IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 as amended

SC/HC/CA/LA No. 134/2016

WP/HCCA/COL/97/2010(F)

DC Colombo Case No. 19673/L

1. Nawinna Kottage Dona Lalitha Padmini
2. Wellalagodage Ganga Geeth Kumara

Both of No. F41,
Bandaranaikapura,
Rajagiriya.

Plaintiffs

-Vs-

1. N.K.D. Pradeepa Nishanthi Kumari
   No. F43, Bandaranaikapura,
   Rajagiriya.
2. Dammika Weerakoon,
   No. F43, Bandaranaikapura,
   Rajagiriya.
3. National Housing Development Authority
   Chittampalam A. Gardiner Mawatha,
   Colombo 02.

Defendants

Between

1. N.K.D. Pradeepa Nishanthi Kumari
   No. F43, Bandaranaikapura,
   Rajagiriya.
2. Dammika Weerakoon,
   No. F43, Bandaranaikapura,
   Rajagiriya.

Defendant – Appellants

-Vs-

1. Nawinna Kottage Dona Lalitha Padmini
2. Wellalagodage Ganga Geeth Kumara
   Both of No. F41,
   Bandaranaikapura,
   Rajagiriya.

Plaintiff – Respondents

3. National Housing Development Authority
   Chittampalam A. Gardiner Mawatha,
   Colombo 02.

3rd Defendant – Respondent

And Now Between

1. Nawinna Kottage Dona Lalitha Padmini
2. Wellalagodage Ganga Geeth Kumara
   Both of No. F41,
   Bandaranaikapura,
   Rajagiriya.

Plaintiff – Respondent – Petitioners

-Vs-

1. N.K.D. Pradeepa Nishanthi Kumari
   No. F43, Bandaranaikapura,
   Rajagiriya.
2. Dammika Weerakoon,
   No. F43, Bandaranaikapura,
   Rajagiriya.

Defendant – Appellant – Respondents

Before: Priyasath Dep, PC, CJ

Priyantha Jayawardena, PC, J

Nalin Perera, J

Counsel: Sanath Weerasinghe with Jayalath Hissella for the Plaintiff –Respondent – Petitioners

Pubudu de Silva instructed by S. Weerasooriya for the 1st and 2nd Defendant – Appellant – Respondents

Argued on: 28th of August, 2017

Decided on: 07th of September, 2018

Priyantha Jayawardena PC, J

Facts of the case

This is an Appeal filed against the judgment of the Provincial High Court of the Western Province (exercising Civil Appellate Jurisdiction) dated 16th of February, 2016 setting aside the judgment of the District Court of Colombo dated 07th of May, 2010.

The Plaintiff – Respondent – Petitioners (hereinafter referred to as the Petitioners), instituted action in the District Court of Colombo and later amended the said Plaint. The 1st and 2nd Defendant – Appellant – Respondents (hereinafter referred to as the Respondents), filed a common answer while the 3rd Defendant filed a separate answer.

When the case was taken up for trial, admissions were recorded and issues were framed. Thereafter, the 3rd Defendant moved Court to try issues raised by the said Defendant as Preliminary issues. The Court answered the said questions of law in favour of the 3rd Defendant and discharged the 3rd Defendant from the case.

Thereafter, the trial against the Respondents commenced by leading evidence by the Petitioners. The Petitioners' case was concluded on the 28th of April, 2009 and further trial was fixed for the 17th of July, 2009 for the Respondents to start the case.

However, when the case was taken up for further trial on the 17th of July, 2009, the Respondents were not present in court on the said date. Moreover, the Counsel for the Respondents informed court that the Registered Attorney of the Respondents has not received instructions to appear on that day. The court concluded the trial on that day without fixing it for ex-parte trial, and granted a date for the correction of proceedings.

When the case was taken up for correction of proceedings, an application was made to lead evidence on behalf of the Respondents which was refused by court as the trial was concluded on the 17th of July, 2009.

Thereafter, having considered the evidence led at the trial, the court delivered the judgment on 07th of May 2010, granting relief to the Petitioners as prayed for in the prayer of the amended Plaint.

Being aggrieved by the aforesaid judgment, the Respondents preferred a petition of appeal to the Provincial High Court of the Western Province [exercising Civil Appellate jurisdiction in Colombo] (hereinafter referred to as the Provincial High Court), on the 07th of July, 2010.

When the Respondents filed the petition of appeal in the original court, the District Judge had made the following minute on the 07th of July, 2010;

"The 1st and 2nd Defendant – Appellants tendered the petition of appeal.

(i) File the petition of appeal of record.
(ii) The petition of appeal has been presented on the 61st date.
(iii) Retain a sub-file and forward the original to the Provincial High Court."

When the Provincial High Court of the Western Province took up the said appeal for hearing, neither party brought it to the notice of the court that the petition of appeal has been filed out of time. On the contrary, the parties had made submissions on the merits. Therefore, the court allowed the appeal and set aside the said judgment of the District Court.

Being aggrieved by the said Judgment, the Petitioners filed the instant application for Special Leave to Appeal and pleaded inter-alia;

b) Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to appreciate that the Respondents have not complied with mandatory provisions contained in section 755(3) of the Civil Procedure Code in failing to file petition of appeal within sixty days from the date of Judgment of the Learned District Judge?
f) Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to comply with mandatory provisions contained in Section 758(2) of the Civil Procedure Code in failing to afford the Petitioners an opportunity of being heard on the question of prescription of the action instituted by the Petitioners?

When the instant application was taken up for support, the Counsel for the Petitioner invited this court to decide the aforementioned questions of law first.

Submissions by the Petitioners

The Counsel for the Petitioners submitted that the learned District Judge had specifically stated in journal entry dated 07th July, 2010 that the petition of appeal had been presented on the 61st date.

Moreover, the Petitioners drew the attention of court to Section 755(3) of the Civil Procedure Code where it states that;

> "Every appellant shall within sixty days from the date of the judgment or decree appealed against, present to the original Court, a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment of decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition shall be exempt from stamp duty:
>
> Provided that, if such petition is not presented to the original Court within sixty days from the date of the judgment or decree appealed against, the Court shall refuse to receive the appeal." [Emphasis added]

The Petitioners in support of their contention cited the case of *Peter Singho v. Costa* (1992) 1 SLR 49 where it was held that; in computing the time limits for filing the notice of appeal and petition of appeal, only the date on which the judgment was pronounced can be excluded.

The Petitioner also drew the attention of the court to section 758(2) of the Civil Procedure Code which states the following;

> "The court in deciding any appeal shall not be confined to grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground."

Therefore, the Petitioners submitted that the said Provincial High Court should have cited *ex mero motu* and dismissed the petition of appeal filed by the Respondents as it was out time, notwithstanding the fact that it was not raised by the Petitioners before the Provincial High Court.

Submissions by the Respondents

The Respondents submitted that the District Court of Colombo delivered the judgment on 07th of May 2010, in favour of the Petitioners. Being aggrieved by the aforesaid judgment, the Respondents preferred a petition of appeal to the Provincial High Court of the Western Province on the 07th of July, 2010.

However, when the said Appeal was taken up for hearing before the said court, the Petitioners did not raise an objection to the maintainability of the said appeal on the basis that it has not been filed within the stipulated period of 60 days from the date of delivery of the judgment of the District Court.

Furthermore, the said time restriction has certain exceptions under the provisions of the Civil Procedure Code and should be considered together with Section 759(2) of the Civil Procedure Code.

Moreover, the Petitioners neither in their oral argument nor in their written submissions raised the said objections before the Provincial High Court. Instead they have participated in the arguments before the Provincial High Court without objecting to the petition of appeal. Hence, the Petitioners have by their conduct, acquiesced in the process and have waived off their right to object to the jurisdiction of the Provincial High Court which heard the Appeal. Therefore, the Respondents argued that the Petitioners are now barred from raising the said objection under the principles of estoppel and equity, and stated that, if the time bar objection was raised before the Provincial High Court, the Respondents would have had the opportunity to adduce reasons for the same.

The Respondents further submitted that the learned Judge of the Provincial High Court in an exhaustive manner has considered the oral submissions and written submissions of the parties and thereafter delivered the judgment on the merits of the Appeal. Thus, the Appellant – Petitioners are now only entitled to raise questions of law, arising from the judgment of the Provincial High Court. Therefore, it was submitted that the preliminary objection should be over ruled.

Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to appreciate that the Respondents have not complied with mandatory provisions contained in section 755(3) of the Civil Procedure Code in failing to file petition of appeal within sixty days from the date of Judgment of the Learned District Judge?

In this application, the District Court judgment was delivered in favour of the petitioners on the 07th of May, 2010. Being aggrieved by the said judgment, the Respondents filed the Notice of Appeal on the 14th of May, 2010 and the petition of appeal on the 07th of July, 2010.

Thus, the District Judge made the aforementioned minute on the 07th of July, 2010 to the effect that the petition of appeal was filed on the 61st date.

Are the Petitioners entitled to raise the time bar objection before the Supreme Court for the first time?

The question of law that needs to be considered by this court is whether the delay in filing the petition of appeal by the Respondents in the Provincial High Court can be raised for the first time before the Supreme Court.

Admittedly, the Provincial High Court has not taken into consideration, the aforementioned minute of the learned District Judge where it was stated that the petition of appeal has been filed out of time. Furthermore, neither party had brought it to the notice of the Provincial High Court. On the contrary, parties participated in the proceedings before the Provincial High Court without any objection to the hearing of the appeal. Thus, the Provincial High Court has delivered the judgment on merits of the appeal and allowed the appeal and the judgment of the learned District Court Judge was set aside.

Being aggrieved by the said judgment, the Petitioners filed a petition of appeal in the Supreme Court. When the instant application was taken up for support, the Petitioners submitted that the petition of appeal addressed to the Provincial High Court had been filed out of time and therefore, the said Provincial High Court ought to have rejected the said petition of appeal.

The Counsel for the Respondents submitted that the said time bar objection was not raised before the Provincial High Court and it was raised for the first time before the Supreme Court. Hence, it was submitted that the Petitioners have acquiesced in the process by participating in

the proceedings before the Provincial High Court and thus, the Petitioners are now estopped from raising the time bar objection.

Therefore, this Court was called upon to determine whether it is possible to raise an objection on the time restriction for the first time in the Supreme Court.

It is important to note that the subject matter of this case is a dispute between private individuals. Hence, the civil adjudication system applies to the instant case and it is subject to private law regimes. In this context, it is necessary to consider whether a litigant should be allowed by courts to implement strategies in order to achieve their object by taking advantage of the lacunas in the legal system or by inviting courts to interpret the law in their favour.

Spenser Bower at page 308 of his work Estoppel by Representation 1966 (2nd Edition) says that;

> "So too, when a party litigant, being in a position to object that the matter in difference is outside the local, pecuniary or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberately elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal has no jurisdiction over the cause or parties, except in that class of case, already noticed, where the allowance of the estoppel would result in a totally new jurisdiction being created. The like estoppel is raised by a party's attendance at the hearing and taking part in the proceedings without raising any objection to the personal disqualification of a member of the tribunal, or to the non – compliance of any notice, summons, or service of the process, with statutory requirements or rules of court, or to the informality of a writ."

Further, I am of the opinion that, such matters contribute to the delays in resolving a dispute. Further, it gives certain parties an undue advantage over their opponents. As such, the courts shall not encourage such matters.

In the case of *Ranaweera and Others v. Sub-Inspector Wilson Siriwardena and Others* [2008] 1 SLR 260 at 272 it was held;

> "The time bar is a plea available to a respondent of a fundamental rights application to resist the application filed against him. A time bar or prescription which affects jurisdiction of court must be specifically pleaded in the very first opportunity and if it is not so pleaded, the court is entitled to proceed on the basis that the respondent has waived his right to raise the defence of time bar in defence of the claim raised against him."

I am of the opinion that if a particular matter which was within the knowledge of a party was not raised before a court, it should not be entertained later in an appeal, unless it is a pure question of law. A similar view was expressed by H.W.R. Wade & C.F. Forsyth in Administrative Law 9th Ed, Page 464;

> "The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged."

However, the court will not preclude a party to raise an objection to entertain an appeal on the basis that it was filed out of time, notwithstanding granting of leave to appeal if such party was not heard prior to granting of special leave as the said party did not receive an opportunity to be heard before being granted special leave.

This was held in *Mohomed Bhai v. Divaiva* 39 NLR 564 at 565;

> "On July 8th an application to this court, for leave to appeal was filed. The journal entry describes it as a petition of appeal against the Commissioner's refusal of leave to appeal.
>
> This court allowed the application. The appeal came on for hearing in due course.
>
> Counsel for the Respondent took the objection that the appeal was not in order as leave to appeal had been granted without jurisdiction inasmuch as the application had not been filed within seven days of the Commissioner's refusal. He relied upon

section 7 of the Interpretation Ordinance for the computation of the period of time and according to that section Sundays are not excluded in the reckoning.

Appellant's Counsel conceded that the application was out of time and he contended that this court having granted leave to appeal could not now reject the appeal and that the period had possibly been reckoned in accordance with a prevailing practice and that this ought not to be disturbed. He cited *Boyagoda v. Mendis* 30 NLR 321.

With regard to the first objection, it is in my opinion not entitled to succeed. The first order was obtained *ex parte* and the respondent had then no opportunity of objecting. This court has repeatedly held that an application to set aside an *ex parte* order should be made to the court making the order and that such a court had power to set aside such an order.

…….

…….

……. There can be no doubt that this court would not have granted leave had it known that the application was out of time, and that its order was made *per incuriam*."

Further an objection of patent lack of jurisdiction or a pure question of law can be raised in an appeal, provided that it is not a question of fact or a mixed question of law and fact.

In the *Tasmania case* (1890) 15 AC 223 it was held that; if an issue is a pure question of law, it can be raised in appeal. Later this judgment was followed in Sri Lanka, in the case of *Manian v. Sanmugam* 22 NLR 249.

In the case of *Talagala v. Gangodawila Co-operative Stores Society Ltd.* 48 NLR 472 at 474 it was held*;*

"Where the question raised for the first time in appeal, however, is a pure question of law, and is not a mixed question of law and fact, it can be dealt with."

In *W. Robison Fernando v. S. Henrietta Fernando* 74 NLR 57 at 58 it was held;

> "Where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself *ex mero motu* to raise the point even if the parties fail to do so."

In the case of *The Attorney General v. Punchirala* 21 NLR 51 it was held that; a court is bound to apply statute law whether an issue is raised on it or not.

Have the Petitioners waived their right to object to the Petition of Appeal?

As discussed above, the Petitioners ought to have known that the petition of appeal had been filed out of time. However, the Petitioners for reasons best known to them, chose not to raise the objection of time bar before the Provincial High Court and participated in the proceedings before the Provincial High Court. However, considering all the related facts of the case, I am of the view that the Petitioners have waived their right to object to the petition of appeal that was filed out of time.

The Halsbury's Laws of England, 5th Ed, Vol 19 states as follows:

> "An application to challenge the jurisdiction of the court must be made at the outset of the proceedings, for if the defendant takes any step in the proceedings other than a step to challenge the jurisdiction, he will be taken to have waived any opportunity for challenge which he might otherwise have had, and to have submitted to the jurisdiction of the court."

In the case of *Rodrigo v. Raymond* [2002] 2 SLR 79 at 83 and 84, it was held;

> "Failure to frame an issue on such a vital matter will amount to waiver of objections in regard to lack of jurisdiction of the court to hear and determine the respondent's action. The defendant is deemed to have consented and submitted to the jurisdiction of the court, and he cannot now be permitted to challenge the jurisdiction of the court… The defendant had ample opportunity of objecting to the jurisdiction of the court. If he has chosen or elected to waive such objections, he cannot subsequently be permitted to challenge it."

Are the Petitioners estopped from raising the time bar objection?

The Petitioners in the instant application have failed to raise an objection at the court of first instance, with regard to the Respondents filing the petition of appeal on the 61st date. Furthermore, both parties did not raise the time bar objection and participated in the proceedings before the Provincial High Court.

The Petitioners raised the time bar objection for the first time in the Supreme Court. Therefore, it must be considered if the Petitioners are estopped by their conduct from raising the time bar objection before the Supreme Court.

According to C.D. Field's 'Law relating to estoppel' revised by Gopal S. Chaturvedi, 3rd Ed, page 166;

> "In order to constitute abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights. Acquiescence or standing by when there is a duty to speak or assert a right creates an estoppel. In such cases knowledge of the act must be brought by the acquiescing party. Acquiescence does not mean simply an intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done."

Therefore, waiver of an objection by a party aggrieved does not afford them the right to raise such objection at a later stage, as they are estopped by their prior conduct.

Conclusion

The Petitioners have failed to bring to the attention of the Provincial High Court that the Respondents failed to file the petition of appeal within the stipulated time and participated in the hearing of the appeal in the Provincial High Court.

No satisfactory explanation was given by the Petitioners for not raising the time bar objection before the Provincial High Court. Furthermore, there is no material to show that the Provincial High Court deprived the Petitioners of raising such an objection.

I am of the view that by not raising an objection to the maintainability of the appeal before the Provincial High Court and participating in the hearing of the appeal without raising an objection, the Petitioners have acquiesced in the process and waived their right to raise the said objection. Therefore, now the Petitioners are estopped from raising the said objection before this court.

I am of the opinion that, when a court has jurisdiction of the subject matter and the parties, a judgment delivered by such a court cannot be impeached in appeal on the basis of irregularities in the procedure, as it goes to the root of the case.

Further, according to section 765 of the Civil Procedure Code Act No. 79 of 1988 as amended, the Civil Appellate Court can entertain an appeal filed out of time.

Section 758(2) of the Civil Procedure Code, has no applicability to the present Petition.

Accordingly, the below mentioned questions of law are answered as follows:

- Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to appreciate that the Respondents have not complied with mandatory provisions contained in section 755(3) of the Civil Procedure Code in failing to file Petition of Appeal within sixty days from the date of Judgment of the Learned District Judge? - No
- Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to comply with mandatory provisions contained in Section 758(2) of the Civil Procedure Code in failing to afford the Petitioners an opportunity of being heard on the question of prescription of the action instituted by the Petitioners? – No

For the aforementioned reasons, I overrule the preliminary objections raised by the Petitioners.

I order a sum of Rs. 30,000/- as costs and the Petitioners should pay the said sum of Rupees to the Respondents within eight (8) weeks from today.

Judge of the Supreme Court

Priyasath Dep PC, CJ

I agree **Chief Justice**

Nalin Perera, J

I agree **Judge of the Supreme Court**