

BROOKE BOND (CEYLON) LTD.
v.
STASSEN EXPORTS LTD. AND ANOTHER

COURT OF APPEAL.
WIJETUNGA, J. AND WIJEYARATNE, J.
CA/LA 124/89
FEBRUARY 19, 1990

Appeal-Interlocutory appeals under s. 182 (3) of Code of Intellectual Property Act, No. 52 of 1979 — Civil Appellate Rules 1938 — Leave to appeal under s. 756 CPC.

Interlocutory appeals are appeals from interlocutory orders. In law an interlocutory order is one which is made or given during the progress of an 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. Viewed in this light the definition of order in section 754 (5) of the Civil Procedure Code of 1977 applies to interlocutory orders.

When section 182 (3) of the Code of Intellectual Property Act, No. 52 of 1979, provided that appeals shall be governed by the "rules which govern interlocutory appeals from the District Courts", they refer to the procedure laid down in sections 754 (2) and 756 (2), (3), (4), (5), (6) and (7) of the Civil Procedure Code of 1977 and any rules relative thereto framed by the Chief Justice and other Judges of the Supreme Court under Article 136 of the Constitution.

The Civil Appellate Rules of 1938 published in the Government Gazette of 24.3.1939 are no longer in force.

PRELIMINARY OBJECTIONS to application for leave to appeal from order of the District Judge of Colombo.

Dr. H. W. Jayewardene, Q. C. with K. N. Choksy, P. C., Lakshman Kadirgamar, Harsha Amerasekera and Harsha Cabraal for the Appellant-Petitioner.

H. L. de Silva, P. C. with G. Dayasiri for 1st respondent.

March 15, 1990.

WIJEYARATNE, J.

This is an appeal under section 182 (3) of the Code of Intellectual Property Act, No. 52 of 1979, from an order of the learned Additional District Judge of Colombo dated 30.11.1989 dismissing an appeal from an order made by the 2nd respondent (Registrar of Trade Marks) under the said Code.

The Appellant (Brooke Bond Ceylon Ltd.) is the registered proprietor of the word mark "Spring Leaf" (No. 2878) and also mark No. 5226 "Spring Leaf", the word and device which have been registered on 11.5.1923 and 13.12.1930 respectively.

The 1st Respondent (Stassen Exports Ltd.) applied to the 2nd Respondent (Registrar of Trade Marks) under section 102 of the Code of Intellectual Property Act, No. 52 of 1979, for registration of the mark "Spring Band" in the same class of goods as those of the Appellant set out above.

The 2nd Respondent accepted the said mark for registration and published the same in the Government Gazette No. 246 of 20.5.1983 (under No. 40849).

Thereupon the Appellant objected to the registration of the said mark No. 40849 in terms of section 107 (10) of the said Act.

The 1st Respondent under section 107 (12) of the Act filed its observations dated 5.3.1989.

Thereafter the matter was taken up for inquiry and by his order dated 25.1.1988 the 2nd Respondent held that the mark of the 1st Respondent was entitled to registration under the said Act.

Being aggrieved the Appellant filed an appeal therefrom in terms of section 182 (1) of the Act to the District Court of Colombo.

Thereupon the 1st and 2nd Respondents filed their objections in the District Court of Colombo.

After the filing of written submissions by the Appellant and the 1st Respondent the learned additional District Judge of Colombo by his order dated 30.11.1989 dismissed the appeal of the Appellant.

Being dissatisfied with this order the Appellant on 14.12.1989 has filed this application for leave to appeal against the said order under section 756 of the Civil Procedure Code, read with section 182 (3) of the said Act.

The 1st Respondent has filed its objections dated 12.2.1990 to this application for leave to appeal.

When this application for leave to appeal came up for hearing learned counsel for the 1st Respondent Mr H. L. de Silva, P. C., raised the preliminary objection that the Appellant should have followed the procedure laid down in section 754 (1) and not the procedure laid down in section 754 (2) of the Civil Procedure Code (as has been done in this case). He argued that the order of the learned Additional District Judge dated 30.11.1989 amounted to a judgment within the meaning of section 754 (5) of the Civil Procedure Code, as it has the effect of a final judgment of a Civil Court. He submitted that the order of the learned Additional District Judge dated 30.11.1989 has the effect of finally disposing of the rights of parties.

He further submitted that if the legislature intended an Appellant under section 183 (2) of the Code of Intellectual Property Act to follow the more cumbersome procedure laid down in section 754 (2) and section 756 (2) to (6) of the Civil Procedure Code by getting leave to appeal, it would have made specific provision for same as laid down in section 13 (3) of the Judicature Act, No. 2 of 1978, in appeals from the Admiralty jurisdiction of the High Court.

He argued that section 182 (3) of the Code of Intellectual Property Act merely repeated what was stated in section 50 of the repealed Trade Marks Ordinance, namely that appeals are to be governed by the same rules which govern interlocutory appeals from District Courts.

Mr. de Silva also submitted that the Civil Appellate Rules of 1938 made under section 53 of the Courts Ordinance and published in the Government Gazette of 24.3.1939 were yet in force and the procedure laid down therein should have been followed in this case.

Mr. de Silva argued that the Civil Appellate Rules of 1938 were yet in force because, although the Administration of Justice Law, No. 44 of 1973 by its section 3 (1) (a) repealed the Courts Ordinance yet by its section

3 (2) provided that unless and until rules are made under the said Law, all rules in force immediately before the appointed date relating to the exercise of jurisdiction of Courts established under the several enactments repealed by the said Law shall *mutatis mutandis* apply to the exercise of jurisdiction by the court vested with such jurisdiction under this Law.

It should be remembered that what is conserved are rules relating to the exercise of jurisdiction by a Court which is vested with jurisdiction. We are concerned here with rules relating to procedure in appeals and not rules relating directly to the exercise of jurisdiction though it may be argued that rules relating to appellate procedure also relate to jurisdiction of Courts.

However that may be, express provision has been made in the very Administration of Justice Law, No. 44 of 1973 itself, for both civil and criminal appeals, and also rules have been made under the said Law relating to appellate procedure which are outlined below.

While a whole new chapter, namely Chapter 4 of the Administration of Justice Law, No. 44 of 1973, consisting of sections 315 to 356 (inclusive) have comprehensively dealt with procedure relating to both criminal and civil appeals, special provision was made for interlocutory appeals in civil actions by section 317 (2) of the said Law after first obtaining the leave of the Supreme Court (which was the court which had appellate jurisdiction).

The procedure to obtain leave is laid down in section 326 (1) of the Law, which provides for an application supported by an affidavit. The words "judgment" or "order" are defined in section 356 (and these definitions are not dissimilar to the corresponding definitions in section 754 (5) of the present Civil Procedure Code of 1977).

Thus it is seen that specific Laws relating to interlocutory appeals were brought into force for the first time.

In addition, certain rules called the Supreme Court Appeals Procedure Rules 1974 have been framed by the Chief Justice and other Judges of the Supreme Court (with the concurrence of the Minister of Justice) under section 15 of the Administration of Justice Law, No. 44 of 1973. These rules were published in Government Gazette (Extraordinary) dated

23.1.1974. They relate to lodging and hearing of appeals.

There are also certain other rules that have been made by the Chief Justice and other Judges of the Supreme Court (with the concurrence of the Minister of Justice) under the said section 15. They contain rules relating to the following matters :-

- (1) Assignment of Attorney-at-Law in appeals from criminal cases or matters from High Courts.
- (2) Admission, enrolment, suspension and removal of Attorneys-at-Law.
- (3) Attire of Judges and Attorneys-at-Law (women).
- (4) Writs and Examination of Records.

All these rules were published in Government Gazette No. 115/4 of 12.6.1974.

Thus it is seen that in 1974 not only Laws but also rules relating to procedure in appeals had become a part of the law.

Hence the saving clause of section 3 (2) of the Administration of Justice Law, No. 44 of 1973, lost effect and the Civil Appellate Rules 1938 became obsolete.

In short, the Civil Appellate Rules 1938 ceased to operate after the enactment of the Administration of Justice Law, No. 44 of 1973 (which laid down express laws in its sections 315-356 for procedure in appeals and even rules were made thereafter by gazette notifications as set out above.

After that the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977, which came into effect on 15.12.1977 provided by section 3 that the provisions of Chapter 4 of the Administration of Justice Law shall cease to regulate the right of, and procedure in, appeals. Section 4 (1) of the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977, provided that the Civil Procedure Code shall, for all purposes, be deemed to be in operation as if the same had not been repealed and shall continue to be the Law governing the procedure and practice in all Civil Courts.

At the same time the Civil Procedure Code (Amendment) Law, No. 20 of 1977, was passed amending the re-introduced Civil Procedure Code.

This amendment included amendments with regard to the procedure in respect of Interlocutory Appeals which are laid down in sections 754 (2) and 756 (2), (3), (4), (5), (6) and (7).

A new Constitution was enacted in 1978.

Acting under Article 136 of the Constitution, the Chief Justice and other Judges of the Supreme Court have framed rules which may be cited as the Supreme Court Rules, 1978. These were published in the Government Gazette No. 9/10 of 8.11.1978. These rules govern the following topics :-

- (1) Special Leave to Appeal.
- (2) Leave to Appeal.
- (3) Appeal procedure.
- (4) Stay of proceedings.
- (5) Writs and examination of records.
- (6) Suspension of sittings of court.
- (7) Constitutional and fundamental rights jurisdiction.
- (8) Admission, enrolment, suspension and removal of Attorneys-at-Law.

Thus it is seen that in addition to the above quoted sections in the Civil Procedure Code, which govern the procedure relating to interlocutory appeals, there are also rules relating to appeals framed by the Chief Justice and other Judges of the Supreme Court, which are now in force and often cited in appeals.

The words "interlocutory appeals" are not defined in the Civil Procedure Code. Interlocutory appeals are appeals from interlocutory orders. In law. An interlocutory order is one which is made or given during the progress of an 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. Viewed in this light, the definition of "order" in section 754 (5) refers to interlocutory orders.

The present Civil Procedure Code was enacted in 1977 and the Code of Intellectual Property Act in 1979. Therefore when section 182 (3) of the Code of Intellectual Property Act, No. 52 of 1979, provided that appeals shall be governed by the "rules which govern interlocutory appeals from

the District Court", obviously they refer to the procedure laid down in sections 754 (2) and 756 (2), (3), (4), (5), (6) and (7) and any rules relative thereto framed by the Chief Justice and other Judges of the Supreme Court under Article 136 of the Constitution.

Hence the Appellant-Petitioner has followed the correct procedure in this appeal.

I overrule the preliminary objections with costs fixed at Rs. 2,100.

WIJETUNGA, J.—I agree.

Preliminary objections overruled.
