JUDGMENTS

Time limit for filing an application for leave to appeal from a Judgment of the High Court of Civil Appeal

SUPREME COURT

Ranjani Warnakulasuriya* v. *K. W. Samaranayake

SC HC CA LA 137/10
CP / HCCA / 775 / 2006
D. C. Nuwara Eliya Case No. 575 / L

Decided on: 04-10-2012

Decided by: N. G. Amaratunga, J.; **Saleem Marsoof, J.**; Chandra Ekanayake, J.

The Plaintiff-Appellant-Respondent (Respondent) filed action in the District Court of Nuwara Eliya for recovery of possession of a State land which he held under annual permit and for damages. The action was dismissed by the District Court. On appeal the High Court of Civil Appeals, Kandy by Judgment dated 15th March, 2010 set aside the decision of the District Court and granted relief to the Respondent as prayed for in the Plaint.

The Petitioner sought leave to appeal against the said Judgment dated 15th March, 2010 from the Supreme Court by Application dated 8th May, 2010 lodged in the Registry of the Supreme Court on 10th May, 2010 on the fifty-sixth (56) day after the pronouncement of the Judgment by the High Court of Civil Appeals, Kandy.

When the matter came up for support a preliminary objection was taken by the Respondent on the basis that it had been filed outside the time limit of six weeks (42 days) specified in Rule 7 of the Supreme Court Rules, 1990 under Article 136 of the Constitution.

The Respondent's position was that the Petitioner's Application for leave to appeal is time barred. The Petitioner resisted the position of the Respondent.

The Respondent submitted that in the absence of express provision in the High Court of the Provinces (Special Provisions) (Amendment) Act of 2006 imposing a time limit for filing an application for leave to appeal from an order or judgment of the High Court of Civil Appeals, the time limit for preferring an Application for special leave to appeal from an order or judgment of the Court of Appeal should be applicable to an order or judgment of the High Court of Civil Appeals for the reason that the legislature has in the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006 sought to equate the High Court of the Province to the Court of Appeal. It was, therefore, the contention of the Respondent that the time limit of six weeks specified in Part 1A, Rule 7 of the Supreme Court Rules, 1990 should apply to an application for leave to appeal to the Supreme Court from an order or judgment of the High Court of the Province.

The Petitioner submitted that the Respondent's preliminary objection should be overruled as no specific time limit is laid down in section 5C(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. The Petitioner argued that no rules have been made dealing expressly with the time limit for applications for leave to appeal from the High Court of the Province exercising civil jurisdiction, and that Part 1-A of the Supreme Court Rules, 1990 including Rule 7 has no application.

After discussing several authorities His Lordship Saleem Marsoof J. held as follows:-

> *"Accordingly, in the light of the reasoning adopted in the aforementioned decisions of this Court, I am inclined to hold that an application for leave to appeal filed in the Supreme Court from an Order of a High Court of the Province exercising civil jurisdiction has to be filed within six weeks of the pronouncement of the order or judgment appealed from, irrespective of whether it is considered to fall within Part 1-A or Part 1-C of the Supreme Court Rules.*
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> *Learned Counsel for the Petitioner has urged before Court certain circumstances to be considered in regard to the question whether the application has been filed within a reasonable time. He has submitted that the Petitioner resides in Nuwara Eliya, situated outside the District of Kandy and quite some distance away from the place where the relevant Provincial High Court is situated, his application may be considered to have been filled within a reasonable period of time from the date of the pronouncement of the judgment sought to be appealed from, and has stressed that in any event, this Court has entertained his application and issued notices to the Respondent accordingly. However, I note that the time limit of six weeks set out in Rule 7 has been held consistently by this Court to be mandatory and must be strictly complied with, and even if the "reasonable test" applied by Edussuriya J. in Mahaveli Authority of Sri Lanka v. United Agency Construction (Pvt.) Ltd., [2002] 1 Sri L. R. 8 is adopted, the circumstances urged by the learned Counsel for the Petitioner are insufficient to permit the application to stand."* (*vide* page 7)

The Supreme Court accordingly upheld the Respondent's preliminary objection, and ruled that the application filed by the Petitioner seeking leave to appeal is time barred.

01 / 02-03 / 2013

Kandyan Law Declaration and Amendment Ordinance / paraveni property / acquired property

COURT OF APPEAL

Meragal Pedi Durayalage Tikira alias Piyaratne* v. *Meragal Pedi Durayalage Thilakaratne

C.A. Appeal No. 625/85 (F)
D.C. Kuliyapitiya Case No. 5174/L

Decided on: 12-05-1995

Decided by: Anandacoomaraswamy, J.; **Edussuriya, J.**

One Tikira filed this action in the District Court of Kuliyapitiya for declaration of title and recovery of possession of certain allotments of land. The action was dismissed by the District Court of Kuliyapitiya.

The parties to this case were subject to Kandyan Law.

One Horatala sold an undivided one sixth share each of the property in suit by Deed No. 5045 of 21st August, 1921 to Tikira (the Plaintiff), Bilinda and Petera. About 1945, Petera died unmarried and issueless, and Tikira and Bilinda became entitled to an undivided one fourth share each. Bilinda died in 1949 (*sic*) leaving as his heir his daughter Anulawathie.

Case No. 7088 has been filed in the District Court of Kurunegala to partition the land in suit, and Tikira (the Plaintiff) was made the 1st Defendant and Anulawathie was made the 5th Defendant in the said case. Anulawathie died during the pendency of the action, and her mother, the 6th Defendant was substituted as the legal representative.

By the Final Decree in the said partition case Anulawathie's mother who was the 6th Defendnat was in her capacity as the legal representative of the deceased Anulawathie allotted the property in suit subject to Horatala the 7th Defendant's life interest.

The Plaintiff claimed the said property as against the Defendant on the basis that she could not have got the said property as the heir of Anulawathie.

The Plaintiff's action was dismissed by the District Court of Kuliyapitiya.

It was firstly contended in appeal that the property in suit was allotted to the 6th Defendant in the said partition case as the legal representative of the deceased Anulawathie, and the Court of Appeal upheld this contention.

Secondly, it was contended that only the newly acquired property of Bilinda (Anulawathie's father) could be deemed to be the acquired property of the deceased Anulawathie since she died without leaving a child and descendant, and that rights acquired by Bilinda in 1921 cannot be considered to be newly acquired property at the time of his death in 1949 which was over twenty (20) years after he acquired the said rights.

His Lordship Edussuriya J. citing authorities held that the one sixth share which Bilinda purchased from Horatala in 1921 which was the acquired property of Bilinda must be deemed to the acquired property of Anuawathie who died without leaving any child or descendant.

The Court of Appeal also considered the position with regard to the one twelfth share which Bilinda got on the death of Petera who died unmarried and issueless in 1941.

His Lordship Edussuriya J. Held that since Petera died in 1941 the law applicable is that laid down in section 10(1)(a) of the Kandyan Law Declaration and Amendment Ordinance, and, therefore, the said one twelfth share to which Bilinda succeeded in 1941 on Petera's death in 1941 becomes Paraveni property of Bilinda in terms of the said section 10(1)(a).

Thus, His Lordship Edussuriya J. Held that the Plaintiff-Appellant as the brother of Bilinda is entitled to the said one twelfth share, and that the Defendant-Respondent is entitled to the said one sixth share.

Subject to the aforesaid variation, the Appeal was dismissed without costs.

02 / 02-03 / 2013

Payment of Gratuity Act / Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act / effect of an interpretation of a statute by Court / exercise of revisionary power

COURT OF APPEAL

Distilleries Company of Sri Lanka Ltd* v. *Deputy Commissioner of Labour

C. A. (PHC) App. No. 76/2005
H. C. Galle (Rev) No. 91/2001
M. C. Galle No. 52480

Decided on: 30-11-2007

Decided by: Sarath De Abrew, J.; S. I. Imam, J.;

The Respondent Deputy Commissioner of Labour filed proceedings in the Magistrate's Court of Galle against the Petitioner, Distilleries Company of Sri Lanka Ltd., to recover surcharge on gratuity payable to an employee, one J. A. D. Peter. The learned Magistrate allowed the application for recovery and determined that the Petitioner was liable to pay. The Petitioner, Distilleries Company of Sri Lanka Ltd., sought to revise this order in the High Court of Galle. The learned High Court Judge upheld the preliminary objection that the Petitioner had violated Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules, 1990 by failing to submit original or duly certified copies of the documents. The Petitioner, Distilleries Company of Sri Lanka Ltd., sought to have the said orders revised in the Court of Appeal.

According to the facts the Distilleries Corporation was converted into the Distilleries Company of Sri Lanka Ltd. on 17-11-1989 under section 2 of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987. The said employee, J. A. D. Peter, joined the service of the aforesaid Corporation on 27-03-1974, and on reaching the age of 55 years retired from the service of the said Distilleries Company of Sri Lanka Ltd. who petitioned the Court of Appeal. The said employee, J. A. D. Peter, was entitled to receive gratuity as a retiral benefit.

The question for determination was whether the said J. A. D. Peter was entitled to receive gratuity for the period he served as a workman under the Corporation too in terms of the provisions of the Payment of Gratuity Act, No. 12 of 1983.

In a similar matter the High Court of Colombo had interpreting the relevant provisions of the Payment of Gratuity Act held that the petitioner employer was liable to pay gratuity to a workman only for the period such workman had served the Petitioner Company, and not for the period he had served under the Corporation. Relying on this decision the Distilleries Company of Sri Lanka Ltd., the Petitioner in this case, had paid the said employee J. A. D. Peter gratuity only for the period he served under the Petitioner Company.

However, the Court of Appeal had later on 23-06-2000 overturned the aforesaid decision of the High Court of Colombo, and held that the Petitioner employer was liable to pay gratuity to the workman for the period he had served under the Corporation as well. The Supreme Court refused an application for special leave to appeal against this decision, and the Court of Appeal was of the view that the law is now settled on this matter.

The main contention of the employer Company was that it paid the gratuity to the employee concerned within thirty days the

employer company became liable to pay gratuity, and, therefore, there is no default and a surcharge cannot be imposed. The employer Company contended that it became liable to pay gratuity only after the Supreme Court on 29-09-2000 refused special leave to appeal against the judgment of the Court of Appeal which overturned the decision of the High Court of Colombo relied on by the employer Company.

The Court of Appeal rejected the contentions of the employer Company, and held that the employer Company is liable to pay to the workman gratuity for the period he worked for the corporation as well.

His Lordship Sarath de Abrew J. said as follows:'

> *Section 5(1) of the Payment of Gratuity Act, No. 12 of 1983 imposes liability on employers to pay gratuity to workmen employed under them. The liability arises on termination of the services and gratuity has to be paid within the period of 30 days. Section 5(4) introduced by Amending Act No. 62 of 1992 states "Any employer who being liable to pay any sum due as gratuity to a workman or his heirs, as the case may be under subsection (1), fails or defaults to pay that sum on or before the de date he shall be liable to pay that workman or his heirs, as the case may be, in addition to the sum due as gratuity, a surcharge on that sum calculated in the following manner ..."*
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> *The key words in this section are "he shall be liable to pay a surcharge on that sum." The liability arises on the failure to pay the sum due on or before the due date, that is within one month of the termination of employment of the workman concerned, and not within one month of the correct interpretation of the statute by a Superior Court. The Petitioner cannot seek refuge behind an erroneous order made by a single Judge in the High Court as the decision of such single Judge is only persuasive and has no binding effect as a compelling authority. No finality can e attached to such a decision. Once the Supreme Court has interpreted the statute correctly, the correct interpretation operates not from the date of interpretation but from the date where liability arises in the first place, that is within one month of the termination of employment. The Petitioner should have been well aware that the order of the learned High Court Judge (P2) has no binding effect as the matter was bring canvassed in a higher forum. The doctrine of stare decisis would mean that people in arranging their affairs are entitled to rely on a decision of the highest Court which appears to have prevailed for a considerable length of time. Therefore the contention of the Petitioner in this regard should fails*
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> *In the interpretation of statutes the final arbiter is the Superior Court by virtue of its appellate and supervisory jurisdiction. Once the meaning of an Act of Parliament has been authoritatively interpreted, that interpretation becomes law unless it is thereafter changed by Parliament. Even though it is the function of Court alone to declare the legal meaning of an enactment, the legal effect of the proper construction or interpretation of the statute concerned will take effect not from the date of interpretation but from the date of the operation of the said statute. Therefore where the Superior Courts interpret the provisions of the Payment of Gratuity Act means that the Petitioner Company is liable to pay gratuity to its employees on termination even for the period they served under the corporation, the liability to pay arises not from the date of the correct interpretation but from the due date, that is within one month of termination.* (*vide* page 10 to 12)

The Court of Appeal held that this is not a fit case for the exercise of its revisionary powers. In regard to the exercise of the revisionary jurisdiction of the Court of Appeal, the following observations were made by His Lordship Sarath de Abrew J:-

> *Before dealing with the several contentions raised by both parties it must be reiterated that invoking revisionary powers of this Court is a discretionary remedy and its exercise cannot be demanded as of right unlike the statutory remedy of Appeal. Certain pre-requisites have to be fulfilled by a Petitioner to the satisfaction of Court in order to successfully invoke the exercise of such discretionary power. This is best illustrated in T. Varapragasam & Another v. S. A. Emmanuel (C.A. Revision Application No. 931/84, decided on 24-07-1991) where it was held that the following facts have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.*
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> *a) the aggrieved party should have no other remedy;*
> *b) If there was another remedy available to the aggrieved party. Then revision would be available if special circumstances could be shown to correct it;*
> *c) the aggrieved party must come to Court with clean hands and should have not contributed to the current situation;*
> *d) the aggrieved party should have complied with the law at that time;*
> *e) the act complained of should have prejudiced his substantial rights;*
> f) *the acts or circumstances complained of should have occasioned a failure of justice;*
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> *In the above context, the following features in this application militate against the successful invoking of revisionary jurisdiction.*
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> *a) Failure on the part of the Petitioner to seek the alternative remedy of Appeal against the impugned Order of the High Court (P16);*
> *b) The refusal of relief by the High Court is on a technical ground and not on consideration of the substantive merits of the application. No exceptional circumstances have been urged in relation to the Order of the learned High Court Judge;*
> *c) The failure of the aggrieved party to comply with the mandatory provisions of the Payment of Gratuity Act and its amendments has contributed to the current situation;*
> *d) The Petitioner has suppressed a very material fact and has failed to show uberima fides toward the Court due to the following reasons: J. A. D. Peter has retired from service on 20-11-1998 according the Petition. Paragraph 13(iv) of the Statement of Objections by the Respondent alleged that the Petitioner has paid gratuity for the first time on 24-12-1998, which is more than one month from the due date of retirement and is therefore liable for a surcharge to be imposed. This averment in the Statement of Objections is not specifically denied in the Counter Objections filed by the Petitioner. Therefore the contention of the Petitioner that there was no default even on the first occasion of payment of gratuity appears to be a myth. On the above grounds enumerated (a) to (d) above alone this application is liable to be dismissed.* (*vide* page 10 to 12)