

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

In the matter of an application for leave to appeal under and in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code.

Wajira Prabath Wanasinghe,
No. 120/1, Balagalla,
Diwulapitiya.

SC (HC) LA Application No. 68/2012

PLAINTIFF-PETITIONER

Commercial High Court

Case No. HC (Civil) 689/2010 (MR)

-Vs-

Janashakthi Insurance Company Limited,
No. 47, Muttiah Road,
Colombo 02.

DEFENDANT-RESPONDENT

BEFORE : Hon.Saleem Marsoof PC, J,
Hon. Sathyaa Hettige PC, J, and
Hon. Eva Wanasurendra PC, J.

COUNSEL: Harsha Amarasekera for the Plaintiff-Petitioner.

Nigel Hatch, PC with Ms. P. Abeywickrama and Ms. S. Illangage for the Defendant-Respondent.

ARGUED ON : 23.11.2012

WRITTEN SUBMISSIONS ON : 07.02.2013

DECIDED ON : 26.03.2014

SALEEM MARSOOF J:

When the petition filed by the Petitioner in this Court dated 27th July 2012 was taken up for support for leave to appeal on 23rd November 2012, the Defendant-Respondent (hereinafter referred to as the 'Respondent') raised the following preliminary objections on the basis that the said petition cannot be maintained by the Plaintiff-Petitioner (hereinafter referred to as the 'Petitioner') having regard to-

- (a) the alleged suppression in the said petition of the fact that the Petitioner had *previously* invoked the jurisdiction of this Court by way of final appeal; and / or
- (b) the fact that the impugned order of the Commercial High Court dated 13th July 2012 can only be canvassed by way of final appeal.

By the said petition dated 27th July 2012, the Petitioner had sought leave to appeal against the order of the High Court of the Western Province held in Colombo exercising civil jurisdiction and hearing commercial

matters (hereinafter referred to as the “Commercial High Court”) dated 13th July 2012, whereby the Commercial High Court had dismissed the action filed by the Petitioner on the ground that the said High Court had no jurisdiction to entertain the same, in view of section 5 of the Arbitration Act No 11 of 1995, which provided as follows:-

Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have *no jurisdiction* to hear and determine such matter *if the other party objects to the court exercising jurisdiction in respect of such matter.* (*Emphasis added*)

This Court can consider whether leave to appeal against the impugned order of the Commercial High Court should be granted in the circumstances of this case only after first dealing with the preliminary objections raised by the learned President’s Counsel for the Respondent, and only in the event that the said objections are overruled. It is therefore necessary to consider these preliminary objections at the outset.

(a) Suppression of fact of prior Invocation of jurisdiction of Court

The first preliminary objection raised by learned President’s Counsel for the Respondent is that the Petitioner has suppressed in his petition dated 27th July 2012, the fact that the Petitioner had previously invoked the jurisdiction of this Court by way of final appeal. Significantly, learned President’s Counsel has not referred to any specific Rule of the Supreme Court, which requires the disclosure of this fact. In any event, it appears that the Petitioner has in paragraph 13 of his petition dated 27th July 2012 expressly pleaded that he has not invoked the jurisdiction of this Court *previously* in this matter.

Learned President’s Counsel for the Respondent has submitted that the said averment of the petition dated 27th July 2012 is false, as the Petitioner has filed a notice of appeal on 23rd July 2012 (R1) and followed it up with a petition of appeal dated 10th September 2012 (R2), thereby invoking the jurisdiction of this Court by way of final appeal. Copies of the Notice of Appeal marked R1 and the Petition of Appeal marked R2 were tendered to this Court only with the written submissions of the Respondent filed in this Court dated 7th January 2013 unsupported by any affidavit. Be that as it may, it appears that even if this Court is to rely upon these documents, only the said Notice of Appeal marked R1 was lodged in the Registry of the Commercial High Court *prior* to the date of the petition of the Petitioner dated 27th July 2012 seeking leave to appeal, and that the Petition of Appeal marked R2 was filed subsequently on 10th September 2012.

In these circumstances, the question arises as to whether the Petitioner had invoked the jurisdiction of this Court by way of final appeal *prior to the date of his petition seeking leave to appeal dated 27th July 2012 filed in this Court.* The provisions applicable to the lodging of a Notice of Appeal are to be found in subsections (3) and (4) of section 754 of the Civil Procedure Code, with which is juxtaposed subsection (2) of that section and section 755 which deals with applications for leave to appeal applicable to interlocutory orders of a court exercising original jurisdiction. The procedure for filing a Notice of Appeal is found in section 754(4), which is quoted below:-

(4) The Notice of Appeal shall be presented to the court of first instance for this purpose, by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or

order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the court shall refuse to receive it.

The provisions of sections 754 and 755 and indeed all provisions in Chapter LVIII of the Civil Procedure Code are made applicable by section 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 to appeals and application for leave to appeal from the Commercial High Court under Section 5 of that Act, for which the appropriate appellate court is the Supreme Court, the word "Court of Appeal" that occur in Chapter LVIII should be understood to be a reference to the "Supreme Court".

It is clear from the above quoted provision that the Notice of Appeal has to be filed in the original court, which in this case is the Commercial High Court, and that court has to deal with it as provided by law. A person who files such a Notice of Appeal does not thereby invoke the jurisdiction of the appellate Court, which in this case is the Supreme Court, to which it is intended to appeal. The Jurisdiction of the appellate court will be invoked only if the Notice of Appeal fulfils all conditions and requirements laid down in the Civil Procedure Code, and is followed by a Petition of Appeal, which too has to be lodged in the original court, and transmitted to the appellate court by the Registry of the original court if all requirements of the law are duly fulfilled. In particular, the mere lodging of the Notice of Appeal in the original court will be of no avail if no Petition of Appeal is filed within the period stipulated for this purpose in section 755(3) of the Civil Procedure Code. If, for instance, the Petition of Appeal is not filed within time, there can be no valid appeal before the appellate court. Learned President's Counsel for the Respondent in fact conceded that much, when he submitted that "the lodging of the Notice of Appeal is the very first step to be taken in the process of appealing".

Thus in *Wickremasinghev v. De Silva* (1978/79) 2 SLR 65, it was held that where the Petition of Appeal was not filed within 60 days in terms of Section 755(3) of the CPC there was non-compliance with a mandatory requirement, and that the Petition of Appeal liable to be rejected. Of course, in the instant case I find that the Petition of Appeal appears to have been lodged in time on 10th September 2012, but that was *after* the Petitioner had invoked the jurisdiction of this Court by his application for leave to appeal dated 27th July 2012. Hence, there was no final appeal before this Court on the date the Petitioner filed his leave to appeal application, and the Petitioner cannot therefore be faulted for suppression or misrepresentation of any material fact.

This preliminary objection is accordingly overruled.

(b) Is the Impugned Order capable of being canvassed only by way of Final Appeal?

The learned President's Counsel for the Respondent has submitted that the impugned order of the Commercial High Court dated 13th July 2012 can only be canvassed by way of final appeal, and not by way of application for leave to appeal. He has correctly pointed out that by reason of section 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, the provisions of Chapter LVIII of the Civil Procedure Code would apply to appeals and application for leave to appeal to this Court from the Commercial High Court under Section 5 of that Act. Accordingly, Section 754 (2) and section 755 of the Civil Procedure Code would apply to applications for leave to appeal, and this application has been filed on that basis. However, learned

President's Counsel for the Respondent has submitted that the Petitioner has followed the wrong procedure, as the impugned order is in essence a "judgment" and is not a mere "order" as defined in section 754(5) of the Civil Procedure Code, and that in those circumstances, the impugned order can only be canvassed by way of final appeal.

The distinction between a "final order" and an "interlocutory order", which correspond to the dichotomy between "judgement" and "order" as used in our Civil Procedure Code, has been considered in a large number of judicial decisions in England. The polarization of judicial thought in that country can best be visualized by referring to the contrasting approaches of the courts in *Salaman v. Warner* [1891] 1 QB 734 and *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547. In the first of these cases Lord Esher, M.R. observed at page 735—

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

However, in *Bozson v. Altrincham Urban District Council*, Lord Alverstone, C.J. at pages 548 to 549 adopted a contrary approach and said—

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order."

A similar conflict of judicial opinion existed in Sri Lanka as well, where in *Siriwardena v. Air Ceylon Ltd.* [1984] 1 Sri LR 286, Sharvananda, J. (as he then was) chose to follow the approach adopted by Lord Alverstone, C.J. in *Bozson v. Altrincham Urban District Council*, while in *Ranjit v. Kusumawathie* [1998] 3 Sri LR 232, Dheerarathne, J. preferred the opinion of Lord Esher, M.R. in *Salaman v. Warner*. As these Sri Lankan decisions both emanated from Divisional Benches which consisted of three Judges, the conflict of judicial opinion was referred to a Bench of five Judges in *Rajendran Chettiar and Two Others v. S. Narayanan Chettiar* 2011 BALJR 25 which put the controversy at rest by its decision to follow the test adopted by Lord Esher, M.R. in *Salaman v. Warner* and applied by Dheerarathne, J. in *Ranjit v. Kusumawathie*.

Learned President's Counsel for the Respondent has attempted to justify this on the basis that the Commercial High Court dismissed the action only after trial had commenced and certain admissions were recorded along with issues, and that the Court with the consent of learned Counsel for both parties decided to take up the issue as to the maintainability of the action in view of Section 5 of the Arbitration Act for determination first. However, as pointed out by learned President's Counsel for the Petitioner, the fact remains that had for whatever reason, such as for the failure to take up the objection to jurisdiction on the first available occasion, the said issue had been answered against the Respondent, the trial would have continued to a conclusion.

In my opinion, if one adopts the approach of Lord Esher, M.R. in *Bozson v. Altrincham Urban District Council*, *supra*, which was favoured by the Five Judge Bench of this Court in *Chettiar's* case, the answer to the question at hand depends on what would be the consequence of the impugned order of the Commercial High Court. If the Commercial High Court had held that the preliminary issue must be answered in favour of the Petitioner, the trial would have continued to final conclusion. However, if the High Court, as it did in this case, decided in favour of the Respondent, the action will come to an end. Hence, as Lord Esher, and five judges of this Court unanimously decided in *Chettiar's* case the impugned order was an interlocutory order, and the application for leave to appeal can be lawfully maintained.

For these reasons, this preliminary objection too has to be rejected.

Conclusion

I accordingly overrule both preliminary objections taken up in this case, and make order that the application of the Petitioner for leave to appeal may be re-fixed for support when it is mentioned in Court for this purpose on 28th April 2014. The Registrar is directed to have this application listed for mention on 28th April 2014.

In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasurendra, PC., J.

I agree.

JUDGE OF THE SUPREME COURT