

CADERAMANPULLE
v.
CEYLON PAPER SACKS LTD
(Case No 1)

COURT OF APPEAL
UDALAGAMA, J.
NANAYAKKARA, J.
C.A.L.A. 136/2001
D.C. COLOMBO 5386/SPL
MAY 11TH, 18TH, 2001

Writ pending appeal - Allowed - Is the order an Interlocutory Order? Failure to comply with Supreme Court Rules - Certified copies of documents not tendered - Is it fatal? Supreme Court Rules 3(1)(b) - Revision and Restitutio in integrum.

Held :

- (i) Application to execute writ pending appeal is special procedure. It is incidental to the principle object of the action. The rights of parties have not been finally disposed of. It is an interlocutory order.
- (ii) It is manifest that while the compliance of the S. C. Rules is mandatory discretion is granted to Court to consider default. In the instant case no application was forthcoming to consider the party's default. Violation of S. C. Rules is fatal to this application.

APPLICATION for Leave to Appeal from an order of the District Court of Colombo.

Cases referred to :

1. *Attorney-General v. Wilson Silva* - CA 18/81
2. *Kiriwanthe and another v. Navaratna and another* - 1990 2 SLR 393
3. *Paramanathan v. Kodithuwakku Aratchi* - 1988 - 1 SLR 315
4. *Koralage v. Mohamed* - 1988 - 2 SLR 299
5. C.A.L.A. 57/99 - D.C. Matale case No. 223/L
6. C.A.L.A. 205/99 - D.C. Kandy case No. 11165/P - CAM 26. 1. 2000
7. C.A.L.A. 293/2000 - D.C. Colombo 18783/99/L
8. C.A.L.A. 88/99 - D.C. Negombo case No. 5603/L
9. *Vivien Perera v. Shani Perera* - C.A.L.A. 335/2000 - D.C. Mt. Lavinia 729/95/D

S. Mahenthiran P.C., with Nihal Fernando, Nigel Bartholomeusz and Buddhika Illangattilaka for Petitioner.

Wijedasa Rajapakse, P.C., with Kapila Liyanagamage for Respondent.

Cur. adv. vult.

May 22, 2001.

UDALAGAMA, J.

The respondent-company filed this action under Chapter xxiv of the Civil Procedure Code in the District Court of Colombo bearing number 5386/Spl., seeking a cancellation of certain Caveat alleged to have been filed by the petitioner and for damages.

The matter been supported on 22. 07. 99 by Counsel for the respondent-company, Court entered order Nisi and set 27. 08. 99 a period of approximately one month to enable the petitioner to show cause against the said order being made absolute. Vide Journal Entry dated 27. 08. 99 it appears that the order Nisi had been duly served by the Fiscal on the petitioner. The petitioner not been present and no cause having been shown the order had been made absolute in accordance with the provisions of section 333 of the Civil Procedure Code. Although the petitioner denies that process was served on him there appears to be no reason to reject the report of the Fiscal on the ground as alleged by the petitioner to have been a "concocted report". It is apparent from the Journal Entry of 19. 10. 99 that the petitioner had moved under section 389 of the Civil Procedure Code to set aside the above order absolute entered on 27. 08. 99, and further that the court had fixed the matter for inquiry on 28. 10. 99. The petitioner been absent on the due date his application to set aside the order of 27. 08. 99 had been rejected. There appears to be no reason for the court to have acted otherwise.

This order is in appeal.

Pending appeal the respondent had moved to execute writ which application had been allowed by the learned District

Judge on 30.04.2001. It is from this order that the petitioner seeks leave to appeal.

When this matter was taken up for argument learned President's Counsel for the respondent raised two preliminary objections to the application of the petitioner. They are namely, (1) that the petitioner had no right of leave to appeal. (2) That due to the failure on the part of the petitioner to comply with the Supreme Court Rules and forward certified copies of documents his application be rejected. In respect of the preliminary objection No.1, I find that the basis on which the learned President's Counsel for the respondent states that the petition should be dismissed in limine is that the impugned order is not an interlocutory order.

I disagree.

Applications to execute writ pending appeal is special procedure. It is incidental to the principle object of the action. The rights of parties have not been finally disposed of. The interpretation to the word, "order" in section 754(5) of the Civil Procedure Code is self explanatory. In the circumstances this preliminary objection is rejected.

In respect of objection No. (2) it is conceded that only a certified copy of the impugned order is filed. It is apparent that the petitioner had not set out in his petition or in his affidavit any reason for his inability to file the necessary certified copies (if that was the case) or that he would tender them in due course. No attempt to comply with section 759(2) of the Civil Procedure Code and cure the default had even been pursued.

In the case of *Attorney General v. Wilson Silva*⁽¹⁾, Justice Grero dealing with Rule 46 which had a similar requirement to wit "the petition shall be accompanied by originals of documents material to the case or duly certified copies thereto" observed that the petitioner in that case had not given any reason as to

why he was not able to submit the originals or certified copies of the order and the evidence of witnesses and that no attempt was made to tender them subsequently and proceeded to hold that there was a violation of the provisions of the Supreme Court Rules which was fatal to the application and upheld the preliminary objection and dismissed that application.

In *Kiriwanthe and another v. Nawaratna and another*⁽²⁾, which decision is referred to by the learned President's Counsel for the petitioner as a watershed in judicial thinking, Fernando J. who considered the matter of compliance of the Supreme Court Rules (46) held that the weight of authority favours the view that while the Rules must be complied with, and non compliance does not require or permit an automatic dismissal of the application or appeal of the party in default. His Lordship further held that the reason of impossibility to comply is a matter falling within the discretion of court to be exercised after considering the nature of the default as well as the excuse or explanation of such default.

Thus it is manifest that while the compliance of the S.C., Rules is mandatory, discretion is granted to court to consider default.

However, in the instant case no application was forthcoming to consider the party's default. The petitioner has nowhere in the affidavit stated that due to reasons beyond his control or for that matter due to any reason that he was prevented from obtaining the necessary certified copies in time and that the shortfall would be rectified later. For the court to consider the reasonableness of his plea, the plea itself should be made. In the absence of an initial plea same cannot be possibly considered. In *Paramanathan v. Kodituwakku Aratchi*⁽³⁾, Bandaranayake J. Held "that such deficiency can be made good later."

In *Koralage v. Mohamed*⁽⁴⁾, a revision application was dismissed on both grounds of merit and non compliance of the S.C. Rules when there was neither subsequent compliance nor an explanation for non compliance.

However, in the instant case, as stated earlier, no reason whatever had been forthcoming as to non compliance of the S.C. Rules. It is evident from the record that no attempt to tender certified copies even after the party was notified of the preliminary objection had been made. The contention of the learned President's Counsel for the petitioner in his written submissions appears to be that the impugned order was made on 30. 04. 2001 and that a number of special holidays intervened and that the petitioner was unable to secure a large number of certified copies. But this fact is not stated by the petitioner in his petition or in his affidavit. He was well entitled to state these facts and expect the indulgence of court to tender the copies on a subsequent date in which event the court could have used its discretion and in all probability granted relief. But the initial application itself was not made for the court even to consider it. Further this application need necessarily be made in the petition and affidavit of the petitioner to enable the respondent to be notified of such application. Such statement in the motion accompanying the petition and or for that matter in the written submissions would not suffice. As for the submission of the learned President's Counsel for the petitioner that no judicial dicta stating that in an application for leave to appeal certified copies of proceedings or pleadings need be filed, I would refer learned Counsel to recent decision of this court which clearly contradicts his stance.

In *C.A.L.A. 57/99⁽⁵⁾* where photo copies of original documents were tendered the application for leave was rejected.

In *C.A.L.A. 205/99⁽⁶⁾* Edussuriya J. held as follows:- "It has been decided often by this Court that compliance of Rule 3(1) is imperative and further in the event of the petitioner not been able to obtain the copies within the prescribed 14 days period that the petitioner should state in his petition and affidavit that he was unable to obtain such certified copies and he would do so in due course."

On the petitioner's default the preliminary objections were upheld and the application was dismissed.

Following the above dicta Jayasinghe J. in *C.A.L.A. 293/2000*⁽⁷⁾ dismissed an application for revision on the same preliminary objection.

In *C.A.L.A. 88/99*⁽⁸⁾ on a similar preliminary objection of non compliance of S.C. Rules 1 had on 01. 08. 2000 upheld the objection and rejected leave.

In *Vivien Perera v. Shant Perera*⁽⁹⁾ on a similar objection I had occasion to once again refuse leave to appeal.

More importantly in the matter of an application for Special Leave to the Supreme Court in case No. S. C. Spl. L. A. 34/2001 leave to appeal against the above said order of this court bearing No. 205/99 (Supra) was refused and dismissed confirming the judgment of Justice Edussuriya referred to above.

The weight of authority thus favours the mandatory nature of the S.C. Rules and that they must be complied with although the consequence of non compliance could fall within the discretion of court to be exercised considering the nature of the default together with any explanation. In the instant case the absence of any plea as to the impossibility in obtaining the necessary certified copies the need to exercise discretion would not arise. Although the contention of the learned President's Counsel for the petitioner seems to be that the certified copies of the impugned order filed would suffice and if and when leave is granted the court would be possessed with the documents filed in the original court, this submission is untenable as even to grant leave this court must necessarily have before it all relevant pleadings and other documents filed of record in the original court.

As I observed in *Vivian Perera v. Shant Perera* referred to above the impugned order flows from proceedings had in the lower court. Impliedly those proceedings must be filed in compliance with the S.C., Rules. The petitioner has no choice as it is this court that decides which documents are necessary for consideration.

The learned President's Counsel for the petitioner also contended that provisions in respect of Rule 3(1)(b) did not call for certified copies and that Rule 3(1)(b) refers to revision and Restitutio in Integrum. However, it must be noted that there is no time limit for revision and Restitutio in Integrum although applications for leave to appeal necessarily had to be filed within 14 days. Hence the reason why the court is given a discretion to consider in appropriate circumstances the non compliance. However, both rules provide for application to be made "in a like manner".

In the circumstance I would reject the submission of the learned President's Counsel for the petitioner contained in his written submissions that "objections pertaining to certified copies is a baseless objection not warranted by Statute or case law and hold that the violation of S.C. Rules is fatal to this application and I would uphold the second preliminary objection of the respondent and refuse leave to appeal with costs fixed at Rs. 10000/-.

However, in view of the provisions of section 763 of the Civil Procedure Code and considering the circumstances of this case and the need to meet the ends of justice, execution pending appeal will be granted to the respondent on security fixed at Rupees 35 Million in cash or by way of Bank guarantee. The said security to be deposited in the District Court to be given for the restitution of any property which may be taken in execution and for due performance of the decree of the Court of Appeal.

NANAYAKKARA, J. - I agree.

Leave to appeal refused.

Execution pending appeal granted on security fixed at Rupees 35 million.