DAINTEE LTD
v.
WILLIAM AND OTHERS

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J. .
CALA NO. 338/2000
DC COLOMBO NO. 5171/Spl
MAY 18, 2001
JUNE 26, 2001
JULY 12, 2001

Winding up proceedings – Companies Act s. 278 (6) – Intervention – Seeking declaratory relief – Application dismissed – Is the Order a final Order? – Civil Procedure Code s. 754 (1), 754 (2), 759 (3) – SC Rules – Certified copies not filed – Fatal.

The intervenient petitioner-petitioner intervening in a winding up proceedings instituted by the petitioners-respondents-respondents against the respondent-respondent-respondent claimed a declaratory judgment and interim relief by way of restraining orders against the added respondents.

Interim relief was granted but after inquiry the application was dismissed. On leave being sought the respondents raised 3 preliminary objections, viz :

(i) The order complained of is a final order, therefore, the petitioner ought to have preferred a final appeal;

(ii) Failure to comply with SC Rules;

(iii) That the petitioner has sought 'Special Leave to Appeal' and not leave to appeal.

Held:

(1) The intervenient petitioner in the present case claimed certain reliefs under s. 278 (*b*) of the Companies Act against the liquidators and the 3rd added respondent. The interim relief that the intervenient petitioner obtained, was later withdrawn and his entire application in respect of all the other claims were dismissed by Court.

(2) Although the intervenient petitioner states that the impugned order is incidental or subordinate to the main cause of action, an analysis of the factual position confirm, it has finally disposed of the rights of the intervenient petitioner and the 1st, 2nd and 3rd added respondents and has not left them to be determined by Court in the ordinary way and there is finality in relation to the suit, further after the impugned order there is no live suit in which the rights of the intervenient petitioner and the 1, 2, 3 added respondents have still to be delivered. It is a final order.

(3) The failure to file certified copies of the necessary documents is fatal to the application.

(4) The respondents are fully aware what the intervenient petitioner has asked for in the application as the caption of the petition and the affidavit clearly and unambiguously indicate that the application is for leave to appeal, if the Court is to uphold such an overly technical objection, the whole judicial process would be reduced to an absurdity.

APPLICATION for leave to appeal from the order of the District Court of Colombo.

Cases referred to :

1. *Siriwardene v. Air Ceylon Ltd.*
2. *Salaman v. Warner and Others* – (1891) 1 QB 734 (CA).
3. *Bozson v. Altrincham Urban District Council* – (1903) 1 KB 547 (CA).
4. *Issac and Sons v. Salbeteen* – (1916) 2 KB 139.
5. *Abdul Rahman and Others v. Cassim & Sons* – (1933) AIR.
6. *Ramchand Mangimal v. Goverdhand Vishandas Ratashand and Others* – 1920 AIR.
7. *Settlement Officer v. Vander Poorten* – (1942) 43 NLR 436.
8. *Fernando v. Chittambaran Chettiar* – (1949) 49 NLR 217.
9. *Usoof v. The National Bank of India Ltd.* – (1958) 60 NLR 381.
10. *M. M. Imamdeen v. People's Bank* – CALA No. 150/97.
11. *V. M. S. Wijesinghe and Another* v. *Metalix Engineering Co., Ltd.* – CALA No. 173/99.
12. *Caderamanpulle v. Ceylon Paper Seeds Ltd.* – (Case No. 1) 2001 – 3 SriLR 1.

B. Ahamed with *M. Adamally* for intervenient petitioner.

Nihal Fernando with *Rajinika Jayasinghe* for 1st and 2nd added respondents.

N. R. Sivendran for 3rd added respondent-respondent.

Cur. adv. vult.

October 04, 2001

NANAYAKKARA, J.

The intervenient petitioner-petitioner (Daintee Ltd. hereinafter referred to as the intervenient petitioner) which is a duly incorporated Company under the Companies Act, intervening in a winding up proceeding instituted in the District Court of Colombo by the petitioner-respondents-respondents, against the respondent-respondent-respondent (respondent) which is also a Company duly incorporated under the Companies Act, claimed a declaratory judgment and interim reliefs by way of restraining orders against the added respondents-respondents, (liquidators and Kingsway Food Product (Pvt) Ltd.)

Thereafter, on an *ex parte* application made on 05. 04. 2000 intervenient-petitioner obtained, *inter alia*, an interim order restraining the 1st and 2nd respondents from disposing of a plant used in the manufacture of toffees, accepting any payment of money in respect of the sale of the said plant from any other person other than the intervenient petitioner, and certain other relief.

On objections being lodged by the 1st, 2nd and 3rd respondents to the grant of restraining order, the Court having held an inquiry into the matter on the basis of written submissions tendered by parties, made an order on 27. 10. 2000, dismissing the application of the intervenient petitioner. It is against that order that the intervenient petitioner has come by way of leave, seeking the relief claimed in this petition.

When this matter was taken up for hearing on the 23rd of January, and 18th of May, 2001, Counsel for the 3rd added respondent taking 3 preliminary objections in regard to the maintainability of this application moved that the intervenient petitioner's application be dismissed *in limine*.

The three objections raised were briefly as follows :

(1) The intervenient petitioner is not entitled to invoke the jurisdiction of the Court by way of leave to appeal, as the order sought to be canvassed in these proceedings is a final order disposing the application of the intervenient petitioner in the District Court and as such the intervenient petitioner should have preferred a final appeal in lieu of leave to appeal.

(2) The intervenient petitioner has failed to comply with the mandatory requirements of the provisions of the Supreme Court Rules in preferring this application to this Court.

(3) That the matters urged, particularly in para 9 of the petition, are grounds for Special Leave to appeal and not for leave to appeal.

Before I deal with the question of validity of the objections raised, I wish to make a brief reference to the argument advanced by the respective Counsel representing the parties in respect of preliminary objections taken at the commencement of the hearing.

Counsel for the 3rd added respondent developing his argument on the question of finality of the order against which the intervenient petitioner has sought relief, by this application, said as far as the intervenient petitioner's application to the District Court is concerned, the intervenient petitioner's application has been finally and fully adjudicated upon and determined by the learned District Judge and that the order made in respect of the intervenient petitioner's application reached a final stage when the impugned order was issued and the said order is not of an interlocutory nature.

The fact that the intervenient petitioner has also preferred a notice of appeal, the copy of which had been served on the registered Attorney of the 3rd added respondent, is indicative of the fact that the intervenient petitioner has now realized that the impugned order

is a final order, and it is not of interlocutory nature. Therefore, his application for leave to appeal is misconceived and cannot be maintained.

Counsel further submitted, the fact that the final appeal that has been preferred has been suppressed from Court in the petition and the intervenient petitioner cannot blow hot and cold at the same time by making a leave to appeal application and also preferring a final appeal. In respect of this preliminary objection, Counsel for the 1st and 2nd added respondents also advanced argument on the same lines.

Responding to this argument, the Counsel for the intervenient petitioner contended that the intervenient petitioner was not originally a party to the winding up action but sought to intervene only after the order for winding up was made, and the liquidators appointed. The petitioner sought relief from the District Court in terms of section 278 (6) of the Companies Act when the 1st and 2nd respondents have acted unfairly and wrongfully in awarding the 3rd added respondent a tender for the sale of a plant belonging to the Company under liquidation.

The Counsel has also submitted that the cause of action set out in the application to the District Court by the intervenient petitioner is not same as the cause of action set out in the principal case. The principal case was instituted for one purpose and the intervenient petitioner's application was another purpose. The intervenient petitioner's application resulted from a wrong done by the liquidators in the course of winding up of the Company. It is the wrongful acts done by the liquidators which prompted the intervenient petitioner to seek relief from the District Court. Therefore, the intervenient petitioner's application to the District Court is only a step arising in the course of a pending case in Court, and the intervenient petitioner's relief is no way associated or connected with the relief claimed in the main case but only incidental to the main case.

Counsel further argued that the District Court case No. 5171/Spl. is still not concluded and the process of winding up is not over and the rights of the parties have not been fully determined by Court yet.

In regard to the 2nd objection raised, the Counsel for the added respondent submitted, that out of the documents tendered to Court by the intervenient petitioner, only the impugned order dated 27th October, 2000, is certified and the rest are uncertified, thereby the intervenient petitioner has failed to comply with the mandatory requirements of the provisions of the Rules of procedure of the Supreme Court. Moreover, the intervenient petitioner has not sought the permission of the Court to tender them even at a subsequent date. Therefore, the Counsel argued, non compliance with the procedural requirements of the Rules of procedure is fatal to his application.

Responding to this argument, the Counsel for the intervenient petitioner submitted thtat the requirements to be observed in making an application to the Court of Appeal are contained in Rule 3 of the Court of Appeal (Appellate Procedure) Rules of 1990 and Rule 3 (1) (*a*) of the Rules of procedure deals with the manner of preferring an application in terms of Article 140 or 141 of the Constitution in matters involving the writ jurisdiction of the Court of Appeal.

The counsel argued that Rule 3 (1) (*a*) is of a mandatory nature and strict compliance is required, while Rule 3 (1) (*b*) of the Rules deals with the applications made by way of revision or *restitutio in integrum* in terms of Article 130 of the Constitution. The procedural requiremetns to be complied with are distinctly different from those relating to writs. It requires applications to be made in like manner together with copies of the relevant proceedings. Therefore, Counsel contended that in regard to the applications made to the Court of Appeal, two different sets of requirements apply, one in respect of applications made under Articles 140 and 141 and one in respect of applications made under Article 138 of the Constitution.

Counsel argued that it would be more appropriate and in keeping with the spirit of the Rules, that applications for leave to appeal should be guided by and conformed to Rule 3 (1) (6) and tendering copies along with the petition are in conformity with Rule 3 (1) (6) and should be allowed.

Counsel further argued that there is no specific provision made in respect of applications for leave to appeal and in the case of leave to appeal, such applications are governed by Rule 15 of the Rules of Procedure which states thus : "These rules shall also apply, *mutatis mutandis,* to applications made to the Court under any provision of law, other than Articles 138, 140 and 141 of the Constitution, subject to any directions as may be given by the Court in any particular case".

Regarding the 3rd objection raised, Counsel for the 3rd respondent submitted as the grounds urged are for special leave, and the intervenient petitioner has sought only special leave to appeal, this Court has no power of jurisdiction to entertain or grant leave. Responding to the argument, Counsel for the intervenient petitioner submitted that the appearance of the words "special leave to appeal" in para 9 of the petition is merely a typographical error and has no significance and the caption of the petition and affidavit decribe the nature of the application as leave to appeal.

At this stage it is necessary to determine the question of validity of the preliminary objections taken, in the light of the submissions, authorities and relevant law cited at the hearing.

For the purpose of determining the question whether the intervenient petitioner has the right to invoke the jurisdiction of this Court by way of leave to appeal or by preferring a final appeal, an analysis of sections 754 (1) and 754 (2) of the Civil Procedure Code, which governs the institution of final appeal and leave to appeal would be necessary.

Section 754 (1) provides thus :

"Any person who shall be dissatisfied with any judgment pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law."

While section 754 (2) provides :

"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 or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained."

Section 754 (5) which provides a definition of judgment and order reads thus :

"Notwithstanding anything to the contrary in this Ordinance, for the purposes of this Chapter –

"judgment" means any judgment or order having the effect of a final judgment made by any civil court; and

"order" means the final expression of any decision in any civil action, proceeding or matter which is not a judgment."

A careful examination of the definition of the word "judgment" given in the section will disclose, the word judgment encompass not only judgment which finally disposes of the rights of the parties but also all those orders made in the course of civil proceedings which have the effect of a final judgment.

The matter for determination now is whether, the impugned order against which relief has been sought by this application, is a final judgment or order which has the effect of a final judgment within the meaning given in the definition to section 754 (5) of the Civil Procedure Code. In this connection, reasoning adopted in the case of *Siriwardena v. Air Ceylon Limited*[1] by Chief Justice S. Sharvananda, then as a Judge of the Supreme Court, on an examination of some important English, Indian and local cases would serve as a useful guidance in resolving the matter in issue.

Justice Sharvananda after analysing the following English cases, *Salaman v. Warner and Others,*[2] *Bozson v. Altrincham Urban District Council,*[3] Isaacs and *Sons v. Salbstein,*[4] and the reasoning of the Privy Council cases in Abdul *Rahman and Others v. Cassim and Sons,*[5] *Ramchand Mangimal v. Goverdhands Vishandas Ratanchand and Others,*[6] which in turn influenced the decisions in *Settlement Officer v. Vander Poorten,*[7] *Fernando v. Chittambaram Chettiar,*[8] *Usoof v. The National Bank of India Ltd.*[9] laid down the following guidelines which would help in determining whether a particular order has the effect of a final judgment which falls into the category of judgment under section 754 (5) of the Civil Procedure Code :

(1) It must be an order finally disposing of the rigts of the parties.

(2) The order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way.

(3) The finality of the order must be determined in relation to the suit.

(4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final one.

Now let us examine the factual position of the present case in the light of guidelines set out by Justice Sharvananda in the case of *Siriwardena v. Air Ceylon Limited* (*supra*). The intervenient petitioner in the present case claimed certain reliefs under section 278 (6) of the Companies Act against the liquidators (1st and 2nd added respondents) and the 3rd added respondent. In the first instance, the intervenient petitioner on an *ex parte* application obtained an interim relief, which was not only subsequently withdrawn, but his entire application in respect of all the other claims were dismissed by Court on objection being lodged by the added respondents. The intervenient petitioner thus, not only lost what he gained initially, but also what he expected to achieve by his application to the District Court. In the circumstances, the intervenient petitioner cannot expect the District Court to take up his claim again. As far as he is concerned, the impugned order is final and conclusive as it is not canvassed in a higher forum. It can be safely assumed so far as his rights in the District Court case are concerned, his rights against the added respondents against whom the intervenient petitioner has claimed relief have been finally disposed of.

The intervenient petitioner claims, that the relief he has claimed is not in any way associated with or connected to the relief claimed by the petitioner who institued winding up proceedings but incidental or subordinate to the main case, and that he has not sought intervention in the District Court case in respect of the substantive cause of action. He also states that the relief claimed by his application is not in any way associated with the principal cause of action in the main case, and the main action in respect of winding up proceedings has not been finally disposed of.

I am not in a position to accept the argument advanced in this respect by the intervenient petitioner. Can it be said that the intervenient petitioner's application after the impugned order will ever be considered

again by the District Court? Therefore, it can be safely said that finality is attached to the impugned order whether the intervenient petitioner has sought relief by this application or not. Although the intervenient petitioner states that the impugned order is incidental or subordinate to the main cause of action, an analysis of the factual position confirm it has finally disposed of the rights of the intervenient petitioner and the 1st, 2nd and 3rd added respondents, but has not left them to be determined by Court in the ordinary way and there is a finality in relation to the suit. Further, after the impugned order, there is no live suit in which the rights of the intervenient petitioner and the 1st, 2nd and 3rd added respondents have still to be determined. It should also be mentioned that even assuming the impugned order is incidental or subordinate to the main cause of action, there can be an order which has the effect of final judgment within the meaning of section of the civil proceedings whether the proceedings are between the parties to the action or not. Finality can be attached not only to judgments delivered in terms of section 754 (5) of the Civil Procedure, but also to certain orders delivered in the course of civil proceedings which has the effect of final judgment.

Therefore, taking into consideration all the circumstances, I am of the view that the said impugned order against which the intervenient petitioner has sought relief by this application is of a final nature against which no leave to appeal should lie. Therefore, the objection in regard to this issue could succeed.

In regard to the second objection that the mandatory requirement of the provisions of the Supreme Court Rules have not been complied with, the importance of compliance with the mandatory rules of the Supreme Court has been emphasized in more than one case by this Court. In the case of *M. M. Imamdeen v. People's Bank*,[10] Justice Udalagama adverting to the importance of compliance with the Rules in preferring an application has said :

"Perusing the brief we have no alternative but to uphold this objection. Except for a certified copy of the order of the learned District Judge dated 08. 07. 97 the other copies of the necessary documents filed are not certified. If certified copies could not have been obtained in time it was the bounden duty of the petitioner to mention that fact in his petition and obtain leave of Court to tender them subsequently. The petitioner has failed to abide by this provision."

Reasoning given in this case has subsequenlty been followed in *V. M. S. Wijesinghe & Another v. Metalix Engineering Co., Ltd.*,[11] *Cadiramanpulle v. Ceylon Paper Sacks Ltd*[12] and a host of other cases.

Therefore, I am of the opinion that the intervenient petitioner's failure to file the certified copies of the necessary documents other than the impugned order is fatal to this application. In this, the intervenient petitioner has not only failed to tender certified copies of documents, but has also failed to adduce convincing explanation as to why he failed to do so or sought permission to submit them later.

The intervenient petitioner's attempt to make a distinction between Rules 3 (1) (*a*) and 3 (1) (*b*) and show that Rule 3 (1) (*a*) is of mandatory nature and the Rule 3 (1) (*b*) is not of such strict nature is not tenable as the cases decided so far insisted on strict compliance under both Rules. Therefore, I am in agreement with the submission of learned Counsel for the respondent when he submits that the intervenient petitioner has failed to comply with the mandatory requirements of the Rules in preferring this application. Therefore, his second objection should also prevail in view of the above-mentioned reasons.

In regard to the 3rd preliminary objection taken it should be stated, that it is of such high technical nature, and an aggrieved person should not be denied justice on sole basis of such technical irregularities. The respondents who raised objections cannot say that they were prejudiced or misled in any manner by the use of an additional word "special" in the petition. The respondents are fully aware of what the 280
intervenient petitioner has asked for in the application as the caption of the petition and the affidavit clearly and unambiguously indicate that the intervenient petitioner's application is for leave to appeal against an order made the learned District Judge of the Court is to uphold such an overly technical objection, it is my view that the whole judicial process would be reduced to an absurdity. Therefore, I reject the 3rd preliminary objection raised by the respondents. Nevertheless, as I have upheld the 1st and 2nd objections of the respondents, this application for leave on that ground alone cannot be maintained and therefore I dismiss this application. The 1st, 2nd and 3rd respondents 290
are entitled to costs fixed at Rs. 5,000 each.

UDALAGAMA, J. – I agree.

Application dismissed.