KARUNADASA
VS.
ABEYWICKRAMA AND OTHERS

COURT OF APPEAL
SOMAWANSA, J(P/CA) AND
WIMALACHANDRA, J.
CALA 477/2004
DC MATARA HCP 213
JULY 11, 2005.

Habeas Corpus application- Two minor children-interim order made regarding access - Divorce action pending - application to vary the order - Should this application be made in the divorce action? - Rules 3 (1) (a), 3(1)(b), 3(1)(15)- Court of Appeal Appellate Procedure Rules 1990 - Application for leave to appeal - Civil Procedure Code - S371,S757(1), S758 - Judicature Act No. 2 of 1978, S 24 (3) S29.- Duplicity of litigation.

The 1st plaintiff-petitioner (husband) sought in the Habeas Corpus application in the District Court in respect of his two children, and obtained access to his two children. Thereafter an application was made by the petitioner to have the order varied. This was refused by the District Court. It was contended that as there is a separate divorce action between the parties; the respondent should have moved Court in the divorce case, rather than causing duplicity of litigation.

HELD

(i) A divorce action is not a bar to an application for Habeas Corpus.

(ii) If the purported application is made in term of S24(3) of the Judicature Act, provisions contained in S29 provides the procedure. There is no mandatory requirement to follow the provisions of S 375 of the Civil Procedure Code.

(iii) The learned District Judge has come to a correct finding that there is no material placed before him to show that there is a change of status quo.

(iv) Rule 3(1)(a) and (b) of the Court of Apeal(Appellate Procedure) will not and cannot apply to an application for leave to appeal and further in terms of S757 and S758 of the Civil Procedure Codr no documents need be filed along with the petition and affidavit and the requirement being that the petition should be supported by an affidavit.

Per Somawansa. J(P/CA),

"If the petitioner is to succeed in the application I would hold that the necessary documents to establish the reliefs claimed should and must be provided or annexed to the petition."

Per Somawansa. J(P/CA),

"The burden is on the party seeking relief to establish his or her case. I am yet to come across any authority where the burden is cast on the Court to call for necessary documents, if court were to adopt this procedure for calling for documents in support of an application for interim relief or for the grant of leave, it would be a procedure hitherto unknown to our legal system and in fact would be a travesty of justice.

HELD FURTHER,

(v) It must be remembered that the systen of Civil Law that prevails in Sri Lanka is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties.

Per Somawansa.J (P/CA)

"How could the Court decide on the question of law for which purpose leave is granted, can the Court decide this aspect purely on the averments contained in the petition and affidavit. The view that a leave to appeal applicaiton can be decided on the averments contained in the petition and afidavit is totally unacceptable."

APPLICATION for leave to appeal for an order of the District Court of Matara.

Cases referred to :

(1) *Algin* vs. *Kamalawathie* - 73 NLR 429
(2) *M.L.C Caderamanpulle and another* vs. *J. M. C. Caderamenpulle*- 2005 - 1 Sri LR 397 - (not followed)
(3) *Pathmawathie* vs. *Jayasekara* - 1997 - 1 Sri LR 248

Wasana Wickremasena for 1st plaintiff-petitioner.
Petitioner-respondent absent and unrepresented.

October 7, 2005

SOMAWANSA, J (P/CA)

The 1st respondent-petitioner (hereinafter referred to as the petitioner) by his amended petition is seeking leave to appeal from the order of the learned Additional District Judge of Matara dated 06.12.2004 whereby the learned Additional District Judge refused an application made by the petitioner to vary the order dated 02.11.2004 made by the same Additional District Judge and if leave is granted to set aside or quash the aforesaid order dated 06.12.2004, to set aside/quash the entire proceedings in the action instituted in the District Court Matara bearing No. HCP 213 for an interim order and or order for the respondents-respondents (the two children born out of the wedlock) to be admitted to the hostel of Sujatha Vidyalaha, Matara till the conclusion of case No. D7951 and also to stay further proceedings in case No. D. C. Matara HCP 213.

Though on several occasions notices have been issued on the petitioner respondent (hereinafter called the respondent) she was absent and unrepresented but as per the minute dated 10.05.2005 a proxy has been tendered on her behalf by one Miss Irosha Gunasekera, Attorne-at-Law. However at the inquiry neither the respondent nor her registered Attorney-at-Law were present and the petitioner having agreed to tender written submissions has tendered the same.

It is contended by counsel for the peititioner that the petitioner and respondent are husband and wife and an action for divorce a vinculo matrimoni No. D7951 has been instituted in the District Court of Matara and both alleged adultery against each other as one of the courses for divorce in their pleadings in the aforesaid divorce action. He further contends that the respondents-respondents are the two children from the marriage between the petitioner and the respondent and the custody of the respondents-respondents is part and parcel and/or made in and/or incidental of the aforesaid divorce case No. D7951 pending in the District Court of Matara. Though the petitioner in paragraph 1 of his amended petition and paragraph 2 of his affidavit as well as in paragraph 1 of his written submissions states that he has annexed true copies of the pleadings, proceedings and the journal entries of the aforesaid divorce case No. D7951 marked XI which are very relevant to the present application of the petitioner. It appears that he has failed and neglected to annex these

documents to the petition or to tender them subsequently. These proceedings in the divorce case No. D7951 becomes very relevant for the reason that the Additional District Judge in his order dated 02.11.2004 has considered at length and in fact has based his order on the proceedings of the aforesaid case and it is this order dated 02.11.2004 that the petitioner is seeking to vary. In the circumstances the petitioner has failed to place before the Court documents which are very relevant to his application and therefore this Court is unable to look into the merits of this application. It is pertinent to refer to some of the observations made by the learned Additional District Judge in his order dated 02.11.2004. On page 3 last paragraph the learned Additional District Judge States as follows :

> "මේ අවස්ථාවේ විශේෂයෙන් සලකා බැලිය යුතු කාරණයක් වනුයේ මෙම පාර්ශවයන් අතරම පවතින දික්කසාද නඩුව පවරන අවස්ථාව වන විට දරුවන් කවුරුන් හාරයේ සිටිද යන කාරණයයි. 2004.05.17 දිනැති නියෝගය මගින් අධිකරණය මගින් 1 වන වග උත්තරකරුට එනම් එම නඩුවේ විත්තිකරුට දරුවන්ගේ ප්‍රවේශය සෑම පසලොස්වක පෝය දිනයකදීම ලබාදී ඇත. ඊට පෙර විහාග සටහන්වල. කාර්ය සටහන් වල දරුවාගේ හාරකාරත්වය සම්බන්ධයෙන් සටහනක් නැත. මේ අනුව පෙනී යන්නේ අධිකරණය මගින් ලබාදී තිබූ ප්‍රවේශය සම්බන්ධව නියෝගය කඩ කරමින් දරුවා තමා වෙතට ලබාගෙන ඇති බවයි. නඩුවක් පවතිද්දී එහි නියෝගයට පටහැනිව ක්‍රියා කිරීම වරදකි. නඩුව පැවරීමට පෙර දරුවා තමා සමග සිටි බව වග උත්තරකරු කරන ප්‍රකාශය මහුගේම ප්‍රකාශයෙන් හැර වෙනත් ආකාරයකින් තහවුරු වීමක් නැත. එසේ වුවද වී. 7951 නඩුවේ කාර්ය සටහන් සහ විහාග සටහන් නඩුව පවතින අවස්ථාවේ දී දරුවන් කවුරුන් සමග සිටිද යන්න පිළිබඳව හොඳම සාක්ෂියයි. වී. 7951 දරන නඩුව පවතින අවස්ථාවේ දී දරුවන් 1 වන වග උත්තරකරු සමග සිටියා නම් ඒ බව ඔප්පු කිරීමට මහු විසින් යම් ලේඛණයක් හෝ සාක්ෂියක් ඉදිරිපත් කළ යුතුව තිබුණි. නමුත් එවැන්නක් නොකිරීමෙන් පෙනී යන්නේ ඒ වන විට දරුවන් පෙත්සම්කාරියගේ හාරයේ සිටි බවයි. එබැවින් අධිකරණ නියෝගය කඩ කිරීමෙන් පෙත්සම්කරු දරුවන් තමාගේ හාරයට ගෙන ඇති බවට නිගමනය කරමි."

Also at page 4

> "මීට පෙර වී. 7951 නඩුවේ 1 වන වගඋත්තරකරුට ලබා දුන් ප්‍රවේශයම මෙම නඩුවේ ද ලබා දීම සුදුසු බව නිගමනය කරමි. සෑම මසකම පසලොස්වක පෝය දින ප. ව. 2.00 - 4.00 ත් අතර කාලය තුල මාතර

බෝටිය අසලදී දරුවන් බලා ගැනීමට 1වන වග උත්තරකරුට ප්‍රවේශය නිමි කරමි."

The petitioner also goes on to say that on 06.12.2004 he made an application to Court to vary the aforesaid order made on 02.11.2004 marked X since the respondents-respondents have re-iterated their desire to join with him subsequent to the aforesaid order. Though it is stated in paragraph 8 of the petition as well as in paragrah 8 of the written submissions that a true copy of the application is marked X5. I am unable to trace such an appication marked X5. However the proceedings dated 06.12.2004 indicates such an application has been made and whether it was in writing or not is not clear. Proceedings indicate that counsel for the petitioner did make certain oral submissions and counsel for the respondent also made oral submissions after which the learned Additional District Judge has made his order rejecting the application to vary his previous order made on 02.11.2004 for good reasons as indicated by him. Furthermore it appears from the order on 06.12.2004 certain documents have been tendered more specifically affidavits by the respondents-respondents. The learned Additional District Judge has rejected this affidavit. Here again I must say the petitioner for reasons best known to him has not tendered this document to this Court for cosideration. As for the failure to tender necessary documents I would give my observations later.

It is contended by counsel for the petitioner that as there is a separate divorce action pending between the parties in which custody of the respondents-respondents is part and parcel thereof and the respondent should have moved Court in the said divorce case rather than causing duplicity of litigation by making an independent and separate application thereby causing grave and irreparable loss and damage to the petitioner and on this ground leave to proceed should be granted. I am not inclined to agree with this view for the reason that a divorce action was not a bar to an application for habeas corpus.

In the case *Algin vs. Kamalawathie* [1] the facts were:

Petitioner obtained a decree for divorce and, during the pendency of the appeal in the divorce action, filed the present application for habeas corpus against his wife for the custody of his children. In the divorce action he

had not sought an order for the custody of the children and the Court made no order on the application of the wife for their custody, because the decree for divorce was entered in the absence of the wife who failed to appear on the trial date.

It was held:

"That the divorce action was not a bar to the application for habeas corpus".

Counsel also submits that the there is non compliance with the provisions of Section 375 of the Civil Procedure Code which reads as follows:

> "If the application is instituted in the course of, or as incidental to, a pending action, whether of regular or summary procedure, the petition shall be headed with a reference to its number in the court, and the names of the parties thereto, and shall be filed as part of the record of such action, and all proceedings taken and orders made on such petition shall be duly entered in the journal required to be kept by section 92".

This again is a matter that has no bearing on the petitioner's application for leave to appeal. In any event even if the purported application under reference is made in terms of Section 24(3) of the Judicature Act No. 2 of 1978 provisions contained in Section 29 of the said Judicature Act provides for the procedure. The aforesaid two sections reads as follows:

> "Section 24(3) : An application for the custody of a minor child or of the spouse of any marriage alleged to be kept in wrongful or illegal custody by any parent or by the other spouse or guardian or relative of such minor child or spouse shall be heard or determined by the Family Court; and such court shall have full power and jurisdiction to hear and determine the same and make such orders both interim and final as the justice of the case shall require."
>
> "Section 29 : All proceedings in a Family Court shall be instituted and conducted as expeditiously as possible in accordance with such as may be applicable thereto and, if there be no such law, in accordance with the provisions relating to summary procedure in the Civil Procedure Code."

Thus there is no mandatory requirement to follow the provisions of Section 375 of the Civil Procedure Code.

The petitioner also has tendered documents marked Y1A to Y1F. These documents too cannot have any impact on the impugned order for on the one hand they were not placed before the learned District Judge when the petitioner supported his application and in any event most of them are recent origin and are placed before this Court to show that the learned District Judge was bias when making the impugned order.

On an examination of the impugned order dated 06.12.2004, I would say the learned District Judge has considered all the material placed before him in arriving at his finding. It is to be seen that he has correctly observed that much reliance cannot be placed on the affidavit sworn by the respondents-respondents who are minors. The learned District Judge goes on to say that in any event the respondents-respondents were questioned in open Court 5 times as to their perference with whom they would prefer to live with. He further says that he himself would have observed the respondents-respondents said anything in answer if they did as alleged by the petitioner. The allegation of the petitioner is that the respondents-respondents did answer. In the circumstances this Court is called upon to decide who is uttering a falsehood. Is it the learned District Judge or is it the petitioner? With no other material to support either of them and the petitioner being at a distinct advantage position of providing such evidence has failed and neglected to do so. In the circumstances I am compelled to accept the statement of the learned District Judge. It appears that the learned District Judge has come to correct finding that there is no material placed before him to show that there is a change of status quo I have no reason to disagree with him.

Before I conclude there is the matter of non production of relevant documents by the petitioner on which I would like to make certain observations. In the case of M. L. C. Caderamenpulle and another vs. J.M. C. Caderamanpulle [2] Gamini Ameratunga, J. having considered a series of cases has come to the following conclusion on the applicability of Rules 3(1)(a), 3(1)(b) and 3(15) of the Rules of Court of Appeal (Appellate Procedure) Rules 1990.

> "I therefore hold that Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990 are not applicable to leave to appeal applicaitons filed in terms of

section 757(1) of the Civil Procedure Code. In consequence I uphold the submission of the learned counsel for the petitioner that Rule 3(1) (a) and (b) of the Court of Appeal (Appellate Procedure) Rules are not applicable to leave to appeal applications."

The preliminary objection raised in that application as narrated in the judgement is as follows:

> "This is an application for leave to appeal. The learned counsel for the respondent raised a preliminary objection in limine to this leave to appeal application on the basis that the petitioner has not complied with Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990 by his failure to annex to his petition, duly certified copies of some of the documents tendered along with his application."

Thereafter he has considered several judgements dealing with this question and has finally come to the conclusion that -

> "As the rules presently stand the Court has no power to dismiss a leave to appeal application on the basis that necessary documents have not been filed. If the Court is of opinion that a party seeking interim relief should have filed documents necessary for the Court to peruse before granting interim relief, the Court may either refuse to grant interim relief or may in its discretion direct the petitioner to furnish copies of the necessary documents. But the court has no power to dismiss a leave to appeal application in limine on the petitioner's failure to produce copies of documents".

It appears that Ameratunga,J. has taken the view that a leave to appeal applciation can be decided on the averments contained in the petition and affidavit is unacceptable.

As this order has been made in another division of this Court I would say with due respet to Amaratunga, J. that I totally disagree with him that there is no requirement to annex any documents to an application for leave to appeal other thatn the affidavit of the petitioner and the Court has no power to dismiss a leave to appeal application on the basis that necessary documents have not been filed.

While I would agree with him that Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) will not and cannot apply to an application for leave to appeal and further in terms of Sections 757 and 758 of the Civil Procedure Code no documents need be filed along with the petition and affidavit and the requirement being that the petition should be supported by an affidavit. However if the petitioner is to succeed in his appication,I would hold that the necessary documents to establish the relief claimed by the petitioner should and must be provided or annexed to the petition.It must always be remembered that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. Thus the burden is on the party seeking relief to establish his or her case. I am yet to come across any authority where the burden is cast on the Court to call for necessary documents. If Court were to adopt this procedure of calling for documents in support of an application for interim relief or for the grant of leave, it would be a procedure hitherto unknown to our legal system and in effect would be travesty of justice.

As Amaratunga, J says in that judgment this can be a lacuna in the law but that lacuna does not confer any additional privileges or for that matter any privilege on the petitioner to solely depent for leave to appeal or interim relief on the averments in his petition and affidavit not even annexing the impugned order.I am at a loss as to how the Court could decide on the question of law for which purpose leave is granted can the Court decide this aspect of the matter purely on the averments contained in the petition and affidavit? I think not I would proceed to say that if this procedure is adopted anyone could aver anything in the petition and the affidavit which has no bearing to the action in the original Court and obtain leave which would bring in a chain of reactions including stay of proceedings in the original Court. The situation becomes worse if the respondent is absent and unreprented. The Court is called upon to assist the petitioner by requiring him to produce the relevant documents so that the Court could grant him the relief prayed for by him. If documents so tendered are not sufficient the Court is obliged to call for more documents. In such a situation where does justice stand.

If notice issued on the respondent is not served on the respondent or prevented from being served on the respondent is the Court meeting our

justice by assiting the petitioner requesting him to produce documents to support his case?

In the case of Pathmawathie vs Jayasekera [3] it was held:

> "It must always be remembered by Judges that the system of civil law that prevails in our country is confrontrational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties.
>
> Our civil law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or Judge is duty bound to determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more".

I would say these are matters that need to be considered before one says that interim relief or leave to appeal could be supported by a petition and affidavit when the documents mentioned in the petition and affidavit are not available to Court for perusal and examination. For the foregoing reasons, with due respect I have no hesitation to differ from the view expressed by Ameratunga, J in the aforesaid case. I was compelled to express the aforesaid observation for one of the reasons for disallowing the application of the petitioner in the instant application is non production of the relevant documents.

For the aforesaid reasons, leave to appeal is rejected and the application is dismissed. In all the circumstances of the case, I make no order as to costs.

WIMALACHANDRA, J. — I agree.

Application dismissed.