

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

In the matter of an Application under `
the provisions of the Companies Act
No. 07 of 2007.

1. Kamkaru Sevana,
10/1, Attidiya Road
Ratmalana.
2. M.D.M. Senarathne
No. 255/5B/1, Saman Mawatha,
Nedimala, Dehiwala.
3. Mala Dassanayake,
43,Punsarawatte, Bettegama,
Panadura.
4. K. Illangakoon,
133/3, 6th Lane,
Uyana, Moratuwa.
5. Sunil Gajasinghe,
35, Goluma Pokuna Mawatha,
Bolawalana, Negombo.
6. Sanet Dikkumbura , No. 99,
Sri Gnanalankara Mawatha,
Kalubowila, Dehiwala
7. Ranjith Liyanage
28, Araliya Mawatha,
Sirimal Uyana,
Ratmalana.

8. M. Sunitha Perera,
Agamethi Mawatha,
Bandaragama.

Petitioners

Vs.

1. Kingsly Perera,
10/1, Attidiya Road,
Ratmalana.
2. Upali Gunarathne
59/1, Main Road, Attidiya,
Ratmalana.
3. Nirmalan Daas
267/25, Galle Road,
Colombo 03.
4. Lakshman Kumara Meragalla
213/21, Balika Niwasa Road,
Rukmale, Pannipitiya.

Respondents

AND NOW

In the matter of a Leave to Appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Articles 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Kamkaru Sevana,
10/1, Attidiya Road
Ratmalana.

2. M.D.M. Senarathne
No. 255/5B/1, Saman Mawatha,
Nedimala, Dehiwala.
3. Mala Dassanayake,
43, Punsarawatte, Bettegama,
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Bolawalana, Negombo.
6. Sanet Dikkumbura
No. 99, Sri Gnanalankara
Mawatha, Kalubowila,
Dehiwala
7. Ranjith Liyanage
28, Araliya Mawatha,
Sirimal Uyana, Ratmalana.
8. M. Sunitha Perera,
Agamethi Mawatha,
Bandaragama.

Petitioners-Petitioners

S.C.H.C. L.A. 86/12

Vs.

HC/Civil 17/12/Co

1 Kingsly Perera,
10/1, Attidiya Road,
Ratmalana.

2. Upali Gunarathne
59/1, Main Road, Attidiya,
Ratmalana.
3. Nirmalan Daas, 267/25,
Galle Road, Colombo 03.
4. Lakshman Kumara Meragalla
213/21, Balika Niwasa Road,
Rukmale, Pannipitiya.

Respondents-Respondents

BEFORE : Marsoof, P.C., J.,
Sripavan, J.
Wanasundera, P.C., J.

COUNSEL : Kuvera De Zoysa, P.C. With Sabry
Haleemdeen for the Petitioners-Petitioners.

M.U.M. Ali Sabry, P.C., with Erusha
Khalidasa for the Respondents-Respondents.

ARGUED ON : 06.02.2013

WRITTEN SUBMISSIONS

FILED : By the Petitioners on 28.02.2013
By the Respondents on 28.02.2013

DECIDED ON : 17.05.2013

SRIPAVAN, J.

The Petitioners-Petitioners (hereinafter referred to as the “Petitioners”) acting in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Articles 127 and 128 of the Constitution sought, inter alia, Leave to Appeal to the Supreme

Court from an Order dated 16.07.2012 made by the Commercial High Court of Colombo in case bearing No. H.C. (Civil) 17/2012/CO. It is not in dispute that the Commercial High Court by its Order dated 16.07.2012 refused to grant the interim relief sought in terms of paragraphs(vii) and (viii) of the prayers to the Petition.

When this matter was taken up for support, the learned President's Counsel for the Respondents-Respondents (hereinafter referred to as the "Respondents") took up a preliminary objection to the maintainability of the application on the basis that the Petitioners' application is out of time in view of the provisions of Sections 5(2) and (6) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

I reproduce below Sections 5 and 6 of the said Act for purposes of convenience:

- "5. (1) Any person who is dissatisfied with any judgment pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgment, for any error in fact or in law.*
- (2) Any person who is dissatisfied with any order made by a High Court established by Article 154P*

of the Constitution, in the exercise of its jurisdiction under section 2 in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such Order for the correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained.

(3) *In this section, the expressions “judgment” and “order” shall have the same meanings respectively, as in section 754(5) of the Civil Procedure Code (Chapter 101).*

6. *Every appeal to the Supreme Court, and every application for leave to appeal under section 5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101). ”(emphasis added)*

A careful reading of the said two sections clearly show how an appeal to the Supreme Court be made from a judgment pronounced and an Order made by the High Court in the course of an action. Thus, if an interim Order is made by the High Court, the Petitioners have to file a leave to appeal application to this Court to have the said Order set aside. The said leave to appeal application shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code, in terms of Section 6. The following Sections in Chapter LVIII of the Civil Procedure Code specify the procedure to be adopted in preparing such an appeal.

754(2) Any person who shall be dissatisfied with any order made by any original Court **in the course of any civil action, proceeding or matter** to which he is, or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact in law, with the leave of the Court of Appeal first had and obtained.
(emphasis added)

757. (1) Every application for leave to appeal against an order of Court **made in the course of any civil action, proceeding or matter** shall be made by petition duly stamped, addressed to the Court of Appeal and signed by the party aggrieved or his registered attorney. Such petition shall be supported by affidavit, and shall contain the particulars required by section 758, and shall be presented to the Court of Appeal by the party appellant or his registered attorney **within a period of fourteen days from the date when the order appealed against was pronounced, exclusive of the day of that date itself, and of the day when the application is presented and of Sundays and public holidays, and the Court of Appeal shall receive it and deal with it as hereinafter provided and if such conditions are not fulfilled the Court of Appeal shall reject it.** The appellant shall along with such petition, tender as many copies as may be required for service on the respondents.(emphasis added)

(2) Upon an application for leave to appeal being filed, in the Registry of the Court of Appeal, the Registrar shall number

such application and shall forthwith send notice of such application by registered post, to each of the respondents named therein, together with copies of the petition, affidavit and annexures, if any. The notice shall state that the respondent shall be heard in opposition to the application on the date to be specified in such notice. An application for leave to appeal may include a prayer for a stay order, interim injunction or other relief.

Learned Counsel for the Petitioners sought to argue that the wording in Section 6 which states “as nearly as may be” is a clear manifestation of the intention of the legislature not to require strict compliance with the provisions contained in Chapter LVIII of the Civil Procedure Code. Counsel further contended that Act No. 10 of 1996 did not specify the time limit within which a leave to appeal application should be preferred to the Supreme Court. I would like to reproduce a passage from the judgment of *Bandaranayake, J.* (as she then was) in the case of *George Stuart & Co. Ltd. Vs. Lankem Tea & Rubber Plantations Ltd.* (2004) 1 S.L.R. 246 at 254 -

“.... if the contention of the petitioner is upheld, there is no time limit for an application for leave to appeal to be lodged, then such an application could even be made after 10 years from the date of the order of the High Court, I wish to add further that such a situation would lead to an absurdity in that, the party who was successful in the High Court in the action for the enforcement of the award, 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....”

When an interpretation leads to absurdity the word “may” is construed as imperative depending upon the context. Thus, Act No. 10 of 1996 in Section 6 provides the procedure for appeal to the Supreme Court and when enacted for public good and for the advancement of justice an expression which appear to belong to the permissive language like “may” must be construed to have a compulsory force.

It is no doubt true that the rule of interpretation permits the interpretation of the word “may” in certain context as “shall” and vice versa, namely, permit the interpretation of “shall” as “may”. In this context, it may be relevant to consider the decision of this Court in *Haji Omar vs. Wickramasinghe & Others* (2001) 3 S.L.R. 61, which arose from an application for leave to appeal under Sections 5(2) and 6 of the High Court of the Province (Special Provisions) Act No. 10 of 1996. When the Petitioner moved for notice on the Respondents, the Court observed that an application for leave to appeal to the Supreme Court shall be made as nearly as practicable in the manner provided by Chapter LVIII of the Civil Procedure Code and held that the procedure set out in Section 757(2) was applicable to the application. Accordingly, M.D.H. Fernando, J. directed the Registrar of the Supreme Court to take steps in terms of Section 757(2) of the Civil Procedure Code in applications of this nature.

Hence, I cannot agree with the learned Counsel for the Petitioner that the wording in Section 6 of Act No. 10 of 1996 is merely directory and not mandatory.

Learned Counsel for the Petitioners further contended that since Act No. 10 of 1996 did not stipulate a time limit within which a leave to appeal application is to be made, the leave to appeal application could be made within a reasonable time, namely within a period of 42 days, as decided by this Court in a long line of cases under Section 5c of Act No. 54 of 2006. I must state that the Petitioners themselves invoked the jurisdiction of the Provincial High Court of the Western Province Holden in Colombo as the matter involved proceedings under the Companies Act.

In fact, in paragraph (1) of the petition filed in the said High Court, the Petitioners state as follows: -

“The Petitioners state that this Honourable Court is vested with exclusive jurisdiction to hear and determine this matter under in terms of the provisions of the Companies Act No. 7 of 2007.”

Having invoked the jurisdiction of the High Court, in terms of Section 2 of Act No. 10 of 1996, the petitioners must follow the appeal procedure laid down in the said Act. It is undoubtedly good law that where a Statute creates a right and gives a specific remedy, a party seeking to enforce the right might resort to that remedy and not to others. The Petitioners, if not satisfied with an interim order designed

to provide provisional relief until the substantive relief is decided at the trial, have the right to prefer an application for leave to appeal against such order as provided in Sections 5(2) and (6) of Act No. 10 of 1996. Such an application for leave to appeal should have been lodged by the Petitioners within a period of 14 days as stated in Section 757(1) of the Civil Procedure Code. Admittedly, this application has been filed by Petition dated 24.08.2012 (almost 38 days after the impugned order was made) to challenge the interim order made by the High Court on 16.07.2012.

I therefore hold that the Petitioners' application was filed long after the expiry of the period of time stipulated in Section 757(1) of the Civil Procedure Code. The Preliminary Objection raised by the learned Counsel for the Respondents is entitled to succeed. The application is accordingly, dismissed.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

MARSOOF, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

