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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 172/2011

SC/HCCA/LA 109/2010
SP/HCCA/Rat/07/2007 (F)
D.C. Ratnapura No. 9844/L

1. Herath Mudiyanselage Leelawathie Menike

2. Kotahawadige Don Wimalasena

   Both of Mahajana Dispensary,
   Buttala.

Plaintiffs

Vs.

1. Ananda Dharmasinghe Bandara,
   Kalyani Pedesa,
   Kelaniya.

2. Herath Mudiyanselage Heen Bandara
   Jambu Sameeraya,
   Kiridigala.

Defendants

And Between

1. Ananda Dharmasinghe Bandara,
   Kalyani Pedesa,
   Kelaniya.

2. Herath Mudiyanselage Heen Bandara
   Jambu Sameeraya,
   Kiridigala.

Defendant-Appellants

SC. Appeal 172/2011

Vs.

1. Herath Mudiyanselage Leelawathie Menike

2. Kotahawadige Don Wimalasena

Both of Mahajana Dispensary, Buttala.

Plaintiff-Respondents

And Now Between

1. Ananda Dharmasinghe Bandara, Kalyani Pedesa, Kelaniya.

Presently At
No. 565/2C, 15th Lane, Mahindu Mawatha, Athurugiriya Road, Malambe.

2. Herath Mudiyanselage Heen Bandara Jambu Sameeraya, Kiridigala.

Defendant-Appellant-Appellants

Vs.

1. Herath Mudiyanselage Leelawathie Menike

2. Kotahawadige Don Wimalasena

Both of Mahajana Dispensary, Buttala.

Plaintiff-Respondent-Respondents

SC. Appeal 172/2011

BEFORE : **Marsoof, PC. J.**
Hettige, PC.J. &
Wanasundera, PC.J.

COUNSEL : W. Dayaratne, PC. with Ms. R. Jayawardane for Defendant-Appellant-Appellants.

Navin Marapana with Uchitha Wickramasinghe for Plaintiff-Respondent-Respondents.

ARGUED ON THE PRELIMINARY OBJECTION : **10-07-2013**

WRITTEN SUBMISSIONS FILED : By the Appellants on **04-05-2012**
By the Respondents on **04-05-2012**

DECIDED ON : **22 -01-2014**

* * * * *

Wanasundera, PC.J.

In this case, a preliminary objection was taken up by the Plaintiff-Respondent-Respondents with regard to non compliance of Rule 30(1) of the Supreme Court Rules by the Defendant-Appellant-Appellants.

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".

This Court granted Leave to Appeal to the Appellants, from the judgment of the Civil Appellate High Court of Ratnapura on 28.10.2011. According to Rule 30(6),

the Appellant should lodge his written submissions within 6 weeks of the grant of leave to appeal.

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”.

According to Rule 30(7), if the Appellant fails to lodge his submissions as required by Rule 30(6), then the Respondent should lodge his submissions within 12 weeks of the grant of leave to appeal.

Rule 30(7) reads:

> “The respondent shall within six weeks of the receipt of notice of the lodging of the appellant’s submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions. Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of special leave to appeal, or leave to appeal, as the case may be giving notice in like manner.”

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. The Respondents by way of a motion dated 14.12.2011 brought to the notice of Court that written submissions of the Appellant had not been filed in Court according to the Supreme Court Rules and pleaded that in terms of the decision of the Supreme Court in *Annamalai Chettiar Muthappan Chettiar vs.*

Mangala Karunanayake (SC. Minutes dated 06.06.2005) this application be dismissed. When this matter was supported in open Court, this Court granted time for both parties to file written submissions on this preliminary objection and thereafter heard oral submissions on the same and decided to make an order.

The Respondents' Counsel has based his argument on the unreported judgment in SC. Appeal 69/2003 written by Justice Shirani Bandaranayake (as she then was), namely the case of *Annamalai Chettiar Muthappan Chettiar Vs. Mangala Karunanayake and another* (SC. Minutes of 06.06.2005).

The fact that in the aforementioned case, the Supreme Court dismissed the appeal for non compliance of Rules 30(1) and 30(6), The Respondent does not urge any other reasons to seek the dismissal of the application. Yet I find that within the said judgment, Justice Bandaranayake states thus "…….. The contention of the Learned President's Counsel for the Appellant is that non-compliance with such Rule will not disentitle the Appellant being given a hearing. I am in agreement with the Learned President's Counsel that Rule 30(1) does not refer to an appeal being dismissed for non-compliance with that Rule. ……..".

In fact I observe that the said appeal was dismissed not due to non-compliance of Rules 30(1) and 30(6) but for not having diligently prosecuted the appeal under Rule 34 which 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."

In *Annamalai Chettiar Muthappan Chettiar Vs. Mangala Karunanayake and another* (SC. Minutes of 06.06.2005), SC. Appeal 69/2003, 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". I disagree with the Counsel for the Respondents when he stated that this case has settled the law with regard to SC. Rule 30.

In *Priyani Soyza vs. Rienzie Arsecularatne 1999- 2 SLR 179* it was held that 'non compliance with the Rules, in particular, with regard to non-filing of written submissions will not disentitle the Appellant to be heard'. In *Union Apparels (Pvt) Ltd. Vs. Director General of Customs* 2000- 1 SLR 27 also, it was held that non compliance of the rules should be considered along with the circumstances of the case and then only could it be decided whether due diligence was not shown in prosecuting the application. The preliminary objection of non-compliance of the Rules was thus overruled.

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.

Recent cases related to this issue of whether Rule 30 not being complied with could disentitle a party to be heard by the Supreme Court is discussed in, *Fernando Vs. Fernando*, S.C. Appeal No. 81/09. (SC. Minutes of 30.04.2010), *Chandrani Vs. Lakmini & others*, S.C. Appeal No. 15/09 (SC. Minutes of 07.10.2010 and *Elias Vs. Gajasinghe & another*, S.C. Appeal No. 50/2008 (S.C. Minutes of 28.06.2011).

In all these cases where the preliminary objection of 'Rules not having been complied with' was taken up, the opposing party submitted to Court that the case of the other party be dismissed in limine. I see this as a plea to cut short the proper matter in issue before Court and an attempt to end a case without going into the merits of the case. Rules of procedure are fine and should be in place to regulate the procedure which smoothens out the path to justice. Yet, I believe Rules should not obstruct the path of justice. Rules are made to facilitate those who hear the case to get ready to do their part, to reach the end, which is nothing but justice. The litigants come to Court to get justice. They know nothing about the Rules. They do not expect their lawyers to win the case for them on technical objections. They expect their lawyers to place their side of the story to Court to reach justice. I quote Justice Suresh Chandra in *Elias Vs. Gajasinghe & another* (S.C. Minutes of 28.6.2011) SC. Appeal 50/2008, with which Justice Tilakawardane & Justice Amaratunga agreed, as follows:-

> "For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would

be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law."

In the case of *W.M. Mendis & Company Vs. Excise Commissioner 1999 (1) SLR 351,* it was held that "The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence". In the case of *Nanayakkara Vs. Warnakulasooriya 1993 (2) SLR 289*, it was held that "if the opposing party is not prejudiced by an omission made by the Appellant, the Court shall not dismiss the appeal."

In the case of *Fernando Vs. Fernando*, SC. Appeal No. 81/09 a preliminary objection was taken up by the Substituted Plaintiff/ Appellant/ Appellant/Respondents that 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 Court rules of 1990 and the Appellants' appeal should be dismissed *in limine*. Justice Sripavan, having considered the facts of that case found that the Appellants have filed their written submissions at the registry and 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.

Justice Sripavan with the Chief Justice J.A,N. de Silva and Justice Imam agreeing with him, in his judgment has stated as follows:

"One of the tests of determining the nature of the rule is to see whether it entails any penal consequences where 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."

In the said case the Supreme Court overruled the said preliminary objection and heard the case on its merits.

In the case of *Chandrani Vs. Lakmini & others*, SC. Appeal No. 15/2009 (S.C. Minutes of 07.10.2010), Justice Chandra Ekanayake with Chief Justice J.A.N. De Silva and Justice Saleem Marsoof agreeing with him, allowed the appeal of the Appellant who has not been able to make several Defendants as parties to the appeal and failing to serve notice of appeal to them, according to the Rules.

In the said judgment of Chandrani Vs. Lakmini & others, SC. Appeal No. 15/2009 (S.C. Minutes of 07.10.2010) the Supreme Court has taken into consideration several judgments and particularly *Nanayakkara Vs. Warnakulasooriya 1993 2 SLR 289,* where it was held that if the opposing party is not prejudiced by an omission made by the Appellant the court shall not dismiss the appeal. In the said case Justice Kulatunga held that **"**in an application for relief under Section 759(2), the rule 'that the negligence of the Attorney-at-Law is the negligence of the client' does not apply as in the case of Defendants, it is curable under Section 86(2), 87(3) and 77 of the Civil Procedure Code. Such negligence may be relevant, but it does not fetter the discretion of the court to grant relief where it is just and fair to do so".

In the instant case, the Respondents are not prejudiced by the Appellants' non-compliance with Rule 30(6) of the SC. Rules, because the written submissions of the Appellant was filed before Court two months prior to the date of hearing. In fact, written submissions of the Appellants and Respondents were filed at around the same time. If at all, if the Respondents claim that notice of the Appellants' written submission could have given the Respondents a chance to reply the submissions made by the Appellants, on application to Court, the Respondents could get more time to file some more written submissions on whatever point they missed giving their mind to. Any case should be heard on merits and not stifled by technicalities to reach justice which is very much needed by the parties.

For the reasons enumerated above, I overrule the preliminary objection taken up by the Plaintiff-Respondent-Respondent and fix this matter for argument of the main appeal, on the questions of law on which leave to appeal was granted by this Court on the 28th October 2011.

This matter **will be mentioned on 03.02.2014** for the purpose of granting a date for argument of the main appeal.

Judge of the Supreme Court

Marsoof, PC. J.

I agree.

Judge of the Supreme Court

Hettige, PC.J.

I agree.

Judge of the Supreme Court