

HYDER ALI
v.
RAJADURAI AND OTHERS

SUPREME COURT.

WANASUNDERA, A.C.J., ATUKORALE, J. AND SENEVIRATNE, J.

S.C. APPEAL No. 37/86 , S.C. LA 53/86, C.A. LA 75/85.

D.C. MT. LAVINIA 1944/RE.

AUGUST 29, 1986.

Appeal—Application for leave to appeal, sections 756 (1) to (7) of Civil Procedure Code—Failure to state reasons for granting leave to appeal, sections 104 and 109 of Civil Procedure Code.

An order by the Court of Appeal without stating its reasons, granting leave to appeal to it from an order made by District Court refusing to dismiss an action for failure to produce a document (sections 104 and 109 C.P.C.) is not an order made in error.

APPLICATION for special leave to appeal from order of the Court of Appeal

K. Shanmugalingam with K. Thevarajah for plaintiffs-appellants.

Dr. H. W. Jayewardene, Q.C. with *M. S. M. Nazeem, P.C.* and *N. Sanoon* for the respondent.

Cur. adv. vult.

November 21, 1986.

SENEVIRATNE, J.

The plaintiffs-respondents-petitioners instituted this action in the District Court of Mt. Lavinia for ejectment of the defendant-petitioner-respondent from premises No. 30, Ridgeway Place, Colombo, in terms of section 22(2) (bb) (ii) of the Rent Act No. 7 of 1972, as amended by Act No. 55 of 1980. The defendant filed answer stating that the plaintiff cannot have and maintain this action under the said provisions of the Rent Act. Thereafter, the case was fixed for trial, and both parties filed their list of witnesses and documents.

After the case was fixed for trial, the defendant made an application under section 104 of the Civil Procedure Code for an order of Court directing the plaintiffs to produce for inspection a listed document to wit—the Birth Certificate of the 2nd plaintiff. The plaintiffs in answer to this application stated that they have applied for a copy of the Birth Certificate listed as a document, and had still not received it. Thereafter the defendant made an application under section 109 of the Civil Procedure Code to have the said action dismissed because the plaintiffs had not complied with the order of the Court to produce the document for inspection.

The above matter was fixed for inquiry and after arguments were heard and written submissions filed, the learned District Judge delivered his Order on 10.7.85, and held that the action cannot be dismissed because the Birth Certificate was not with the plaintiffs, and further ordered that the Birth Certificate should be tendered to the defendant as soon as it was received. Thereafter, on the same day, 10.7.85 the defendant filed papers in the Court of Appeal for leave to appeal to the Court of Appeal from the said Order of 10.7.85. On 21.3.86 the Application for leave to appeal was supported in the Court of Appeal, and the Court of Appeal granted leave making the following order:

"Court is of the view that there is a final matter which should be argued. Leave to appeal is granted. List for argument in due course. Registrar to take steps under section 756(7) of the Civil Procedure Code."

The plaintiffs-respondents-petitioners then made this Application to this Court for special leave to appeal from the order of the Court of Appeal dated 21.3.86. Several grounds have been urged in the Application for special leave to appeal, *inter alia*:-

(a) No reasons have been given by the Court of Appeal for granting leave to appeal, although the plaintiffs opposed the Application for leave to appeal.

(b) The defendant has sought to appeal against the District Judge's Order though "erroneously in favour" of the defendant in order to delay the action.

(c) The Court of Appeal has erred and misdirected itself in granting the leave to appeal. As such the plaintiffs-respondents-petitioners pray:

(a) that special leave to appeal from the order of the Court of Appeal dated 21.3.86 be granted.

(b) that the order of the Court of Appeal of 21.3.86 be set aside.

(c) make order that the record be sent back to the District Court of Mount Lavinia and to fix the case for trial and to proceed with the trial.

On 16.7.86 this court has granted special leave to appeal and the appeal has now come before this court for hearing.

The ground specially urged in this appeal was that the Court of Appeal did not give any reasons for granting leave to appeal. As such this court has to consider section 756 of the Civil Procedure Code, which provides for an Application for leave to appeal. Sections 756(1)–(7) which deals with "procedure in respect of appeal and application for leave to appeal" (marginal note section 756(1)), do not provide that the Court of Appeal when it grants an application for leave to appeal must give its reasons. On the contrary there is a proviso to section 756(5)(b) "provided that when an application is rejected under this sub-section the court shall record the reasons for such rejection". This proviso shows, that this section 756 has purposely not provided for giving the reasons when a leave to appeal application is allowed. In any case on a consideration of the order of the Court of Appeal dated 21.3.86 granting leave to appeal there is a reason given for that order to wit—"Court is of the view that there is a final matter which should be argued". This statement seems to suggest that in the view of the Court of Appeal what was involved is a matter of some substance, for if the lower court had decided the matter the other way, it would have had the effect of finally disposing of the matter.

Learned Queen's Counsel for the respondent has opposed this appeal urging that section 756 has only provided that reasons be given if the leave to appeal application is refused; leave to appeal having been granted by the Court of Appeal, there is now an appeal pending in the Court of Appeal; only that court can dispose of the pending appeal, and if this court hears this appeal, this court will be deciding an appeal which is already pending in the Court of Appeal. Learned President's Counsel submitted that as regards the ground urged by the petitioners that the application for leave to appeal to the Court of Appeal had been made by the defendant-respondent to delay the tenancy action, the plaintiffs-petitioners can move the Court of Appeal for acceleration of the hearing of the appeal, and that the defendant-respondent will not oppose such an application.

While we do not propose at this stage to make any pronouncement touching on the merits of the issue before the Court of Appeal, we are unable to say that the Court of Appeal erred when it granted leave to the defendant-respondent. I therefore dismiss this appeal with costs.

WANASUNDERA, J.—I agree.

ATUKORALE, J.—I agree.

Application dismissed.