nounced.

97. ***Colly* v. *Colly's Estate*, 1946 W.L.D. 83**, (Hahlo, H.R. *Husband and Wife* 2nd Edition p.373): Husband had agreed to pay his divorced wife maintenance until her death or remarriage. The husband died before the wife who had not remarried. The Court held that in the absence of any provision to the effect maintenance was to cease on the husband's death, the obligation continued and had to be met out of his estate.

98. ***Belfort* v. *Belfort*, (1961) 1SA 257, (Hahlo, H. R. *Husband and Wife* 2nd Edition p.384)**: Despite the sympathy for the husband who had suffered unhappiness by reason of the Defendant's conduct, their married life been ridden with drink, neglect, deceit and broken promises, the husband was not granted a divorce, because there was no evidence that the wife never visualized his departure.

JUDGMENTS

Failure to aver previously invoking the jurisdiction of the Court of Appeal

SUPREME COURT

Surendra Das* v. *G. Jeevananthan David and Another

S. C. Appeal No. 109/2009
SC (SPL) LA No. 87/2009
CALA No. 504/2006
D.C. Horana Case No. 2533/L

Decided on: 05-03-2012

Decided by: **Hon. R. K. S. Suresh Chandra, J**; Hon. S. Tilakawardane, J.; Hon. C. Ekanayake, J.

In this case the learned District Judge of Horana made an Order dated 30th November, 2006, to issue an interim injunction restraining the Defendants from selling, transferring, mortgaging or leasing the property described in the schedule to the Plaint at the instance of the Plaintiff-Appellant.

The Defendants-Respondents filed an application for leave to appeal against the said Order in the Court of Appeal.

At the argument the Plaintiff-Appellant raised a preliminary objection that the Defendants-Respondents have failed to aver in their petition that they have not previously invoked the jurisdiction of the Court of Appeal and to produce material documents, namely, Motion dated 31-05-2006 and Journal Entries 9 and 10 in contravention of Rule 3(1)(a), 3(1)(b) and 3(2) read with Rule 3(15) of the Court of Appeal (Appellate Procedure) Rules, 1990 and that the Leave to Appeal application of the Defendants-Respondents should be dismissed *in limine*.

The Court of Appeal overruled the preliminary objection following the decision in *Caderamanpulle and Others* v. *Caderamanpulle and Others*, [2005] 1 Sri LR 397 where Amaratunga J. held that Rules 3(1)(a) and 3(1)(b) do not apply to Leave to Appeal applications and that the procedure to be followed in relation to Leave to Appeal applications are laid down under sections 757 and 758 of the Civil Procedure Code. The Court of Appeal further held that Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules, 1990 only governs applications made in terms of Articles 138 and 140 necessitating the averment that the jurisdiction of the Court of Appeal has not been previously invoked in respect of the same matter.

On appeal the Supreme Court affirmed the Order of the Court of Appeal, and dismissed the Appeal.

Suresh Chandra J. said as follows:-

> *"Considering the present case it is clear that considering the interpretation of Rule 3(15) it would suggest that since the Learned Judge did not make any specific directions as to the procedure needed to be followed the normal procedure for Leave to Appeal applications would have to have been followed which would mean that it would have had to be in accordance with s.757 and s.758 of the Civil Procedure Code which provides the normal procedure to be followed for any leave to appeal application. The rule of exclusion as stated in Bindra Interpretation of Statutes (10th edition) at pg. 427 provides the rationale for the above interpretation of Rule 3(15) as it is clear that what has been left out was left out clearly with the intention of leaving it out of the scope of the said provision.*
>
> *The wording of Rule 3(2) of the Court of Appeal Rules suggests that even when the party makes a false or incorrect averment in relation to whether the jurisdiction of the court being previously invoked the Court would still have a discretion as to whether it should dismiss the application or not. Considering the repercussions of such a situation and when looking in to a situation where the party fails to mention that they have not previously invoked the jurisdiction of the court, it would suggest that it would be a grave injustice if there would be a mandatory dismissal of the application due to such an omission. It would be in the interests of justice for the judge to be given the discretion as to the course of action needed to be taken in such a situation as stated in Rule 3(2) for situations of a false or incorrect averment being mentioned in the Petition. This would suggest that even if such a Leave to Appeal application is required to be made under the procedure laid down in accordance with the Court of Appeal Rules, in such a situation the failure to adhere to Rule 3(2) alone would not warrant a mandatory dismissal of the application.*
>
> *Considering the issue as to the filing of certified copies of documents it would be necessary to consider the procedure to be followed under the Civil Procedure Code in relation to Leave to Appeal applications supra. The procedure to be followed under the Civil Procedure Code under s.757 and s.758 makes no mention as to filing of any documents apart from the Petition of Appeal and Affidavit by the Petitioner. This would clearly suggest that there is no mandatory requirement to file certified copies of documents in Leave to Appeal applications when following the normal procedure laid down under the Civil Procedure Code. The judge using his discretion under Rule 3(15) of the Court of Appeal Rules may require parties to file any such documents as required or follow the procedure laid down under the Court of Appeal Rules but in neither situation would a mandatory dismissal of an application be permissible for failing to submit certified copies of documents to the court. It is extremely clear that the relevant procedure to be followed by the courts in relation to Leave to Appeal applications under the normal procedure would be under the Civil Procedure Code and that the Courts should follow a uniform approach in dealing with such applications."* (*vide* pages 6 and 7)

01 / 08-09 / 2012