NAJ MUDEEN AND OTHERS
v.
NATIONAL DEVELOPMENT BANK

COURT OF APPEAL
YAPA, J.,
GUNAWARDANA, J.
C.A/L.A No. 142/97
D.C. COLOMBO 4787/SPL
NOVEMBER 4 [redacted], 1997.

Leave to appeal application not supported within the period stipulated in the order made by a Judge of the Court of Appeal in Chambers – Is it fatal?– Interpretation Ordinance S. 2 (b) and S. 14 (a) applicability.

The application for leave to appeal had been submitted to a Judge in Chambers, and he had made order on 23.7.1997, to support application in open court within two weeks. This matter had come up on 7.8.97, as the Counsel had wished to support this application on a latter date with proper Notice to the respondents..." it was put off.

The defendant-respondent contended that when the matter came up for support on 7.8.97, the date was outside the time limit prescribed and in any event the date 25.9.97 on which date the application finally came up for support was well outside the prescribed period.

Held:

(1) It is a common ground that the Court vacation commenced on 4.8.97 and lasted till 18.8.97. The application could not have been supported on 6.8.97, the last date of the relevant 14-day period, as the vacation court had not sat on that date.

(2) S. 8 (2) of the Interpretation Ordinance permits a thing or an act to be done on the next day thereafter if the court is closed on that day. On 7.8.97 (the next day) the petitioner had taken a step towards supporting it on a later date, with the express sanction or permission of the court.

Per Gunawardana, J.

> "Court must not be content to take the path of least resistance by making a mechanical order but must adopt a more interventionist judicial attitude by making an order which represents or embodies the right mixture of law and justice for the rigour and severity of the law untempered by good sense is not justice but somewhat akin to denial of it."

(3) S. 14 (a) of the Interpretation Ordinance does not apply to orders made by court and will apply only in the case of enactments such as laws and acts or the like.

APPLICATION for Leave to Appeal.

K. N. Choksy PC, with *Palitha Kumarasinghe* for petitioner.

Romesh de Silva, PC, with *Geethaka Gunawardene* for respondent.

Cur. adv. vult.

November 5, 1997

U. DE Z. GUNAWARDANA, J.

This is an application for leave to appeal in respect of an order dated 01.07.1997 made by the learned Additional District Judge. There is no dispute as to the fact that the said application had been made to the Court of Appeal within the period stipulated by the law.

When this application came up for support on 25.09.97 the learned President's counsel for the defendant-respondent has raised a preliminary objection, to wit: that the application for leave to appeal had not been supported within the period stipulated in the order made by a Judge of the Court of Appeal in chambers and moved that the said application be rejected or not entertained.

This application for leave to appeal had been submitted to a Judge in chambers and he had made an order on 23.07.1997 in the following terms: "support application in open court within two weeks from today".

Thereafter, the application for leave to appeal had come up before a bench of two Judges of this court on 07.08.1997 and the proceedings of that date reads thus: "Counsel wishes to support this application on a later date with proper notice to the respondents . . . "

The argument or the objection of the learned President's Counsel for the defendant-respondent to the hearing of this matter or, to put it more accurately, to the application being allowed to be supported, now, is two-fold: (*a*) that, when the matter came up before a bench of two Judges for support on 07.08.1997 that date, i.e. 07.08.1997 was outside the time-limit of 14 days prescribed by the aforesaid order

made in chambers on 23.07.1997; (*b*) in any event, the date, i.e. 25.09.1997 on which date the application finally came up for support was well outside the period within which it had to be supported in terms of the aforesaid order made by the Judge in chambers on 23.07.1997.

To consider the above two objections in order: (*a*) it is common ground that the court vacation commenced on the 4th of August 1997 and lasted till the 18th August. The sittings of the court was scheduled to be resumed (after the vacation) on the 18th of August 1997 which date fell on a poya day. It is also to be noted that the 2nd and 3rd of August being Saturday and Sunday, respectively, i.e. the two days immediately preceding the 4th (on which date the vacation commenced) were also dates on which the court was "closed" and the application had come up for support on 07.08.1997 which date fell outside the 14 days, just by one day, which was the period stipulated in the order made in chambers on 23.07.1997. But the application couldn't have been supported on the 06.08.1997 which was the last date of the relevant 14-day period, as the vacation court had not sat on that date. However, in this regard one cannot be oblivious to the effect of the operation of section 8 (2) of the Interpretation Ordinance which is to permit a thing or an act to done on the next day thereafter if the court is "closed" on that day, i.e. on the day, that the act had to be done. So that it was competent for the plaintiff-petitioner, or he was entitled, to support the application on 07.08.97 on which date the matter had come up for support in open court for the first time. Nor can it be strictly said that it was not supported on 07.08.1997, for the plaintiff-petitioner, to say the least, had taken a step towards supporting it on a later date, be it noted, with the express sanction or permission of the court.

However it is worth noticing that the judge's order made on 23.07.1997 had not, apart from delimiting or indicating the period within which the application has to be supported, appointed a particular or specific date for that purpose; so that if the plaintiff-petitioner had shown greater vigilance the application could have been supported on any one of the 7 clear working days that had intervened between the date of making the order in chambers and the date on which the period of holidays commenced. And even assuming for the sake of argument, that the position that the application was not sought to be supported till 25.09.1997 is correct–still it must be held that the

order made by the court on 07.08.1997 had permitted him (the plaintiff-petitioner) to do so, that is, to support it on the extended date which was 25.09.1997. Of course 25.09.1997 was not a date appointed by the court for in terms of the order made on 07.08.1997 the choice of the date was left to the counsel. It is worth repeating the relevant excerpt of the order in this context as well: "Counsel wishes to support the application on a later date with . . . notice to the respondent . . ."

This order clearly presupposes that the counsel for the plaintiff-petitioner had on 07.08.1997 made an application or moved the court that he be permitted or allowed to support the application for leave to appeal on a later date which application (i.e. the application that he be permitted to support on a later date) had been allowed by court. The court having, on 07.08.1997, allowed the counsel to support the application for leave to appeal on a later date, is now precluded from holding that the application had not been supported within 14 days in terms of the original order made in the chambers of the Judge and refuse to hear the application on that footing, viz. that it had not been supported within 14 days – for by its order made on 07.08.1997 the court must be taken to have clearly extended the period and permitted the counsel (for the plaintiff-petitioner) to support the application for leave to appeal on a date of his (counsel's) choice since the court had omitted on 07.08.1997 to appoint a date for support.

The learned President's counsel for the plaintiff-petitioner had also contended that the terms in which the relevant order had been made on 23.07.1997 was such as to exclude the day on which the said order was made inasmuch as the said order read thus: "support application ..... within two weeks from today". The said argument is rested on section 14 (*a*) of the Interpretation Ordinance which states that for the purpose of excluding the first day of any period it is sufficient to use the word "from" as has been done in the order directing that the application be supported within 14 days. But this provision, i.e. section 14 (*a*) of the Interpretation Ordinance does not apply to orders made by courts and will apply only in the case of enactments such as laws and acts or the like as had been explained in section 2 (*b*) of the Interpretation Ordinance. It is to be observed that the period of 14 days had been appointed not by the law as such, but by the order of the judge made in chambers.

In a way it is not wholly incorrect to say that the application for leave to appeal had not been supported within the 14 days in strict compliance with the original order made on 23.07.1997. But as explained above the court vacation had, in some measure, come in the way of obeying that order to the very letter. Anyhow, even if the period originally appointed had not been extended – as, in fact, it had been done – still laws or orders ought not be rigidly applied so as to prevent a realistic solution. It is manifest that rigid adherence, now, to the strict letter of the original order to support the application within 14 days (even assuming that the period had not been extended as, in fact, it had been done by the court on 07.08.1997) would undoubtedly cause great inconvenience, if not injustice, to the plaintiff-petitioner, even when the defendant-respondent cannot conceivably be prejudiced in the slightest degree on account of the application not being so supported, i.e. within 14 days. Apart from submitting, that the application for leave to appeal had not been supported within 14 days in strict conformity with the order made on 23.07.1997, the fact that the defendant-respondent had not complained of or pointed to any tangible prejudice that he would suffer, in consequence of the application being allowed to be supported after the lapse of 14 days, too, calls for remark.

It is also to be observed that whichever authority framed these laws, it presupposes that consequences of non-compliance therewith are not specified because it was intended that a discretion ought to reside in the court or from the silence of the law with regard to consequences of non-compliance, is such a discretion, willy-nilly, inferentially vested in the courts. Nowhere is it laid down that the rejection of the application ought to ensue automatically in the event of failure to support it within the period stipulated, and as such, the court has to decide, in its discretion, how the failure to follow the order, with regard to the time-limit imposed thereby, is to be treated.

It is obvious that the overall object of these rules or laws is to ensure better, perhaps quicker, administration of justice and not to deny access to the seat of justice altogether which would invariably be the result from the standpoint of the plaintiff-petitioner if this application is refused on the aforesaid grounds urged by the learned President's counsel for the defendant-respondent. Justice does not get stale but retains its sweetness and aroma even if belated. It is a requirement of natural justice that a person, claiming to be aggrieved,

who seeks redress through the intervention of the court should not lightly be denied an opportunity of presenting his case.

In conclusion it must be said that in assessing the importance of a procedural requirement, such as that we are considering in this case, regard must be paid to basic principles of fairness. The question is: even assuming, for the sake of argument, that the order made by the Judge in chambers has not been varied by the subsequent order made on 07.08.1997 – does the failure to follow the previous order, in all its rigour, result in serious injustice or, for that matter, any injustice at all to the defendant-respondent who merely complains that the application had not been supported within 14 days of the original order made on 23.07.1997 ? The answer to this is obvious. The nature of this matter is such that the defendant-respondent couldn't have possibly suffered any prejudice whatever in consequence of the application not being supported within the 14 days. On the contrary, it is worth repeating, that if the plaintiff-petitioner is not permitted now to support the application on that score, i.e. because it has not been supported within 14 days it would undoubtedly cause great injustice to him, so to say, by ousting him from the seat of justice and thereby denying justice to him altogether. If it is, indeed, an ironical result to deny justice altogether by not even giving the plaintiff-petitioner a hearing, when as had been contended by the learned President's counsel for the defendant-respondent, the object of the relevant law, under which the judge had made the order on 23.07.1997, i.e. to support within 14 days, was better, if not quicker, administration of justice.

Lastly, it should be emphasized that good and proper administration of justice, perhaps, requires speed of decision but it also ought to concern itself with substance rather than form. The main object of the courts being to work justice between the parties we ought not to be backward in recognising that in special circumstances, rigid and inflexible application of the law (or any order) may have the opposite result – as it would, in this case, if the plaintiff-petitioner is not permitted now to support his application for leave to appeal. In such circumstances, as have been revealed in this matter (application) – the court must not be content to take the path of least resistance by making a mechanical order but must adopt a more interventionist judicial attitude by making an order which represents or embodies the right mixture of law and justice for the rigour and severity of the law untempered (in such circumstances when such moderation is warranted) by good – sense is not justice but somewhat akin to denial of it.

For the aforesaid reasons, the objection (enunciated above) raised by the learned President's counsel for the defendant-respondent is hereby overruled.

YAPA, J. – I agree.

Preliminary objection overruled.