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

In the matter of an Appeal in terms of Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the Provisions of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Case No. CA (PHC) 192/2018
P.H.C. Kegalle No. 5411/REV
M.C. Kegalle No. 9861/D/17

Consumer Affairs Authority
1st and 2nd Floor, C. W. E. Secretariat Building,
P. O. Box 1581, No. 27,
Vauxhall Street, Colombo 02.

Plaintiff

Vs.

Atlas Metal Engineering (Private) Limited
No. 571, Kandy Road, Kegalle.
(M. H. M. Ghouse appearing as the Agent)

Respondent

AND BETWEEN

Mohamad Hanifa Mohamad Ghouse
[Owner of Atlas Metal Engineering (Private) Limited at No. No. 571, Kandy Road, Kegalle]
No. 434, Meepitiya, Kegalle.

Respondent-Petitioner

Vs.

1. Hon. Attorney General
   Attorney General's Department, Colombo 12.

   1st Respondent

2. Consumer Affairs Authority
   1st and 2nd Floor, C. W. E. Secretariat Building,
   P. O. Box 1581, No. 27,
   Vauxhall Street, Colombo 02.

   Plaintiff-Respondent

3. M. T. M. Shafi
   No. 54 C, Sirimawo Bandaranayake Mawatha,
   Kandy.

   3rd Respondent

AND BETWEEN

Mohamad Hanifa Mohamad Ghouse
[Owner of Atlas Metal Engineering (Private) Limited at No. No. 571, Kandy Road, Kegalle]
No. 434, Meepitiya, Kegalle.

Respondent-Petitioner-Appellant

Vs.

4. Hon. Attorney General
   Attorney General's Department, Colombo 12.

   1st Respondent-Respondent
5. Consumer Affairs Authority
   1st and 2nd Floor, C. W. E. Secretariat Building,
   P. O. Box 1581, No. 27,
   Vauxhall Street, Colombo 02.

   Plaintiff-Respondent-Respondent
6. M. T. M. Shafi
   No. 54 C, Sirimawo Bandaranayake Mawatha, Kandy.

   3rd Respondent-Respondents

AND NOW BETWEEN

Mohamad Hanifa Mohamad Ghouse
[Owner of Atlas Metal Engineering (Private) Limited at No. No. 571, Kandy Road, Kegalle]
No. 434, Meepitiya, Kegalle.

Respondent-Petitioner-Appellant-Petitioner

Vs.

1. Hon. Attorney General
   Attorney General's Department, Colombo 12.

   1st Respondent-Respondent-Respondent
2. Consumer Affairs Authority
   1st and 2nd Floor, C. W. E. Secretariat Building,
   P. O. Box 1581, No. 27,
   Vauxhall Street, Colombo 02.

   Plaintiff-Respondent-Respondent-Respondent

3. M. T. M. Shafi
No. 54 C, Sirimawo Bandaranayake Mawatha,
Kandy.

3rd Respondent-Respondent-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Sunil Abeyratne for Respondent-Petitioner-Appellant-Petitioner

Nuwan Pieris SC for 1st Respondent-Respondent-Respondent and Plaintiff-Respondent-Respondent-Respondent

Written Submissions tendered on:

Respondent-Petitioner-Appellant-Petitioner on 04.01.2019

1st Respondent-Respondent-Respondent and Plaintiff-Respondent-Respondent-Respondent 09.01.2019

Decided on: 15.10.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 26.09.2018.

The 3rd Respondent-Respondent-Respondent (3rd Respondent) made a complaint to the Plaintiff-Respondent-Respondent-Respondent (Respondent) that although he had paid a sum of Rs. 21,000,000/= to the Respondent-Petitioner-Appellant-Petitioner (Petitioner) to make a spice drying machine, the Petitioner had failed to provide him with such a machine with the required qualities. The Respondent after inquiry had made order directing the Petitioner to return the sum of Rs. 21,000,000/= to the 3rd Respondent.

Thereafter the Respondent acting in terms of section 13(6) of the Consumer Affairs Authority Act complained to the Magistrates Court of Kegalle in case no. 9861/D/17 to recover the said sum of Rs. 21,000,000/= from the Petitioner to the 3rd Respondent.

The learned Magistrate rejected the show cause tendered by the Petitioner and directed him to pay the said sum against which order the Petitioner sought to move in revision to the Provincial

High Court of Sabaragamuwa holden in Kegalle. The learned High Court Judge refused to issue notice and hence the Petitioner filed the above styled appeal to this Court.

While the appeal was pending the Petitioner made an application by way of petition and affidavit to stay the order of the learned Magistrate of Kegalle in case No. 9861/D/17 to pay the said fine before the judgment of the said appeal pending before this Court.

A preliminary objection was raised on whether there is a right of appeal to this Court against the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 26.09.2018.

It is true that the present application arose from the application made by the Petitioner for interim relief. However, the preliminary objection is a matter that must necessarily engage the attention of Court since in *Weerawansha and Others v. Attorney General* and *Others* [(2006) 1 Sri. L. R. 377 at 385] S.N. Silva C.J. stated as follows:

> "In considering the nature and the extent of the interim relief to be granted it is relevant to advert to the criteria generally applicable to the grant of interim relief. The criteria that is generally applicable is to be discerned from the judgments of this Court constituting precedents that date to the judgment in the case of Jinadasa vs. Weerasinghe. The criteria fall under 3 different heads. I would summaries the criteria under the following heads:
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> (i) Prima Facie Case
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> The party seeking interim relief should make out a strong prima facie case of an infringement or imminent infringement of a legal right. That, there is a serious question to be tried in this regard with the probability of such party succeeding in establishing the alleged ground of illegality.
>
> (ii) Balance of Convenience
>
> Under this head the main factor to be considered is the uncompensatable disadvantage or irreparable damage that would result to either party by granting the interim relief or the refusal thereof.
>
> (iii) Equitable Considerations
>
> This involves the consideration of the conduct of the respective parties as warrants the grant of interim relief.

The prima facie test requires the Court to consider whether the Petitioner does have a right of appeal against the impugned order refusing notice.

Article 154P (6) of the Constitution reads:

> *"Subject to the provisions of the Constitution and any law, any person aggrieved by a* ***final order,*** *judgement or sentence* ***of any such Court, in the exercise of its jurisdiction under paragraphs (3)(b)*** *or (3)(c) or (4)* ***may appeal there from to the Court of Appeal in accordance with Article 138****"*

Thus, the right of appeal conferred by this constitutional provision is only in respect of final orders, judgments or sentences imposed by a Provincial High Court exercising either its appellate or revisionary jurisdiction. The question therefore is whether the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 26.09.2018 is a final order, entitling the Petitioner to invoke the appellate jurisdiction of this Court relying on Article 154P (6) of the Constitution.

In Sri Lanka, the method of determining whether an order of a civil court is a final order or interlocutory order had given rise to two conflicting strands of judicial opinion. In *Siriwardena v. Air Ceylon Ltd.* [(1984) 1 Sri L.R. 286] the Supreme Court adopted a test known as the 'order approach' to answer this question. In essence, the test was whether the order of the Court finally disposed of the rights of the parties. If an order did so, it could be regarded as a final order. The rival strand of authority adopted a test known as the 'application approach'.

This approach is succinctly explained in the following judicial statements made in *Salaman v. Warner* [(1891) Q.B. 734]:

> *"I think that the true definition is this.* ***I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined.****"*

The application approach which was initially adopted by a three-judge bench of the Supreme Court in *Ranjit v Kusumawathie* [(1998) 3 Sri L.R. 232], has subsequently been followed in *S.R. Chettiar vs. S.N. Chettiar* [(2011) 2 SLR 70] (5 judge bench) and SC. Appeal No. 41/2015 and SC/CHC Appeal 37/2008 (S.C.M 04.08.2017) (7 judge Bench).

Admittedly, the aforementioned tests have been used to decide whether an order of a court governed by the Civil Procedure Code is a final or interlocutory order. However, in *Patirana v. Goonawardena and others* [CA (PHC) 15/2016, C.A.M 14.07.2016] the application approach was applied by a divisional bench of this court (Dehideniya J. with Walgama J. agreeing) in order to determine whether an order of a Provincial High Court exercising its revisionary jurisdiction against an order of a Primary Court was a final or interlocutory order.

In *Patirana v. Goonawardena and others* (supra) this court had to decide whether an order of a Provincial High Court refusing to issue notice was a final or interlocutory order. This Court observed that the order of the High Court was made upon an application by the petitioner to issue notice on the respondents. It was held that although the order refusing to issue notice on the respondents finally determined the matter, if the High Court decided to issue notice, the matter would not have been finally determined. On this basis, this Court regarded an order refusing to issue notice as an interlocutory order that did not come within the scope of Article 154P (6) of the Constitution.

We are inclined to adopt the approach taken in *Patirana v. Goonawardena and others* (supra) and determine that the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 26.09.2018 is an interlocutory order. If the Court decided to issue notice then the matter needed to be finally determined.

We are fortified in coming to this conclusion having regard to the following unreported decisions as well. In *Neththikumara v. OIC Thalangama Police Station and others* [CA (PHC) APN 21/2016, C.A.M. 2017.08.03], an order of a Provincial High Court refusing to issue notice in the exercise of its revisionary jurisdiction was challenged by invoking the revisionary jurisdiction of this Court. In *Abbas v. Brown and Company PLC* [CA (PHC) APN 77/2015, C.A.M 03.03.2016] a stay order issued by a Provincial High Court – being an order of an interlocutory nature – was challenged before this Court by way of revision.

Accordingly, the Petitioner is not entitled to invoke the appellate jurisdiction of this Court against the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 26.09.2018.

For the foregoing reasons, the appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal