complained against was delivered or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the Defendants shall be set out in full.*"

It was submitted that if only Rule 28(5) were in existence, then the Plaintiff is not obliged to set out the "full title" and instead the Plaintiff had to only comply with the said Rule 28(5). Since this appeal falls within the category of "Other Appeals" the combined effect of both Rule 28(2) and Rule 28(5) is that the requirement of "full title" must be

complied with and be supplemented by other parties required to be added under Rule 28(5).

In the case of *Ibrahim* Vs. *Nadarajah* (1991) 1 S.L.R. 131 , this Court held that the failure to comply with the requirements of Rules 4 and 28 of the Supreme Court Rules 1978 is necessarily fatal. Rule 4 of the Supreme Court Rules, 1978 reads thus:

> "*4. Every application Special leave to appeal shall name as respondent, in the case of a criminal cause or matter the party or parties whether complainant or accused in whose favour the judgment complained against was delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal, and in the case of a civil cause or matter, the party or parties in whose favour the judgment complained against has been delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal, and shall set out `in full the address of such respondents."*

One could therefore see that the wordings in Rule 4 of the Supreme Court Rules, 1978 are almost identical to Rule 28(5) of the Supreme Court Rules, 1990.

"Where there is non-compliance with a mandatory rule, serious consideration should be given for such non-compliance as such non-compliance would lead to serious erosion of well established Court procedures followed by our Courts throughout several decades." - per

Dr. Shirani Bandaranayake, J. (as she then was) in the case of *Attanayake* vs. *Commissioner General of Election & Others* (S.C. Minute of 21.07.11) .

The case of *De Silva* vs. *Wettamuny (2005)* 3 S.L.R. 251 decided by the Court of Appeal and relied upon by the Learned Counsel for the Plaintiff is based on an objection of non-compliance of the provisions contained in Rule 3(d) of the Court of Appeal (Appellate Procedure) Rules 1990. The facts in *De Silva's* case are different from the facts of the application in hand, which deals with an application for leave to appeal from the High Court of the Province, to the Supreme Court, the relevant applicable rules being the Supreme Court Rules 1990.

It is also observed that the Plaintiff in Paragraph (b) of the Prayer to the Petition seeks to set aside the judgment of the Court of Appeal when in fact no judgment was delivered by the Court of Appeal but by the High Court of the Central Province Holden in Kandy. In Paragraph 12(i) of the petition too the Plaintiff puts in issue the determination of the judgment by the Court of Appeal. The prayer to the petition does not contain a request for the grant of leave to appeal in the first instance in compliance with Section 5(c) of Act No. 54 of 2006. I must emphasize that when accepting any professional matter from a client, it shall be the duty of any Attorney-at-Law to exercise his skill with due diligence in drafting the necessary papers with due regard to his duty to Court and to the client.

On a consideration of all the material placed before the Court and for the reasons set out above, I uphold the preliminary objection raised by the Learned Counsel for the Defendant and dismiss the Plaintiff's application for leave to appeal for non-compliance with Rule 28(2) of the Supreme Court Rules, 1990. The defects I have pointed out in the prayer to the petition too dis-entitles the Plaintiff to obtain any relief from this Court.

I make no order as to costs.

Judge of the Supreme Court

S. HETTIGE, P.C.,J.

I agree.

Judge of the Supreme Court

P. DEP, P.C., J.

I agree.

Judge of the Supreme Court