

**DE SILVA**

**VS.**

**WETTIMUNY**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA).  
WIMALACHANDRA, J.  
CALA 215/2004.  
DC BALAPITIYA PROBATE/24.  
JULY 6, 2005.

*Court of Appeal (Appellate Procedure Rules 1990 3(a) - 3(2) – Leave to appeal application – Non compliance with Rule 3(d) –Is it fatal? – Civil Procedure Code, sections 754(2), 757, 758 and 159 – Applicability of the Rules to leave to appeal applications.*

A preliminary objection was taken that, the petitioner had not averred in the application for leave to appeal that he has not previously invoked the jurisdiction of the Court of Appeal in respect of the subject matter of the application and moved that the application be dismissed *in limine*.

**HELD:**

- (1) The provisions contained in the Court of Appeal (Appellate Procedure) Rules 1990 has no application to leave to appeal applications;
- (2) The procedure in instituting an application for leave to appeal is governed by the provisions of the Civil Procedure Code and not by the Rules as laid down in the Court of Appeal (Appellate Procedure) Rules 1990;
- (3) Leave to appeal is a statutory remedy. As such when exercising the statutory remedy there is no necessity to insert an averment in the petition that the petitioner had not invoked the jurisdiction of the Court of Appeal before.

**APPLICATION** for leave to appeal from an order of the District Court of Balapitiya—on a preliminary objection

**Cases referred to :**

*J. M. C. Caderamanpillai vs. A. M.J. M.V. Caderampillai* 2005 1 Sri L. R.

*Rohan Sahabandu with Gamini Hettiarachchi for respondent -petitioner, Navin Marapana with T. Palliyaguru for petitioner-respondent.*

*Cur.adv.vult.*

October 7, 2005

**ANDREW SOMAWANSA, J.(P/CA)**

When this application for leave to appeal was taken up for inquiry counsel for the petitioner-respondent took up a preliminary objection, in that in as much as the respondent-petitioner has not averred in the petition that he has not previously invoked the jurisdiction of this Court in respect of the subject matter of the present application, the respondent-petitioner's application should be dismissed *in limine*. It is to be seen that the objection is based on non-compliance of the provisions contained in Rule 3(d) of the Court of Appeal Appellate Procedure Rules 1990.

Both counsel agreed to tender written submissions on this preliminary objection and accordingly both counsel have tendered their written submissions.

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Having considered their respective submissions, the relevant provisions contained in the Civil Procedure Code as well as the provisions stated in Rule 3(2) as well as other provisions contained in the aforesaid Court of Appeal (Appellate Procedure) Rules 1990, I do not think that there is any merit in the aforesaid objections taken by the petitioner-respondent, for the simple reason that the provisions contained in the Court of Appeal (Appellate Procedure) Rules 1990 has no application to the instant application which is a leave to appeal application.

It is to be seen that the order canvassed in this application is an incidental order falling under the purview of section 754(2) of the Civil Procedure Code. The events which culminated in the learned District Judge making the aforesaid order is as follows: On 10.06.2004 when further inquiry was taken up and as the respondent-petitioner was ill his registered Attorney-at-Law had tendered a medical certificate and moved for a postponement. The petitioner-respondent moved for costs in a sum of Rs. 50,000 to equate his expenses. Though the respondent-petitioner's Attorney-at-law suggested to pay Rs. 15,000 as costs for the day the learned trial Judge made order directing the payment. The order is marked R1.

As to which application the learned District Judge accepted is not clear, viz. whether the payment of Rs. 50,000 or whether it should be restricted to Rs. 15,000. In any event, the so called medical certificate issued by Dr. T. Wickramasinghe has not been challenged.

Be that as it may, it is a matter that needs our consideration when this application is taken up for argument. For at the moment we are only concerned with the objection taken for the maintainability of this application.

Let us now consider the relevant provisions contained in the Civil Procedure Code that deals with leave to appeal applications. The manner of making an application seeking leave to appeal is laid down in sections 754(2), 757, 758 and 759 of the Civil Procedure Code. The relevant particulars that should be contained in a petition for leave to appeal is stated in section 758 of the Civil Procedure Code and in terms of section 759, if the petition is not drawn up in the manner as set out in section 758 the petition could be either rejected or returned to the petitioner for amending the same.

The relevant procedural provisions read as follows :

“757(1) Every application for leave to appeal against an order of court made in the course of any civil action, proceeding or matter shall be made by petition duly stamped, addressed to the Court of Appeal and signed by the party aggrieved or his registered attorney. Such petition shall be supported by affidavit, and shall contain the particulars required by section 758, and shall be presented to the Court of Appeal by the party appellant or his registered attorney within a period of fourteen days from the date when the order appealed against was pronounced, exclusive of the day of that date itself, and of the day when the application is presented and of Sundays and public holidays, and the Court of Appeal shall receive it and deal with it as hereinafter provided and if such conditions are not fulfilled the Court of Appeal shall reject it. The appellant shall along with such petition, tender as many copies as may be required for service on the respondents.”

“758(1) The petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars:

- (a) the name of the court in which the case is pending;
- (b) the names of the parties to the action;
- (c) the names of the appellant and of the respondent;
- (d) the address of the Court of Appeal;
- (e) a plain and concise statement of the grounds of objection to the judgment, decree, or order appealed against, such statement to be set forth in duly numbered paragraphs;
- (f) a demand of the form of relief claimed.

759(1) If the petition of appeal is not drawn up in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court; or be amended then and there. When the court rejects under this section any petition of appeal, it shall record the reasons for such rejection. And when any petition of appeal is amended under this section, the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature.

(2) In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be

done) the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just".

It is to be seen that the particulars that should be contained in a petition filed in a leave to appeal application is specified in section 758 and the provisions contained therein applies to a final appeal too. In the circumstances it is to be seen that the procedure in instituting an application for leave to appeal is governed by the provisions of the Civil Procedure Code and not by the Rules as laid down in the Court of Appeal (Appellate Procedure) Rules 1990. Further leave to appeal is a statutory remedy like the final appeal made available to a party by the Civil Procedure Code. As such when exercising this statutory remedy there is no necessity to insert an averment in the petition that the petitioner had not previously invoked the jurisdiction of this Court. My considered view is that a leave to appeal application being a statutory remedy does not attract the provisions contained in the Court of Appeal (Appellate Procedure) Rules 1990.

I might point out that this same issue was considered by Ameratunga, J. in *J. M. C. Caderamenpulle vs. A. M. J. M.V. Caderamenpulle*.<sup>(1)</sup> In that case Ameratunga, J. having considered most of the judgments that considered this issue, viz: the applicability of Rules of the Court of Appeal (Appellate Procedure) Rules 1990 to an application for leave to appeal came to a finding that the provisions as prescribed in the aforesaid Rules are not applicable to leave to appeal applications. I would certainly agree with him on this point only. However though not relevant to the issue at hand, his finding in that case that Court has no power to dismiss a leave to appeal application on the basis that necessary documents have not been filed is unacceptable and should be frowned upon.

For the foregoing reasons I would over-rule the preliminary objection taken by the counsel for the petitioner-respondent and fix the matter for inquiry.

**WIMALACHANDRA, J.** — *I agree.*

*Preliminary objection over ruled.*

*Matter set down for inquiry.*