MEDIA IMAGE LTD
VS.
DISSANAYAKE

COURT OF APPEAL.
WIMALACHANDRA. J.,
CALA 35/2004 (LG).
DC COLOMBO 6508/SPL.
JULY 28,2006.

Civil Procedure Code, Sections 793,797 (1),792 (2),798 - Offence of Contempt - Court to be satisfied that an offence of contempt committed?- Should the Court form an opinion that sufficient grounds exist before issue of summons? –Order- Is it final?

The plaintiff- respondent obtained an enjoining order against the Sri Lanka Rupavahini Corporation from transferring the teledrama air time on Thursdays at 8.30 to a 3rd party during the year 2002, and preventing the SLRC from telecasting the teledrama "Maine Naiyo" produced by the plaintiff at 8.30 p.m. on Thursdays in 2002. Despite the enjoining order, the defendants- petitioners transferred the teledrama air time to a third party and refused to telecast the teledrama produced by the plaintiff-respondent.

The plaintiff - respondent moved Court to charge the defendant -petitioner (SLRC) for contempt of Court and the Court issued summons under Section 793 of the Code. The defendants- petitioners raised a preliminary objection and stated that, the charge sheet did not comply with Section 793 and did not disclose the date and the alleged act of contempt. The trial Court rejected the objections, and observed that, whether there is an offence of contempt will be decided after the evidence is led and the burden of proof of establishing a charge of contempt is on the plaintiff and if the plaintiff fails to prove the charge the Court can act according to law at that time.

The defendant - petitioner sought leave to appeal from the said order and leave was granted.

It was contended by the defendant- petitioner that, before issuing summons in terms of Section 793, it is necessary for the Court to be satisfied that an offence of contempt appears to have been committed and the Court should form an opinion as to whether sufficient grounds exist to charge a person for contempt before the issue of summons.

It was also contended that the order of the District Judge was a final order.

HELD:

(i) The impugned order is an order rejecting the preliminary objection. The impugned order rejecting the preliminary objection is not a final order but an interlocutory order.

Held further:

(2) Contempt proceedings even to punish for Court contempt are in the nature of criminal proceedings, even if contempt is not a crime it bears a criminal character.

(3) In contempt proceedings, as in any other criminal case instituted in a Magistrate's Court, before issuing summons the Court has to be satisfied that the petitioner has disclosed sufficient grounds to proceed against the respondents.

(4) The trial judge should form an opinion as to whether there were sufficient grounds for him to issue summons under section 793

Per Wimalachandra. J.

" I am of the view that the trial judge erred when he held that whether the petition and affidavit disclose a contempt charge will be decided after the inquiry. The learned judge by making that aforesaid order deviated from the legal position laid down.................. he had not made an objective assessment of the available material before deciding to issue summons".

APPLICATION for leave to appeal from an order of the District Court of Colombo with leave being granted.

Cases referred to:-

1. *Jayaratne vs Sirimavo Bandaranayake* - 69NLR 184
2. *Dayaratne and Peiris vs Dr. S. D. M. Fernando and others* - 1988 - 2 Sri LR 314 at 323
3. *Bartleet Commodity Exchange Ltd vs. N. Susilani* - CA 57/90 - CAM 21.06.1994
4. *Malini Gunaratne, Additional District Judge of Galle vs. Abeysinghe* - 1994-3 Sri LR 196 at 199
5. *Shah vs. Hatton National Bank* - 2001-2Sri LR 59
6. *Thurasingham vs Karthekisu* - 50NLR 570 at 574

Palitha Kumarasinghe with *Priyantha Alagiyawanna* for respondent - petitioner
Nizam Kariapper with *M. I. M. Iynulla* for plaintiff - respondent.

Cur. adv. vult.

November 11, 2006

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the learned Additional District Judge of Colombo dated 19.01.2004. Leave to appeal has been granted on the following questions :

(i) Before issuing summons in terms of section 793 of the Civil Procedure Code in respect of contempt of Court, is it necessary for the Court to be satisfied that an offence of contempt appears to have been committed?

(ii) Does it require the Court to form an opinion as to whether sufficient grounds exist to charge a person for contempt of Court, before the issue of summons to the accused persons, in terms of Section 793 of the Civil Procedure Code?

(iii) Is the impugned order made by the learned District Judge dated 19.01.2004 an interlocutory order overruling an objection and can a final appeal lie against such an order?

Briefly, the facts as stated in the petition are as follows :

The plaintiff-petitioner-respondent (plaintiff) instituted the above styled action in the District Court of Colombo *inter alia* for a declaration that the plaintiff is entitled to the teledrama air time on Thursdays at 8.30 p.m. of the defendant- petitioner's (defendant's) Corporation under and in terms of the contract entered into between the plaintiff and the defendants.

The plaintiff also prayed for an interim injunction preventing the Sri Lanka Rupavahini Corporation from transferring teledrama air time on Thursdays at 8.30 p.m. to a 3rd party during the year 2002. The plaintiff also sought an enjoining order until the interim injunction was granted.

The plaintiff obtained an enjoining order aganst the Sri Lanka Rupavahini Corporation from tranferring the teledrama air time on Thursdays at 8.30 p.m. to a 3rd party during the year 2002 and also preventing the Sri Lanka Rupavahini Corporation from telecasting the teledrama called "Maine Naiyo" produced by the repondent, at 8.30 p.m. on Thursdays in the year 2002.

Despite the said enjoining order the defendants transferred the said teledrama air time to a third party and refused to telecast the teledrama produced by the Plaintiff. Thereafter the plaintiff made an application to Court to charge the defendants for contempt of Court and the Court issued summons under and in terms of section 793 of the Civil Procedure Code. The plaintiff moved Court to amend the charge sheet. The Court also allowed an application made by the defendants to file objections against the amendment sought by the plaintiff.

The defendants filed their statements of objections, stating that the said charge sheet did not comply with the provisions of section 793 of the Civil Procedure Code in as much as the said charge sheet did not disclose the date and the alleged act of contempt of Court. When the matter was taken up for inquiry, the parties agreed to tender written submissions. The learned District judge delivered the order on 19.01.2004 rejecting the preliminary objections raised by the defendants on the following grounds :

(a) Whether there is an offence of contempt will be decided after the evidence is led.

(b) The burden of proof of establishing a charge of contempt of Court would be on the plaintiff and if the plaintiff fails to prove the charge, the Court can act according to law at that stage.

It appears that the learned judge was of the view that it is only after the conclusion of the inquiry, if the charge is not proved, the accused could be discharged.

The learned counsel for the respondents submitted that before issuing summons under and in terms of section 793 of the Civil Procedure Code in respect of contempt of Court, it is necessary for the Court to be satisfied that an offence of contempt appears to have been committed. In support of his contention the learned counsel cited the case of *Jayaratne Vs. Sirimavo Bandaranaike*[1] wherein H. N. G. Fernando S. P. J. (as he was then) who delivered the judgment held that a rule *nisi* for contempt of Court will not be issued unless there is available evidence which can lead the Court to conclude that an offence of contempt appears to have been committed.

It seems to me that before taking steps to issue summons the Court must be satisfied that there is a *prima facie* case to frame contempt charges against the respondents on the material facts placed before Court.

When a party institutes contempt proceedings it resembles instituting criminal proceedings in a Magistrate's Court by filing a private plaint. When a private plaint is filed the Magistrate is required to consider and form an opinion that there are sufficient grounds to proceed against the accused.

In the case of *Dayawathie and Peiris vs. Dr. S. D. M. Fernando and other*[2] at 338, Justice Jameel held that contempt proceedings even to punish for civil contempt are in the nature of criminal proceedings. Even if a contempt is not a crime it bears a criminal character.

In an unreported case of *Bartleet Commodity Exchange Limited Vs. N. Susilani*[3] Justice Sarath N. Silva (as he was then) observed :

> "A prosecution in a criminal case necessarily entails adverse consequences to an accused person quite irrespective of its ultimate outcome. A Plaint filed by the Police is preceded by an investigation, a report of which is filed in Court. Sufficient ground for proceeding against the accused should be disclosed in the report thus filed by the Police. Where a private plaint is filed there is no such report or investigation. Hence it is imperative that the Magistrate should consider the Affidavits and other document filed by the Complainant to decide whether there is **sufficient ground to proceed against the accused.**"

A similar opinion has been expressed in the case of *Malini Gunaratne, Additional District Judge of Galle Vs. Abeysinghe* at 199.[4]

Considering the aforesaid judgments, it appears that, in contempt proceedings too, as in any other criminal case instituted in a Magistrate Court, before issuing summons the Court has to be satisfied that the petitioner has disclosed sufficient grounds to proceed against the respondents.

In the case of *Malini Gunarathne, Additional District Judge of Galle Vs. Abeysinghe and another* 196, (Supra) one of the grounds urged by the accused petitioner was that in terms of section 139(1) of the Code of Criminal Procedure Act No.15 of 1979 the Magistrate may issue warrant or summons as the case may be, only where he is of the opinion that there is sufficient ground for proceeding against a person who is not in custody and the Magistrate has not given his mind to this requirement before directing the issue of summons.

Justice S. N. Silva, P/CA (as he was then) observed (at 199).

> "As regards the first ground urged by the learned President's Counsel it is seen that section 139(1) of the Code of Criminal Procedure Act empowers a Magistrate to proceed against a person not in custody against whom proceedings are instituted by way of a "Private Plaint" **only where he is of opinion that there is sufficient ground for such action.** The opinion has to be formed on verifiable material that is adduced before the Magistrate and which should be assessed objectively. It is obvious that the learned Magistrate required the complainant to give evidence in view of the need to form his opinion on the matter...."
>
> Section 139(1) requires a Magistrate to form an opinion as to whether there is sufficient ground for proceeding against some person who is not in custody. I am of the view that the opinion to be formed should relate to the offence the commission of which is alleged in the complaint or plaint filed under section 136(1). The words "sufficient ground" embrace both, the ingredients of the offence and evidence as to its commission. The use of the word opinion does not make the action of the Magistrate a purely subjective exercise. Since the opinion relates to the existence of sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective assessment. **I am of the view that the proper test is to ascertain whether on the material before Court, prima facie, there is sufficient ground on which it may be reasonably inferred that the offence as alleged in the complaint or plaint has been committed by the person who is accused of it.**"

I am of the view that the principle laid down in the aforesaid cases shall apply to contempt proceedings. Therefore the Court, before issuing summons, must form an opinion as to whether sufficient grounds exist to issue summons under section 793 of the Civil Procedure Code. In order to form an opinion, the learned judge may examine the affidavit and other documentary evidence placed before Court disclosing sufficient grounds upon which the contempt charge is framed. However in the case before this Court the respondent has not affirmed to in the affidavit nor has he

placed any evidentiary material to form an opinion that there are sufficient grounds to proceed against the petitioner.

In the circumstances, it is an imperative requirement for the learned judge, after considering the material placed before Court and the affidavit filed, to be satisfied that there are sufficient grounds to issue summons to the respondents. In the instant case the learned judge had not formed an opinion as to whether there were sufficient grounds for him to issue summons under section 793 of the Civil Procedure Code against the respondent.

The learned judge by his order dated 19.01.2004 held that whether the petition and affidavit tendered by the plaintiff disclose an offence of contempt of court will be decided only after the inquiry. In his order (at page 3) he has stated thus :

> 'පැමිණිලිකාර පෙත්සම්කරු විසින් ඉදිරිපත් කරනු ලබන පෙත්සමෙන් හෝ දිවුරුම් පෙත්සමෙන් අධිකරණයට අපහාස කිරීමක් අනාවරණය වන්නේද නැද්ද යන්න සාක්ෂි මෙහෙයවීමෙන් පසුව පමණක් සලකා බැලිය යුතුයි'

It is seen that in making the order to issue summons he has not formed an opinion as to the existence of sufficient grounds to issue summons.

In the circumstances, I am of the view that the learned judge erred when he held that whether the petition and affidavit disclose a contempt charge will be decided after the inquiry. The learned judge by making the aforesaid order deviated from the legal position laid down in the above mentioned cases.

I am unable to agree with the submissions made by the learned counsel for the respondent that at the time of issuing summons under section 793 of the Civil Procedure Code the learned judge was in possession of material to issue summons as there was prima facie evidence that the petitoners had violated the enjoining order. In my view, the learned judge must form an opinion as to the existence of sufficient grounds. The learned judge must be satisfied that there are sufficient grounds to issue summons. In the instant case the learned judge had not formed an opinion that there were sufficient grounds for proceeding in the matter. He had not made an objective assessment of the available material before deciding to issue summons.

Next I proceed to consider the third question upon which the leave to appeal was granted. The learned counsel for the respondent submitted that the petitioners had followed a wrong procedure by filing an application for leave to appeal from the impugned order in as much as the correct procedure was to have a direct appeal against the impugned order.

Section 798 of the Civil Procedure Code provides that an appeal lies to the Court of Appeal from every order, sentence or conviction made by a Court in the exercise of its special jurisdiction to take cognizance of, and to punish the offence of contempt of Court. In the course of submissions both counsel cited the case of *Shah Vs. Hatton National Bank* [5] The facts of this case are similar to the facts of the case before Court. In the said case, the District Court enjoined the Ceylon Bank Employees Union (C. B. E. U. O its members, servants, agent and all those holding under and through it from in any manner engaging in any strike.

The plaintiff-respondents had filed petition and affidavit and moved that summons be issued under section 793 of the Civil Procedure Code on the Petitioner, who is the General Secretary of the CBEU for disobeying the enjoining order.

The plaintiff - respondent contended that only a direct appeal lies against the said order. The Court held that,

(a) a reading of section 797(1), 797(2) and section 797(3) implies that the word "order" in section 798 refers to an order of acquittal.

(b) Words "every order" do not contemplate an order of the type canvassed by the application for leave to appeal or an interim order made in the course of an inquiry with the charge of contempt after the accused has pleaded to the charge.

At 61, Edurisuriya, J. (P/CA) said ;

"The question which arises for answer first, is whether an order such as the one which is appealed from, namely, an order made overruling the preliminary objection prior to the Petitioner pleading to the charge of contempt is one which is contemplated in Section 798"

In interpreting the words "An appeal shall lie to the Supreme Court from every order, sentence, or conviction made by any Court' in section 798 Dias J with Gratien , J. agreeing in *Thuraisingham Vs. Karthikesu* at [6]574 states :the true intention underlying section 798 is that while a right of appeal exists in every case against an order, sentence or conviction in a contempt proceedings, the general rules of procedure contained in chapter XXX of the Criminal Procedure Code, so far as they are applicable must be followed in order to bring the case before the Supreme Court." **So that clearly, the words "every order" do not contemplate an order of the type canvassed by the application for leave to appeal or an interim order made in the course of an inquiry with the charge of contempt after the accused has pleaded to the charge."**

"Thus, it is my view that there is a lacuna in the law with regard to the mode of appeal in respect of such interim orders. in the circumantances recourse must necessarily be had to the provisions relating to interlocutory appeals laid down in Section 754(2)".

In the present application before this Court the impugned order was an order rejecting the preliminary objection. Applying the principle laid down in the case of *Shah vs. Hatton National Bank Ltd.*(supra), the impugned order rejecting the preliminary objection is not a "Final order" but an interlocutory order which is an order canvassed by way of an application for leave to appeal.

It was held in the case of *Thuraisingham Vs. Karthikesu*[6] that "order" referred to in section 798 of the Civil Procedure Code would include a discharge or acquittal.

In these circumstances, I am inclined to agree with the submissions made by the learned counsel for the petitioners that if a final appeal is available against every interlocutory order in contempt proceedings the case will never conclude, because against every interim order such as admitting evidence or rejecting evidence, or any order made in respect of procedural objection, if the aggrieved party made a final appeal to the Court of Appeal, the original Court is bound to send the case record to the

Court of Appeal for the determination of the final appeal.

In these circumstances, it is my considered view that the petitioners have correctly made this application for leave to appeal against the impugned order which was an interlocutory order.

In the circumstances the questions upon which the leave to appeal was granted are answered as follows :

1. Yes
2. Yes.
3. The impugned order was an interlocutory order and no final appeal shall lie against such an order.

In consequence, I hold that the order of the learned Additional district judge dated 19.02.2004, directing to issue summons under and in terms of section 793 in form 132 be set aside. The appeal is allowed with costs fixed at Rs.5,250.

Appeal allowed.