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

In the matter of an application for Special Leave to Appeal from the order of the High Court of the North Western Province.

Dassanayake Mudiyanselage Ranbanda,
"Dharshana"
Narammala Road
Wadha Kada

Applicant-Respondent-Petitioner

Vs.

SC Spl LA No. 229/11
NWP/HCCA/KUR/37/2010 LT Appeal
LT No. 23/Ku/7850/2002

Peoples' Bank
P.O.Box 728
Colombo 02

Respondent-Appellant-Respondent

Before : Marsoof, P.C., J,
Sripavan, J &
Dep, P.C., J.

Counsel : Geoffrey Alagaratnam, PC and Ms. S. Jayatunga for Applicant –Respondent-Petitioner

Ms Manoli Jinadasa with Tharanga Ambepitiya for Respondent-Appellant-Respondent

Argued on : 08.08.2012

Decided on : 17.07.2014

Priyasath Dep, PC, J

The Applicant –Respondent –Petitioner (hereinafter referred to as Applicant –Petitioner) filed an application in the Labour Tribunal alleging that his services were wrongfully and unjustly terminated by the Respondent-Appellant –Respondent (hereinafter referred to as the Respondent Bank).

The learned President of the Labour Tribunal by his order dated 28.10. 2010 granted to the Petitioner pension benefits without back wages as if his services were not terminated. The learned President held that the Respondent Bank had failed to prove several charges made against the Applicant-Petitioner and that the termination of employment is an excessive punishment. However reinstatement was not ordered as at the time of making of the order the Applicant had reached the retirement age. The Respondent Bank appealed against the order of the Labour Tribunal. The High Court set aside the order of the Labour Tribunal and dismissed the Application of the Applicant – Petitioner made to the Labour Tribunal.

Being aggrieved by the said order of the learned High Court Judge, the Applicant-Petitioner filed a Special Leave to Appeal application to the Supreme Court on 23-12-2011. When this application was taken up for support on 15.03.2012, the learned counsel for the Respondent Bank raised the following preliminary objections regarding the maintainability of the Application:

(a) Non- compliance with the relevant laws;

(b) Non- compliance with the specific rules.

Thereafter it was re-fixed for support on 23.05.2012 to consider the preliminary objections. On 23.05.2012 it was recorded that both learned counsel moved that they be permitted to file written submissions on the preliminary objections before the matter is taken up for consideration before a bench of which oral submissions will be made.

On 08.08.2012 the case was taken up for support and counsel appearing for both parties made submissions and the order was reserved.

Counsel appearing for both parties had filed comprehensive and lengthy written submissions on the two preliminary objections:

(a) Non-compliance with the relevant laws

(b) Non- compliance with the Supreme Court Rules.

The caption of the application which invokes the jurisdiction of the court reads thus:

> "In the matter of an Application for Special Leave to Appeal from the order of the High Court of the North Western Province".

It does not refer to any Law. According to the learned Counsel for the Respondent Bank this is the only averment that pleads jurisdiction of the Court. The Respondent Bank

submits that the Applicant -Petitioner failed and/or neglected to specify under which act or law he has invoked the jurisdiction of the Supreme Court. Applicant -Petitioner merely pleads that he is making a Special leave to Appeal application from the High Court of North Western Province to the Supreme Court.

Although the title to the Petition refers to the Supreme Court which is the proper forum, the Applicant- Petitioner had failed to mention the relevant law and the section which enable him to apply for leave from the Supreme Court. The question that arises is whether or not the failure or omission is fatal or curable. The learned counsel for the Respondent Bank further submitted that the application to the Supreme Court should be a Leave to Appeal in terms of section 31DD of the Industrial Disputes Act as amended by Act No 32 of 1990 and not a Special Leave to Appeal Application under High Court of the Provinces (Special Provisions) Act No 19 of 1990.

It is appropriate at this stage to refer to the legislative history briefly. Before the enactment of the 13th Amendment to the Constitution, the Court of Appeal was the only Court that had jurisdiction to hear appeals directly from the Magistrate Courts, Primary Courts. Labour tribunals etc. At that time High Court of Sri Lanka was the highest court of criminal jurisdiction and was devoid of appellate or revisionary jurisdiction. This situation was fundamentally changed by the 13th amendment to the Constitution by establishing High Courts for the Provinces. Under Article 154P(2) the Chief justice was required to nominate among judges of the High Court of Sri Lanka to the High Court of the Provinces. Article 154P (3) confers the jurisdiction in the High Court of the Province on following matters. 154P(3) reads thus:

> Every such High Court shall-
>
> (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;
>
> (b) notwithstanding anything in Article 138 and subject to any law , exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province;
>
> (c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

The High Court of Provinces (Special Provisions) Act No. 19 of 1990 makes provision regarding the procedure to be followed in, and the right to appeal to and from the High Court established under Article 154P of the Constitution.

Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 gives jurisdiction to the High Court to hear appeals from Labour Tribunals and orders made under Agrarian Services Act.

Section 3 reads thus:

> " A High Court established by Article 154P of the Constitution for a Province shall, subject to any law, exercise appellate and revisionary jurisdiction in respect

of orders made by Labour Tribunals within the Province and orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979, in respect of any land situated within that province."

Section 9 of the Act reads thus:

9. Subject to the provisions of this Act or any other law, any person aggrieved by-

(a) a final Order, judgment, decree or sentence of a High court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or Section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings:

Provided that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence made by such High Court, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or Section 3 of this Act, or any other law where such High Court has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance; and

At the commencement of Section 3 of the High Court of the Provinces(Special Provisions) Act No. 19 of 1990 it is stated that this section is 'subject to any law exercise appellate and revisionary jurisdiction ' and similarly the section 9 of the same Act also states that 'subject to the provisions of this Act or any other law'. The Act No. 19 of 1990 provides the general procedure regarding appeals to the Supreme Court from the High Court in exercising appellate jurisdiction. This Act does not prohibit any other law providing right of appeal or providing procedure for appeals. The Industrial Disputes Act have provided for the right of appeal to the Supreme Court from the judgments of the High Court exercising appellate jurisdiction. Maintenance Act No. 37 of 1999 has similar provisions . Therefore, there is no conflict between section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD of the Industrial Disputes Act amended by Act No. 32 of 1990.

The learned Counsel for the Applicant –Petitioner strenuously argued that the relevant law applicable to appeals to and from the High Court is the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and the application should be a Special Leave to Appeal application. On the other hand the learned Counsel for the Respondent- Bank argued that application to the Supreme Court should be a leave to Appeal application under Section 31DD of the Industrial Disputes Act as amended by Act No 32 of 1990.

The question that arises in this application is whether the appeal should be preferred under High Court of the Provinces (Special Provisions) Act No. 19 of 1990 or Industrial Dispute (Amendment) Act No. 32 of 1990. High Court of the Provinces (Special Provisions) Act No. 19 of 1990 was enacted according to its preamble, 'to make provision regarding the procedure to be followed in, and the right to appeal to and from the High Court establish under Article 154P of the Constitution. ..' Section 3 of the Act gives jurisdiction to the High Courts to hear appeals in respect of orders made by Labour Tribunals. Section 9 of the said Act provides for an appeal to the Supreme Court from an order made by the High Court in the exercise of appellate jurisdiction vested in it by section 3 of this Act which involves a substantial question of law. The manner and the procedure in appealing to the Supreme Court is spelt out in this section.

(A) If the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of an aggrieved party

(B) If the High Court refused to grant leave to appeal, the aggrieved party may invoke the jurisdiction of the Supreme Court to exercise its discretion and grant special leave to appeal.

(C) If a special leave to appeal is preferred to the Supreme Court and the Supreme Court is of the opinion that the matter is fit for review it may grant, Special Leave to Appeal .

The remedies provided in (B) and (C) above are discretionary in nature and cannot be granted as a matter of course. The Supreme Court will grant special leave only if the case or matter before it in the opinion of the Supreme Court is fit for review by the Supreme Court.

Provided further, that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to decided is of public or general importance.

On the contrary section 31DD of the Industrial Disputes Act merely states that a party aggrieved by any final order of the High Court in relation to an order of a Labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained.

There is no doubt as to the fact that appeals to the High Court and appeals to the Supreme Court from the High Court should be preferred under High Court of the Provinces (Special Provisions) Act No. 19 of 1990. However, Section 9 of the Act dealing with appeals from the High Court to the Supreme Court states that it is subject to the provisions of that Act or any other law. The question that arises is whether any other law could also provide for appeals to and from the High Court. High Court of the Provinces (Special Provisions) Act No.19 of 1990 was certified on 15th May 1990. The learned Counsel for the Respondent -Bank strenuously argued that the appeal to the Supreme Court should be preferred under Industrial Dispute (Amendment) Act

No. 32 of 1990 which was certified on 31st August 1990 subsequent to the enactment of High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

The Industrial Dispute Act before it was amended by Act No. 32 of 1990 had only one section that is section 31D dealing with appeals. Under this section the aggrieved party can appeal to the Court of Appeal from an order of the Labour Tribunal on a question of Law. The provisions of Code of Criminal Procedure Act dealing with appeals from the Magistrates Court applied to appeals to the Court of Appeal from the Labour Tribunal in regard to all matters connected with hearing and disposal of appeals. On the other hand Industrial Dispute Act(Amendment) Act No. 32 of 1990 has several new provisions regarding the procedure applicable to appeals to the Supreme Court from the High Court. Section 31DD(1) deals with right of appeal to the Supreme Court from the High Court and 31DD (2) refer to the jurisdiction and powers of Supreme Court to hear appeals.

The section 31DD of the Industrial Disputes (Amendment) Act, No.32 of 1990 reads thus:

> 31DD. (1) Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a Labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained.

Therefore one could argue that a party aggrieved by the final order of the High Court exercising Appellate jurisdiction in relation to an order of the labour Tribunal could appeal to Supreme Court under Section 31DD of the Industrial Disputes Act with the leave of the High Court or the Supreme Court first had an obtained. The section 31 DD (1) is the section that enables or provides the right of appeal to the aggrieved party to appeal to the Supreme Court. This is similar to the section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990. Section 31DD (2)refers to the powers of the Supreme Court in appeal. This section is similar to 10(2) of the High Court of Provinces(Special Provisions) Act19 of 1990. Therefore it is clear that the High Court of the Provinces(Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990 has similar provisions if not identical provisions. The question that arises is whether these provisions overlaps, supplements each other or has an independent existence or a co-existence.

In view of this ambiguity or confusion created by the legislation or the draftsmen different forms of applications are filed in the Supreme Court. The litigants should not be penalized or non suited due to this ambiguity.

There are special leave to appeal applications filed under the High Court of the Provinces (Special Provisions) Act No 19 of 1990. In some instances leave to appeal applications are filed under section 31DD of the Industrial Disputes (Amendment) Act No 32 of 1990. In some applications due to an abundance of caution reference is made to both High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment Act) No 32 of 1990.There has been no consistent practice in this regard. In the case before us we are called upon to deal with an application which has no reference to any law in the caption. It merely states " In the

matter of an application for Special Leave to Appeal from the order of the High Court of the North Western Province"

Therefore the question that arises in this case is whether the application to the Supreme Court should be a special leave to appeal application under High Court of the Provinces (Special Provisions)Act No 19 of 1990 or a leave to appeal application in terms of 31DD of the Industrial Disputes Act No**.** 43 of 1950 as amended by Act No. 32 of 1990.

Though there is a substantial difference between special leave to appeal and leave to appeal applications when comparing various statutes at times draftsmen had overlooked and ignored this difference

It is pertinent to mention that the Article 128 of the Constitution and section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 the Court of Appeal or High Court as the case may be could grant leave to the Supreme Court only if it involves a 'substantial question of law' The section 31DD of the Industrial Disputes Act No. 43 of 1950 as amended by Act No. 32 of 1990 does not refer to a 'substantial question of law'. Further the Supreme Court in exercising its jurisdiction under Article 128 of the Constitution and section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 in granting special leave to appeal could do so if it is in its opinion the case or matter is fit for review by the Supreme Court. Industrial Disputes Act 43 of 1950 as amended by act No. 32 of 1990 does not refer to the words ' fit for review'. In the Article 128 of the Constitution and section 9 of the High Court of Provinces (Special Provisions) Act No 19 of 1990 when granting leave by the Supreme Court it is referred to as special leave to appeal. Section 31DD of the Industrial Disputes Act No. 43 of 1950 as amended by Act No. 32 of 1990 refers to the application as leave to appeal .

The learned Counsel for the Applicant-Petitioner submitted that Application for special leave to appeal is the proper application and that the Applicant-Petitioner had filed the application under the proper law and followed the proper procedure. It was further submitted that High Court of the Provinces (Special Provisions) Act No. 19 of 1990) is the enabling statute whereas Industrial Disputes Act as amended by Act No. 32 of 1990 merely set out the rights of the parties. Further, the counsel referred to the establish practice in appealing to the Supreme Court in respect of orders from the Labour Tribunal. Before the establishment of High Court of the Provinces under Article 154P of the 13th Amendment to the Constitution appeals from Labour Tribunal was heard in the Court of Appeal. The appeal from the Judgment of the Court of Appeal to the Supreme Court could be filed with leave from the Court of Appeal or where Court of Appeal refuse to grant leave to appeal to the Supreme Court or where in the opinion of the Supreme Court the case or matter is fit for review by the Supreme Court with special leave from the Supreme Court. High Court of Provinces (Special Provisions) Act No. 19 of 1990 also has similar provisions. Therefore, when leave is sought from the Supreme Court the Application should be a special leave to appeal. However, Industrial Disputes No.43 of 1950as amended by the act No 32 of 1990 refers to a leave to appeal application. Counsel submitted that nothing in the Act indicates the intention of the legislature to depart from the established practice. Counsel submits that this may be due to a draftsman's error or an oversight.

In *Martin v. Wijewardena* (1989) 2 Sri.LR 409 a case decided after the establishment of High Court of the Provinces in 1987 under article 154P of the Thirteenth Amendment to the Constitution and before the enactment of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 stated thus:

> ' A right of appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments.'

This case was folowed in *Gunarathne vs. Thambinayagam* (1993) Sri.LR at 355 and Malegoda vs. Joachim (1997) 1 Sri.LR at 88.

It should be observed that both the High Court of the Provinces (Special Provisions) Act No19 of 1990 and Industrial Disputes (Amendment) Act No 32of 1990 provide for a right of appeal and confer jurisdiction and power on the Supreme Court to hear and determine cases.

The learned Counsel for the Respondent Bank strenuously argued that Industrial Disputes Act falls into the category of a special legislation and its amending Act No. 32 of 1990 was enacted subsequent to the High Court of Provinces (Special Provisions) Act 19 of 1990 and it should prevail over the High Court of Provinces (Special Provisions) Act No. 19 of 1990. Therefore, the proper application is the Leave to Appeal application in terms of section 31DD of the Industrial disputes Act as amended by Act No. 32 of 1990.

For the reasons stated above I hold that the proper Application to the Supreme Court is under section 9 of the High Court of the Provinces (Special Provisions) Act No 32 of 1990.However we are mindful of the fact that Industrial Disputes (Amendment) Act No 32 of 1990 also provides for a right of Appeal and power and jurisdiction conferred on the Supreme Court to hear and determine cases. Therefore leave to appeal application could also be filed/entertained under section 31DD of the Industrial Disputes Act.

The learned Counsel for the Applicant Petitioner in his written submissions submitted that 'in any case the difference between "leave to appeal" and "special leave to appeal" being one of terminology only and there being no inconsistency/difference in the procedure by which they may be granted and the end result is the same'. He invites the Supreme Court as the apex court of the land not to be hamstrung and/or hindered by such technicalities.

However it should be observed that there is a subtle difference between a leave to appeal and special leave to appeal applications. High Court could grant leave to appeal if it involves a substantial question of law. On the other hand though granting of special leave to appeal by the Supreme Court is discretionary it has a wide discretion. The criteria is that the matter or case in the opinion of the Supreme Court is fit for review by the Supreme Court. Further the Supreme Court shall grant leave in every matter of proceeding in which it is satisfied that the question to be decided is of public or general importance.

Industrial Disputes act fall into the category of social legislation. Section 31C(1) of the Industrial Disputes Act requires the Labour Tribunal after inquiry to 'make such order as may appear to the tribunal to be just an equitable. Therefore when granting equitable relief the court should not be hamstrung by mere technicalities and terminology.

Therefore, I am of the view that the litigant should not suffer due the choice of different words in different statutes by the draftsman in similar context.

The next objection raised by the learned Counsel for the Respondent Bank is that the Applicant Petitioner had failed to comply with the Supreme Court Rules. He had failed to mention in the caption the relevant law which provides for Special Leave to appeal and for that reason the application is defective. The caption should refer to the law under which the application is filed. Question that arise is whether this defect or omission is a mere technical defect or not.

The learned counsel for the Respondent Bank cited the case of *The Ceylon Electricity Board & 9 others V. Ranjith Fonseka* 2008 (BALR) Part 11 page 155 as a case relevant to this application. The petitioner in that case filed a Special Leave to Appeal Application in the Supreme Court regarding an Order made by the Court of Appeal. But included an incorrect title and caption where the jurisdiction was pleaded incorrectly.

The Petition and affidavit for special leave to appeal was titled 'In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka instead of Supreme Court. In the Caption it was stated that the application was made in terms of Article 154P(3)B of the Constitution. This article refers Appellate jurisdiction of the High Court. Article 128 is the correct article as the special leave was sought from the order of the Court of Appeal. Further the Petitioner in that case failed to annex the order of the Court of Appeal. In addition to that there were several other defects too.

The Respondents raised a preliminary objections in respect of the same and moved for dismissal. Petitioner filed amended papers. Although several hearing dates had lapsed Petitioner did not support the application to seek the permission of the Court to amend the Caption.

The Supreme Court dismissed the entire case of the Petitioner and refused the amendment on the following premise:

> " As correctly submitted by the learned President's Counsel, for the respondent the application for Special leave to Appeal filed by the Petitioners before the apex Court of the Republic, should have been drafted with 'care and due diligence' in order to maintain the stature and dignity of this Court. An application such as the present application, which is teeming with irregularities and mistakes cannot, not only be tolerated , but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application. Even if the objections may be technical in nature, such irregularities clearly demonstrate the fact that the application made by the petitioners has not complied with the Supreme Court Rules of 1990."

In the present case the facts are different. The title of the Petition is correct. The caption reads thus: 'In the matter of an Application for Special Leave to Appeal from the order

of the High Court of the North Western Province'. The only omission in the caption of the Petition is that there is no reference to section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 which is the relevant law.

I am of the view that this omission could be considered as a technical defect or irregularity which could be cured by allowing the Applicant-Petitioner to amend the Caption.

The other question that arises is whether Applicant-Petitioner had failed to comply with the Supreme Court rules. Supreme Court Rules 1990 Part 1 (3) reads thus:

" Every such application shall be typewritten, printed or lithographed on suitable paper, with a margin on the left side, and shall contain the Court of Appeal number, and shall be signed by the Petitioner himself, if he appears in person, or by his instructing attorney-at-law. It shall contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted, including the questions of law in respect of which special leave to appeal is sought, and the circumstances rendering the case or matter fit for review by the Supreme Court."

The Respondent Bank submitted that the Applicant –Petitioner failed to refer to the questions of law fit to be reviewed by the Supreme Court. The learned counsel for the Respondent Bank submitted that the non compliance of these rules are fatal and due to that reason application should be dismissed in limine. The Counsel had referred to several cases where Supreme Court had dismissed applications for non-compliance of this rule.

In the case of *Attanayake v. Commissioner General of Elections & Others* 2011(2) BLR page 349 the jurisdiction of the Supreme Court was properly invoked but there was non compliance with the Rules by failing to tender the required number of notices along with the petition, Her ladyship Shirani Bandaranayake CJ held:

> "Through a long line of cases decided by this Court, a clear principle has been enumerated that 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 a serious erosion of well established court procedure followed by our courts throughout several decades."

The Counsel for the Applicant-Petitioner had submitted that he had referred to the question of laws in the Petition and thereby complied with the Supreme Court Rules. Paragraph 8 of the Petition referred to the questions of law. In paragraph 10 Petitioner has stated that the said questions are fit and proper and or substantial questions of law for consideration by the Supreme Court. This paragraph does not refer to the exact words "fit for review". However, I find that Petitioner had pleaded questions of law and also averred that the questions are fit and proper questions for consideration. Therefore, I am of the view that the Petitioner had substantially complied with the Supreme Court Rules of 1990.

The Applicant-Petitioner relied on cases of *Priyani Soyza V. Rienzie Arsacularatne* 1999 2 SLR 179 and *Kiriwantha and another Vs Nawaratne* and another 1990 2SLR

393. In Kiriwantha's case Fernando J said that " the weight of authority does favours the view that while all these rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default".

Having considered the submissions of both parties, I am of the view that the above mentioned omissions and errors are technical in nature and do not warrant the dismissal of the Application. The preliminary objections are over ruled and the Application will be listed for support for granting of leave.

No costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J
I agree.

Judge of the Supreme Court

K Sripavan, J.
I agree.

Judge of the Supreme Court