CEYLINCO TRAVELS LTD.

v.

GRINDLAYS BANK

COURT OF APPEAL.
ABEYWARDENA, J. AND GOONEWARDENA, J.
C.A. APPLICATION No. 93/96.
D.C. COLOMBO 33189/S.
JANUARY 28 AND FEBRUARY 2, 1987.

Appeal– Written submissions – Practice – Leave to appeal.

Where leave to appeal was sought from an order of Court permitting written submissions to be filed and refusing costs in connection with the trial of certain preliminary issues–

Held–

(1) A very salutory practice has now developed of enabling written submissions to be filed or on appropriate occasions permitting the Court itself to call for them in substitution for or as supplementary to oral submissions.

(2) The grant of leave to appeal will depend on the circumstances of each case but the following guidelines can be reduced from the decided cases:

(i) The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against an order disposing of the matter under consideration at its final stage.

(ii) Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the flood gates to interminable litigation. But if the incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage then leave to appeal will be granted.

(iii) Another test is, will a decision of the Appellate Tribunal on the incidental order obviate the necessity of a second trial?

(iv) The main consideration is to secure finality in the proceedings without undue delay or unnecessary expense.

(3) The order being canvassed does not fall within any of the above grounds.

Cases referred to:

(1) *Wettasinghe v. Nimal Weerakody and Others–C. A. Application No. LA 106/81 CA Minutes of 8.9.91; [1981] 2 SLR 423.*

(2) *Fernando v. Fernando–(1920) 8 CWR 43, 44.*

(3) *Balasubramaniam v. Valliappar Chettiar–(1938) 39 NLR 553, 560*

(4) *Girantha v. Maria–(1948) 50 NLR 519, 521*

(5) *Gunewardena v. De Saram–(1962) 64 NLR 145, 151.*

(6) *Arumugam v. Thampu–(1912) 15 NLR 253, 255.*

APPLICATION for leave to appeal from Order of the District Judge of Colombo

Nimal Senanayake, P.C. with *Miss A. D. Thelespha* for plaintiff–petitioner.

Romesh de Silva with *Palitha Kumarasinghe* for defendant–respondent.

Cur. adv. vult.

February 27, 1987.

GOONEWARDENA, J.

The plaintiff-petitioner instituted this action against the defendant-respondent seeking to recover by way of summary procedure on liquid claims in accordance with the provisions set out in Chapter 53 of the Civil Procedure Code, a sum of Rs. 152,917 with interest, alleged to be due on a bill of exchange.

Summons in form No. 19 in the First Schedule to the Code having been duly served, the defendant-respondent within the time stated in such summons sought leave of Court to appear and defend the action.

It would appear that on the 20th of January 1986, when such application was taken up for inquiry, counsel for the defendant-respondent contended that for certain reasons urged, the case of the plaintiff-petitioner could not proceed and sought an opportunity to tender written submissions to support such contention. Despite objection to this course taken by opposing counsel who claimed that such a contention could not be properly gone into without the defendant-respondent first having obtained leave to appear and defend the action, the Court granted an opportunity for such written submissions to be tendered. However when the case was called on 12.2.1986 for that purpose, although such submissions were in fact tendered, by agreement the defendant-respondent was afforded an opportunity to file answer (Vide J. E. dated 12.2.1986 in document P1). On 5.3.1986 answer

was filed as had been ordered and on 26.6.1986 the trial was taken up. Twelve issues suggested were adopted by Court and on the motion of counsel for the defendant-respondent, despite objection by counsel for plaintiff-petitioner, issues Nos. 7 and 8 were taken up by the Court for determination as preliminary issues of law in terms of section 147 of the Civil Procedure Code. Counsel for the defendant-respondent thereupon sought permission to tender his submissions with respect to his contention upon these issues, in writing. This too was objected to by counsel for the plaintiff, but the District Judge in permitting such written submissions gave a date for tendering the same on the basis that that was the usual practice in that Court. An application for costs made by plaintiff's counsel was refused. It is these orders permitting written submissions and refusing costs that constitute the matters complained of by the plaintiff in this application and in respect of which leave to appeal is sought. No arguments were adduced by plaintiff's counsel at the hearing before us as to the District Judge's decision to try those numbered 7 and 8, as preliminary issues. The observation must also be made that although some arguments were directed towards attacking certain earlier steps taken in the case by the Court, having regard to the compass of the present application it is altogether unnecessary to dwell upon them.

Counsel for the petitioner contended that the District Judge was remiss in permitting written submissions and that this approach contributed to the laws delays. I take the opposite view in thinking that the course adopted is conducive to the expeditious disposal of a greater number of cases. The time spent in listening to oral submissions in open Court in one case can well be devoted to secure the accomplishment of something that must perforce be done in open Court in some other case. I fail to understand how, if a party is content to make his submissions in writing instead of orally and in fact chooses to do so, the other side which, as here, was not compelled by the Court to do likewise can be heard to complain, particularly as it has every opportunity then of studying the opponent's written submissions at leisure and thus has the advantage of being able to reply to them with full preparedness either orally or in writing.

Section 454 of the Administration of Justice Law No. 25 of 1975 gave, I think, legislative effect to a practice which earlier sometimes prevailed of making submissions in writing and despite there being no

provision to the like effect in the present Civil Procedure Code the practice still continues in quite many cases. In my view it can well be said that a very salutory practice has now developed in the absence of direct statutory provision either way of enabling written submissions to be filed or on appropriate occasions permitting the Court itself to call for them in substitution for or as supplementary to oral submissions, and this practice, in my view, far from being disturbed by this Court should receive its full encouragement. Adopting the contrary view would, I think, be a retrogressive step in the context of and against the background of the need of the time to minimise the laws delays and secure the expeditious disposal of cases. The District Judge very properly exercised a discretion which I think he had to entertain written submissions and to enable that to be done, in the exercise of his further discretion postponed the further hearing of the case to enable such submissions to be filed, a step which clearly then did not entail mulcting the defendant-respondent in costs.

The application for leave to appeal in the circumstances of the case must therefore fail.

It is appropriate however for the sake of completeness, and perhaps useful, to refer to the circumstances under which leave to appeal is generally granted. One can do no better than quote from the judgment of Soza, J. in *Wettasinghe v. Nimal Weerakody and Others* (1), where he said thus:

> "The attitude of the Courts will no doubt depend on the circumstances of each case. Yet from the decided cases to which we were referred the following guidelines could be deduced:
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> (1) The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against an order disposing of the matter under consideration at its final stage (*Fernando v. Fernando* (2); *Balasubramaniam v. Valliappar Chettiar* (3); *Girantha v. Maria* (4); and *Gunawardene v. De Saram* (5)).
>
> (2) Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the flood gates to interminable litigation (*Balasubramaniam v. Valliappar Chettiar (supra)* (3) at p. 560). But if the incidental order goes to the root of the matter and it is both convenient and in the interests of both

parties that the correctness of the order be tested at the earliest possible stage then leave to appeal will be granted (*Arumugam v. Thampu* (6) and *Girantha v. Maria (supra)* (4) at p. 521).

(3) Another test is, will a decision of the Appellate Tribunal on the incidental order obviate the necessity of a second trial? (*Arumugam v. Thampu (supra)* (6) at p. 255; *Girantha v. Maria (supra)* (4) p. 521; *Gunawardene v. De Saram (supra)* (5) p. 152).

(4) The main consideration is to secure finality in the proceedings without undue delay or unnecessary expense (*Girantha v. Maria (supra)* (4) at p. 521)."

In my view the present application does not fall within any of the grounds so contemplated. The application for leave to appeal is refused with costs fixed at Rs. 210.

ABEYWARDENE, J. – I agree.

Leave to appeal refused.