

**SAMANTHA KUMARA****VS.****MANOHARI**

SUPREME COURT.

S.N. SILVA, C. J.

FERNANDO, J.

AMARATUNGA, J.

SC 44/2005.

HC KALUTARA NO. 118/2003.

MC MATUGAMA NO. 13390.

MARCH 13, 2006.

MARCH 24, 2006.

*High Court of the Provinces Act, No. 19 of 1990, section 9 – Maintenance Act, No. 37 of 1999, section 14(2) – Maintenance Ordinance, No. 19 of 1889–Maintenance Ordinance, No. 13 of 1925 - Constitution Article 138–Article-154P 3(b)-13th Amendment – Appeal from the High Court – Applicability of Rules of Supreme Court 1990 – Procedure.*

**HELD:**

- (1) The 13th amendment to the Constitution which came into force on 14.11.1987 by Article 154P(3)(b) vested the High Court of the Provinces with jurisdiction in respect of orders made by the Magistrates.
- (2) The present Maintenance Act section 14 specifically provided for an appeal to the Provincial High Court and from there to the Supreme Court with the leave of the Supreme Court and when such leave is refused with special leave of the Supreme Court first had and obtained.
- (3) Supreme Court Rules of 1990 have categorized appeals to the Supreme Court into three groups. The instant appeal falls into the category of other appeals Part 1C.

*Per Raja Fernando, J.*

“When the appeal is with leave of the High Court then Supreme Court Rules under Part 1C applies; if the appeal is with special leave of the Supreme Court, then rules under Part 1A shall apply.”

- (4) In determining the time for an aggrieved party to lodge an application for special leave to appeal – when no time is fixed by statute or Rules - the time frame is 42 days.
- (5) Following the same reasoning the time frame for a petitioner to file an appeal from a High Court order is 42 days from the date leave to appeal is granted by the High Court.
- (6) According to Rule 28(2) every such petition of appeal when leave is granted by the High Court shall be lodged at the Supreme Court Registry not in the Registry of the High Court.
- (7) The appellant should also tender a notice of appeal with his petition of appeal-Rule 28(3).

**HELD FURTHER:**

- (7) The petition of appeal has been filed in the Registry of the High Court Kalutara contrary to Rule 28(2).
- (8) The appellant has also failed to comply with Rule 28(3) which required the appellant to tender with his petition of appeal the notice of appeal.

**APPEAL** from an order of the High Court, Kalutara on a preliminary objection raised.

*Cases referred to :*

1. *Tea Small Holders Ltd., vs. Weragoda* 1994 3 Sri LR 353
2. *Mahaweli Authority of Sri Lanka vs. United Agency Corporation (Pvt) Ltd.* 2002 1 Sri LR 8

*D. Amarasekera* for petitioner.

*Rohan Sahabandu* with *Athula Perera* for respondent.

June 15, 2006.

**RAJA FERNANDO J.**

The applicant Respondent-Respondent, hereinafter referred to as the Respondent instituted action No. 13390 (Maintenance) on 6th July 2000 in the Magistrate's Court of Mathugama claiming maintenance from the Respondent-Appellant-Appellant (hereinafter referred to as the Appellant) for the child born out of wedlock.

The learned Magistrate by his order dated 17.12.2002 ordered the Respondent to pay a sum of Rs. 750 per month as maintenance for the child.

Being aggrieved by this order the appellant appealed to the High Court under Article 154 P of the Constitution read with section 14 of the Maintenance Act, No. 37 of 1999, and the High Court dismissed the appeal on 10.03.2005.

The Appellant thereafter sought leave to appeal to the Supreme Court in terms of section 14(2) of Act, No. 37 of 1999 read with section 9 of Act, No. 19 of 1990 from the High Court and leave was granted by the High Court on 06.06.2005.

After leave to appeal to the Supreme Court has been granted by the High Court on 06.06.2005 the appellant on 13.06.2005 has filed a petition of appeal addressed to the Supreme Court in the Registry of the High Court.

When the matter came up before this Court counsel for the Respondent took up a preliminary objection that the Petition of Appeal has not been filed in terms of the Rules after the High Court granted leave.

Written submissions of both parties were filed on 24.03.2006.

It was the position of the respondent that the Petition of Appeal has been filed out of time and that the Petition of Appeal ought to have been filed in the Supreme Court whereas the appellant has lodged the petition in the High Court and therefore there is no valid appeal before Court.

Under the old Maintenance Ordinance No. 19 of 1889 as amended by Act, No. 13 of 1925 an appeal from the order under the Maintenance

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Ordinance was to the then Supreme Court and the procedure was the same as if the order was by the Magistrate in a criminal case. (Vide section 17 of the Maintenance Ordinance No. 19 of 1889).

In 1978 with the new Constitution when the Court of Appeal was established. Article 138 vested the Court of Appeal with appellate jurisdiction in respect of orders made by courts of first instance, resulting in all appeals under the Maintenance Ordinance which hitherto came to the Supreme Court being directed to the Court of Appeal.

The 13th Amendment to the Constitution which came into force on 14.11.1987 by Article 154 P 3(b) vested the High Court of the Province with jurisdiction in respect of orders made by the Magistrate.

The present Maintenance Act, No. 37 of 1999 repealed the Maintenance Ordinance and Section 14 specifically provides for an appeal to the Provincial High Court and from there to the Supreme Court with the leave of the High Court and when such leave is refused with the Special Leave of the Supreme Court first had and obtained. (vide Section 14 of Act, No. 37 of 1999).

The Appellant in this case has in terms of section 14 of the Maintenance Act, No. 37 of 1999 read with Article 154 P 3 (b) of the Constitution made an appeal to the High Court of the Province. He has obtained leave to appeal to this Court from the High Court.

The Appellant has thereafter filed a petition of appeal addressed to the Supreme Court in the registry of the High Court.

This procedure is being challenged by the Respondent as being contrary to the Supreme Court Rules of 1990.

The Appellant submits that no Rules exist at present governing appeals from the Provincial High Court to the Supreme Court and there is no default on his part.

Supreme Court Rules of 1990 have categorised Appeals to the Supreme Court into three groups:

Part 1A – Appeals with special leave obtained from the Supreme Court

Part 1B – Appeals with leave to appeal from the Court of Appeal

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### Part 1C – Other appeals

Part 1C – Rule 28 of the Supreme Court rules read as follows :

**“(1) Save as otherwise specifically provided by Parliament, the provisions of the rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other court or Tribunal”**

The present Appeal is neither with special leave from the Supreme Court nor with leave of the Court of Appeal but with leave from the High Court. Therefore the instant appeal clearly falls into the category of other appeals and hence rules in Part 1C dealing with other appeals would apply.

The position of the Appellant that there are no rules governing appeals from the Provincial High Court to the Supreme Court is therefore incorrect.

An appeal to the Supreme Court from an order of the Provincial High Court can be either with the leave of the Provincial High Court or with special leave obtained from the Supreme Court upon a refusal of leave by the High Court.

If the appeal is with leave of the High Court then Supreme Court rules under Part 1C (other appeals) shall apply; if the appeal is with special leave of the Supreme Court then Supreme Court rules under Part 1A (special leave to appeal) shall apply *mutatis mutandis* since Rule 2 relates to every application for special leave to appeal.....”

As regards the procedure in the instant case the rules applicable to other Appeals in Part 1C of the Supreme Court rules shall apply.

A question arises in fixing the time within which the Appeal is to be filed in the Supreme Court for the reason that the Rules are silent on the matter.

In determining the time for an aggrieved party to lodge an application for special leave to the Supreme Court where no time is fixed either in the statute or the rules; this Court has in the case of *Tea Small Holders Limited vs. Weragoda* <sup>(1)</sup> and in the case of *Mahaweli Authority of Sri Lanka vs. United Agency Construction (Pvt.) Ltd.* <sup>(2)</sup> held that the Petitioner

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should make his application within a reasonable time, and relying on the time period prescribed in the rules for similar applications has held that 42 days is reasonable time.

Following the same reasoning I am of the view that the time frame for a petitioner to file an appeal should be 42 days from the date leave to appeal is granted by the High Court.

Coming to the preliminary objection with regard to the place of filing of the appeal papers after having obtained leave from the High Court; Part 1C (other appeals) is clear in its provisions as to the papers that need to be filed and also the place where it has to be filed.

According to rule 28(2) "every such appeal shall be upon a Petition in that behalf lodged at the Registry" (Supreme Court).

It is undisputed that the petition of appeal has been filed in the Registry of the High Court contrary to the provisions of Rule 28(2) of Supreme Court Rules 1990.

Further the Appellant has failed to comply with rule 28(3) which requires the Appellant to tender with his petition of appeal a notice of appeal.

Therefore I hold that the Appellant is guilty of non-compliance of the Rules and hence the preliminary objection raised by the Respondent must succeed.

Accordingly this appeal of the Appellant is rejected.

The Respondent is entitled to the costs of this application.

Registrar is directed to return the record to the High Court of Kalutara to be forwarded to the Magistrate's Court of Matugama.

**S. N. SILVA C. J.** — *I agree.*

**AMARATUNGA, J.** — *I agree.*

*Appeal rejected.*