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

1. W.A. Fernando,
"Milan Christina",
Thoduwawe South,
Thoduwawe.

2. W.J.E. Fernando,
C/o.K.A. Newton Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya, alpitiya.

3. W.R. Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya

4. W.J.W. Fernando,
"Nuwan",
Thoduwawe North,
Thoduwawe.

-Substituted Plaintiffs-

S.C. Appeal No. 81/09

Vs.

1. W. Francis Fernando,
"Sameera",
No. 588/1, Pitipana North,
Pitipana.

2. M. Dona Mary Jeanette Muriel Francis,
No. 238, Embaraluwa,
Weliweriya.

- Defendants -

And between

1. W.A. Fernando,
"Milan Christina",
Thoduwawe South, Thoduwawe.

2. W.J.E. Fernando,
C/o.K.A. Newton Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya, Kalpitiya.

3. W.R. Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya

4. W.J.W. Fernando,
"Nuwan",
Thoduwawe North, Thoduwawe.

-*Substituted Plaintiff Appellants*

Vs.

1. Francis Fernando,
"Sameera",
No. 588/1, Pitipana North,
Pitipana.

2. Dona Mary Jeanette Muriel Francis,
No. 238, Embaraluwa,
Weliweriya.

- *Defendant Respondentss*

And now between

1. W. Francis Fernando,
"Sameera",
No. 588/1, Pitipana North, Pitipana.

2. Dona Mary Jeanette Muriel Francis,
No. 238, Embaraluwa,
Weliweriya.

- *Defendants Respondents Appellants-*

Vs.

1. W.A. Fernando,
"Milan Christina",
Thoduwawe South, Thoduwawe.

2. W.J.E. Fernando,
C/o.K.A. Newton Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya.

3. W.R. Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya

4. W.J.W. Fernando,
"Nuwan",
Thoduwawe North,
Thoduwawe.

-Substituted Plaintiff Appellants-Respondents-

Before J.A.N. de Silva, C. J.

K.Sripavan, J.

S.I. Imam, J.

Counsel : Sanjeewa Jayawardane for the Defendants-Respondents-Appellants.

Ms. Chamantha Weerakoon Unmboowe for the substituted Plaintiff-Appellant-Respondents

Argued on : 09.02.2010

Written Submissions
Filed on : 15.03.2010

Decided on : 30.04.2010

SRIPAVAN. J.

When this appeal was taken up for hearing on 9th February 2010, Learned Counsel for the substituted-Plaintiff-Appellants-Respondents (hereinafter referred to as the Respondents) took up a preliminary objection to the effect that the Defendants-Respondents –Appellants (hereinafter referred to as the Appellants) had failed to serve a copy of their written submissions on the Respondents as required by Rule No. 30(6) of the Supreme Courts Rules 1990 and that the Appellants' appeal should be dismissed *in limine* in terms of Rule 34 thereof.

It is not in dispute that five copies of the Appellants' written submissions were duly lodged in the Registry of this Court on 4th August 2009, in terms of Rule 30(1), read with Rule 30(6). However, the only matter to be considered is whether the Appellants' failure to serve the said written submissions on the Respondents would amount to a failure to exercise due diligence as provided in Rule 34.

It is a well known principle in the construction of the Rules, that effect must be given to the language irrespective of the consequences. No doubt when the intention is clear it must unquestionably be so construed in order to achieve the result which has been manifested in express words. One of the tests for determining the nature of a Rule is to see whether it entails any penal consequences and in cases where the disobedience of a Rule carries a sanction it could safely be said that said rule is mandatory. In the case of Rules framed by Court for regulating its own procedure, I am of the view that one should look for a greater degree of reasonableness and fairness.

It should be borne in mind that Rule 30(1) mandates that no party to an appeal shall be entitled to be heard unless he has previously lodged five copies of his written submissions complying with the provisions of this Rule. Rule 30(5) further provides that submissions not in substantial compliance with the "foregoing provisions" may be struck out by the Court, whereupon such party shall not be entitled to be heard.(emphasis added)

The use of the words "foregoing provisions" in Rule 30(5) by necessary implication shuts out imposition of any sanction in the subsequent provisions to Rule 30(5). (emphasis added). In the event of non-compliance of the said provisions of the Rules, the only sanction imposed by Rule 30(1) is that such party shall not be entitled to be heard. However, in an appropriate case, the Court may consider the dismissal of an appeal or application under Rule 34 for failure to show due diligence in prosecuting the appeal or application.

In this appeal, both Counsel agreed that the Appellants have lodged their written submissions within six weeks of the grant of Special Leave to Appeal as provided in Rule 30(6). However, inadvertently or otherwise, a copy of the Appellants' written submissions had not been served on the Respondents prior to the first date of hearing. On the first date of the hearing of the appeal, namely, on 08th October 2009, an application was made on behalf of the Counsel for the Appellants to have the appeal re-fixed for hearing as the learned Counsel for the Appellants was indisposed. Accordingly, the hearing of the appeal was postponed for 9th February 2010. The learned Counsel for the Respondents, in their written submissions, have taken up the position that the written submissions of the Appellants was served on the Respondents by registered post after the first date of hearing. Counsel for the Respondents also submitted that under Rule 34, the Court has discretion to proceed with the hearing of the appeal after considering the circumstances of non-compliance and whether the Appellants have rectified any omission as soon as they became aware of it. Counsel for the Respondents relied on the case of *Muthappan Chettiar* vs. *Karunanayake and Others,*(2005) 3SLR 327. It may be relevant to reproduce below the observations made by Shirani Bandaranayake, J. (at page 334) in the said application –

> *"According to the aforementioned Rules, the appellant should have filed his written submissions on or before 05.11.2003. Although the matter was fixed for argument on 29.01.2004, on a motion filed by the learned President's Counsel for the respondents dated 10.10.2003, this matter was re-fixed for hearing on 03.03.2004. On 03.03.2004, on an application made on behalf of the learned President's Counsel for the appellant, the hearing was again re-fixed for 01.07.2004. On 01.07.2004, it was not possible for the appeal to be taken up for hearing as the*

Bench comprised of a judge who had heard this matter in the Court of Appeal and this was re-fixed for hearing on 01.11.2004. On that da,y it was once again re-fixed for hearing for 17.02.2005. By that time one year and four months had lapsed from the date special leave to appeal was granted. It is not disputed that even on the day this appeal was finally taken up for hearing, viz. on 17.02.2005, the appellant had neither filed his written submissions nor had he given an explanation as to why it was not possible to file such written submissions in accordance with the Rules." (emphasis added)

It is observed that in *Muthappan Chettiar*'s case , the delay in filing written submissions ran to several months. Notwithstanding such delay, even thereafter the appellant had not taken any interest to comply with the Rules relating to filing of written submissions. On 17.02.05 when the matter was taken up for hearing, the written submissions were not before Court. When the learned President' Counsel for the respondents took up the preliminary objection, appellant moved to file written submissions on the question of the said preliminary objection. The Court directed the respondents to file their written submissions on or before 07.03.2005 and the appellant to file their written submissions on the said preliminary objections on or before 01.04.2005. The respondents however filed their written submissions on 04.03.2005 and the appellant failed to file his written submissions on or before 01.04.2005. The appellant finally filed his written submissions only on 10.05.2005.

All the abovementioned events, clearly indicate that the appellant had been consistent in not showing due diligence in prosecuting his appeal. I am therefore of the view that *Muthappan Chettiar's* case is easily distinguishable from the instant appeal.

In the case of *Priyani de Soyza* vs. *Arsacularatne,* (1999) 2 S.L.R. 179 at 202, Wijethunga, J. referred to the case of *Piyadasa and Others* vs. *Land Reform Commission,* S.C. Appeal No. 30/97 - Minutes of 8th July 1998 where a preliminary objection was taken by the learned Counsel for the Petitioners that the Respondents had filed their written submissions 197 days after the date of which they were required by Rule 30(7) to be filed, and it was contended that the Respondents belated submissions should not be accepted and that the Respondents

should not be heard even though there was no explanation tendered regarding the delay. Amerasinghe, J. overruled the preliminary objection stating that "*In my view, Rule 30 is meant to assist the Court in its work and not to obstruct the discoveryy of the truth. There were numerous documents that had to be considered; and in our view, we needed the assistance of learned Counsel for the Petitioner as well as the Respondents, including their written submissions to properly evaluate the information that we had before us. It was therefore, decided that the preliminary objection should be overruled."*

It may be relevant to consider the observations made by Court in the cae of *Union Apparels (Pvt) Ltd.* vs. *Director General of Customs and Others* (2000) 1 S.L.R. 27. The petitioner Company in this case filed its application on 03.06.1999. Hearing was fixed for 20.08.1999, and the written submissions of the petitioner were filed on 19.08.1999.The objection of the respondents was that the petitioner had failed to comply with Rule 45(7) which required the written submissions to be filed at least one week before the date of hearing. The respondents therefore moved Court that the application must stand dismissed in terms of the Supreme Court Rules of 1990. The Court having considered the purpose of Rule 45(7) in comparison with Rule 30, the object of Rule 34 and specially the surrounding circumstances of the case decided that it could not be said that the petitioner had failed to show due diligence in taking all necessary steps for the purpose of prosecuting the application and overruled the preliminary objection. Amerasinghe, J. commented that *the question whether an application should be rejected for the failure to comply with a rule of the Court depends on whether, having regard to the words of the relevant rule , the Court has a discretion to entertain or reject the application, and whether having regard to the object of the rule and the circumstances of the case the Court is justified in arriving at its decision."*

Considering the above cases, I am of the view that the Appellants in this appeal have tendered their written submissions to the Respondents once the failure to tender written submissions had been brought to their notice. I am of the view that this is an appropriate case for the preliminary objection to be overruled and the application for special leave to appeal to be set down for hearing in due course. I therefore make order accordingly. There will be no costs.

JUDGE OF THE SUPREME COURT

J.A.N. DE SILVA, CJ.,

I agree.

CHIEF JUSTICE

S.I. IMAM, J.,

I agree.

JUDGE OF THE SUPREME COURT