NAYAR

v.

THARICK AMEEN

SUPREME COURT
DHEERARATNE, J.
WIJETUNGA, J. AND
WEERASEKERA, J.
SC APPEAL NO. 38/99
CA APPEAL NO. 82/92(F)
DC COLOMBO CASE NO. 7315/RE
02ND JUNE 2000

Appeal - Procedure of appeal to the Supreme Court from a judgement of the Court of Appeal - Article 128(1) of the Constitution - Stay of execution of the judgement of the Court of Appeal pending appeal - The manner and the time of applying to the Court of Appeal for leave to appeal - Rules 22(1), 22(2) and 22(3) of the Supreme Court Rules of 1990 - effect of non-compliance.

Consequent to an action instituted by the plaintiff respondent (the respondent) the District Judge entered judgement for the ejectment of the defendant - appellant (the appellant) from the premises let to him and for damages. An appeal by the defendant against that judgement was dismissed by the Court of Appeal by its judgement delivered on 18. 05. 1999. On the same day, the appellant filed a motion applying for a stay of execution as he intended to appeal to the Supreme Court and moved that the case be called on 19. 05. 1999 to support the motion. On 19. 05. 1999 the court in *ex parte* proceedings, ordered writ of execution to be stayed upto 01. 06. 1999 and permitted the appellant's counsel to file questions of law before that date. On 27. 05. 1999 written questions of law were filed and the court by its order made on 31. 05. 1999 granted leave to appeal on question (e) and stayed writ until the decision of the Supreme Court.

Held :

(1) In making its order on 19. 05. 1999 for stay of execution of writ, the Court of Appeal acted without jurisdiction; hence that order is void. Such jurisdiction lay only with the Supreme Court (Rule 42 of the Supreme Court Rules 1990).

(2) The Order of the Court of Appeal dated 31. 05. 1999 granting leave to appeal on question (e) is a nullity by reason of non-compliance with the

mandatory provisions of Rules, 22(1), (2) and (3) in particular, the failure on the part of the appellant to make an oral application for leave to appeal on the day the Court of Appeal delivered judgement as required by Rule 22(1). Such failure was of a grave and fundamental nature.

Per Weerasekera, J.

> "I find no explanation has been given nor can be given at all that is reasonable, cogent and acceptable to view it merely as an irregularity".

Cases referred to :

1. *Woodward v. Sarsons* (1875) LR 10 CP 733
2. *Kiriwanthe and Another v. Navaratne* (1990) SRI LR 393
3. *Rasheed Ali v. Mohammed Ali and Others* (1981) 1 SRI LR 262, 278
4. *Jayawickrema, Someswaran Manthri and Company v. Jinadasa* (1994) 3 Sri LR 185
5. *Aspinall v. Sutton* (1894) 2 QBD 349 at 350
6. *Anlaby and Others v. Praetorius* (1888) 20 QBD 764 at 766, 767 and 768
7. *Barker v. Palmer* (1881) 8 QBD 9 at 10 and 11
8. *Hamp-Adams v. Hall* (1911) 2 KB 942 at 945
9. *Pritchard deed Pritchard v. Deacon and Others* (1963) Ch 502 at 503
10. *Hewitson and Milner v. Fabre* (1988) 21 QBD 6 at 9

APPEAL from the judgement of the Court of Appeal.

J.W. Subasinghe, P.C. with *Harsha Soza* for defendant - Appellant.

Faisz Musthapha, P.C., with *Farook Thahir* for substituted Plaintiff - Respondent.

Cur. adv. vult.

July 31, 2000.

WEERASEKERA, J.

The Plaintiff-Respondent sought to eject the Defendant-Appellant-Petitioner from premises No. 179, Panchikawatte Road, Colombo 10 on the basis that the premises were excepted premises and that the Defendant-Appellant failed to pay an increased rental of Rs. 15000/- per month demanded

by notice from the original rental of Rs. 4000/- per month and for damages.

The Defendant-appellant admitted the notice demanding the increase in rental but averred that the premises were governed by the Rent Act and denied that they were excepted premises.

The District Court of Colombo by its judgment dated 28th February, 1992 decreed in favour of the Plaintiff-Respondent with damages at Rs. 4000/- per month.

The Defendant-Respondent appealed from this judgment but the Court of Appeal dismissed the appeal by its judgment delivered on 18th of May 1999.

On the same day i. e. on the 18th of May 1999 the Defendant-appellant filed a motion presumably in the Registry to the effect that

(a) the Defendant-appellant intends to appeal to the Supreme Court

(b) for a stay of execution

(c) that the case be called on 19. 05. 1999 to support this motion.

It would be pertinent at this stage to refer to Article 128 of the Constitution which provides for appeal from the judgment of the Court of Appeal and which is supplemented by Rules of Procedure provided for by Article 136 1(e) 2, 3, and 4. This motion clearly does not intend to seek relief under Article 128(1) but under Article 128(2) by way of special leave and the Supreme Court Rules 1990 would supplement the procedure as specified in Part 1 of the Supreme Court Rules in particular Rules 7,8 and 9. Though the motion of 18. 05. 1999 states that notice has been given under registered cover it barely seeks to satisfy the requirements of the Rules without proof of service

nor that the Plaintiff-Respondent had adequate notice of what was proposed to be supported when it was in fact supported on 19. 05. 1999, the following day.

The case was called in the Court of Appeal in Open Court with such undue haste to be supported on the 19th of May 1999, and on an ex parte application

(a) the writ of execution was stayed upto 01. 06. 1999

(b) the Counsel for Defendant-Appellant undertook to file questions of law before 01. 06. 1999.

It is my considered view that it is inconceivable under what provision of written law or practice the Court of Appeal stayed the writ of execution and whether it was so stayed in that forum or by a direction to the District Court which issued the writ. Suffice to state that such jurisdiction would lay only with the Supreme Court and the Court of Appeal clearly acted without and beyond its jurisdiction and the order is void *ab initio* without more.

It is also inconceivable as to what provision of law or rule of the Supreme Court permitted the Defendant-Appellant to file questions of law in the Court of Appeal when his own motion stated his intention to file an appeal to the Supreme Court presumably by way of an application for special leave.

Be that as it may, written questions of law were in fact filed on 27th May, 1999 and the Court of Appeal by its order of the 31st of May 1999 granted leave to appeal on question (e) and the writ was stayed until the decision of the Supreme Court. With regard to stay of writ whether of consent or otherwise the order of the Court of Appeal on 19. 05. 1999 being void *ab intitio* all subsequent orders in my opinion are patently without jurisdiction and therefore a nullity.

The Defendant-Appellant thereafter made an application for special leave to the Supreme Court on the questions of law

on which leave was not granted by the Court of Appeal and that application was refused by the Supreme Court.

In the light of this scenario the Plaintiff-Respondent urged two objections at the hearing of this appeal.

1. Is the order of the Court of Appeal dated 31. 05. 1999 a nullity by reason of non compliance with the provisions contained in Rules of the Supreme Court and is the appeal untenable.

2. Has the Defendant exercised due diligence as conceived by Rule 34 of the Supreme Court Rules and if not should the appeal be dismissed.

Article 128(1) of the constitution which permits an appeal to the Supreme Court with leave of the Court of Appeal on a substantial question of law is supplemented by Rules of the Supreme Court of 1990 as set out in Rules 20(1), 20(2), 20(3), 21, 22(1), 22(2) and 22(3)(5) and (6).

For the purpose of this objection it would suffice to examine Rules 22(1) (i), (ii), 22(2) and (3)

Rule 22(1)(2) and (3) reads as follows and to reproduce them would not be superfluous to determine this question.

(1) Notwithstanding that no such submission or application has been made under Rule 20(1) an application may be made *orally* by or on behalf of any party aggrieved being a final order, judgment, or sentence *on the day* such a final order of judgment is delivered.

(i) for leave to appeal to the Supreme Court in respect of a substantial question of law which shall be specified and recorded; or

(ii) for time to consider making an oral application for such leave.

(2) An oral application for leave to appeal shall be determined by the Court of Appeal *forthwith* or may be adjourned for consideration or determination within 21 days.

(3) Where an *oral application for* time to consider the making of an application for leave to appeal is made, a certified copy or uncertified copy of the judgment or order of the Court of Appeal shall be issued to the Applicant and to any other parties requiring copies within forty eight hours. The Court shall forthwith fix a date, not later than twenty one days from the date of delivery of such final order or judgment for the consideration of such application. On or before the date so fixed, the party applying for leave shall tender to Court and to all other parties present or unrepresented a written statement of the question of law in respect of which leave to appeal is sought.

The emphasis is mine.

What force and what authority do the rules convey and what consequences flow from a breach of the rules which supplement the statute namely Article 128(1) with rules of procedure formulated under Article 136(1), (2), (3) and (4) to supplement its procedure.

It would not be inappropriate in order to complete the picture to quote an oft quoted passage from Maxwell on Interpretation of Statutes 12th Edition at page 314 quoting Lord Colridge C.J. at page 746 in *Woodward v. Sarsons*[1].

"An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially"

and at page 320 of Maxwell

"Enactments regulating the procedure in Courts are usually construed as imperative".

In this instance on the day the Court of Appeal delivered judgment on 18. 05. 1999 Counsel representing the Defendant-Appellant was present and no oral application was made for leave to appeal. In fact this is confirmed by the motion of the same date which must presumably have been filed in the Registry seeking a stay of writ, that they sought to appeal to the Supreme Court. It could by no means be taken to mean a written application for leave to appeal. Subrules 22(1), (2) and (3) do not envisage in any event a written application but an oral application for leave to appeal and only when such an oral application is made do the provisions of Subrules 22(2) and 22(3) come into operation. Moreover the Right of Appeal flows from Article 128(1) of the Constitution and the Rules are Rules of the Supreme Court.

In any event the absence of the application for leave to appeal does not cause prejudice to the Defendant-Appellant since he would in any event as he professed to and proposed to do in his motion of the 18th of August 1990 have the right to seek refuge under Rule 7 and seek special leave to appeal to the Supreme Court so that even if he acted in the mistaken belief of fact or law as to the correct procedure such act would not cause prejudice to him.

It has been urged on behalf of the Defendant-Appellant that since non compliance of the rules does not have penal consequences envisaged in the Rules itself they are only enabling guidelines and that the application for leave to appeal could have been filed or even made within the 21 days and order made by the Court of Appeal within and before the expiry of 21 days.

It has been the practice that as empowered by the Rules all leave to appeal applications in our experience were made and rightly so on the day judgment was delivered, orally, in Open Court, and only if any application is so made on the day judgment is delivered; that a postponement is granted under

the Rules for written questions of law to be submitted and determined within 21 days. Any other alternative argument adduced is but a vain attempt to render so grave a defect in procedure curable at the discretion of Court.

But can the Court condone such a grave defect of non compliance, a defect which is conditioned with a time limit in that it should be made on the judgment is delivered?

I do concede that in appropriate circumstances non compliance with the rules may be curable. Thus in the case of *Kiriwanthe and another v. Navaratne*,[2];

Fernando, J. held:-

> ***"The weight of authority thus favours the view that while these rules (Rule 46, 47, 49, 35) must be complied with the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court to be exercised in considering the nature of the default as well as the excuse or explanation in the context of the particular rule."***

or as Sharvananda, J. said in *Rasheed Ali v. Mohamed Ali and Others*[3] at 278 in a dissenting judgment;

> ***"These rules are designed to facilitate justice and further its ends. They are not designed to trip the petitioner for justice. Too technical a construction of the Rules should be guarded against."***

In this instance there is no doubt a default by non compliance with Rule 22(1). No explanation for such default has been forthcoming and inferentially is repeatedly continued except for the spurious excuse that such an

application could be made since it not so prohibited, in writing within 21 days of the judgment. There can be no prejudice as the Defendant-Petitioner had a right to have recourse to Rule 7 and in fact did with regard to what was refused by the Court of Appeal. He could not be inferred to be under a mistaken belief of fact or law as the motion of 18. 05. 1999 indicated his intention to make an application for special leave to the Supreme Court and not for leave to appeal from the Court of Appeal. When there was a default of Rule 35 of the Supreme Court Rules it was held in the case of *Jayawickrama Someswaran Manthri & Company v. Jinadasa*[4] that,

> ***"The appellant failed to file written submissions as required by Rule 35 of the Supreme Court Rules 1978 and was unable to tender an excuse for not so tendering written submission. The appeal has therefore to be dismissed for failure to show due diligence for the purpose of prosecuting the appeal."***

I have referred to the practice of the Court of Appeal in respect of the applications for leave to appeal and such practice has by itself the force of law. I am supported by the decision in *Aspinall v. Sutton*[5] at page 350 of Wright J.

> ***"We have consulted the officers of the crown office and we find the practice is perfectly settled. A case stated by the justices must be lodged at the crown office within 3 days after the receipt by the Appellant. We must therefore give effect to the objection."***

in which the requirement of a rule that the Appellant transmits the case to the Court within 3 days had not been complied with had no penalty for non compliance, gave rise to the objection being upheld.

So also Fry, LJ in the case of *Anlaby and Others v. Praetorius*[6] who considered the most material question to be one of practice when there was no penalty attached to the non

compliance of a rule where the service of a writ which was not endorsed as required by the rules within three day of service held at page 768.

> ***"The judgment entered was premature and irregular. In such a case the right of the Defendant to set aside the judgment is made ex debito justitae and there are good grounds why that should be so became the entry of the judgment is a serious matter, leading to the issue of execution and possibly to an action for trespass"***

Thus the fact that no penalty is prescribed in the rules does not bear ground to support the argument that non compliance with a rule of the Supreme Court which is grounded in firm practice is a curable irregularity.

Moreover the rule specified the time at which the application for leave to appeal has to be made. It is urged that this can be extended to mean an elastic 21 days. In the case of *Barker v. Palmer*[7].

It was held that the provision in Rule 7 with respect to the time of delivery of the summons to the bailiff was obligatory and not merely directory and therefore the judge ought not to have tried the case.

Grove, J. at page 10 of this judgment went on to elaborate thus.

> ***"The rule is that the provisions with respect of time are obligatory unless the power of extending the time is given to the Court and there is no such power here."***

The words of Subrules 22(1), (2) and (3) have similar content and are preemptory and give no more discretion than what the ordinary meaning conveys.

What is left for me to consider is whether the default or non compliance with Rule 22(1), (2) and (3) is an irregularity which can be waived. Whilst accepting the view expressed by Fernando, J. in *Kiriwantha and another v. Navaratne* in regard to Rule 46, 47, 49 and 35 and of Sharvananda, J. in *Rasheed Ali v. Mohamed Ali and others*(Supra) what reason if any could be given for the default in the instant case. I find no explanation has been given nor can be given at all that is reasonable, cogent and acceptable to view it merely as an irregularity.

In the case of *Hamp Adams v. Hall*[8] it was held that;

"non compliance with order 1x., r.15 was not an irregularity which could be waived and that the Plaintiff not having complied with the rule was not entitled to proceed by default and that the judgment and verdict be set aside."

The order referred to in this case was a rule as seen in the reasoning of Buckly LJ. quoted hereinafter.

I quote with approval the reasoning which is very apt to the facts of this case of Buckly LJ at page 945 in *Hamp Adams v. Hall*(Supra):

"The Judgment and the assessment of damages was plainly wrong, unless Order 1x., r.15 can be read in the way: 'otherwise the Plaintiff shall not be at liberty, in case of non-appearance, to proceed by default unless the Court or a judge shall retrospectively think proper to give effect to the judgment as if the rule had been complied with.' But supposing that the rule could be read in that way, ought the Court retrospectively to treat proceedings as valid which have been taken against a Defendant in his absence? I think not. Where a Plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; that is a matter strictissimi juris. That has not been done in this case, and on

these grounds I am of opinion that this judgment must be set aside."

The non compliance in this case is no mere irregularity and no manner of explanation can possible rectify it. What remains to be considered now is the consequence of such default or non compliance which is incurable.

The rules specified a time at which the leave to appeal application had to be made. It is clear that the application for leave to appeal was not made when judgment was delivered. On the contrary the motion of the 18th of May 1999 when judgment was delivered sought to indicate an intention to apply for leave presumably special leave to the Supreme Court. The questions of law were never suggested orally when judgment was delivered nor was an application for leave to appeal made orally at any time even within the 21 days or for written questions of law to be tendered. Written questions of law were tendered only on 27th of May 1999. No explanation for these lapses has been tendered nor are they forthcoming. Where the procedure is wrong the judgment or order of 31. 05. 1999 cannot be right. The failure to comply was of a grave and fundamental nature.

It was decided in the case of *Pritchard, decd Pritchard v. Deacon and others*[9].

"That originating summons had never been issued and was a nullity ab initio, for where an action was commenced by an originating summons, which was purely a creature of the Rules of the Supreme Court, and that summons was not issued in accordance with the only relevant rule, Order 54, r.4B, that constituted a fundamental failure to comply with the requirements of section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, relating to the issue of civil proceedings; and the Court had no power under R.S.C., Ord. 70, r.1, to cure proceedings which were a nullity."

So also in the case of Hewitson and *Milner v. Fabre*[10] it was held that:

> ***"the service of the writ instead of a notice was a nullity, and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside."***

In this case too the non compliance with Subrules 22(1), (2) and (3) constituted a fundamental failure, grave and irremediable and such failure amounted to the non compliance with Article 128(1) which constituted the entire proceedings in the Court of Appeal after the delivery of judgment on 18. 05. 2000 a nullity and in particular the order of 31. 05. 1999 granting leave to appeal on question (e).

I have already for the reasons given held that the order to stay the writ of execution has been made without jurisdiction.

I hold that the appeal is rejected on the purported order of the Court of Appeal dated 31st of May 1999 granting leave to appeal on question (e) as that order by reason of non compliance with the mandatory provision of Subrules 22(1), (2) and (3) is a nullity.

In view of the conclusion I have already come to it would be unnecessary to examine whether the Defendant-Appellant has exercised due diligence.

I uphold the objection of the Plaintiff-Respondent that the order of 31. 05. 1999 is a nullity and the appeal is rejected. I award the Plaintiff-Respondent costs fixed at Rs. 15000/-.

DHEERARATNE, J. - I agree.

WIJETUNGE, J. - I agree.

Appeal Rejected.