

DALUWATTE AND ANOTHER
v.
KARIYAWASAM AND OTHERS

COURT OF APPEAL
UDALAGAMA, J., AND
NANAYAKKARA, J.
CALA NO. 164/2001
DC GALLE NO. 5666/SPL
JUNE 20 AND 21, 2001

Leave to appeal application – Application to dismiss action – Not pleaded – Is it fatal?

Held :

- (1) Perusing the various parts of the petition it is clear that at the commencement of the petition itself the application is for leave to appeal. In the circumstances, by no stretch of imagination could the respondent be deemed to have been misled as to the type of application that has been filed.
- (2) As regards the absence from the petition of a prayer to dismiss the application the objection is premature and in any case such relief would be forthcoming only from the original court and not from an appellate Court.

Romesh de Silva, PC with *Nihal Fernando* and *Shamil Perera* for defendant-petitioner.

Wijedasa Rajapakse, PC with *G. G. Arulpragasam* and *Kapila Liyanagama* for plaintiff.

APPLICATION for Leave to Appeal.

Cur. adv. vult.

June 27, 2001

UDALAGAMA, J.

When this matter came up before this Court on 20. 06. 2001, 1
Mr. Wijedasa Rajapakse, PC, Counsel who appeared for the respondent
submitted two preliminary objections to the application, (1) that the
relief claimed had not been properly pleaded, and (2) although the
petitioner sought to vary the order dated 10. 05. 2001 that no application
to dismiss the action in the original court had been pleaded.
Subsequently, on 21. 06. 2001 Mr. Mustapha, PC also appearing for
another respondent while supporting the application of Mr. Wijedasa
Rajapakse brought to the notice of Court the fact that the petitioner
not having prayed in the prayer of his petition for leave to appeal 10
that this Court was precluded from granting relief not asked for.
Mr. Mustapha also referred us to the provisions in the Constitution
whereby the word "proceed" was used in fundamental rights applications
and distinguished same from a leave to appeal application, where in
the origin of the former itself was the Supreme Court and leave to
proceed was a preliminary step and that leave to appeal from a lower
Court must necessarily denote such application and that the word
"proceed" in a leave to appeal application is faulty and cannot be
corrected as there was no prayer for leave to appeal. 20

Perusing the various parts of the petition it is clear that at the
commencement of the petition itself the application is for leave
to appeal against the order of the learned District Judge dated
10. 05. 2001. Paragraph 22 of the said petition is also as clear and
thereby too, in no uncertain terms the application is one to appeal
to this Court with leave first obtained.

In the circumstances by no stretch of imagination could the
respondent be deemed to have been misled as to the type of application
that has been filed in this Court. No prejudice could have been caused
to the respondent when the word "proceed" has been inserted in prayer 30

(A) of the petitioner's prayer when, in fact it should have been the word "appeal", as the intention of the petitioner is clear, I am unable to agree with the learned Counsel that the said omission could not be corrected or that due to the absence of the said word "appeal" that there is no proper relief claimed from this Court.

As regards the second objection, namely the absence from the petition of a prayer to dismiss the main application, I am of the view that the relevant objection pleaded before this Court is premature and in any case such relief would be forthcoming only from the original court and not from an appellate Court.

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In the above circumstances both the preliminary objections are overruled and the matter is fixed for inquiry into leave.

NANAYAKKARA, J. – I agree.

Preliminary objection overruled. Matter set down for inquiry.