

KULATILEKE
V.
KARUNARATNE AND OTHERS

COURT OF APPEAL

A. de Z. GUNAWARDENE, J.

CA L A (SC) NO. 05/89 — C.A. APPLN. NO. 45/82

P. C. WELIMADA NO. 4750

OCTOBER 20, 1989

Revision — Leave to appeal — Article 128(1) of the Constitution — When Court of Appeal will grant leave to appeal to the Supreme Court.

Of the 8 questions of law formulated in the application for leave to appeal, 7 questions did not arise from the judgment of the Court of Appeal, nor were they argued before the Court of Appeal. Only 1 question of law formulated had some relation to the said judgment and there too the question was whether it raised a substantial question of law fit for review by the Supreme Court.

Held

(i) That the Court of Appeal only has power to grant leave to appeal from a "final order, judgment, decree or sentence of the Court of Appeal." The circumstances under which the Supreme Court exercises its jurisdiction to grant special leave to appeal is much wider.

(ii) That the exercise of reviewing facts not argued in the main appeal, in relation to the questions of law raised in the leave to appeal application, is unwarranted, in considering a leave to appeal application.

Cases referred to:

1. *Mohamed Haniffa Rasheed Ali v. Khan Mohamed Ali and another* S. C. No. 6/81, S. C. Minutes of 20/11/81.
2. *Marynonã v. Fransina* [1988] 2 S. L. R. 250.

APPLICATION for leave to appeal to the Supreme Court.
Sanath Jayatilleke for Petitioner, no appearance for Respondents.

November 14, 1989

Cur. adv. vult.

A. DE Z. GUNAWARDENE, J.

This is an application for leave to appeal to the Supreme Court from a judgment of the Court of Appeal, in a revision application which came up before this Court. When the said revision application was taken up for argument, Counsel for the respondents raised a preliminary objection, stating that the petitioner has failed to comply with the mandatory provisions of Rule 46 of the Supreme Court Rules, in that, he had failed to furnish certified copies of some of the orders sought to be revised in the said application. The petitioner in the said application sought to revise 4 orders made by the Primary Court Judge of Welimada dated 31/7/81, 6/11/81, 5/1/82 and 15/1/82 and also an order alleged to have been made by the Registrar of the Court on 19/12/81. However, only the certified copies of the orders made by the Primary Court Judge on 13/7/81 and 6/11/81 have been filed with the petition. When the said preliminary objection was taken, Counsel who appeared for the petitioner abandoned the prayer for the revision of the orders dated 5/1/82, 15/1/82 and 19/12/81, as certified copies of the said orders have not been filed. Since the petitioner has not complied with Rule 46 and not filed the relevant certified copies of the proceedings as required under that rule and had abandoned part of the relief claimed in the petition, the Court of Appeal upheld the said objection raised by the Counsel for the respondent.

In dismissing the said application, Court also noted that it appears from the proceedings that the parties have invited the Primary Court Judge to visit the land and had consented to abide by the order that he would make. Accordingly the Primary Court Judge has inspected the land and gone through the documents and made an appropriate order. This application for leave to appeal is from the said judgment of the Court of Appeal.

The Counsel for the petitioner conceded that, of the 8 questions of law formulated in para. 9 of his petition, 7 questions

do not arise from the judgment of the Court of Appeal nor were they argued before the Court of Appeal. Only the question stated in para. 9(g) appears to have at least some relation to the said judgment. Therefore, the question arises for consideration whether leave to appeal should be granted in such an application.

In Article 128(1) where provision is made for leave to appeal to the Supreme Court to be granted by the Court of Appeal the words used are, "final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law." This in my view restricts the power of the Court of Appeal to grant leave to appeal only where substantial questions of law arises from such, "final order, judgment, decree or sentence." This becomes clear when one examines Article 128(2) where the power of the Supreme Court to grant special leave is dealt with. The amplitude of the provisions there appears to be much wider. The said sub-section provides for special leave to appeal to be granted, "from any final or interlocutory order, judgment, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal." In addition, and importantly, the Supreme Court is vested with the power to grant such special leave "where in the opinion of the Supreme Court, a case or matter is fit for review by the Supreme Court." The words 'case' or 'matter' in my view enlarges the scope of the power of the Supreme Court to grant special leave to appeal even other than from a "final order, judgment, decree or sentence of the Court of Appeal." Furthermore, the proviso to the said article states that the Supreme Court shall grant leave to appeal on every matter of proceedings in which it is satisfied that the question to be decided is of public or general importance." It is therefore seen that the power vested in the Supreme Court to grant special leave to appeal is more extensive than the power granted to the Court of Appeal to permit leave to appeal to the Supreme Court.

Thus it appears from the above analysis that whilst the Court of Appeal only has power to grant leave to appeal from a "final order, judgment, decree or sentence of the Court of Appeal."

The circumstances under which the Supreme Court exercises its jurisdiction to grant special leave to appeal is much wider. In the light of the said interpretation, when one considers the present application of the petitioner, the questions of the law urged by the petitioner not being questions of law arising from the judgment of the Court of Appeal, are therefore beyond the scope of Article 128(1). Hence, the petitioner would not be entitled to obtain leave to appeal to the Supreme Court, from the Court of Appeal.

There is also another aspect that arises from the said questions of law that the petitioner is seeking to canvass before the Supreme Court. Of the said questions, some are questions of mixed fact and law and the Court of Appeal in deciding this application would be required to consider facts in relation to the questions raised in order to decide upon the question whether they are substantial questions of law, fit to be reviewed by the Supreme Court. This exercise of considering facts not argued in the main appeal, in my view, is unwarranted in a leave to appeal application.

In conclusion it must be noted that of the grounds urged as substantial questions of law, the only matter which related, if at all, to the judgment of the Court of Appeal as I stated earlier, is the ground urged in para. 9(g). This relates to the question of non-compliance with Rule 46 of the Supreme Court Rules. It has been held by the Supreme Court, by a majority of the Judges, in the case of *Mohamed Haniffa Rasheed Ali vs. Khan Mohamed Ali and another*⁽¹⁾, that the Rule 46 of the Supreme Court Rules is mandatory. This decision has been followed by the Court of Appeal in the case of *Marynona vs. Fransina*⁽¹⁾. In any event, the non-compliance of Rule 46 is mainly a question of fact. In my view it does not give rise to a question of substantial law which is fit to be reviewed by the Supreme Court. For the above reasons I refuse leave to appeal in this case and dismiss the application.

Leave to appeal refused.

Application dismissed.