

DHARMASIRI AND OTHERS
v
JANATHA FERTILISER ENTERPRISE LTD AND OTHERS

COURT OF APPEAL

IMAM, J.

C.A. 2211/02

JULY 13, 2004

Application for writ of certiorari – Failure of the respondents to comply with Supreme Court Rule 22(3) of 1990 – Right to appear deprived – Respondents sought leave to appeal to the Supreme Court against the said order – Is it a final order? – Could the Court of Appeal grant leave? – Constitution, Art. 128 (1) Civil Procedure Code – Section 575 (5).

The petitioners sought writs of *certiorari* and *mandamus*. The Court of Appeal by its order of 24.06.2004, held that the respondents having failed to comply with the mandatory Appellate Rules cannot appear in the proceedings in opposition to the petitioner and fixed the application of the petitioners for inquiry.

The respondents sought leave to appeal against the said order to the Supreme Court.

Held :

- (i) The Court of Appeal has the power to grant leave to appeal only from a final order.
- (ii) The impugned order is an interim order and not a final order.

APPLICATION for leave to appeal to the Supreme Court from an order depriving the respondents of their right to appear in opposition to the petitioners, with the petitioners' case being fixed for inquiry.

Cases referred to:

1. Siriwardena v Air Ceylon Ltd., – (1981) 1 SRI LR 286
2. Kulatilake v Karunawathie and others – (1989) 1 SRI LR 303
3. Brooke Bond(Ce) Ltd., v Stassen Exports Ltd., – (1990) 1 SRI LR 61
4. Bank of Ceylon v Bank Employees Union – SC App. No. 30/2002 decided on.....

Dr. Jayantha de Almeida Guneratne, P.C. with Viran Corea for petitioners.

Sathya Hettige, Additional Solicitor-General with Euresha de Silva, State Counsel for 1st, 2nd, 4th and 5th respondents.

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Order

On the 12th of July 2004, attorney-at-law for the 1st, 2nd, 4th and 5th respondents tendered a Leave to Appeal application against the order of this Court dated 24.6.2004 in terms of section 22(3) of the Supreme Court Rules 1990. A statement containing the questions of law were also annexed to this application. President's Counsel for the petitioner made submissions that this Court has **No Jurisdiction** to entertain such an application as the order made by this Court on 24.6.2004 was an **Interim Order** and not a **Final Order**. 01

The learned ASG contended that the Order dated 24.6.2004 was a **Final Order**, as the respondents were precluded from partaking in the main case as a result of the aforesaid **Order**, and thus the respondents had been deprived of a right of audience. 10

Learned President's Counsel submitted that the aforesaid order is an **Interim Order** as the relief claimed by the petitioners in this

case has not been **inquired** into and thus the proceedings in this case are **not concluded**. Learned ASG submitted that in view of the aforesaid order the 1st, 2nd, 4th and 5th respondents were precluded from taking part in future proceedings.

Article 128(1) of the Constitution states that an appeal shall lie to the **Supreme Court** from any **Final Order** of the **Court of Appeal** in any matter or proceedings if the Court of Appeal grants Leave to Appeal to the Supreme Court *ex mero motu*. Hence this Court has to examine whether the order dated 24.6.2004 is a **Final Order** or an **Interim Order**. 20

Rule 22(1) of the Supreme Court Rules of 1990 refers to a party aggrieved by a **Final Order** for Leave to Appeal to the Supreme Court. In *Siriwardene v Air Ceylon Limited*⁽¹⁾ the question as to whether an Order is a **Final Order** was determined by Chief Justice Sharvananda with Justice P. Colin-Thome and Justice P. Ranasinghe agreeing. The Judgment stated "The tests to be applied to determine whether an Order has the effect of a **Final Judgment** and so qualifies as a Judgment under section 754(5) of the Civil Procedure Code are as follows. 30

1) It must be an Order **finally disposing** of the **rights** of the parties.

2) The Order **cannot** be treated as a **Final Order**, if the suit or the action is still left a **live suit** or **action** for the purpose of determining the rights and liabilities of the parties in the Ordinary way.

3) The finality of the order must be determined in relation to the suit. 40

Section 754(5) of the Civil Procedure Code defines a Judgment and Order as follows.

"**Judgment**" means any Judgment or Order having the effect of a Final Judgment made by any Civil Court and "**Order**" means the final expression of any decision in any civil action proceeding or matter, which is not a Judgment.

In this instant case the Petitioners have sought for writs of certiorari, Prohibition, and *Mandamus*. By the Order of this Court dated 24.06.2004, I held that the aforesaid respondents having failed to 50

comply with the mandatory appellate rules were deprived of their right to appear in these proceedings in opposition to the petitioners. The Order further stated that "The matter of the application of the petitioners is to be fixed for inquiry". Thus this case is not **concluded** by Order dated **24.6.2004**.

Hence I hold that the Order dated 24.06.2004 is an **Interim Order and not a Final Order**. Furthermore the aforesaid respondents have other remedies available to them. With this regard in *Kulatilleke v Karunaratne and others*⁽²⁾ Justice A.de Z. Gunawardene held "that the Court of Appeal only has the power to grant leave to appeal from a Final Order, Judgment, Decree or Sentence of the Court of Appeal. The circumstances under which the Supreme Court exercises its jurisdiction to grant special Leave to Appeal is much wider."

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Furthermore in *Brooke Bond (Ceylon) Ltd v Stassen Exports Ltd. and another*⁽³⁾ it was held that in law an Interlocutory Order is one which is made or given during the **progress** of the **action**, but which does not thereby dispose of the rights of parties. It is **incidental** to the **principal object** of the action, namely the Judgment.

The learned Additional Solicitor General referred to *Bank of Ceylon v Ceylon Bank Employees Union*⁽⁴⁾ where, it was held by Justice Gunasekera with Justice Ismail and Justice Yapa agreeing that the failure of the respondent to file a caveat opposing the grant of Special Leave does *not preclude* the respondent from being heard at the hearing of the appeal. However in the instant case, there has been no application for Special Leave to Appeal as yet.

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The line of decisions in our superior courts have held that parties should comply with the Rules of Court.

For the aforesaid reasons, I disallow the application of the 1st, 2nd, 4th and 5th respondents and dismiss the application for Leave to Appeal to the Supreme Court. No costs.

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Leave to appeal to the Supreme Court refused.