

MAHAWELI AUTHORITY OF SRI LANKA
v.
UNITED AGENCY CONSTRUCTION (PVT) LTD

SUPREME COURT
WADUGODAPITIYA, J.
EDUSSURIYA, J. AND
YAPA, J.
SC (LA) NO. 23/2001
PROVINCIAL HIGH COURT
NOS. HC/ARB/390/99 AND
HC/ARB/478/2000
SEPTEMBER 25, 2001

Appeal – Appeal to the Supreme Court from an order of the High Court under section 37 of the Arbitration Act, No. 11 1995 – Time to apply for leave to appeal.

An Award had been made in favour of the respondent on 4th October, 1999. The High Court made an order allowing enforcement of the Award on 18th May, 2001 pursuant to an application made by the respondent in terms of section 31 (1) of the Arbitration Act, No. 11 of 1995. The petitioner sought leave to appeal to the Supreme Court from the order of the High Court, in terms of section 37 (2) of the Act. The Counsel for the respondent raised a preliminary objection that the application had been filed 55 days after the order of the High Court and was, therefore, out of time.

Held:

In the absence of any provision prescribing the time for an application for leave to appeal under section 37 (2) or any rule made by the Supreme Court under section 43 of the Act, the petitioner should make his application within a reasonable period; and 55 days from the order of the High Court cannot, in all the circumstances, be considered to be a reasonable period.

APPLICATION for leave to appeal from the judgment of the Provincial High Court.

Nihal Jayamanne, PC with Ananadalal Nanayakkara for petitioner.

Wijayadasa Rajapakse, PC with S. D. Yogendra for respondent.

Cur. adv. vult.

December 12, 2001.

EDUSSURIYA, J.

An arbitral award had been made in favour of the respondent to the present application on 4th October, 1999. Thereafter, on 3rd December, 1999, the present petitioner had made an application to the High Court to have the arbitral award set aside. 1

The respondent had made an application to the High Court for enforcement of the arbitral award on the same day. The High Court had pronounced its order allowing enforcement of the arbitral award on 18th May, 2001. The petitioner then made the present application for leave to appeal from the order of the High Court to this Court on 12th July, 2001. 10

Learned President's Counsel for the respondent raised a preliminary objection that the application for leave to appeal has been filed 55 days after the order of the High Court and is therefore out of time and should be rejected by this Court.

Learned President's Counsel for the respondent has submitted that according to Rule 7 of the Rules made by the Supreme Court the time limit prescribed even for special leave to appeal is 42 days from an order or judgment of the Court of Appeal.

Learned President's Counsel for the respondent submitted that in terms of section 41 a decree entered under section 31 (6) is deemed to be a decree entered under the Civil Procedure Code and on that premise went on to contend that any appeal lodged from such a decree should comply with the provisions of section 756 of the Civil Procedure Code as section 37 (2) of the Arbitration Act sets out that an appeal from an order of the High Court is available only with the leave of the Supreme Court, and therefore an application for leave to the Supreme Court should be filed within 14 days of the pronouncement of the High Court order or judgment. 20

Learned President's Counsel for the respondent contended that an application for leave should be made to the Supreme Court, ³⁰ in any event, within 42 days of the pronouncement of the judgment or order of the High Court.

The first contention that an application for leave to appeal must comply with section 756 of the Civil Procedure Code is not tenable, inasmuch as section 41 of the Arbitration Act only refers to the mode of execution of a decree entered by the High Court under the Arbitration Act and cannot be extended to include the provisions relating to appeals in the Civil Procedure Code. Besides, section 756 relates to appeals to the Court of Appeal from judgments or orders ⁴⁰ of the District Court.

Learned President's Counsel for the petitioner contended that no rules had been made by the Supreme Court under section 43 of the Arbitration Act although it was mandatory that rules should be made and therefore, in the absence of rules prescribing the period within which an application for leave to the Supreme Court should be filed, any such application for leave which is filed within a reasonable period should be entertained by the Supreme Court. Learned counsel also submitted that Rule 7 referred to applications for special leave from judgments or orders of the Court of Appeal and as such had no applicability to applications for leave to appeal under section 37 (2) ⁵⁰ of the Arbitration Act.

Learned President's Counsel for the petitioner also contended that in arriving at "a reasonable period" for leave to appeal to the Supreme Court, this Court should take into consideration the fact that a period of 60 days of the receipt of the award has been prescribed by section 32 of the Arbitration Act as the period within which an application to set aside an arbitral award should be made to the High Court. Learned counsel further contended that Court should also bear in mind that a party in whose favour an award had been made should apply to the High Court within one year of the date of ⁶⁰

the award, and on that premise submitted that in deciding what length of time is reasonable, that too should be taken into consideration.

Firstly, it must be said that section 43 of the the Arbitration Act does not make it mandatory for the Supreme Court to make rules. Section 43 only sets out that the Supreme Court *may* make rules.

I fail to see how the period within which a party in whose favour an award has been made may apply for enforcement to the High Court, has any bearing on the question of what is a reasonable period within which an application for leave to appeal to the Supreme Court should be made from an order of the High Court.

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Learned President's Counsel was heard to contend that inasmuch as a period of sixty days of the receipt of the award was provided by section 32 to make an application to have such award set aside, a reasonable period within which an application for leave to appeal to the Supreme Court from an order of the High Court should exceed sixty days.

It would be helpful in deciding this question to examine the rules made by the Supreme Court relating to appeals from the Court of Appeal.

The rules provide for a party seeking leave to appeal from a judgment or order of the Court of Appeal to the Supreme Court to apply to the Court of Appeal for such leave on a substantial question of law *within twenty-one (21) days* since the Court of Appeal must make an order on such an application within twenty-one days or as set out in the proviso to Rule 23 (5) and that if no order is made within that period the application for leave is deemed to have been refused.

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According to the rules a party may apply directly to the Supreme Court for special leave to appeal *within a period of forty-two (42) days*

of the judgment or order of the Court of Appeal. So that it is seen that in providing for a period of forty-two days for presenting an application for special leave the Supreme Court has allowed a party who has been unsuccessful in his application for leave to appeal in the Court of Appeal *a further period of twenty-one days* within which an application for special leave can be made. ⁹⁰

In my view, the clear inference is that the Supreme Court in making the rules did not consider it necessary to go beyond a maximum of forty-two days for making an application for special leave to the Supreme Court. In deciding on these periods within which such applications for leave to appeal should be made we must necessarily conclude that the Supreme Court fixed such periods as it was of the view that such periods were reasonable having regard to all relevant circumstances, and also that the Supreme Court acted reasonably in doing so. In this context, also relevant, would be the question as to whether, in a situation where the appealable period from the Court of Appeal to the Supreme Court is forty-two days, it is conceivable that the appealable period from the High Court to the Supreme Court should be longer? If so, by how many days? ¹⁰⁰

For the above-mentioned reasons I hold that the period of fifty-five days from the date of the order of the High Court taken by the petitioner to file his application for leave to appeal cannot be considered to be a reasonable period and therefore uphold the preliminary objection raised by the learned counsel for the respondent. I, accordingly, reject this application for leave to appeal. ¹¹⁰

The respondent is entitled to costs in a sum of Rs. 2,500.

WADUGODAPITIYA, J. – I agree.

YAPA, J. – I agree.

Application for leave to appeal rejected.