

**DHARMASENA
v
NAVARATNE**

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
CALA NO. 261/2003
D.C. MAHO 5385 /L
MAY 26, AND
JUNE 10, 2004

Contempt proceedings – Violation of terms of enjoining order – Withdrawal of charge with leave to bring fresh charge – Refused – Does leave to appeal lie? – Civil Procedure Code, sections 754(2) 792 , 798 – Code of Criminal Procedure Act – Civil or Criminal proceedings?

Held:

- (i) Although contempt is not a crime, contempt proceedings bear a criminal character.
- (ii) Contempt proceedings cannot come within the phrase "civil action, proceeding or matter appearing in section 754(2) of the Civil Procedure Code."
- (iii) The procedure for filing an appeal is the procedure set out in the Code of Criminal Procedure.

APPLICATION for leave to appeal from an order made by the learned District Judge of Maho in contempt proceedings.

Cases referred to:

1. *Dayaratne and Pieris v Dr. Fernando* – (1988) 2 Sri LR 314
2. *Fernando v Fernando* – 71 NLR 344
3. *Thuraisingham v Karthikesu* – 50 NLR 570

Jacob Joseph for petitioners.

Upali de Almeida with *Ann de Almedia* for respondent.

Cur.adv.vult

September 2, 2004

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against an order made by the learned District Judge of Maho on 30.6.2003 in contempt proceedings initiated against the defendant-respondent. In a land action filed by the plaintiff-petitioners against the defendant, they have obtained an enjoining order restraining the defendant from constructing a building in the land relevant to the case. 01

The plaintiffs alleged that even after the enjoining order was served on her the defendant continued her construction work, thereby violating the terms of the enjoining order. Therefore they moved court to commence contempt proceedings against the defendant. Upon receipt of the summons relating to contempt proceedings the defendant appeared in court on 5.5.2003 and pleaded not guilty to the contempt charge. The inquiry was then postponed to 30.6.2003. 10

On 30.6.2003, the 1st plaintiff was present in court and he was represented by a senior counsel. An objection was taken on behalf of the defendant that summons have not been served in accordance with the provisions of the Civil Procedure Code relating to the service of summons in contempt proceeding. The learned counsel for the plaintiffs conceded that there was no proper service of summons and moved to withdraw the charge with liberty to move court again to commence fresh contempt proceedings.

20

The learned Judge allowed the application to withdraw the charge of contempt, but having observed that summons have been properly served, refused to grant leave to bring a fresh charge of contempt. The plaintiffs-petitioners now seek leave to appeal against that part of the order of the learned Judge refusing leave to bring a fresh charge of contempt. Is it legally possible for the petitioners to come by way of leave to appeal against the order of the learned Judge?

30

Section 754(2) of the Civil Procedure Code states that any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such order with the leave of the Court of Appeal first had and obtained. Can contempt proceedings come under the phrase 'civil action, proceeding or matter' appearing in section 754(2)?

Jurisdiction to take cognizance of and to punish for contempt of court is a special jurisdiction. (section 792 of the Civil Procedure Code) Although contempt is not a crime contempt proceedings bear a criminal character. *Dayaratne and Peiris v Dr. Fernando* (1). The charge must be read out to the accused and his plea shall be recorded. This is imperative. *Fernando v Fernando* (2). If the accused is found guilty on his own plea or after inquiry a conviction shall be entered in the manner set out in section 797 of the Code. In order to find the accused guilty of the charge must be satisfactorily proved, that is beyond reasonable doubt. (*Supra*)

40

What has been stated above very clearly indicate that contempt proceedings cannot come within the phrase 'civil action, proceeding or matter' appearing in section 754(2) of the Code. Therefore it necessarily follows that section 754(2) of Code cannot be invoked in respect of an order made in contempt proceedings.

50

Section 798 of the Code puts the matter beyond doubt. That section enacts that an appeal shall lie to the Court of Appeal from every order, sentence of conviction made by any court in the exercise of its special jurisdiction to punish for the offence of contempt of court. This section gives the right of appeal, but according to the same section the procedure for filing the appeal is the procedure set out in the Code of Criminal Procedure Act, No. 15 of 1979 - that is chapter XXVIII of that Code. The word 'order' in section 798 of the Civil Procedure Code would include a discharge or an acquittal. *Thuraisingham v Karthikesu* ⁽³⁾ On a parity of reasoning even the District Judge's refusal to allow the plaintiffs petitioners of this case to submit a fresh charge of contempt would fall within the word 'order' appearing in section 798 of the Code. Accordingly the appeal against the order of the learned Judge refusing leave to the plaintiffs to bring a fresh charge of contempt has to be filed in accordance with the provisions of the Code of Criminal Procedure Act relating to the procedure for filing appeals. Thus the order in respect of which leave to appeal is sought does not fall within the ambit of section 754(2) of the Code. This application is misconceived in law. Accordingly, this application is dismissed without costs.

WIMALACHANDRA, J.

I agree.

Application dismissed.