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

In the matter of an Application for Leave to Appeal against the Judgment of the Provincial High Court of Sabaragamuwa Province Holden at Rathnapura dated 27.06.2019 under Section 5C of the High Court of the Province (Special Provisions) Act No. 19 of 1990 as amended by Act No.54 of 2006.

Suriya Arachchige Inoka Udayangani,
Pebottuwa, Ratnapura.

Plaintiff

SC/HCCA/LA 303/2019
SP/HCCA/RAT/75/2018/FA
DC Ratnapura Case No. 23168/L

Vs,

Kombu Mudiyanselage Thanuja Dilhani,
Near the School, Pebottuwa, Ratnapura.

Defendant

And then

Suriya Arachchige Inoka Udayangani,
Pebottuwa, Ratnapura.

Plaintiff-Appellant

Vs.

Kombu Mudiyanselage Thanuja Dilhani,
Near the School, Pebottuwa, Ratnapura.

Defendant-Respondent

And Now Between

Kombu Mudiyanselage Thanuja Dilhani,

Near the School, Pebottuwa, Ratnapura.

Defendant-Respondent-Petitioner

Vs,

Suriya Arachchige Inoka Udayangani,

Pebottuwa, Ratnapura.

Plaintiff-Appellant-Respondent

Before: Justice Vijith K. Malalgoda, PC

Justice S. Thurairaja, PC,

Justice E. A. G. R. Amarasekara

Counsel: Tharanga Edirisinghe with Nilusha Silva for the Defendant-Respondent-Petitioner

Seevali Amitirigala, PC, with Pathum Wijepala for the Plaintiff-Appellant-Respondent

Argued on: 29.07.2021

Order on: 17.12.2021

Vijith K. Malalgoda PC J

The Defendant Respondent Petitioner (herein after referred to as the Defendant-Petitioner) being dissatisfied with the Judgment delivered by the Provincial High Court of the Sabaragamuwa Province holden at Ratnapura, had filed the instant Application before this court seeking Leave to Appeal. The

matter was fixed to support for leave, and notice was issued on the Plaintiff-Appellant-Respondent (herein after referred to as the Plaintiff Respondent) for 26th September 2019.

On the said day, both parties were represented by Counsel, but the learned Counsel for the Petitioner without moving to support the matter for leave, made an application to file fresh papers, since the papers before Court were incomplete. The said application was objected to, by the Plaintiff-Respondent but the Court permitted tendering fresh papers, subject to objections by the Plaintiff-Respondent.

On 17th October 2019, the Plaintiff-Respondent tendered the statement of objection raising a preliminary objection under Rule (2) and Rule (6) of the Supreme Court Rules 1990 with regard to the maintainability of the instant application and by this order I will be considering the said preliminary objection raised by the Plaintiff-Respondent.

As reveled before us, the Plaintiff-Respondent instituted an action before the District Court of Ratnapura against the Defendant-Petitioner seeking a declaration that the Plaintiff-Respondent is the State land grantee of the land described in the 1st schedule of the Plaint and to eject the Defendant and all under him from the said portion of land and grant damages in a sum of Rs. 50,000 with cost for litigation. The Defendant-Petitioner sought dismissal with a cross claim of Rs. 50,000 with cost for litigation when filing the answer.

The trial proceeded *interparte* with one admission, eleven and eight issues raised on behalf of the Plaintiff-Respondent and Defendant-Appellant respectively and at the conclusion of the trial, the learned District Judge delivered the Judgment by dismissing the Plaintiff's action as well as the counter claim by the Defendant-Respondent.

Being aggrieved by the said Judgment, Plaintiff-Respondent appealed to the Provincial High Court of the Sabaragamuwa Province holden at Ratnapura in terms of Section 154(1) of the Civil Procedure Code read with Section 5A of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 (as amended).

The Judges of Provincial High Court of the Sabaragamuwa Province holden in Ratnapura, by way of their Judgment dated 27.06.2019 allowed the Appeal and set aside the Judgment dated 04.04.2018 by the District Judge of Ratnapura. The said Judgment of the Provincial High Court of the Sabaragamuwa Province holden at Ratnapura was challenged by the Defendant-Petitioner in the instant application.

Among the other questions of law raised for the consideration of this Court for the purpose of granting leave and the final determination, the Defendant-Petitioner had also raised the following questions of law before us,

I) Has the Respondent failed to prove Deeds marked as P2 and P3 in accordance with Section 68 of the Evidence Ordinance thus failed to prove his title to the land in dispute?

II) Have the Deeds marked P2 and P3 not been compiled with the requirements of the Section 162 of the Land Development Ordinance?

III) Has the Respondent failed to prove that she has obtained the prior consent of the Government Agent before the execution of the Deeds marked as P2 and P3?

IV) Has the High Court of Civil Appeal erred in law making a finding that letter marked as P10 in the trial implies that the Divisional Secretory had given prior consent for the execution of Deeds marked as P2 and P3 without examining, the contents of the letter marked as P10?

As observed by me, when allowing the appeal before them, the Judges of the Provincial High Court had considered the evidence placed before the District Court and the documents produced including P2, P3 and P10 referred to in the questions of law as above.

When raising the above questions of law, challenging the decision of the Provincial High Court, the Defendant-Petitioner had heavily relied on the evidence led before the District Court, including the oral testimony of the witness called by the Plaintiff-Respondent and the documents relied by them.

In the light of the position taken by the Defendant-Petitioner referred to above, I will now consider the preliminary objection raised by the Plaintiff-Respondent.

When raising the objection on behalf of the Plaintiff Respondent it was submitted that, material documents have not been annexed with the Application filed before the Supreme Court and as a result, the Defendant-Petitioner has violated Rules (2) and (6) of the Supreme Court Rules 1990, which are mandatory and requires compliance by a petitioner who is invoking the Jurisdiction of the Supreme Court.

The learned President's Counsel for the Plaintiff Respondent had further submitted that;

a) The Defendant-Petitioner has not reserved any right to file additional papers, neither have the Petitioner given reasons for non-compliance
b) The Defendant-Petitioner failed to adduce any reasons for the default and for the failure to exercise due diligence to obtain such documents
c) From the application made on behalf of the Defendant-Petitioner on 26.09.2019 to file fresh papers, it is clear that the Defendant-Petitioner admits the non-compliance referred to above.

In the light of the above submissions, the Plaintiff-Respondent argued that without examining and analysing the evidence, the Supreme Court will not be in a position to answer the questions of law set out in the Petition filed before this Court or even to determine whether there is a *prima facie* case warranting the grant of Leave to Appeal, which has been made out and moved for the dismissal for the application for non-compliance with Rules 2 and 6 of the Supreme Court Rules 1990.

In this regard the Plaintiff-Respondent heavily relied on the Judgment by this court in ***D. S. Aron Senerath Vs. Manager Moray Estate and another SC SPL LA 231/2015*** SC minute 19.01.2017.

As observed by me, Part I of the Supreme Court Rules 1990 refers to three types of applications. Category A of Part I refers to applications filed before Supreme Court for obtaining Special Leave in order to proceed before the Supreme Court (Rule 2-18). According to Rules 6 and 7, what can be challenged before the Supreme Court by way of a Special Leave to Appeal application is an order, judgment, decrees or sentence made by the Court of Appeal, while Category B of Part I refers to applications filed before the Supreme Court with leave obtained from the Court of Appeal (Rules 19-27) and Category C of Part I refers to all other appeals as referred to in Rule 28 (1) of the Supreme Court Rule 1990 which reads as follows;

Rule 28 (1) 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 form an order, judgment, decree or sentence of the Court of Appeal or any other court or tribunal.

The Amendment Act No. 54 of 2006 to the High Court of Provinces (Special Provisions) Act No. 19 of 1990 made specific provisions with regard to the civil appellate and revisionary jurisdiction, by taking away the jurisdiction of the Court of Appeal with regard to the appellate and revisionary jurisdiction

in respect of judgments, decrees, and orders delivered and made by any District Court or a Family Court and transferring the said power to the High Court established by Article 154P of the Constitution for a Province.

The new Section introduced as 5C to the amending Act, made provisions with regard to the next level of the appellate jurisdiction and granted the same to the Supreme Court 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 154 P of the Constitution in the exercise of its jurisdiction granted by Section 5A of this Act, with leave of the Supreme Court first and had 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.

The question of whether the Supreme Court Rules are applicable for Leave to Appeal applications filed before the Supreme Court, challenging the Judgment delivered by the High Court established by Article 154P of the Constitution for a Province, was considered in the case of ***Priyanthi Chandrika Jinadasa V. Pathma Hemamali and 4 others SC (HC) CALA 99/2008 {2011] 1 Sri LR 337***, with regard to an objection raised under Rule (7) of the Supreme Court Rules 1990.

In the said case Dr. Shirani Bandaranayake CJ had observed at page 341 the following;

> "The Supreme Court Rules of 1990, deal with many matters pertaining to appeals, applications stay of proceedings and applications under Article 126 of the Constitution.
>
> Part 1 of the said Rules, refers to three types of applications dealing with leave, which includes Special Leave to Appeal, Leave to Appeal and other appeals. Rule (7) which is under the

> category of applications for Special Leave to Appeal from the judgments of the Court of Appeal clearly states that such an application should be made within six weeks of the impugned judgment…..
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> ……. It is however to be born in mind that the said Rule (7) deals only with applications for Special Leave to Appeal from the Judgments of the Court of Appeal and the present application for Leave to Appeal is from a judgment from the Civil Appellate High Court of the Western Province holden at Gampaha.
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> As stated, earlier Categories B and C of Part I of the Supreme Court Rules, 1990 deal with Leave to Appeal and other Appeals, respectively. Whist the category of Leave to Appeal deals with instances where Court of Appeal had granted leave to appeal to Supreme Court, other Appeals refer to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court Appeal or any other Court or Tribunal. Thus, it is evident that the present, application for Leave to Appeal from the Judgment of the High of the Western Province (Civil Appeal) holden at Gampaha would come under the said Category C ……
>
> It is therefore not correct to state that there are no rules made by the Supreme Court that would be applicable to applications for leave to appeal form the High Court of the Provinces to the Supreme Court."

When considering the matters referred to above, I do agree with the view taken by Her Ladyship, that Category C of the Part I of the Supreme Court Rules 1990 govern the Leave to Appeal applications made under Section 5C of the High Court of Provinces amendment Act from the Provincial High Courts.

In the said circumstances the Rules that should be applicable are not Rules (2) or (6) of the Supreme Court Rules 1990 but it is Rule 28 of the Supreme Court Rules 1990.

The procedure that should be followed in an application filed under Rule 28 is explained under Sub-Rules (2) and (3) as follows;

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 the 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 typewritten, printed or lithographed on suitable paper, with 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.

(3) The Appellant shall tender with his petition of appeal a notice of appeal in the prescribed form, together with such number of copies of the petition of appeal and the notice of appeal as is required for service on the respondents and himself, and three additional copies, and shall also tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post.

In addition to the above, Rule 28 (7) provides that "the provisions of Rule 27 shall apply "*mutatis mutandis* to such appeals." Rules 27 in Category B provides for the preparation of briefs at the Registry in a matter the parties have come before the Supreme Court with leave obtained from the Court of Appeal, and the responsibility of the parties in the said process. Rule 27 (4) which provides

for the identification of necessary documents that should be made available in the appeal brief reads as follows,

27 (4) Upon the date fixed in terms of sub-rule (1) the Registrar shall, after consulting the parties present, determine what document should be included in the record. As far as possible, the briefs used in the Court of Appeal shall be used for the appeal. In any event, the Registrar shall endeavour to exclude from the record all documents (more particularly such as are purely formal) that are not relevant to the subject-matter of the appeal, and generally, to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other formal parts of documents. The decision of the Registrar as to the exclusion of any document or part thereof shall be final, but any party dissatisfied therewith shall be entitled to require the matter to be submitted to a single judge sitting in Chambers for review. The preparation of the record shall be the duty of the Registrar, who shall prepare as many copies as are required for the Court and the parties. Before the preparation of a copy of the record for any party, such party shall there for such fee as may be determined in accordance with the rules made in that behalf.

However, since neither Rule 27 nor Rule 28 contains any provision in the lines of Rules 2 and 6, the question arises whether the Petitioner is free to invoke the appellate jurisdiction of the Supreme Court against the impugned judgment without submitting the basic needs identified in the said rules.

When raising the preliminary objection based on Rules (2) and (6) of the Supreme Court Rules 1990, Plaintiff- Respondent took up the position that the Leave to Appeal application filed before this court

is incomplete and the material documents that were relied on by the Defendant-Petitioner was not before the Court, and is a violation under the above rules. Since both, Rules (2) and (6) as well as Rules 28 (2) and (3) refers to the procedure that should be followed when filing two types of applications before this court, it is more appropriate for me to first consider the requirements under Rules (2) and (6) above in order to ascertain whether the said requirements are embodied in Rule (28) or whether the said requirements are basic requirement that should be followed by any Petitioner who invoke the jurisdiction of this court under category A or C.

Rule (2) and Rule (6) of the Supreme Court Rules 1990 reads as follows;

Rule (2); 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 tiled;

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 obtains 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.

Rule 6; 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 or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney at law, or his recognized agent, 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 ground for such behalf be set forth in such affidavit.

Rule 2 provides for the basic requirement that should fulfilled by a Petitioner who comes before the Supreme Court in a Special leave to Appeal application challenging a judgment or order made by the Court of Appeal. This includes submitting the petition, affidavit, copy of the judgment or order challenged before the Supreme Court and the documents in support thereof as prescribed in Rule 6. Proviso to Rule 2 require the party who comes before the Supreme Court to provide reasons for the failure by the said party to provide the affidavit, documents along with the petition filed before the Supreme Court or reserve the right to provide.

Rule 6 explains the additional documents that need to be filed when the judgment or order that is challenged, before the Supreme Court itself is insufficient to established an allegation before the Supreme Court.

However, as per Rule 28 (2), the petition filed before the Supreme Court should contain plain and concise statement of facts and grounds for the objection to the order, judgment, decree or sentence appealed against, specifying the relief claimed. The requirements as identified in Rule 2, the need to submit an affidavit, copy of the order, judgment challenged and the other documents as per Rule 6 or any other provisions similar to the above is not found in Rule 28 (2), but it only requires, that the petition shall contain full title and number of the proceedings.

Apart from the above, Rules 28 (2) and (3) has identified the manner in which the Petition should be printed and tendered at the registry.

As already observed in this judgment, the High Court of Provinces (Special Provisions) amendment Act No. 54 of 2006 gave jurisdiction to the High Court of Provinces with regard to the appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered or made by the District Court or Family Court. An appeal shall lie directly to the Supreme Court with regard to a judgment, decree or order pronounced or entered by the said High Court in appeal, with leave from the Supreme Court first obtained on a substantial question of law or on a matter fit for review by the Supreme Court.

Prior to the said amendment, appellate and revisionary jurisdiction in respect of judgments, decrees and orders by the District Court and the Family Court was with the Court of Appeal under the provisions of the Civil Procedure Code and the Judicature Act.

When special leave is sought from the Supreme Court against an order or judgment by the Court of Appeal, the party which is dissatisfied with the said order or judgment was responsible to fulfill the requirements as identified in Category A in part I of the Supreme Court Rules 1990 including Rules 2 and 6.

However direct applications for Leave to Appeal from the High Court to the Supreme Court came into being only following the amendments brought to the High Court of Provinces (Special Provisions) Act by its amendment 54 of 2006.

The question that was before the Supreme Court in the case of ***Priyanthi Chandrika Jinadasa Vs. Pathma Hemamali and 4 others*** *(supra)* was whether Rule 7 which fixed the time limit a party could come before the Supreme Court by way of a Special Leave to Appeal application would bind the Petitioner in a Leave to Appeal application filed challenging the judgment of the Civil Appellate High Court made under Section 5A of the High Court of Provinces (Special Provisions) Amendment Act No. 54 of 2006.

When deciding that an application for Leave to Appeal from the High Court (Civil Appeal) of the Provinces to the Supreme Court should be filed within 42 days from the date of the judgment, Her Ladyship Dr. Shirani Bandaranayake observed;

> "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, judgment, 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."

In the said circumstances it is clear that, when parties come before this court seeking leave to appeal against an order or judgment of the Provincial High Court of the Provinces, the Supreme Court expected the said party to comply with the mandatory requirements with regard to Special Leave,

identified under Category A of Part I of the Supreme Court Rules 1990, even if the said requirement is not identified under Category C of Part I of the Supreme Court Rules 1990.

The nature of the requirements identified under Rules 2 and 6 were discussed in the case of ***D.S. Aron Senarath Vs. The Manager Moray Estate Maskeliya and another (Supra)*** by *Priyasath Dep PC J* (as he then was) as follows;

> "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 non-compliance.
>
> In terms of Rule 2 of the Supreme Court Rule 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.
>
> I uphold the first preliminary objection raised by the Respondents that the Petitioner had failed to file material documents and violate Rules 2 and 6 of the Supreme Court Rule 1990"

In the light of the position this court has taken with regard to the mandatory nature of Rules 2 and 6 I will now proceed to examine the factual matrix of the instant matter. As mentioned prior, the Defendant-Appellant among the other questions of law, had raised several questions of law based on the evidence and the documents that was placed before the District Court including the documents produced marked P-2, P-3 and P-10. In his Petition filed before this Court the Petitioner

had produced marked ‘X’ and ‘Y’, the proceedings before the provincial High Court of Ratnapura and the Judgment of the said Court dated 27. 06.2019 respectively.

However, the documents the Defendant-Petitioner has tendered marked ‘X’ did not contain the proceedings before the District Court, documents tendered before the District Court including P-2, P-3 and P-10. As further revealed before this Court, the Defendant-Petitioner has neither reserved any right to file additional documents nor have they adduced any reasons for the default for the failure to exercise due diligence in obtaining such document. The only explanation provided by the Defendant-Petitioner before this court was that she had acted on the certificate made by the Registrar of the Provincial High Court of Ratnapura appeared on page 110 of document ‘X’ to the effect “පිටු අංක 01-110 දක්වා ඉහතින් සඳහන් වන්නේ රත්නපුර සිවිල් අභියාචනාධිකරණයේ අංක 75/ 2018FA අංක නඩුවේ තීන්දුව හැර සම්පූර්ණ නඩුවාර්තාවේ සත්‍ය ඡායා පිටපතක් බව මෙයින් සහතික කරමි.”, but when going through the petition filed by her including the questions of law raised on behalf of her, it appears that she had referred, both to the proceedings before the District Court and the documents tendered before the District Court which clearly indicates the failure on the part of the Petitioner to exercise due diligence when tendering papers before this Court.

In the said circumstances, I uphold the preliminary objection raised by the Plaintiff-Respondent.

The Application is Dismissed. No costs.

Judge of the Supreme Court

Justice S. Thurairaja, PC,

I agree,

Judge of the Supreme Court

Justice E. A. G. R. Amarasekara

I agree,

Judge of the Supreme Court