

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA

In the matter of an application in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka for punishment for Contempt of Court.

SC Case No. SC Appeal 29/2022
with
SC Case No. SC Appeal 29A/2022
CA Case No. COC 08/2021

A. P. Dilrukshi Dias Wickramasinghe,
No. 377/2, Thalawathugoda Road,
Hokandara South.

PETITIONER

Vs.

1. Jagath Balapatabendi,
Chairman - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla.

2. Indrani Sugathadasa,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

3.V. Sivagnanasothi,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

4. C.R.C. Ruberu,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,

Battaramulla

5. A.L.M. Saleem,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

6. Leelasena Liyanagama,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

7. Dian Gomes,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

8. Dilith Jayaweera,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

9 W.H. Piyadasa,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

10. M.A.B. Daya Senarath,
Secretary - Public Service Commission,
No.177, Nawala Road, Narahenpita,
Colombo 05.

11. Secretary to the Ministry of Justice,
Ministry of Justice,
Colombo 12.

12. Sanjaya Rajaratnam Esq.,
Hon. Attorney General,
No.14/11, Auburn Side,
Dehiwala.

RESPONDENTS

AND NOW BETWEEN

1. Jagath Balapatabendi,
Chairman - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla.

8. Dilith Jayaweera
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

1ST & 8TH RESPONDENT-APPELLANTS

11. Secretary to the Ministry of Justice,
Ministry of Justice,
Colombo 12.

12. Sanjaya Rajaratnam Esqr,
Hon. Attorney General,
No.14/11, Auburn Side,
Dehiwala.

11TH & 12TH RESPONDENT-APPELLANTS

Vs

A. P. Dilrukshi Dias Wickramasinghe
No.377/2, Thalawathugoda Road,
Hokandara South

PETITIONER-RESPONDENT

1. Indrani Sugathadasa,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

2. V. Sivagnanasothi,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

3. C.R.C. Ruberu,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
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4. A.L.M. Saleem,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
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5. Leelasena Liyanagama,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

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No.1200/9, Rajamalwatta Road,
Battaramulla

7. W.H. Piyadasa,
Member - Public Service Commission,

No.1200/9, Rajamalwatta Road,
Battaramulla

8. M.A.. Daya Senarath,
Secretary - Public Service Commission,
No.177, Nawala Road, Narahenpita,
Colombo 05

RESPONDENT- RESPONDENTS

Before: **VIJITH K. MALALGODA PC J**
 P. PADMAN SURASENA J
 ACHALA WENGAPPULI J

Counsel: Faiszer Musthapha PC with Siara Amarasiri for the 1st & 8th
Respondent-Appellants in SC Appeal No. 29A/22.
Nerin Pulle PC. ASG with Medhaka Fernando, SC for the 11th &
12th Respondent-Appellants in SC Appeal No. 29/22.
M.A. Sumanthiran PC with Divya Mascrange for the Petitioner-
Respondent.
Uditha Egalahewa PC with N.K. Ashokbharan instructed by Mr.
Chandrakumar de Silva for the 1st 3rd-8th Respondent-
Respondents in both cases.

Argued on: 17.10.2022

Decided on: 23.02.2023

P Padman Surasena J

The instant matter was instituted before the Court of Appeal by the Petitioner-Respondent by petition dated 5th November 2021. That is a matter filed under Article 105(3) of the Constitution against persons named as Respondents in the Court of Appeal (they will be hereinafter referred to as the Respondents in the Court of Appeal) claiming that the Respondents in the Court of Appeal have defied and blatantly flouted

an order of the Administrative Appeal's Tribunal (AAT) thus praying *inter alia* a determination that the Respondents in the Court of Appeal are guilty of acting in contempt of the Administrative Appeals Tribunal and an order to punish the Respondents in the Court of Appeal for being in contempt of the AAT's order due to their alleged failure to give effect to and/or comply with the said order.

When the matter was taken up before the Court of Appeal, the Respondents in the Court of Appeal raised several preliminary objections urging the application to be dismissed *in limine*. Subsequently the Court of Appeal had heard the learned counsel for all the parties, and then, by order dated 04th April 2022 has overruled the said preliminary objections and has fixed the matter for support.

On the same day, the learned President's Counsel appearing for the 2nd, 4th-7th, 9th and 10th Respondents in the Court of Appeal and the Additional Solicitor General appearing for the 11th and 12th Respondent in the Court of Appeal had sought to make an application under Rule 22 (1) (ii) of the Supreme Court Rules seeking Leave to Appeal to the Supreme Court against the said order of the Court of Appeal.

Accordingly, on 7th April 2022 the learned judges of the Court of Appeal had granted Leave to Appeal to the Supreme Court under Rule 22 of the Supreme Court Rules. This is despite the learned counsel who appeared for the Petitioner at that time itself bringing to the notice of the Court of Appeal of the fact that the order dated 04th April 2022, against which the Court of Appeal was to consider granting Leave to Appeal to the Supreme Court is not a final order. It is on record that the learned counsel who appeared for the Petitioner at that time itself had brought to the notice of Court and relied on The Maharaja Organization Limited vs. Viacom International Inc and Another¹ and Chettiar vs. Chettiar² in support of that argument. The Court of Appeal having recorded this submission, had nevertheless proceeded to grant Leave to Appeal to the Supreme Court against its own order dated 04th April 2022 on the following questions of law holding that '*the order made has flavor of finality*'.

¹ SC CHC Appeal 03/2006 decided on 30th June 2021.

² [2011] 2 SLR 70.

01. Did the Court of Appeal, by its order dated 4th April 2022, in the guise or application, in fact, interpreted the Constitution, thereby exceeding its jurisdiction, and encroached into the sole and exclusive jurisdiction vested on the Supreme Court by Article 125 of the Constitution, to interpret the Constitution, and thereby erred in law?

02. Did the Court of Appeal, by its order dated 4th April 2022, misconstrue the scope of the Contempt of Court jurisdiction vested on the Court of Appeal by the provisions contained in the Constitution, and thereby erred in law?

03. Did the Court of Appeal, by its order dated 4th April 2022, misconstrue the provisions pertaining to Contempt of Court jurisdiction by holding that provisions contained in Article 105(2) not relevant, and thereby erred in law?

04. Did the Court of Appeal, by its order dated 4th April 2022, misconstrue the Administrative Appeals Tribunal as a "tribunal" referred to in Article 105(1)(c) of the Constitution, and thereby erred in law?

05. Did the Court of Appeal, in its order dated 4th April 2022, ignore the fact that the Supreme Court has not interpreted the Administrative Appeals Tribunal to fall within scope of Article 105 of the Constitution, and thereby erred in law?

06. Did the Court of Appeal, in its order dated 4th April 2022, in arriving at its decision, fail/neglect/ignore to consider the submissions of the Respondents pertaining to the placement of Article 59 of the Constitution, within the Constitution, and thereby erred in law?

07. Did the Court of Appeal, in its order dated 4th April 2022, took irrelevant matters into consideration, in arriving at its decision, and thereby erred in law?

As there were two applications before the Court of Appeal for Leave to Appeal to the Supreme Court, one from the learned President's Counsel appearing for the 2nd, 4th-7th, 9th and 10th Respondents in the Court of Appeal and the other from the Additional Solicitor General appearing for the 11th and 12th Respondents in the Court of Appeal seeking Leave to Appeal to the Supreme Court, two numbers i.e., S C. Appeal No. 29A/2022 and S C. Appeal No. 29/2022 have been assigned by the Registry. The

learned counsel for all parties concur that this Court can amalgamate both these matters as the issue to be decided is the same and therefore both matters can be heard together and that it would suffice for this Court to pronounce one judgment in respect of both appeals.

When the matter was taken up for argument before this Court, the learned President's Counsel for the Petitioner-Respondent raised a preliminary objection to the maintainability of this appeal on the basis that there is no lawful appeal before this Court. He relied on Article 128 of the Constitution to show that the Court of Appeal could not have lawfully granted Leave to Appeal to the Supreme Court in this instance.

Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka is as follows.

"127 (1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance."

Article 127 (2) sets out what this Court can do in the exercise of its appellate jurisdiction and therefore the said Article comes into operation only when it considers an appeal lawfully filed before it.

Article 127 (1) has specifically subjected itself to the other provisions of the Constitution. This is clear from the wording "*The Supreme Court shall, subject to the Constitution,..*", found in that Article.

Thus, Article 127 (1) must be read with Article 128 of the Constitution. This is because Article 128 is another provision in the Constitution which has specified several channels through which any appeal can reach this Court. Article 128 of the Constitution as it was then as follows.³

"128 (1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings; (2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.

(3) Any appeal from an order or judgement of the Court of Appeal, made or given in the exercise of its jurisdiction under Article 139, 140, 141, 142 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.

(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament."

³ A new sub paragraph was added as Article 128 (5) by the Twentieth Amendment to the Constitution which was certified on 29th October 2020.

In the instance at hand, it is the Court of Appeal which has granted leave to appeal to the Supreme Court. The Court of Appeal has been conferred with jurisdiction to make orders granting leave to appeal to the Supreme Court only under Article 128 (1) of the Constitution and no other.

Article 128 (2) of the Constitution has also conferred jurisdiction on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. Closer comparison of Article 128 (1) with Article 128 (2) of the Constitution clearly reveals that the jurisdiction conferred by the Constitution on the Court of Appeal to grant leave to appeal to the Supreme Court is a restricted jurisdiction than that conferred on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. This is manifest from the sections themselves. Article 128 (1) has only conferred Court of Appeal with jurisdiction to grant leave to appeal to the Supreme Court only from any final order of the Court of Appeal whereas Article 128 (2) has conferred on the Supreme Court much wider jurisdiction to grant Special Leave to Appeal both from any final or interlocutory order of the Court of Appeal. The fact that Article 128 (2) has included '*from any final or interlocutory order*' and the fact that Article 128 (1) has included only '*any final order*' and had dropped '*or interlocutory order*' is significant. This means that the Court of Appeal has jurisdiction to grant leave to appeal to the Supreme Court only in respect of any final order it has made as per Article 128 (2). This also means that the Court of Appeal has no jurisdiction to grant leave to appeal to the Supreme Court from any interlocutory order it has made. It is only the Supreme Court which has jurisdiction to grant Special Leave to Appeal from any interlocutory order made by the Court of Appeal.

The next question I must decide is whether the order dated 04th April 2022 pronounced by the Court of Appeal is a final or interlocutory order.

the said question was considered by this Court by a bench comprising of 5 judges in the case of Chettiar vs. Chettiar.⁴ In that case Dr. Shirani A. Bandaranayake, J. observed the following.

Therefore to ascertain the nature of the decision made by a civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the

⁴ [2011] 2 SLR 70.

Civil Procedure Code, it would be necessary to follow the test defined by Lord Esher MR in Standard Discount Co. v La Grange (supra) and as stated in Salaman v Warner (supra) which reads as follows:

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

The question was again re visited by a bench constituting 7 judges of this Court in Priyanthi Senanayake vs. Chamika Jayantha⁵ where Priyasath Dep PC J observed the following and arrived at the same conclusion as that of Chettiar vs. Chettiar.⁶ Observations of the Priyasath Dep PC J are as follows.

According to this interpretation section, appeals could be filed in respect of judgments or orders which are final judgements. In respect of other orders which are not final and considered as interlocutory orders leave to appeal applications have to be filed. In view of this definition it appears that judgements fall into two categories.

Similarly, orders also fall into two categories.

(A) Judgements which are final judgements

(B) Judgements which are not final

(C) Orders which are final judgements

(D) Orders which are interlocutory orders

Therefore appeal could be filed in respect of judgements or orders which are final. In respect of other orders leave has to be first obtained. Therefore it appears that finality of the judgement or order that matters and not the name given as judgement or order.

...

⁵ [2017] BLR 74.

⁶[2011] 2 SLR 70.

In order to decide whether a order is a final judgment or not. It is my considered view that the proper approach is the approach adopted by lord Esher in Salaman vs Warner (Supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (supra). It stated:

"If their decision, whichever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

As has already been mentioned above, the learned counsel who appeared for the Petitioner in the Court of Appeal, in addition to the case of and Chettiar vs. Chettiar,⁷ also brought to the attention of the Court of Appeal in resisting the application for Leave to Appeal by the Court of Appeal, the case of Maharaja Organization Limited Vs. Viacom International Inc and Another.⁸

In that case (Maharaja Organization Limited case), His Lordship Samayawardhena J having considered two previous approaches used by our Courts namely the Order Approach and the Application Approach to ascertain the nature of orders given by a court to decide whether an appeal or a leave to appeal lies in a given situation, stated as follows.

"The order approach contemplates only the nature of the order. When taken in isolation, if the order finally disposes of the matter and the parties' rights in litigation without leaving the suit alive, the order is final and a direct/final appeal is the proper remedy against such order.

The application approach contemplates only the nature of the application made to Court, not the order delivered per se. In accordance with this approach, if the order given in one way will finally dispose of the matter in litigation, but if given in the other way will allow the action to continue, the order is not final but interlocutory, in which event, leave to appeal is the proper remedy. In other

⁷ [2011] 2 SLR 70.

⁸ SC CHC Appeal 03/2006 decided on 30th June 2021.

words, according to the application approach, if the order, whichever way it is given, will, if it stands, finally determine the matter in litigation, the order is final. "

Thus, having regard to the nature of the order the Court of Appeal has made in relation to the application made before it requesting it to grant Leave to Appeal in the instant case, shows clearly that the Court of Appeal had failed to appreciate the contents of the judgment in Maharaja Organization Limited case.

Turning to the instant case, the decision dated 4th April 2022 given by the Court of Appeal was merely a decision on the preliminary objections raised by the Respondents. While upholding the objections would have finally dispose the matter in litigation, overruling the objections would have allowed the action to continue. Thus, applying the above test it is clear that the order dated 4th April 2022 given by the Court of Appeal in the instant case is not final but an interlocutory order.

I have already mentioned above that the Court of Appeal has no jurisdiction to grant leave to appeal to the Supreme Court from any interlocutory order it has made and it is only the Supreme Court which has jurisdiction to grant Special Leave to Appeal from any interlocutory order made by the Court of Appeal.

In Martin Vs Wijewardena.⁹ Jameel J (with Ranasinghe CJ and Amerasinghe J agreeing) stated that the right of appeal is a statutory right and must be expressly created and granted by statute. This Court has not granted Special Leave to Appeal from the impugned order (Appellants in the instant case have not applied to this Court for Special Leave to Appeal). The Court of Appeal has acted without any jurisdiction when it had granted Leave to Appeal to the Supreme Court from any interlocutory order. The Court of Appeal in the instant case has exercised a non-existent power. Such exercise of power has no force or avail in law. In the case of Jeyaraj Fernandopulle Vs. Premachandra De Silva and Others,¹⁰ Amerasinghe J stated that "*the Supreme Court is a creature of statute and its powers are statutory.*" Thus, this Court has no power/ jurisdiction to entertain the purported appeals in the instant case.

⁹ [1989] 2 SLR 409.

¹⁰ [1996] 1 SLR 70.

For the above reasons, I have no hesitation in upholding the preliminary objection to the maintainability of this appeal raised by the learned President's Counsel for the Petitioner-Respondent. I hold that there is no lawful appeal before this Court to enable this Court to exercise its jurisdiction conferred on it by Article 127 (2) of the Constitution. These 'appeals' should therefore stand rejected.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC. J.

I agree,

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.

I agree,

JUDGE OF THE SUPREME COURT