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

In the matter of an Application under Chapter LIII of the Civil Procedure Code.

SC.CHC. Appeal No.19/2009

HC (Civil) No. 74/2002 (1)

Adamjee Lukmanjee & Sons Limited,
No. 140, Grandpass Road,
Colombo 14.

Plaintiff

Vs.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant

And

In the matter of an application under Section 839 read with Section 218 and 343 of the Civil Procedure Code.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant-Judgment-Debtor-Petitioner

Vs.

1. Adamjee Lukmanjee & Sons Ltd.
   No. 140, Grandpass Road,
   Colombo 14.

   Plaintiff-Judgment-Creditor-Respondent

2. Hatton National Bank,
   HNB Towers, No. 479,
   T.B. Jayah Mawatha,
   Colombo 10.

   Respondent

And

In the matter of an application under Section 298 and Section 300 of the Civil Procedure Code.

Adamjee Lukmanjee & Sons Limited,
No. 140, Grandpass Road,
Colombo 14.

Plaintiff-Petitioner

Vs.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant-Respondent

And Now

In the matter of an application for Special Leave to Appeal under Article 128(4) of the Constitution read with Section 5(2) of the High Court of the Province (Special Provisions) Act No. 10 0f 1996.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant-Judgment-Debtor-Petitioner-Appellant

Vs.

1. Adamjee Lukmanjee & Sons Ltd,
   No. 140, Grandpass Road,
   Colombo 14.

   Plaintiff-Judgment Creditor-Respondent-Respondent

2. Hatton National Bank
   HNB Towers, No. 479,
   T.B. Jayah Mawatha,
   Colombo 10.

   Respondent-Respondent

*** * * ***

BEFORE : **Eva Wanasundera, PC.J,**

Sisira J De Abrew,J. &

Sarath de Abrew,J.

COUNSEL : Saliya Pieris, with Palitha Yaggahawita for Defendant-Judgment-Debtor-Petitioner-Appellant.

M. Adamaly with J. Abeysundera for Plaintiff-Judgment-Creditor-Respondent-Respondent.

ARGUED ON : **24-06-2014**

WRITTEN SUBMISSIONS FILED ON THE PRELIMINARY OBJECTIONS : By the Defendant-Judgment-Debtor-Petitioner-Appellant on **22-07-2014.**

By the Plaintiff-Judgment-Creditor-Respondent-Respondent **22-07-2014.**

DECIDED ON : **29-09-2014**

*** * * * ***

Wanasundera, PC.J.

This application before the Supreme Court has arisen from an order of the Commercial High Court of Colombo dated 21.08.2008 in case No. HC. Civil 74/2002(1) to the effect that, the land and house bearing premises No. 28/18, Bauddhaloka Mawatha, Suwarapola, Piliyandala which was seized under a Writ of Execution was not the residential premises of the judgment-Debtor as claimed by him and it cannot be released from seizure under the Writ of Execution, in terms of Section 343(1) of the Civil Procedure Code.

The Writ of Execution was issued on 26.03.2003 for the recovery of the decreed sum of about Rs.3.7 million with interest from 30.11.2001 in default of the consent judgment entered between the parties for the judgment-debtor to pay only Rs.1.85 million in monthly instalments on or before 31.07.2004 to the Judgment-Creditor which the Defendant-Judgment-Debtor-Petitioner-Appellant defaulted by not paying a single instalment as agreed.

Leave to Appeal was granted by the Supreme Court on 18.06.2009 against the order dated 21.08.2008. At the same time, by agreement of parties, the 2nd Respondent, Hatton National Bank was discharged from the Supreme Court proceedings and the journal entry of 18.06.2009 reads thereafter, "**written**

submissions to be filed in terms of the Rules. Hearing is fixed for 24.09.2009". In the said order the questions of law were not specified meaning that all the questions of law as enumerated in the petition were allowed.

Written submissions of the Plaintiff-Judgment- Creditor-Respondent-Respondent (hereinafter referred to as the "Respondent") dated 09.09.2009 was filed on 10.09.2009. A motion dated 09.09.2009 was also filed by the Respondent bringing to the notice of Court that written submissions had not been filed at all even by that date, by the Defendant-Judgment-Debtor-Petitioner-Appellant (hereinafter referred to as the "Appellant"), in terms of the rules of the Supreme Court and as such the Respondent moved that any written submissions by the Appellant should be rejected by Court. The date fixed for hearing was 24.09.2009. The Petitioner had not filed written submissions on that date or before that date. In summary, the Petitioner failed to file written submissions on or before the date fixed for hearing, i.e. 24.09.2009.

On 24.09.2009 hearing was refixed for 11.05.2010 as the Supreme Court Bench that day did not have time to hear the case. The Appellant filed written submissions dated 18.11.2009 on 19.11.2009. The case got postponed many times thereafter till the date it was taken up for argument on 24.06.2014 when a preliminary objection was raised by the Respondent with regard to the Appellant's non-compliance of Supreme Court Rules 30 and 34. Oral submissions of Counsel for both parties were heard and written submissions on this preliminary objection have been tendered to Court.

The Respondent who raised the preliminary objection submitted that,

(a) the Appellant ought to have filed written submissions within 06 weeks from 18.06.2009, ie. on or before 30.07.2009 which he failed to do.

(b) the Appellant had failed up to date to furnish certified copies of documents X1 to X7 in terms of the Supreme Court Rules which he had pleaded in the Petition and undertaken to be filed and this act is further evidence of the failure to prosecute diligently and,

(c) the Appellant's appeal should be dismissed for failure to prosecute diligently disregarding the Supreme Court Rules.

The Appellant objecting to the preliminary objection submitted that,

(a) the present Appeal is not one which is covered by the Supreme Court Rules which deal with Special Leave to Appeal and Leave to Appeal applications from the Court of Appeal (such Court acting as an Appellate Court),

(b) the present Appeal is an Appeal as per the Leave to Appeal procedure found in the Civil Procedure Code when in the course of proceedings an original civil court makes a certain order and

(c) in terms of the latest decisions of the Supreme Court, when written submissions have been filed by the date of the argument and no prejudice has been caused to a party, the failure to file written submissions on the due date is not a ground for rejecting the entire Appeal.

In deciding on this preliminary issue, I would like to firstly consider the first objection taken up by the Appellant to the effect that Supreme Court Rules do not apply to Appeals from the Commercial High Court being an original Court from which the appeal has reached the Supreme Court.

Section 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 provides that **"Every appeal to the Supreme Court and every application to appeal under Section 5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101)"**. It could be understood that the procedure in making an Appeal to the Supreme Court, which means the time limits within which the Appeal or the application for leave should be filed should be in compliance with the provisions in the Civil Procedure Code. The Act No. 10 of 1996, does not intend to do anything touching the Supreme Court Procedure with

regard to hearing of the Appeal. It only provides for procedure from the commencement, i.e. the filing of actions in the High Court to the point it leaves the High Court. An Act of Parliament has to be interpreted within the four corners of the Act. When Act No. 10 of 1996 was enacted, there could not have been any intention in the law-maker's mind to regulate the procedure once the case 'steps out the High Court'. I cannot agree with the contention of the Appellant that when a High Court decision is appealed on, that written submissions need not be filed in the Supreme Court. The moment any case enters the arena of the powers given to the Supreme Court from any forum, whether it is from an original Court or a Court of Appeal, it comes under the wing of the Supreme Court. That is the very basic reason behind the Supreme Court Rules. Regulating the manner in which the Supreme Court hears the case is done by the SC. Rules and no Act of Parliament could ever have intended to have a bearing as to how cases should be heard and the procedure that should be adopted in the Supreme Court. It does not make sense when one tries to differentiate between cases coming to the Supreme Court from another Appellate Court or another original Court. Before reaching the threshold of getting the Supreme Court to hear the case, permission has to be received whether it is a fit matter to be heard by the Supreme Court or not. That is the 'leave' stage. Once leave is granted the case enters the Supreme Court. Once entry is granted, the Rules to be applied cannot be any rules other than the Supreme Court Rules. The argument of the Appellant is untenable.

Secondly I consider the second objection taken up by the Appellant to the effect that the Supreme Court Rules as considered in the latest judgments are in favour of the Appellant in this case. In the instant case, leave was granted and I consider that the Appellant got entry to the Supreme Court to get his case heard on the merits, of course. Then comes the procedure which should be followed if anyone needs to get the Supreme Court to hear the case on its merits.

Rule 34 reads:-

> *"Where an appellant, or a petitioner who has obtained leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application, the Court may, on an application in that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non-prosecution, and the costs of the appeal or application and any security entered into by the appellant shall be dealt with in such* manner as the Court may think fit."

Rule 30(1) reads:-

> *"No party to an appeal shall be entitled to be heard, unless he has previously lodged five copies of his written submissions (hereinafter referred to as "submissions", complying with the provisions of this rule."*

Rule 30(6) reads:-

> *"The appellant shall within six weeks of the grant of special leave to appeal, or leave to appeal, as the case may be lodge his submissions at the Registry and shall forthwith give notice thereof to each respondent by serving on him a copy of such submissions."*

It is obvious that the Appellant has de facto failed to comply with the Rules of the Supreme Court. Yet he contends that the latest judgments are in his favour and thereafter even though filed late, his written submissions be accepted and the case should be heard on the merits.

The recent relevant judgments are ***A.C. Muthappan Chettiar Vs. M.R. Karunanayake and another*** SC. Appeal 69/2003 - reported in BALJ (2005) Vol. X1), ***Tissa Attanayake Vs. Commissioner General of Elections and 27 others*** (SC. Spl, LA. No. 55/2011.- SC. Minutes of 21.07.2011), ***Ananda Dharmasinghe Bandara and Another Vs. Herath Mudiyanselage Leelawathie Menike and Another*** (SC. Appeal 172/2011- SC. minutes of 22.01.2014) and ***Elias Vs.Gajasinghe & another*** (SC. Appeal 50/2008- SC. minutes of

28.06.2011), and ***Fernando Vs. Fernando*** (SC. Appeal 81/2009- SC. Minutes of 30.04.2010).

In the case of ***Muthappan Chettiar Vs. M.R. Karunanayake and another*** (supra), the then Chief Justice Dr. S. Bandaranayake, discussed the applicability of Rule 34 of the Supreme Court Rules of 1990 as follows:-

> "Although the appeal shall not be dismissed for the non-compliance of Rule 30(1) and the effect of such non-compliance would be the non-entitlement to be heard, such non-compliance would attract Rule 34 which clearly states that, an appellant who fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal, the Court would declare the appeal to stand dismissed for non-prosecution".

It was further held that,

> "**Rule 30 of the Supreme Court Rules of 1990 deals with the written submissions that has to be filed prior to the date of the hearing.** Both Rules 30(1) and 30(6) refer to the filing of the written submissions regarding an appeal. Whilst Rule 30(1) refers to the need for filing of such submissions, Rule 30(6) clearly specifies the time period given for the filing of the said written submissions. A careful reading of both Rules indicates that the provisions stated in them are **mandatory**"….
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> "In terms of these two rules, it is **necessary** for the Appellant to file five copies of his written submissions in the Registry and **this has to be carried within six weeks** of the grant of special leave or leave to appeal by this Court. **Also it is necessary that the appellant must take steps to give notice to each respondent of the lodging at the Registry of such submissions by serving on them a copy of his written submissions.** *Therefore the cumulative effect of Rules 30 (1) and Rules 30(6) would be that the Appellant* ***should*** *file five copies of his written submissions within six weeks of the grant of special leave or leave to*

appeal as the case may be, and a copy of such submissions has to be served to the respondent/s notifying of the said submissions."

In the instant case, the Appellant could have moved this Court for further time by way of a motion or by way of an oral request when the case came up before Court or explained why the written submissions were delayed so that this Court could have used its discretion and granted time. Even when written submissions was filed after the due time, the Appellant did neither give any reason for the delay nor mentioned that the written submissions be accepted by Court even though delayed.

In the aforementioned case of ***Muthappan Chettiar Vs. M.R. Karunanayake and another***, Chief Justice Dr. Bandaranayake observed,

> "**The appellant could have moved this Court stating valid and acceptable reasons and sought the leave of the court for further time** to furnish written submissions. However, it is to be borne in mind that the appellant had not sought to exercise the discretion of this Court, **but also had not given any valid reason even belatedly for this Court to consider using its discretion** ".

The rules are in place so that the Supreme Court would function smoothly. This aspect, if totally disregarded would lead to chaos in hearing the cases before the Supreme Court. In ***Tissa Attanayake Vs. Commissioner General of Elections and 27 others*** (supra) case, it was observed that,

> "The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution **cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court**"…. .
>
> "Through a long line of cases decided by this Court, a clear principle has been enumerated that where there is non-compliance with a mandatory

Rule, **serious consideration should be given for such non-compliance as such non-compliance would lead to a serious erosion of well established Court procedure followed by our Courts throughout several decades.**"

Again, in the case of ***Fernando Vs. Sybil Fernando and others*** 1997 3 SLR 1, Justice Dr. A.R.B. Amarasinghe observed "Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly".

In ***Ananda Dharmasinghe Bandara and Another Vs. Herath Mudiyanselage Leelawathie Menike and Another*** (supra) case, this Court over-ruled the preliminary objection of non-compliance with the SC. Rules distinguishing the facts of the case from those in Muthappan Chettiar case. Writing the judgment in Bandara's case, Justice Eva Wanasundera,PC observed that ,

"In this case 6 weeks from 28.10.2011 falls on 09.12.2011 and 12 weeks from 28.10.2011 falls on 13.01.2012. ***The Respondents have in fact filed their written submissions on 16.01.2012, i.e. three days after 13.01.2012.*** *The Appellant has filed his written submissions on 17.01.2012.* ***At the time of granting leave, this Court had fixed the date of hearing of this matter as 26.03.2012. Therefore, written submissions of both parties in fact were filed in Court before the date of hearing.****"*

"In **Annamalai Chettiar Muthappan Chettiar Vs. Mangala Karunanayake and another** SC. Appeal No. 69/2003 - SC Minutes of 06.06.2005, the Appellant had not filed written submissions for 1 year and 4 months after Court granted Special Leave to Appeal on 24.09.2003. **Even when the appeal was taken up for hearing on 17.02.2005, there was no written submissions of the Appellant on record. It was an obvious case on "not prosecuting diligently""**.

> "In the present case, the Appellants did not file the written submissions within 6 weeks according to SC. Rules but filed at the end of 12 weeks begging Court to accept the written submissions mentioning that the delay was due to inadvertence on the part of the Lawyers appearing for the Appellants. The explanation given for the delay is 'inadvertence' of the Lawyer. The meaning of 'inadvertence' according to the Blacks Law Dictionary is, "an accidental oversight" which could be construed as 'an oversight not having occurred as a result of anyone's purposeful act'. The Lawyers have apologetically accepted inadvertence on their part on behalf of the Appellants, in the motion with which the written submissions were submitted. The first date of hearing of the appeal fell on 26.03.2012 and the Appellants filed their written submissions on 17.01.2012 which was more than 2 months prior to the date of hearing. In the instant case, the Respondents are not prejudiced by the Appellant's non-compliance with Rule 30(6) of the SC. Rules, because of the written submissions of the Appellant was filed before Court two months prior to the date of hearing".

In the instant case, from the day that leave was granted and Court ordered that written submissions be filed in terms of the rules, the Appellant knew that he had to file written submissions according to the rules within 06 weeks. That was an order of Court. If he wanted more time he could have filed a motion and got more time at the discretion of Court. He failed to do so. Then at the end of 12 weeks the Respondent filed his written submissions and brought to the notice of Court that the Appellant had not filed the written submissions. Even at that time the Appellant did not give his mind to his failure and did not do anything about it. By the first date of hearing which was 24.09.2009 the written submissions of the Appellant was not before Court nor had he asked for an extension of time to do the same. In fact the Appellant was not ready with the submissions in place for the argument to be taken up on that day. He ran the peril of not being heard by the Supreme Court on 24.09.2009. It may be that he being under the impression that written submission was not necessary to be filed as it was, according to his line of arguments, that he was not bound by the SC. Rules but bound only by

the High Court (Special Provisions) Act No. 10 of 1996 where there is nothing mentioned anything regarding written submissions. He had hardly recognized that he was not complying with an order of Court to file written submissions according to the Rules of the Supreme Court. Having got leave, having come before the Supreme Court, the orders of Court should be complied with, and priviledges should be asked for and received from Court to the benefit of the parties. This Court would have never refused any reasonable request.

In addition to not having filed written submissions according to rules, at the beginning of the case, the Appellant has pleaded in paragraph 13 of the Petition and in paragraph 15 of the Affidavit that he will submit to Court certified copies of documents X1 to X7 which he has failed to do up to date. This fact also adds to due diligence not being taken to prosecute the case. He has not cared for any proper prosecution of his case. Now he cannot be heard to say that no prejudice was caused by not having tendered certified copies of documents. I hold that he has not prosecuted his case properly.

In the circumstances, I uphold the preliminary objection that the Appellant has failed to prosecute the case diligently under the Supreme Court Rules, 1990 and as such I dismiss the appeal. I order no costs.

Judge of the Supreme Court

Sisira J De Abrew,J.

I agree.

Judge of the Supreme Court

Sarath de Abrew,J.

I agree.

Judge of the Supreme Court