PARAMANATHAN AND ANOTHER

v.

KODITUWAKKUARACHCHI

COURT OF APPEAL.
BANDARANAYAKE, J. & S. N. SILVA, J.
C.A. 383/87 (Apn.) with C.A.L.A. 48/87
FEBRUARY 8, 9 AND 10, 1988.

Landlord and tenant – Use of premises for an illegal purpose – Nuisance – execution pending appeal – s. 761 C.P.C. – Substantial loss – Stay of execution – s. 5, 754 (2), 756 (2) C.P.C. – Rules 46 and 50 of the Supreme Court Rules 1978.

Plaintiff sued the defendant – petitioner for ejectment from certain business premises on the grounds of nuisance and using the premises for an illegal purpose and obtained judgment. The defendant appealed and while the appeal was pending the plaintiff moved for execution of writ under s. 761 C.P.C. The defendant filed objections and moved for stay of execution pleading substantial loss in that he was running a substantial business with a large turnover and stock in trade and stating that he had a substantial amount of debts to recover. Alternate premises were looked for without success. The plaintiff filed no counter – affidavit. On 24.3.1987 the District Judge ordered execution to issue. On 25.3.1987 the District Judge ordered plaintiff to deposit Rs. 10,000 as security.

The defendant applied in revision averring with a supporting affidavit from his attorney-at-law that no reasons had been given by the District Judge for his order of 24.3.1987 and no security was ordered on that date. The Court of Appeal ordered notice and stay of execution on defendant depositing Rs. 50,000 in the District Court of Kandy. The defendant deposited the security. In addition the defendant also filed an application for leave to appeal from the District Judge's order of 24.3.1987 and notice was issued.

In fact the record showed that reasons had been delivered by the District Judge on 24.3.1987 for his order of that date. But the Security of Rs. 10.000 had been ordered on 25.3.1987.

Held–

(1) The filing of the application for leave to appeal also when an application for revision was filed is the right procedure.

(2) For the Court to entertain an application for leave to appeal the Court must be satisfied prima facie that there is an error in fact or in law in the impugned order which needs correction. Hence the order being impugned must be annexed to the petition and affidavit. This not having been done the application must fail. The allegation (later retracted) that reasons were not given is contradicted by the record which must be presumed to be correct.

(3) The Order sought to be revised was not annexed to the application as required by Rule 46 of the Supreme Court Rules 1978 and the omission was not supplied even later as is permissible under Rule 50.

Cases referred to:

(1) *Gunawardene v. Kelaart 48 NLR 522.*
(2) *Rasheed Ali v. Khan Mohamed [1981] (2) Sri LR 29, 33.*
(3) *Mack v. Shanmugam Sri Kantha Law Reports Vol. 3 p. 89.*
(4) *Seebert Silva v. Aronnona Silva 60 NLR 272 DB.*
(5) *Caldera v. John Keels Holdings Ltd. 1986 Colombo. Appellate Law Reports Vol. 1, p. 575.*
(6) *Saleem v. Balakumar [1981] 2 Sri LR 74.*
(7) *Jayasekera v. Perera C.A. Application 1412/86– C.A. Mins of 21.5.87.*
(8) *Navaratnasingham v. Arumugam [1980] 2 Sri LR 1.*

APPLICATIONS for leave to appeal from and revision of the order of the District Court of Kandy.

K. N. Choksy P.C. with *L. C. Seneviratne* P.C. and *Lakshman Perera* for defendant petitioners.

Dr. H. W. Jayewardene Q.C. with *D. B. Dillimuni* and *Miss M. Samarasekera* for plaintiff-respondent.

Cur. adv. vult.

February 9, 1988.

BANDARANAYAKE, J.

A large building standing in Dalada Veediya, Kandy, had been divided into several assessed premises. The defendants-petitioners were carrying on business in premises No. 23 thereof under the name, style and firm of "Rex Pharmacy" since 1965. The plaintiff-respondent subsequently purchased the entire building.

In 1980 the plaintiff-respondent filed action for ejectment of the defendants-petitioners. The grounds for ejectment pleaded were that the defendants-petitioners were guilty of conduct which constituted a nuisance to adjoining occupiers in that they had obstructed a common passageway and stairway to the basement of the building and also that they had been convicted in the Magistrate's Court of using the

premises for an illegal purpose, to wit: refusal to sell a packet of milk powder at the premises, grounds allegedly recognised by s. 22 (1) (*d*) of the Rent Act as permitting an action for ejectment of the tenant. The defendants-petitioners resisted the action.

At the trial the plaintiff did not give evidence; nor did any other tenant testify that the defendants had conducted themselves in a manner which constituted a nuisance. After trial the Court held that the plaintiff had proved his case and ordered that interlocutory decree be entered accordingly.

The defendants-petitioners filed notice of appeal and petition of appeal from the judgment and decree. The appeal is pending in the Court of Appeal.

On 5.3.86 the plaintiff-respondent applied to the District Court for execution of the said decree and ejectment of the petitioners pending hearing of the appeal under s. 761 of the Civil Procedure Code making the petitioners as respondents to the application. The petitioners filed affidavit objecting to issue of writ of execution on the ground that substantial loss would be suffered if writ issued and they were consequently ejected from the premises and prayed that the issue of writ be stayed. They relied upon the following in support of their contention that they would suffer substantial loss if ejected:–

(*a*) they had a substantial business as distributing agents of several firms in the Kandy District;

(*b*) the turnover of the said business for the years 1983-1986 was approximately 4 million, 41/2 million, 8 million and 113/4 million, respectively; they gave figures of their turnover and taxes paid;

(*c*) the stock in trade was Rs. 1,200,000;

(*d*) debts due to the firm for credit purchases were Rs. 995,193/35; if ejected they would not be able to recover the said debts nor pay their creditors; and,

(*e*) they had looked for alternate premises without success.

The plaintiff-respondent had not filed any counter-affidavit. There was no denial of the defendants' affidavit; no evidence led to the contrary either. The plaintiff's position was that he would suffer hardship if writ was not issued. The plaintiff complained that the

defendants were paying only Rs. 107 per month for these business premises which incidentally was the authorised rent. The defendant-petitioners however submitted to the District Court that they have satisfied all the conditions required by s. 763(2) of the Civil Procedure Code to obtain a stay of execution of decree and were ready to pay such security as may be required; the learned District Judge however delivered his order on 24.3.87 issuing writ of execution of decree.

From the said order of the District Court the petitioners took the following courses of action:

(i) They filed an application in the Court of Appeal for Revision of the said order of the District Court. This application was filed on 25.3.87 and supported on 26.3.87. In supporting the application Counsel had it recorded that "up to yesterday afternoon no reasons have been given by the learned District Judge for his order issuing writ of execution". Counsel further stated that "... On the 25th March 1987 the learned District Judge had ordered the plaintiff to deposit a sum of Rs. 10,000 as security".

This Court then made order issuing notice on the respondent for 4th May 1987. Court also directed that the issue of writ be stayed until 5th May 1987 on the defendant-petitioners depositing a sum of Rs. 50,000 in the District Court of Kandy. The defendants-petitioners undertook to furnish this sum in cash on or before 31.3.87. In the event of the failure to deposit the said sum on or before the said dates, the order for execution of decree was to stand. It is found that the petitioners had deposited the security ordered.

(ii) The petitioners also filed an application for leave to appeal from the order of the District Court made on 24.3.87. This application was filed in the Court of Appeal on 31.3.87. Order was made by a Judge in Chambers that the application be supported by the Attorney-at-Law for the petitioners in open Court. Upon it being supported on 6.5.87 notice on respondents was issued for 27.5.87.

As regards the Revision application referred to in (i) above, part of the preamble to paragraph 20 of the petition presented to the Court of Appeal reads as follows:

"The learned Additional District Judge made Order on 24th March 1981 (a true copy of the Journal Entry of 24.3.87 is annexed herewith marked 'G') issuing writ of execution of decree and being aggrieved..." (It is noted that the date of the order has been typed in one place to read as 24.3.1981).

It is convenient at this point to set out the relevant portions of the contents of the document marked 'G' annexed: which is the Journal Entry of that date in the Record.

(82) 87.3.24

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(සටහන් බලන්න.)

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Among the grounds relied upon for Revision of the said order in the aforesaid paragraph 20 of the petition are the following:

"(*b*) the learned Additional *District Judge has not delivered his reasons for the said order* but merely made order specified in the said Journal Entry.

(The clause explicitly states that the Judge did not deliver reasons for his order).

(*c*) Nor has the learned District Judge ordered the plaintiff-petitioner-respondent to deposit any security as required by s. 763 of the Civil Procedure Code."

The plaintiff-respondent in the statement of objections to the revision application filed on 26th May 1987 stated as follows:

"*Paragraph 15.* The plaintiff-respondent admits that the learned Additional District Judge made order on 24.3.87 allowing the application for issue of writ of execution pending appeal and denies specifically all and singular the several averments in each of the sub-paragraphs (*a*) to (*f*) in paragraph 20 of the petition.

18. By way of further objections the plaintiff-respondent states as follows:

(a) The order sought to be revised is an appealable order under s. 754(2). . . . No specific reasons are set out as to why the defendants-petitioners are invoking the revisionary powers of the Court. . .

(d) The plaintiff-respondent annexes hereto marked 'X' a certified copy of the Journal Entries from No. 55 to No. 86 *and the order of the learned Additional District Judge delivered on 24.03.87* in the aforementioned D. C. Kandy Case No. 1426/RE to show that the defendants-petitioners are not correct in the statements made in their petition and specifically plead that *the documents now produced by the plaintiff-respondent are not meant to supplement the omission made by the defendants-petitioners by failing to comply with Rule 46* of the Supreme Court (Appeal) Rules 1978.

19. The plaintiff-respondent has deposited the security of Rs. 10,000 already in Court.

20. It is respectfully submitted that the stay order issued. . . .has been obtained on incorrect representations and is causing great prejudice to the plaintiff-respondent."

We have therefore the fact that written reasons have in fact been delivered by the District Judge and are dated 24.03.87. They have been annexed by the respondent to his objections in the revision application.

We next have an affidavit made by Nimal Jayawardane the registered Attorney-at-Law for the petitioners also marked 'X' dated 02.09.87 and filed on 08.09.87 which states as follows:

The relevant portions are:—

"3. I perused the record in D.C. Kandy Case No. 1426/RE on 24th and 25th March, 1987. The record was in the custody of the Registrar of the District Court, Kandy. On the 24th March 1987 the 1st defendant-petitioner S. Paramananthan was with me at the time I looked into the record.

4. I did not find any written reasons for the order issuing writ of execution in this case when I perused the record on the dates stated above. There was the Journal Entry of 24th March 1987, a certified copy of which was obtained on 24th March 1987 itself. . . .filed marked 'G'.

5. When I perused the record on 25.03.87 there was a *further* order directing the plaintiff-respondent. . . .to deposit Rs. 10,000 as security.

6. I informed Counsel appearing for my client of the aforesaid on 25.03.87 as . . . . the application was to be supported . . . .on 26.03.87".

As a response to this, a copy of a letter written by A. K. Liyanage, registered Attorney-at-Law for the plaintiff-respondent dated 01.02.88 and marked 'X4' addressed to the Registrar, District Court Kandy has been annexed. By this letter Liyanage inquires whether the record in D.C. Kandy 1426/RE ...– "has been applied for or issued to any A.A.L. on the 24th and 25th March, 1987.." A true copy of the Registrar's reply is annexed marked 'X3' dated 03.02.88. It reads as follows:

> "I have perused the Register maintained in the Record Room of this Court for the issue of records for reference to Attorneys and their clerks for the period 01.03.87 to 31.03.87 and I find that no application has been made by any Attorney or his clerk for the issue of the above record for reference on the 24th or 25th of March 1987."

As regards the leave to appeal application referred to in (ii) above, the petitioner once again in paragraph 20 thereof relies on the identical grounds (amongst others) referred to in paragraph 20 of the revision appliction aforesaid, namely, that the Judge ". . . has not delivered his reasons for the said order. . . ." "Nor has (he) ordered the plaintiff . . . .to deposit any security as required by s.768 of the Civil Procedure Code. . . . " In the preamble to paragraph 20 of the leave to appeal application the petitioner carelessly refers to the Judge's order of *11.02.87* on which date the order was not in fact delivered. (These mistakes and others became apparent to the Court in the course of the argument). Journal Entry No. 82 of 24.03.87 aforesaid has once again been annexed as document 'G'.

As far as the leave to appeal application referred to in (ii) above which should have taken precedence as it was from an appealable order was concerned learned Queens Counsel for the Plaintiff Respondent submitted that:

(a) leave has not yet been granted;

(b) the only attack on the Judge's conduct was by means of document 'G' aforesaid – an isolated entry in the Journal. That entry itself suggests that an order containing reasons had been delivered –" අවශ්‍ය බලනු " it means – vide proceedings –

(c) no application had been made to the District Court for a copy of the 'reasons'.

(d) the clauses referred to in paragraph 20 of the affidavit attached to the petition merely contains assertions of the defendants that no reasons were delivered and no security ordered. They now admit they were wrong and ask the Court to act on the document tendered by the respondent to show they were wrong. Even the affidavit of the Attorney-at-Law for the petitioner marked as document 'X' in the revision application has not been annexed to the leave to appeal application. Nor has the petitioner made any effort to annex the reasons even afterwards by asking for permission to tender additional papers in the Court of Appeal.

(e) Section 5 of the Civil Procedure Code defines 'Judgment' as the statement given by the Judge on the grounds of a decree or order; the section also defines 'Order' as the formal expression of any decision of a Civil Court which is not a decree. Section 754(5) defines for the purpose of Chapter LVIII of the Code 'Judgment' as any judgment or order having the effect of a final judgment made by any civil Court and 'Order' as the final expression of any decision in any civil action, proceeding, or matter which is not a judgment.

These are thus interlocutory orders as well as other orders which are final but are not judgments (eg. under the Trusts Ordinance). In execution proceedings the judgment is over; so you make an order. Such an order is final. You can however appeal with leave – (an action

within an action). In s.754(1) there is an appeal from a judgment. Under s.754(2) anyone dissatisfied with an order must ask for leave. An order is the final expression of the Court. If leave to appeal is not filed the party cannot further proceed. It was submitted that if a party asks relief from an order the order must be before the Court. There must be disclosure, otherwise the Court is incapable of exercising its judicial function. When s.754(2) speaks of there being "dissatisfaction with any order" there must be an Order plus leave to appeal from it "for correction of any error in fact or in law". So when a Court is called upon to grant leave it must be satisfied that at least a prima facie case exists of "an error in fact or in law" that must be put right.

(ie) (*a*) there must be an Order; and,
(*b*) an error in fact or in law in that Order.

Section 756 spells out the procedure in respect of an appeal and an application for leave to appeal. Section 756(2) speaks of an application for leave "against an Order of Court" shall be by way of petition and affidavit. Section 437 dealing with affidavits speaks of "an affidavit or written statement of facts" – (ie) facts must be set down as defined by s.181. Statement of facts is necessary. Now, in an ordinary appeal the record is sent up. In leave to appeal situations the record is not there. Therefore you must set out the facts. It is imperative therefore to say that the Judge has delivered the order and obtain a copy of it and annexe it to the petition and set out the errors of fact or law as required by s.754(2). The petitioner must say what the errors are and those errors must be manifest in the Order. Thus the law requires that the document must be annexed. One cannot refer to a further document without annexing it. In the instant case the petitioners are asking the Court by the papers they have filed to accept there are errors without looking at the document. The petitioners without complying with the above requirements are now asking the Court to look at a document filed by the respondent with their objections to prove that the averments in the petition and affidavit of the petitioners is false and incorrect and that they obtained notice on misrepresentation and that therefore their petition should be rejected. If such is allowed the whole process would be rendered nugatory as by the application one invokes the jurisdiction of the Court to examine the Order. All stamp fees will be lost. Now, s.756(5) deals with what the Judge can do to whom an application for leave to appeal has been submitted. He can forthwith fix it for hearing or require the applicant to

support it in open Court as has been done in the instant case. The Section also contains a *Proviso* which provides that *the Judge can reject the application (on the merits) whilst recording the reasons for such rejection.* The question in this application therefore arises "How can the Judge reject it if the Order was not there?" Their position at the time was there was no Order. If there was no Order how can they ask for leave to appeal from a non existent order? Again, the petitioners have made observations regarding the content of the order without seeing it. Grounds set out in sub-paragraphs (*d*), (*e*) and (*f*) of paragraph 20 refer to acts of commission and omission on the part of the Judge in making the order: They are:

(*d*) The Judge has failed to take into account the admission of the plaintiff that the defendant would suffer substantial loss if writ issued;

(*e*) The Judge has failed to consider the extent of the defendants' turnover of business which would cease if writ is allowed;

(*f*) The plaintiff has not challenged the defendants' averments or led evidence; it may be conjecture or it may not be. The court in exercising its judicial authority must see if there is a prima facie case. So there must be disclosure. Then the Court can take the next step either of rejecting the application or giving an opportunity of supporting it to obtain leave. The petition and affidavit for leave filed on 31.3.87 say there was no order. It is however incumbent on the Court to examine the order before it exercises judicial power. Look at the substance of the law. What is the duty of a litigant? The onus is on him to place before the Court the material upon which the Court can be satisfied there are errors. A necessary corollary from the context is that the order must be annexed. There is also the presumption of regularity of judicial acts under s.114(*d*) of the Evidence Ordinance. In the result the application for leave to appeal should be rejected *in limine.*

As for the Revision application learned Counsel for the plaintiff-respondent submitted this was an appropriate case for the exercise of Court's discretionary powers. The petitioners should have applied for certified copies of public documents – vide – ss. 74(*a*)(iii) and 76, 77, 79 of the Evidence ordinance. He has not applied to the Registrar for a copy of the 'Reasons' or Proceedings of 24.3.87. The petitioners rely on their document 'X' – the affidavit of their

Attorney-at-Law (ante). The letter marked 'X3' by the Registrar of the District Court, Kandy is that no application has been made by any Attorney-at-Law or his clerk for issue of the record on 24.3.87 or 24.3.87; instead of informally looking at a journal entry petitioner should have applied for a certified copy of the proceedings. Affidavit 'X' of the petitioner is therefore without any value and is improper – you cannot contradict the record – (*Gunewardane v. Kelaart*) (1). Having not done what he ought to have done he asks for relief. Relief cannot be given on that basis. Once the format of their application breaks down it must be dismissed.

In the Revision application, the *'reasons'* which they now seek to adopt have *not* been appended. There is also therefore a breach of Rule 46. Nor have they been tendered since, although the Rules provide for later tendering with permission – vide Rule 50. The question therefore arises whether there is a proper application for Revision before the Court. Counsel cited *Rasheed Ali vs. Khan Mohamed* (2) in support.

Submission:

If your documents are defective you cannot rely on them. The petitioners have not sought to correct their averments.

So we now find that the petitioners' Counsel in the course of submission accepts there were 'Reasons' delivered and wishes to adopt them in these proceedings. If that is so we must then get back to the leave to appeal application. But the order has not been annexed to that application. Therefore that application for the reasons already stated must be rejected. The petitioners misled court in the leave to appeal application into giving notice.

Again it was submitted for the respondent that by referring to the merits petitioners' Counsel was challenging the main judgment which is in appeal. He cannot do that. Notice to quit was given on 27.8.79. Plaint was filed on 5.8.80; judgment was delivered on 20.11.85. The plaintiff-respondent got a decree on both grounds. He is entitled to his decree. When there is a right of appeal with leave, revision is not granted by itself. When petitioners asked for revision there was no leave to appeal application which was wrong. Petitioners took up the position that no reasons were delivered. Thus they obtained a stay order. They now admit their facts were not correct. The fact that the

respondent placed the Order before Court is not a ground to give relief to the petitioners who have conducted themselves in this way. The revision application too should therefore be rejected as there is something improper. The petitioners have defied the rules. A party cannot be heard to say "I have done wrong but give me relief."

Finally, it was submitted on behalf of the plaintiff respondent that the District Court exercises a discretion in deciding to allow writ of execution or not. For instance, when an appeal is filed under the amended s. 23 of the Judicature Act – vide Act No. 37 of 1979 it shall not have the effect of staying the execution of such judgment, decree or order unless the District Judge shall see fit to make an order to that effect; there is no difference when leave to appeal is sought – it is still an appeal. Similarly, when an order is made for the execution of a decree the Court may, *on sufficent cause being shown* by the appellant require security to be given – vide second part of s. 763(1). In both these instances *the District Judge* exercises a discretion; so also he exercises a similar discretion when Court decides to stay execution of writ under s. 763(2) when the judgment debtor satisfies the Court that substantial loss may result.

Submission: in all these instances the District Court being satisfied exercises a discretion. No question of "substantial questions of law" arises for consideration in the exercise of this discretion as that question will be considered in the main appeal. For this reason, it was submitted that *Mack v. Shanmugam* (3) case cited by the petitioners was wrongly decided by the Court of Appeal to the extent that it held that the District Judge is entitled to consider whether there were substantial questions of law involved in considering stay of writ of execution. The exercise of discretion by the District Court should not be lightly interfered with. The Court of Appeal should not interfere with the exercise of discretion by the lower Court unless it can be shown it was *wrong*. A mere different view is not enough. If it was permissible for the District Judge to take that view it must not be interfered with.

On behalf of the defendants-petitioners it was contended that:–

As to whether affidavits can contradict the record it was submitted that it was merely Journal Entry 'G' that was sought to be contradicted (පටහන් බලන්න) the petitioners say there was no written reasons or (Order) contained in the Record when 1st defendant-petitioner and his Attorney-at-Law examined it in the Registrar's Room on 24.3.87 and no order for security. On 25.3.87

when his Attorney-at-Law again looked at the record there was a *further* order directing the plaintiff-respondent to deposit Rs. 10,000 as security. The judgments referred to by Counsel for Respondent (supra), viz: *Gunawardene v. Kelaart* (1) 1 Browne's Reports p. 188 and (1859) Lorensz's Reports, Vol. 3 p. 74;75 all deal with prohibitions against seeking to contradict *evidence* given at the trial by subsequent affidavit. Such contradiction should have been sought to be done by the correction at the trial itself. But the case of *Seebert Silva v. Aronnona Silva* (4) held that the Court is entitled to presume that the Journal Entries made in a case in compliance with the requirements of s. 92 of the Civil Procedure Code set out the sequence of events correctly. That is to say it was submitted such entries are not conclusive but raised a rebuttable presumption of correctness – vide s. 91 and s. 114(*e*) of the Evidence Ordinance.

Now,a further order had been added by 25.03.87 ordering Rs. 10,000 security with the words " පසුව " added. This shows the entry has been made at different times. Thus affidavit 'X' of Attorney-at-Law Nimal Jayawardane shows there were no written reasons in the record on 24.03.87. Therefore in the revision application filed on 25.03.87 in the Court of Appeal in Colombo the petition and affidavit stated that no written reasons were delivered by the Judge for his order granting writ of execution; therefore there was no misrepresentation made to Court; there was no false affidavit or false instructions given to Counsel. If that was so the respondent should have so sworn by affidavit; in any event Rule 46 of the Supreme Court Rules 1978 does not apply to leave to appeal applications.

It was further contended for the petitioners that the leave to appeal application cannot be rejected now, because petitioners have not tendered the 'Reasons' of the District Judge for his Order because there is no rule requiring the petitioners to do so. The Civil Procedure Code which governs the procedure regarding such applications does not require the party seeking leave to append a copy of the original Court proceedings to his application for leave.

It was further submitted that no one knows when the written reasons came into the record since it was examined by Attorney-at-Law Jayawardane on 24.03.87 and 25.03.87. Therefore the petitioners should not be penalized for not appending them.

Further, the formal parts of the petition had been prepared before 24.03.87 (ie) paragraphs 1-18. That accounts for the original date on the face of the petition reading as 25th *February* 1987. Such preparations are frequently done and innocuous. It was admitted by Counsel that the petitioners had not made any application to the District Court for a copy of the order with reasons. There was nothing improper about an Attorney-at-Law examining a record in the presence of the Registrar. The respondent on the other hand had avoided the issue by asking the Registrar, District Court Kandy by 'X4' whether an Attorney-at-Law applied in writing for an inspection of the record on 24.03.87 and 25.03.87. The Registrar's reply 'X3' is therefore neither here nor there. There is no rule prohibiting such conduct. The rule-making power is exercised by the Supreme Court vide Article 136(1) of the Constitution. There is no rule with regard to leave to appeal applications that the proceedings and documents must be supplied when leave is sought. Counsel relied on the case of *Caldera v. John Keels Holdings Ltd.(5)* a decision of the Court of Appeal reported in (1986) The Colombo Appellate Law Reports, Vol. 1, p. 575 where an important document, namely the 'Answer' was not filed by the petitioner in his leave to appeal application. Court held that 'Answer' was a material document and its absence was a material non-disclosure and refused Revision but allowed leave to appeal. *Submission*–because there was no rule requiring it in the leave to appeal application. It was submitted that for such a course of conduct to be enforced there must be (*a*) a rule and, (*b*) it should be mandatory and not merely directory. Here there was no rule at all governing leave to appeal applications. Therefore the leave to appeal application cannot now be rejected. Rejection can take place only when there is a fallure to comply with mandatory rules. Section 756(2) of the Civil Procedure Code contained no such rule.

The reference to " සටහන් බලන්න " in " Journal Entry 'G' is meaningless as there were no proceedings in the record. Nor does 'G' have the additions regarding security to be deposited. That was an addition made later. So this fact makes it highly likely that there was in fact no written reasons in the record when Attorney-at-Law Jayawardane examined it as he affirms.

Again, paragraph 20(c) of the petition and affidavit stating that no order has been made by the Judge for the deposit of security *as required by s. 763* of the Civil Procedure Code does not mean there

was order for security but that no simultaneous order for security was made *at the time* order for issue of writ in execution was made on 24.03.87 as required by s.763. That clause merely sets out the *grounds* of appeal which is true as the Journal Entry now supports that it was made later. That clause must not be taken to read that *no security was ordered* by the Court *at all.* So there is no material misstatement of fact in petitioners' affidavit. What has been said is that there has been no compliance with the requirements of s.763. Thereupon the application ought not to be rejected.

Submissions on behalf of petitioners:–

On the Merits:–

Learned Counsel for defendants-petitioners submitted that on the merits the application should be heard. The petitioners have tenanted the premises for 20 years and were carrying on a large business. Eviction would mean loss of business which satisfies the criterion of 'substantial loss'. Counsel also relied on *Mack's case* (3) that there were also substantial questions of law involved arising on the grounds of 'nuisance' and 'illegal purpose' specified in the plaint which merit stay of execution. No evidence of adjoining occupiers was led that petitioners' conduct amounted to a nuisance; further, one solitary instance of a conviction for refusal to sell did not constitute *using* the premises for an illegal purpose. Therefore the findings of the learned District Judge against the defendants were not supportable. Counsel also relied on the judgment in *Saleem v. Balakumar*(6). Further, there were grave misdirections in the judgment regarding the petitioners' failure to look for alternate premises for over 8 years. There is no obligation of the defendants-petitioners who were statutory tenants to look for alternate premises under the Rent Act.

From the point of view of the administration of justice, here was a situation when the 'Order' of the District Judge purported to have been made on 24.3.87 is indeed now before the Court by whomsoever filed. Examine it and permit argument on the merits or call for the record and examine it and permit argument on the merits. In the circumstances it was contended that the respondent's objections were of a technical nature and should not be allowed to stand in the way of the dispensation of justice.

It was lastly submitted that the District Judge has exercised his discretion of allowing execution of decree under appeal *wrongly*. The discretion enjoyed was towards being satisfied whether substantial loss will be caused to the defendants if writ is allowed. The plaintiff did

not challenge the defendants' affidavits. All plaintiff said was that he would suffer hardship if execution was stayed. The District Judge has wrongly directed his attention to ascertaining whether plaintiff would suffer damage as is manifest in his Order. Weighing relative merits is not contemplated by s.763(2)–vide s. 19 of Act 53 of 1980. The only question is whether substantial loss will be caused to the defendant if execution pending appeal is not stayed. Hardship to plaintiff is irrelevant. (It is observed that this submission touches on the *merits* of the case.)

It was also contended that leave to appeal was sought only against the *Order* and not against the *'Reasons'* for it–Reliance was placed on the definitions of 'Judgment' and 'Order' referred to elsewhere in this judgment. Order was delivered on Wednesday 24th morning. It was not available till Thursday 25th. The petitioners have not suppressed any fact and their conduct is relevant in considering whether their applications should be gone into on the merits.

Conclusions:

As regards the leave to appeal application:

(*a*) this is the proper application which should have been made when the law provides for an appeal with leave first had and obtained as in this instance. If *only* a revision application had been made without seeking leave to appeal, then the revision application cannot be granted and it must be rejected – vide *Jayasekera v. Perera* (7). Even if a revision application is made in the first instance, a leave to Appeal application must follow within the prescribed time.

(*b*) leave to appeal is from an Order which is the final expression of a decision in a civil action proceeding or matter which is not a judgment (as in this case). Any person dissatisfied *with such an Order* may under s. 754(2) of the Civil Procedure Code prefer an appeal with leave first had and obtained for the correction of any error in fact or in law.

(*c*) when the application comes before a Judge in terms of s.756(5) of the Civil Procedure Code he can,

(i) either fix a date for the hearing of the application *for leave* and order notice thereof to be issued to respondent; or

(ii) require the applicant to support it in open Court (as in this case); the Court may at the hearing reject such application or fix a date for hearing of it *for leave* and order notice of it to be issued to the respondent.

It will be seen that the Judge must at this stage be satisfied that prima facie, the applicant has been able to show an error in fact or in law in the Order which needs correction. If he fails to do this the Judge must reject the application, stating his reasons. Thus, this would appear to be a crucial stage of the application as it has not yet been fixed for hearing on the question whether leave should be granted or not. If leave is granted the appeal will be heard in due course. Now, how does the Judge decide this? Obviously by a perusal and consideration of the Order sought to be attached in the light of the petition and affidavit and submission of Counsel. Thus, if the Order sought to be canvassed is not there at this crucial stage the Judge will not be able to exercise the judicial function or power given to him by the Section. It is part and parcel of established procedure which is the substantive law on the subject.

(*d*) In the instant case the Order of the District Court granting Execution of decree under appeal which is sought to be impugned *was not placed before the Judge.* The affidavit of the petitioner states that the District Judge has not delivered his reasons but merely made the Order specified in the Journal Entry ('G'). Its ordinary meaning is that an Order amounting to the final expression of the Court's decision in the proceeding or matter and which is not a judgment was not made. That is a very serious matter. Now the petitioners accept that an order was indeed made and seek to attack it. There is therefore an incorrect statement of fact in the affidavit. Also, Clause (C) of paragraph 20 of the affidavit declares that no security was ordered. It simply means that no security was ordered at all. I reject the arguments of Counsel that what was meant was no security ordered at the proper time. This statement is also therefore misleading. It is my conclusion that as the Order was not placed before the Judge by the petitioner *at the proper time* the Court was deprived of examining it for errors of fact or law and thus exercising its ordinary jurisdiction. The procedural steps provided by the Code must be taken. In comparing the position with regard to former applications for leave to appeal to the Privy Council one finds that under the Schedule of Rules there was an obligation on the Registrar to transmit the record. Vide (1938) Subsidiary Legislation Vol. 2. Cap. 85, p.422 – Rules 11-18. What this means is that the Council had to have the document before it so as to consider granting leave. There is no necessity for any Rules to govern the situation as the procedural provisions already provide for it, understood as they should be with commonsense and reason. These

steps are mandatory in nature. The Court has no discretion to waive them. Failure to comply with those steps necessarily deprive the applicant of seeking further relief. Questions on the merits are wholly irrelevant as there is no proper application before the Court. One cannot move the Court to go into the merits without an application. The case of *Caldera v. John Keels* (supra) relied upon by the petitioners can be distinguished in that in that case the Judge's order from which an appeal was sought was annexed to the petition and was available. That decision therefore does not help the peititioner in the leave to appeal application. In that case however the Revision application was disallowed for failure to comply with Rule 46 of the Supreme Court Rules. This judgment is therefore relevant when considering the Revision application in the instant case. The application for leave to appeal therefore fails in limine and must be rejected. If the petitioner was misled by events into thinking that the Court had not given reasons or made an Order, then those are exceptional circumstances that may be considered in a revision application but not in a leave to appeal application.

As regards the Revision application:

(*a*) learned Counsel for the petitioners stressed the importance of mandatory Rules in the course of his argument. There are such rules governing applications made for revision. The jurisdiction to have cognisance by way of revision of all causes is exclusively vested in the Court of Appeal by Article 138(1) of the Constitution. Applications inviting the exercise of this jurisdiction are governed by the Supreme Court Rules 1978. The procedures set out therein must be followed. See also *Navaratnasingham v. Arumugam* (8). The petitioner complained in his affidavit that no Order or no written reasons were delivered or made by the District Court. That (if such was so) could constitute exceptional circumstances enabling the Appellate Court in terms of s. 753 of the Civil Procedure Code to examine the legality or regularity of the proceedings had before the lower Court and revise them if need be. But the petitioners at the hearing now accept that an order was indeed made and they seek to canvass it on the merits. They thereby retract from the position taken in their affidavits. If indeed there was an order then there are no more exceptional circumstances justifying the Court acting under s. 753 aforesaid. That there was such a proper Order is borne out by the document marked 'X' of the respondent's documents. In this situation the Court should draw the

presumption that judicial acts were regularly and duly performed under s. 114 of the Evidence Ordinance. There is no material to the contrary and the words in document 'G' to wit: ' (සටහන් බලන්න.) ' would therefore have no other meaning than a reference to the order made on 24.3.87. Thus it is beyond doubt that the order 'X' must in this case be accepted as an order made by the Judge on 24.3.87 but had not reached the record when document 'G' was taken. There is now the situation that the said averments in paragraph 20 of the petition were misleading and that no exceptional circumstances are perceived. This removes the foundation or format for an application in revision as it is a discretionary remedy. To add to it there is the circumstance that there is now a non-compliance with Rule 46 in that the Order now acknowledged to exist as on 24.3.87, has not been annexed to the application as required by the Rule. Rule 46 has been held to be a mandatory provision in *Rasheed Ali's* case (supra) and *Caldera v. John Keels* (supra). Nor has the petitioner moved to make good the deficiency later by tendering additional papers with permission of Court as provided for in Rule 50. No attempt to obtain permission has been made. This provision too has been construed as an *imperative* provision – vide – *Udeshi et el v. Mather* – C.A. Application 622/86 – C.A. Minutes of 24.10.86. Thus a breach of mandatory rules is observed as regards the Revision application. In the circumstances this application too must be rejected in limine and the stage of going into the merits cannot arise. The argument of the petitioners that the Court should consider the Order as it is among the papers is a strained submission which is unacceptable. Likewise the argument that *Rasheed Ali's* case can be distinguished in that in that case the required document was never available to the Appeal Court but that in this case it is among the papers is also unacceptable; strained as it is against the discipline of the law. The exercise of discretion by the District Court is entitled to be upheld in these circumstances. All these consequences were avoidable had the petitioners applied for a certified copy of the Judge's Order.

Both Applications C.A.L.A. 48/87 and C.A. 383/87 are accordingly rejected and stand dismissed. Costs are fixed at Rs. 1050.

S. N. SILVA, J. – I agree.

Application rejected.