STATE GRAPHITE CORPORATION
V.
FERNANDO

SUPREME COURT
SAMARAKOON, C.J., WANASUNDERA, J., AND WIMALARATNE, J.
SC. 87/81; CA (LA) 75/81; CA 1182/80
AUGUST 5, 1982

Appeal – Leave to appeal – Supreme Court Rules 1978 – Rules 4,8,18,20 & 24 – Leave granted without other side being heard – Civil Procedure Code, Section 763.

Held –

The Court of Appeal can dispense with a hearing in granting leave *ex mero motu*. In other cases where a party wishes to be heard or the issues involved are such that the Court ought not to make an order without hearing a party affected, a proper hearing and determination of the application would generally require a hearing however summary or brief that hearing may be.

The Bench which gave leave being the same Bench that gave the judgment was fully conversant with the facts. It cannot be said that the exercise of the jurisdiction of the Court was arbitrary.

Cases referred to:

(1) *Edward v. de Silva (1945) 46 N.L.R. 342.*
(2) *Wimalasekera v. Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd. (1955) 58 N.L.R. 298.*

PRELIMINARY OBJECTION against order granting leave to appeal.

N. Sinnatamby with *A. Cooray* for petitioner-appellant.

H.W. Jayewardene, Q.C., with *H.L.de Silva, S.A.*, and *L.C. Seneviratne* for 2nd respondent.

Cur.adv.vult.

August 16, 1982

WANASUNDERA, J.

Counsel for the 2nd respondent has taken a preliminary objection to the hearing of this appeal, which purports to come before us with the leave of the Court of Appeal. He contends that the Court of Appeal lacked the necessary jurisdiction to grant leave to appeal in this matter as the court made its decision without hearing the 2nd respondent and this was a violation of a mandatory requirement under the rules.

The application for leave to appeal was made in respect of a judgment of the Court of Appeal in a petition filed by the present

appellant for a mandate in the nature of a Writ of Certiorari. That petition was refused by the Court of Appeal on the 8th of October 1981. Thereafter, on the 19th of October 1981, the appellant filed the application for leave to appeal. The two respondents before us were named as respondents in that application. This application for leave to appeal had been listed for hearing on 28th October 1981 and was supported by counsel on that date. Counsel for appellant stated that on a direction given by court, the matter was postponed for the 30th of October 1981 to enable counsel to formulate the grounds of appeal on which leave was being sought. When the matter thereafter came up on the 30th of October 1981, the Court granted leave to appeal. It would be seen from what had transpired that the respondents were neither noticed to appear in court nor given a hearing before the court granted leave to appeal.

Mr. H.L. de Silva, who appeared for the 2nd respondent, invited our attention to the provisions of rule 20 of the Supreme Court Rules 1978 and submitted that the rule required the grant of a hearing to the respondent and this was the condition precedent to the court acquiring jurisdiction to make a valid order. He submitted that this failure to comply with this requirement rendered the order, made by the Court of Appeal granting leave, null and void.

Mr. de Silva relied on two decisions, namely *Edward v. De Silva*, (1), and *Wimalasekera v. Parakrama Samudra Co-operative Agricultural Production and Sales Society, Ltd.*, (2), in support of his proposition. These decisions relate to the interpretation of section 763 of the Civil Procedure Code which allows the execution of a decree by the lower court even when the judgment-debtor has filed an appeal.

The decisions are to the effect that the failure to make the judgment-debtor a party respondent in such execution proceedings renders a judgment or order made by the court a nullity.

These decisions appear to be based on the principle that once an appeal is filed in an action, which has been concluded in a lower court, the lower court ceases to have any further jurisdiction over the case and the lower court must maintain the case in *statu quo* until a decision is made by the appellate tribunal. But a provision like section 763 allows the lower court to execute the decree notwithstanding the appeal, and this may tend to impinge on the powers of the appellate tribunal. However, such a provision has been

narrowly interpreted, so as not to derogate from the powers of the appellate tribunal, and has been regarded as vesting only a limited jurisdiction. Section 763 has therefore been interpreted strictly confining the lower court to the exact provisions of the section. In *Edward v. De Silva* (1), Soertsz, J., observed:

> " .... the Legislature continued the jurisdiction, that is to say, the competency of the Court as the Court appointed to try and determine the case, beyond its ordinary limits, but it took care to see, as it almost invariably does, that its jurisdiction, in the sense of its power to act, and of its correct action are made dependent on the observance of rules of procedure. Some of these rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence."

The matter before us deals with a different situation. It relates to the process of filing an appeal and deals with that preliminary stage before an appeal is actually lodged in the Supreme Court. Articles 127 and 128 of the Constitution, which provide for the right of appeal to the Supreme Court, reposes a portion of that power in the Court of Appeal itself. The exercise of that power by the Court of Appeal does not impinge on the jurisdiction of the Supreme Court and the issues that arose in the cases relied on by Mr. de Silva do not arise for consideration here.

There are also other differences between the rules of the Supreme Court and section 763. As Mr. Sinnatamby rightly pointed out, section 763 not only prescribes that the judgment-debtor should be made a party to the execution proceedings, but goes on to indicate, in no uncertain terms, that the respondent should also be given the opportunity of being heard. The words "on sufficient cause being shown by the appellant" is indicative of this. Incidentally, in the two reported cases the applications did not even name the execution-debtor as a party unlike the present application.

A closer scrutiny of the rules reveals further differences. It seems to me that the scheme formulated in the rules intended to leave an area of discretion to the Court of Appeal in regard to the procedure that should be followed in granting leave. The Court of Appeal is

empowered to grant leave *ex mero motu* and this could be done at any time within a period of 14 days from the date of the judgment or order. It was conceded by counsel that the Court of Appeal need not give a hearing to the parties if it chooses to exercise this power.

Rule 22 allows the court to entertain an oral motion for leave to appeal, though this could be done only at the time the court delivers the final order or judgment. If a party is not present on that occasion, it would still be within the powers of the court to grant leave, although a necessary party may not have been heard. Mr. de Silva however submitted that a party who is absent on the date the judgment is delivered would not have a right to complain, because he had denied himself the opportunity of being heard, owing to his own default. But if the scheme of the rules required that an adverse or interested party must be heard before the court could make a legally effective order, then it is somewhat surprising to see that a matter of such significance and importance does not find a place in the rules and has to be gathered by implication, as Mr. de Silva sought to do. In this connection Mr. Sinnatamby drew our attention to the parallel provisions dealing with the grant of Special Leave by the Supreme Court contained in rules 4 and 8. Rule 4 is identical with rule 20 relied on by Mr. de Silva. Rule 4, however, is supplemented by rule 8 and this rule expressly enjoins the Registrar, Supreme Court, to "forthwith give to the respondent notice of the making of such application." Why is there a deliberate omission of a corresponding provision in respect of applications for leave in the Court of Appeal? The answer is to be found in rule 24.

This rule is peculiar to these provisions and somewhat unique in its operation. It is worded as follows:-

> "24. Upon an application for leave to appeal being filed, the Court of Appeal may give such directions and direct such steps to be taken, as to it may seem meet for a proper hearing and determination of such application."

This provision was clearly intended to free the Court of Appeal from technicalities and to give it a certain amount of flexibility and discretion in dealing with applications for leave to appeal. I need hardly emphasise that such a discretion must be exercised justly and fairly and within the perspective within which it was intended to operate.

In the present case the judgment in the writ application was delivered after argument lasting nine days. The judgment was writtent by Soza, J. with whom H.A.G. de Silva, J. agreed. It was not pronounced and delivered by the same bench. It was pronounced on 8th October 1981 by another bench. Counsel for the appellant stated that, in those circumstances, the appellant could not have made an oral application for leave to appeal. A written application for leave to appeal had been filed on the 19th of October 1981. It contained the names of the present respondents as respondents to the application. It was supported in court by counsel on the 28th of October 1981 before Soza, J. and H.A.G. de Silva, J. The Court had then directed that the matter be fixed for the 30th of October 1981 before the same bench, as the court desired counsel for the applicant to formulate the grounds of appeal. When the matter came up on the 30th of October 1981, the court granted the appellant leave to appeal. The order of Soza, J. with H.A.G. de Silva, J. agreeing, embodies eleven points of law which the Court of Appeal considered "substantial enough to justify ..... granting leave to appeal to the Supreme Court". The bench which gave leave was the same bench that gave the judgment and was fully conversant with the case. It would be observed that the matter had proceeded according to the directions given by the court, and as far as the appellant was concerned he had complied with express requirements of the law.

As far as the record goes, the non-issue of notice on the respondents seems consistent with the view that the court had formed the opinion that such notice was unnecessary. There is a presumption as regards the regularity of official acts.

The Court of Appeal can dispense with a hearing on granting leave *ex mero motu*. In other cases it seems to me where a party wishes to be heard, or the issues involved are such that the court ought not to make an order without hearing and determination of the application would generally require a hearing however summary or brief that hearing may be. Considering the large discretion vested in the court, it is doubtful whether an omission in this respect will affect the jurisdiction of the court rather than constitute a wrongful exercise of a discretion. I am unable to say that the exercise of discretion in this case has been arbitrary.

I also find that the 2nd respondent may not be shut out from raising any issue of a decisive nature, which he may have intended

to raise before the Court of Appeal even at this stage, but if substantial prejudice has been caused to the respondent, this court would have given him relief.

On the facts of this case, therefore, I see no useful purpose in sending this matter back to the Court of Appeal to enable the 2nd respondent to be given a hearing. In these circumstances the preliminary objection is overruled and I leave the question of costs of this proceeding to which the appellant is entitled to be taken into consideration when the court gives it final judgment in this appeal.

SAMARAKOON, C.J. – I agree.
WIMALARATNE, J. – I agree.
Preliminary objection overruled.