GEORGE STUART & CO. LTD.
v
LANKEM TEA & RUBBER PLANTATIONS LTD.

SUPREME COURT
BANDARANAYAKE, J.
EDUSSURIYA, J. AND
YAPA, J.
SC (CHC) LA NO 12/2002
HC (ARB) NO. 773/2001
JUNE 25, NOVEMBER 7 AND DECEMBER 23 AND 17, 2003

Arbitration – Act, No. 11 of 1995 – Order of the High Court under section 31 of the Act for enforcement of award – Leave to appeal from the order of the High Court under section 37 – Time of application for leave from the High Court.

On the application of the respondent, the High Court of Colombo by its order dated 1.3.2002 made under section 31 of the Arbitration Act, allowed the enforcement of the arbitral award made in favour of the respondent. An application was made by the petitioner on 18.6.2002 (108 days after the order of 1.3.2002) for leave to appeal to the Supreme Court under section 37 of the Act.

Held:

1. In the absence of provision in section 37, or a rule under section 43 of the Act prescribing time to seek leave to appeal, the application for leave to appeal should be made within a reasonable time. An application made 108 days after the order of the High Court is unreasonable.

Cases referred to:

1. *Mahaweli Authority of Sri Lanka* v *United Agency Construction (Pvt) Ltd.* – (2002) 1 Sri L R 08

2. *Billimoria* v *Minister of Lands and Land Development* – (1978-79-80) 1 Sri LR 10
3. *Ganeshanatham* v *Vivienne Gunawardene and others* – (1984) 1 Sri LR 319
4. *Jeyaraj Fernandopulle* v *Premachandra de Silva and others* (1996) 1 Sri LR 70
5. *Young* v *Bristol Aeroplane Co. Ltd* – (1994) 2 ALL ER 293
6. *GTE Directories Lanka (Pvt) Ltd* v *Mukthar Marikkar and another* – (1998) 2 Sri LR 180
7. *Morelle Ltd* v *Makeling* – (1955) ALL ER 708

APPLICATION for leave to appeal from the order of the High Court

K. Kang-Iswaran. P.C. with *Anil Tittawela* and *Avindra Rodrigo* for petitioners

Romesh de Silva P.C. with *Harsha Amarasekera* for respondent

Cur.adv.vult

January 29, 2004

SHIRANI BANDARANAYAKE, J.

The claimant-respondent-petitioner (hereinafter referred to as the petitioner) entered into a Management Agreement with the respondent-petitioner-respondent (hereinafter referred to as the respondent) on 04.09.1995. By the said Agreement, it was agreed that the management fees for the period specified in the said agreement should accrue to the then current shareholders of the petitioner company. Upon the respondent failing to comply with the conditions of the said agreement, the petitioner as provided by Clause 23 of the said Agreement invoked the Arbitration Clause. The Arbitration Tribunal held on 15.02.2000, that the alleged dispute cannot constitute the subject matter of the proceedings before it and any finding in relation to substantive questions covered by the other issues would serve no purpose as they are outside their jurisdiction. The Arbitration Tribunal made an award against the petitioner and he was directed to pay Rs. 750,000/- to the respondent as costs of Arbitration. The petitioner thereafter instituted action in the District Court of Colombo against the respondent seeking to set aside the award of the Arbitration Tribunal and for a declaration that there exists a valid and subsisting agreement to arbitration. The matter is still pending before the District Court of Colombo.

Meanwhile the respondent by petition dated 14.02.2001, instituted proceedings in the High Court of Colombo seeking to have the award made by the Arbitral Tribunal dated 15.02.2000, enforced under section 31(1) of the Act. The High Court made order on 01.03.2002 holding that the respondent is entitled to recover the sum of Rs. 750,000/- as awarded by the Arbitral Tribunal and further ordered the petitioner to pay the respondent a sum of Rs. 15,000/- as costs.

Being aggrieved by the order of the High Court, the petitioner sought leave to appeal from this Court.

When the learned President's Counsel for the petitioner sought to support the application for leave to appeal, a preliminary objection was raised on behalf of the respondent that this application was out of time and therefore it should be rejected.

It is common ground that the order of the High Court was made on 01.03.2002 and that the petitioner filed this application on 18.06.2002, which is 108 days after the said order.

Learned President's Counsel for the respondent relied on the decision of this Court in *Mahaweli Authority of Sri Lanka* v *United Agency Construction (Pvt) Ltd*[1]. In the said case the application for leave to appeal from the judgment of the High Court to the Supreme Court was made 55 days after the order of the High Court and this Court held that the period of 55 days taken by the petitioner to file this application for leave to appeal cannot be considered as reasonable.

Learned President's Counsel for the petitioner however submitted that the said decision in case of *Mahaweli Authority of Sri Lanka* (*supra*) was given per incuriam and therefore cannot be taken as an authority which has laid down the time period within which an appeal from an order of the High Court should be lodged in the Supreme Court.

Regard to this matter learned President's Counsel for the petitioner cited the decisions in *Billimoria* v *Minister of Lands and Land Development and Mahaweli Development*[2], *Ganeshanantham* v *Vivienne Goonawardene and three others*[3], *Jeyaraj Fernandopulle* v *Premachandra de Silva and others*[4]. He also referred to two Classes of decisions regarded as *per incuriam*. As pointed out by Greene, M.R in *Young* v *Bristol Aeroplane Co. Ltd*[5] and referred to

in the decision in *Billimoria* (*supra*) the two Classes of decisions are:-

(i) a decision in ignorance of a previous decision of its own Court or of a Court of co-ordinate jurisdiction covering the case; and

(ii) a decision in ignorance of a decision of a higher Court covering the case which binds the lower Court,

Learned President's Counsel for the petitioner relied on the decision in *GTE Directories Lanka (Pvt) Ltd* v *Mukthar Marikkar and another*(6) where the question arose as to the time limit within which an appeal should be lodged under the Code of Intellectual Property Act, No. 52 of 1979. This Act does not provide a time limit within an appeal should be lodged in the District Court in terms of section 182 of the Act. In the District Court, a preliminary objection was taken that the appeal should be dismissed as it has not been filed within a reasonable time. The Supreme Court, setting aside the order of the District Court and the judgment of the Court of Appeal held that an appeal under section 182 of the Code of Intellectual Property Act could be filed within 3 years of the decision of the Registrar. Referring to the judgment, in *GTE Directories Lanka (Pvt) Ltd (supra)* learned President's Counsel for the petitioner contended that, in the said case, the Court had held that, when the law does not prescribe an appealable period, the provisions of section 10 of the prescription Ordinance would apply and that an appeal could therefore be made within a period of 3 years.

Learned President's Counsel for the petitioner also took up the position that the right of appeal under section 37 of the Arbitration Act is a vested right and such a vested right cannot be taken away or restricted unless it is expressly and unambiguously provided by statute. It was submitted that when the Supreme Court is conferred with powers to make rules in respect of practice and procedure relating to appeals to the Supreme Court, any limitations with regard to such matters relating to appeals could only be prescribed by express and unambiguous rules made in compliance with the procedure provided for making such Rules in terms of Article 136 of the Constitution.

He submitted that no such Rules were made by the Supreme Court in terms of Article 136 of the Constitution and section 43 of the Arbitration Act prescribing a time frame within which an application for leave to appeal should be made to the Supreme Court under section 37 of the Arbitration Act. It was contended on behalf of the petitioner that considering the procedure laid down in Article 136 of the Constitution, the Court cannot formulate such Rules by applying the doctrine of reasonable time.

Furthermore, learned President's Counsel for the petitioner submitted that denial of litigant's vested right of appeal is violative of his constitutional right under Article 12(1) which has been enacted for the purpose of upholding the Rule of Law and granting such protection under the law.

Finally, it was contended that although the Arbitration Act does not provide for an appealable time frame from an order of the High Court to the Supreme Court, section 31(1) provides that a party may within one year and after the expiry of fourteen days of the making of an award apply to the High Court for the enforcement of the award. It was therefore submitted that, in view of section 31(1) of the Arbitration Act, that a reasonable time should not exceed a period of 42 days cannot be maintained.

Admittedly, the Arbitration Act, No. 11 of 1995, does not stipulate a time frame in respect of application for leave to appeal.

Section 31(1) of the Act provides for an application for the enforcement of the award and section 32(1) provides for an application to be made for setting aside the arbitral award. Under section 37(1) an application has to be made within one year after the expiry of fourteen days of the making of an award whereas in terms of section 32(1) an application for setting aside an arbitral award can be made within 60 days of the award being made.

The contention of the learned President's Counsel for the petitioner was that, as provision has been made for a period of one year to make an application for the enforcement of the award, it would not be reasonable to limit the time frame to make an application for leave to appeal to 42 days.

Section 31(1), as pointed out earlier deals only with the enforcement of an award. An arbitrator's award, is different to an order or a

judgment of a Court, as it does not immediately entitle the successful party to take action for execution against the assets of the unsuccessful party. Prior to taking such action on the award, the successful party must take steps to convert the award into a judgment or an order of Court. It is only thereafter that the successful party would be entitled to commence execution. Therefore it would be necessary to have a long time span for both parties to take necessary action after the pronouncement of an arbitral award.

An appeal on the other hand is made by a party who is dissatisfied with the decision made by the arbitrator. In such circumstances, an appeal cannot wait until the enforcement of award is made and must be made at the earliest possible instance so as to avoid undue delay. In a situation where no such time frame is specified in the Act, it would be necessary to refer to the Supreme Court Rules in order to ascertain the requirements in filing a leave to appeal application. As contended quite correctly by the learned President's Counsel for the petitioner there are no Rules pertaining to leave to appeal applications from an order of the High Court to the Supreme Court. Although in terms of section 43 of the Arbitration Act, the Supreme Court could make such Rules regulating the practice and procedure of the Court, it cannot be taken as a mandatory requirement that such Rules be made by the Supreme Court. Section 43 of the Arbitration Act only sets out that the Supreme Court 'may' make Rules. Moreover, Article 136(1) of the Constitution which refers to Rules of the Supreme Court reads thus,

> "Subject to the provision of the Constitution and of any law, the Chief Justice with any three Judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and the procedure of the Court....."

It is to be remembered that direct applications for leave to appeal from the High Court to the Supreme Court came into being only after the 13th amendment to the Constitution was enacted providing for the establishment of High Courts of the Provinces.

Prior to the enactment of the Arbitration Act and the establishment of the High Courts of the Provinces, leave to appeal applications form the Court of Appeal to the Supreme Court followed the procedure laid down in terms of the Rules of the Supreme Court. Accordingly when

a leave to appeal application is made to the Supreme Court, Rule 19(3) provides that it may be made in terms of Rule 7 of the Supreme Court Rules 1990. Rule 7 is the following terms.

> "Every such application shall be made within **six weeks** for the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought (emphasis added)."

When no provision is made in the relevant Act, specifying the time frame in which an application for leave to appeal be made to the Supreme Court and simultaneously when there are Rules providing for such situations, the appropriate procedure would be to follow the current Rules which govern the leave to appeal application to the Supreme Court. Consequently such an application would have to be filed within 42 days from the date of the award.

Learned President's Counsel for the petitioner strenuously argued that the Court could not take away a vested right and that it was only a matter for the legislature to take such action. His position was that the Court has no power to take away by way of interpretation the right of appeal given to a party.

On the other hand, learned President's Counsel for the respondent quite correctly pointed out that the contention of the petitioner is based on a wrong premise. His position was that there is no such 'vested right' as in an appeal, as it is necessary 'to obtain leave' initially from the Supreme Court.

Section 37(1) of the Arbitration Act refers to appeals from any order, judgment or decree of the High Court to the Supreme Court. This section specifies that an appeal or revision shall be in respect of any order, judgment or decree of the High Court subject to the provisions of sub-section 2 of section 37 of the Act. Section 37(2) of the Act in the following terms:

> "An appeal shall lie from an order, judgment or decree of the High Court referred to in sub-section (1) to the Supreme Court only on a question of law and **with the leave of the Supreme Court first obtained** (emphasis added)".

Accordingly there is no vested right of appeal as such, and mak-

ing an application for leave to appeal cannot be regarded as a right of appeal given to the petitioner as he has to first obtain leave of the Supreme Court. Furthermore, even if a petitioner has a right of appeal, it is a necessary requirement that such an application be made within the prescribed period. For instance, a person who alleges that his fundamental rights guaranteed in terms of the Constitution have been violated, he must come before Court within such prescribed period. In a situation where such period has lapsed, the petitioner cannot be heard to say that as he had a vested right of coming before the Court on the alleged violation of his fundamental rights, that his petition should be entertained even beyond the prescribed period.

In such circumstances, whether there is a vested right or not, it would be necessary to exercise such a right within the prescribed period.

Learned President's Counsel for the petitioner took up the position that the decision in *Mahaweli Authority of Sri Lanka (supra)* was made *per incuriam*.

What makes a decision per incuriam was discussed in detail, as mentioned earlier, in *Billimoria* v *Minister of Lands (supra)*. In that decision, Samarakoon, CJ. had cited the observations of the Court in *Morelle Ltd* v *Wakeling*[7] in the following terms:

> "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong...."

Considering the decision in *Mahaweli Authority of Sri Lanka (supra)* it is obvious that it does not come within the scope discussed in *Morelle's case* or within the scope of *Young* v *Bristol Aeroplane Co. Ltd. (supra)*. A close scrutiny of the said decision clearly shows that it is not a judgment, which was given in ignorance of a previous decision of this Court or any other Court. The decision in *Mahaweli Authority of Sri Lanka (supra)* had discussed all the relevant provisions governing the matter and further there is nothing to indicate

that there was ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on this Court. Accordingly, I am unable to agree with the submission of learned President's Counsel for the petitioner that the decision in *Mahaweli Authority of Sri Lanka (supra)* was given *per incuriam.*

There are two other points I wish to make before I part from this judgment.

Firstly, it was pointed out by learned President' s Counsel for the respondent that if the contention of the petitioner is upheld, there is not time limit for an application for leave to appeal to be lodged, then such an application could even be made after 10 years from the date of the order of the High Court. While endorsing the contention of the learned President's Counsel for the respondent I wish to add further that such a situation would lead to an absurdity in that, the party who was successful in the High Court in the action for the enforcement of the award, will have to wait for an unknown period not knowing whether there would be a leave to appeal application made by the other party to the Supreme Court. Such a situation would lead to an absurd system, where it would not be possible for the Arbitration Act to work as stipulated. It is a well-known fundamental rule that any interpretation given to a statute must not lead to absurdity that would direct the smooth functioning of a system in to chaos.

Secondly, the decision in *Mahaweli Authority of Sri Lanka* (*supra*) was decided on 12.12.2001 and the order of the High Court in the petitioner's case was made on 01.03.2002. By the time the said order of the High Court was made, the Supreme Court had decided that an application for leave to appeal from the High Court has to be made within 42 days of the date of the order of the High Court. Therefore the petitioner had sufficient notice of the time limit to make an application for leave to appeal from the High Court to the Supreme Court and sufficient notice to comply with the said decision if he wanted to do so.

For the aforementioned reasons, I uphold the preliminary objection raised, and reject this application for leave to appeal.

There will be no costs.

EDUSSURIYA, J. – I agree.

YAPA, J. – I agree.

Application dismissed.