WICKREMASINGHE AND OTHERS
V.
CORNEL. PERERA AND OTHERS

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
WIJETUNGA, J.
S.C. (S.L.A.) NO. 49/96.
C.A. REVISION APPLICATION NO. 889/95.
D.C. COLOMBO NO. 4413/Spl.
15 JULY, 1996.

Application for review of order made by the Supreme Court by the court making order or by reference to a fuller bench-Difference between jurisdiction to grant special leave to appeal and appellate jurisdiction.

Leave to appeal to the Supreme Court can be granted either by the Court of Appeal under Article 128(1) or by the Supreme Court under Article 128(2) of the Constitution. When the Court of Appeal grants leave to appeal it does not purport to correct errors either of inferior Courts or of its own. Obtaining leave is a condition precedent to invoking the appellate jurisdiction of this Court, and the grant of leave only involves considering whether the matter is fit for review. It is thus distinct from the appellate jurisdiction of the Court of Appeal.

In the same way, when the Supreme Court grants leave under Article 128(2), it exercises a jurisdiction which is anterior to and distinct from its appellate jurisdiction. The proceedings in respect of leave, are thus distinct from the appeal itself.

In any event, even if in a broader sense they can loosely be regarded as being part of the appellate jurisdiction, yet it has two distinct stages, involving two distinct issues, the first is whether leave ought to be granted, and that depends on whether the question is important enough to merit adjudication by the highest court, and the second is, at the appeal stage, to find the right answer to that question. Thus it may happen that even if this Court thinks that probably the question raised must be answered adversely to the Petitioner, yet the Court may grant leave because it is in the public interest that that question should be finally and authoritatively decided by the Supreme Court.

The Petitioners' application for special leave to appeal was concluded on

28.2.96 and hence could not be referred under Article 132 (of the Constitution) to a "fuller bench".

The first part of the order which the petitioners seek to review for the second time, permits and requires the District Court to decide (and not to delay) the important questions of law which all parties concede are involved in the action. The second part of the order, review of which the petitioners now seek (although they did not in March 1996) merely permits the **status quo** to prevail until the interim injunction inquiry is over. Although asserting that that order was wrong, Counsel made no effort to show in what respect the Court's reasoning was faulty. Thus there was no ground for the second application for review.

The application for special leave was finally concluded when the order of 28.2.96 was made, and it cannot now be re-opened before another bench or be referred by His Lordship the Chief Justice to a "fuller bench". It was duly listed before the present bench of the Supreme Court and no ground for review has been established.

Cases referred to :

1. *De Silva v. Fernandopulle S.C.* Nos. 66 & 67/95 S.C. Minutes of 9.7.96.
2. *Moosajees v. Fernando* (1966) 68 NLR 414.
3. *Liyanage v. The Queen* (1965) 68 NLR 265.

APPLICATION for review by the Supreme Court of its own order or by reference to a fuller bench.

M.A. Sumanthiran for the Defendant Respondent-Petitioners.
S. Sivarasa P.C. with *S.L. Gunasekera, S. Mahenthiran, Nihal Fernando* and *N.R. Sivendran* for the Plaintiff-Petitioner-Respondent.

Cur.adv.vult.

July 26, 1996.
FERNANDO, J.

This is an application, filed on 7.5.96, to "constitute a fuller bench to review the orders dated 21st March and 28th February 1996", and to set aside those orders.

His Lordship the Chief Justice said that he did not think that he had the power to refer this matter to a fuller bench and directed that it

be listed before the same bench which made those orders, and accordingly it came up before this bench on 15.7.96.

The facts are fully set out in our order dated 21.3.96. The Plaintiff instituted action in the District Court challenging his purported removal from the office of Chairman and Managing Director (but not Director) of the 12th Defendant Company. An enjoining order was made, and subsequently extended; Counsel for the 1st to 6th and 12th Defendants - the present Petitioners - stated that the last extension of that enjoining order was operative up to 2nd February, 1996. The present Petitioners made an application in revision, asking the Court of Appeal to revise the order of 30.11.95 (in respect of the enjoining order), to vacate the enjoining order issued, to uphold a preliminary objection and dismiss the Plaintiff's action, and to stay the proceedings in the District Court pending the hearing and determination of the revision application. On 30.1.96 the Court of Appeal issued notice and made order staying all further proceedings in the District Court; the Court made no reference whatever to the enjoining order, although it was still in force.

The application for special leave to appeal against the order made on 30.1.96 was considered on several dates, and on 28.2.96 (1) special leave was granted by this bench upon the question whether the Court of Appeal had the jurisdiction and /or the discretion to make interim orders having the effect of staying all proceedings in the District Court, and in particular the Plaintiff's application for interim injunction and the Plaintiff's action itself; (2) pending the final hearing and determination of the appeal, the operation of the interim order made by the Court of Appeal was stayed, and the District Court enjoining order was varied; and (3) the Court also made the following order:

> "Notwithstanding any order already made by the Court of Appeal, the District Court of Colombo is directed to proceed to hear and determine the Plaintiff's application for interim injunction and the action as expeditiously as possible, giving precedence to that case; the District Court is directed to call this case on 8.3.96, for the purpose of fixing dates in respect of the interim injunction inquiry, which Counsel agree can be disposed of without oral evidence, and to conclude that inquiry on or before 10.6.96;

and the enjoining order granted by the District Court will stand extended and be operative [subject to certain modifications] up to 10.6.96, or the conclusion of that inquiry, whichever is earlier."

In their petition filed on 13.3.96 (the first application for review) the Petitioners did not seek review of the order granting special leave, the stay of the Court of Appeal's interim order, and the variation of the District Court's enjoining order. (Learned Counsel now appearing for the Petitioners also stated that he did not seek review in respect of that part of the order.)

In the first application, the Petitioners prayed for the deletion of the above-quoted paragraph from the order of 28.2.96, and asked that a larger bench be constituted to hear their application. However, at the hearing, learned Counsel then appearing for the Petitioners stated that he had no complaint in respect of the last part of that order, but sought review of the first part of that order, namely the direction to the District Court to proceed with the hearing.

But learned Counsel now appearing for the Petitioners states that they now seek review of the **whole** of the above-quoted paragraph of the order of 28.2.96.

Counsel submitted that we should recommend to His Lordship the Chief Justice that the second application for review be referred to a "fuller bench", or to a differently constituted bench. He contends that :

(1) despite the recent decision of a bench of five Judges of this Court in *de Silva v Fernandopulle* [1] an order made by one bench can be reviewed by a differently constituted bench or by a fuller bench;

(2) *Moosajees v Fernando,*[2] is authority for the proposition that a matter which has not been finally disposed of; can be re-examined by another, differently constituted bench; in the present instance this Court commenced exercising its appellate jurisdiction, when granting special leave, and the exercise of that appellate jurisdiction has not yet been concluded;

(3) the Plaintiff-Respondent is not entitled to the substantive relief which he sought in the District Court, and the impugned portion of our order of 28.2.96 gives him, by way of interim relief, that which he cannot get ultimately; and

(4) in the course of the submissions in February, the bench had suggested that the parties might consider certain agreements or undertakings on the basis of which the litigation then pending in the District Court (namely, the interim injunction inquiry and the trial) might continue, during the pendency of the appeal in this Court, and that upon the Petitioners not agreeing to any such adjustment, the order made on 28.2.96 incorporated all those suggestions; and thereby that order caused vexation to the Petitioners.

Learned Counsel for the Petitioners tried to brush aside the unanimous decision of a bench of five Judges in *de Silva v Fernandopulle*, with the single sweeping submission that the Court having held that an application for review must be considered by the same bench, nevertheless went on to review, at great length, the impugned judgment on the merits, and then dismissed that application. It is unfortunate that the following observations of Amerasinghe, J., in the course of a careful and comprehensive judgment, seem to have escaped Counsel's attention:

"the course of action we take in the extraordinary circumstances of this case should not be regarded as a precedent for departing from the rule established by practice. An exception confirms the rule."

Amerasinghe, J. found that there were no grounds for holding that there were circumstances which brought the impugned decision within the scope of the inherent powers of this Court. It was in these circumstances that the matter was not referred to the original bench. It is wholly unjustifiable now to ask that the exception be treated as being the rule, particularly where the circumstances are anything but extraordinary. Indeed, what is extraordinary in this case is the way in which the circumstances have somehow conspired to delay the decision of the substantive questions.

Moosajees v Fernando does not assist the Petitioners at all. There a bench of five judges made an order upon a preliminary question of jurisdiction in certain writ applications; that order did not result in a final order (allowing or dismissing the applications); at a later stage in those applications, a differently constituted bench (one of the original five Judges not being conveniently available) reviewed the earlier order, in view of the "unique circumstance" that in the meantime the error of the former order was manifested by an intervening decision of the Privy Council (in *Liyanage v The Queen.*[3]) The proceedings had not attained finality - because a decree disposing of the applications had not been entered. Here the proceedings in the special leave application had attained finality on 28.2.96; the only matter which arose in that proceeding had been finally determined; and nothing more was required to give that order finality. Learned Counsel argued, however, that the appellate jurisdiction of this Court also extended to the consideration of the application for leave, and that until the appeal is finally determined, the order granting leave can be reviewed. Leave to appeal to the Supreme Court can be granted either by the Court of Appeal under Article 128(1) or by this Court under Article 128(2). Counsel argued that when the Court of Appeal granted leave, it did so in the exercise of its appellate jurisdiction. But that seems misconceived. Under Article 138 the appellate jurisdiction of the Court of Appeal is to correct errors by inferior Courts. When it grants leave, it does not purport to correct errors either of inferior Courts or of its own. Obtaining leave is a condition precedent to invoking the appellate jurisdiction of this Court, and the grant of leave only involves considering whether the matter is fit for review. It is thus distinct from the appellate jurisdiction of the Court of Appeal. In the same way, when the Supreme Court grants leave under Article 128(2), it exercises a jurisdiction which is anterior to and distinct from its appellate jurisdiction. The proceedings in respect of leave are thus distinct from the appeal itself. In any event, even if in a broader sense they can loosely be regarded as being part of the appellate jurisdiction, yet it has two distinct stages, involving two distinct issues: the first is whether leave ought to be granted, and that depends on whether the question is important enough to merit adjudication by the highest Court, and the second is, at the appeal stage, to find the right answer to that question. Thus it may happen that even if this Court thinks that probably the question raised must be answered adversely to the petitioner, yet the Court may grant leave

because it is in the public interest that that question should be finally and authoritatively decided by this Court. The Petitioners' application for special leave to appeal was concluded on 28.2.96, and hence could not be referred under Article 132 to a "fuller bench".

In elaborating the Petitioner's third contention, learned Counsel seized the opportunity to attack the Plaintiff, calling him a self-confessed fraud and a wrongdoer in control of the company. He may be right or wrong, but the only issue before the Court was whether there was a substantive question of law involved; whether the Court of Appeal had the power to stay all further proceedings in the District Court, including the interim injunction inquiry and the trial. Obviously, there was; neither in the first application for review nor in the second did Counsel dispute that. Having granted special leave to appeal on that question, the Court had then to decide what was to happen in the meantime should the District Court proceedings be stalled. Should the *status quo* immediately prior to the institution of the District Court action be maintained ? On 21.3.96 we set down at length our reasons for making our order of 28.2.96, and learned Counsel had not said a word about those reasons. Not only are his allegations against the Plaintiff irrelevant but if they were relevant, reference must have been made to them in the board minutes relating to his removal. When we pointed out that these had not been produced, Counsel insisted that they had. However, after taking time to peruse the voluminous brief, he had to confess that they had not been made available to any of the three Courts which dealt with this case. In any event, by allowing the District Court proceedings to continue this Court ensured that the serious questions which arose (some of which we mentioned in our order of 21.3.96) would receive a speedy determination, instead of being delayed interminably, pending proceedings in this Court and in the Court of Appeal. Further the interim order which we made was to be of short duration, and would cease to be operative when the District Court made order in the interim injunction inquiry.

As for Counsel's complaint about suggestions for settlement, those were not in respect of the grant of special leave. They were made in order to ascertain whether, if special leave was granted, whether the parties could agree on how best to ensure the expeditious disposal of the inquiry and the trial, and to minimise the possible prejudice to all parties in the meantime. Our suggestions to consider whether inquiry

and trial could be taken up together (in order to avoid duplication of proceedings), and possibly dealt with wholly or mainly on documents, were not accepted. Our order neither required such consolidation nor excluded oral proceedings. Further, our order modified the District Court enjoining order by excluding restraints on the removal of the Plaintiff from the post of Chairman and on the 2nd Defendant functioning as a director. Thus it is quite incorrect to say that those suggestions were wholly incorporated in the order. In any event, making those suggestions did not in any way prejudice the Petitioners, and learned Counsel conceded that if the other ground on which review was sought failed, this ground did not suffice.

To sum up, the first part of the order which the Petitioners seek to review for the second time, permits and requires the District Court to decide (and not to delay) the important questions of law which all parties concede are involved in the action. The second part of the order, review of which the Petitioners now seek (although they did not in March 1996) merely permits the *status quo* to prevail until the interim injunction inquiry is over. Although asserting that that order was wrong, Counsel made no effort to show in what respect our reasoning was faulty. Thus there was no ground for the second application for review. The application for special leave was finally concluded when the order of 28.2.96 was made, and it cannot now be reopened before another bench or be referred by his Lordship the Chief Justice to a "fuller bench". It has been duly listed before this bench, and no ground for review has been established. Indeed, the present application for review is wholly without merit. The change in position after the first application, and the attempt to bring in extraneous and irrelevant matters, lead to the conclusion that it was also a misuse of the process of this Court, and there is cause for the complaint of learned President's Counsel on behalf of the Plaintiff, that his client has been unduly and unfairly vexed thereby.

The application is dismissed, with costs in a sum of Rs. 20,000/- payable by the Petitioners to the Plaintiff.

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Application dismissed.