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

In the matter, of an Appeal with Leave to Appeal granted by Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 199/2012

S.C. LA No.SC/HCCA/LA/178/2012
Civil Appellate High Court of Mt. Lavinia
Case No. WP/HCCA/MT/31/2011/LA
D.C. Nugegoda Case No. 284/2010/L

Mahawattage Dona
ChanikaDiluniAbeyratne,
No. 227/2, Stanley
ThilakaratneMawatha,
Nugegoda.

Plaintiff

Vs.

1. Janaka R. Gunawardena,
   No. 17, 1st Lane,
   Colombo 5.

2. Jaykay Marketing Services (Pvt.) Ltd.,

   Registered Office
   No. 130, Glennie Street,
   Colombo 2.

   Place of business
   Keels Super Market,
   No. 225, Stanley ThilakaratneMawatha,
   Nugegoda.

Defendants

And Between

Jaykay Marketing Services (Pvt.) Ltd.,
No. 130, Glennie Street,
Colombo 2.

Carrying on business at:
Keels Super Market,
No. 225, Stanley ThilakaratneMawatha,
Nugegoda.

2nd Defendant-Petitioner

Vs.

Mahawattage Dona
ChanikaDiluniAbeyratne,
No. 227/2, Stanley
ThilakaratneMawatha,
Nugegoda.

Plaintiff-Respondent

Janaka R. Gunawardena,
No. 17, 1st Lane,
Colombo 5.

1st Defendant-Respondent

And Now Between

Mahawattage Dona
ChanikaDiluniAbeyratne,
No. 227/2, Stanley
ThilakaratneMawatha,
Nugegoda.

Plaintiff-Respondent-Appellant

Vs.

Jaykay Marketing Services (Pvt.) Ltd.,
No. 130, Glennie Street,
Colombo 2.

Carrying on business at:
Keels Super Market,
No. 225, Stanley ThilakaratneMawatha,
Nugegoda.

2nd Defendant-Petitioner-Respondent

Janaka R. Gunawardena,
No. 17, 1st Lane,
Colombo 5.

1st Defendant-Respondent-Respondent

* * * * *

ORDER ON THE PRELIMINARY OBJECTION

BEFORE : **S. Eva Wanasundera, PC. J**
Sisira J. de Abrew, J. &
Sarath de Abrew. J.

COUNSEL : Manohara de Silva, PC. for the Plaintiff-Respondent-Petitioner.

Suren Fernando for the 2nd Defendant-Petitioner-Respondent.

Kuvera de Zoysa, PC. With Niranjan de Silva for the 1st Defendant-Respondent-Respondent.

.

PRELIMINARY OBJECTION ARGUED ON: 11.11.2014

WRITTEN SUBMISSIONS FILED : By the Plaintiff –Respondent – Appellant on 09. 12. 2014
By the 2nd Defendant-Petitioner-Respondent on 11.12.2014
Bythe1st Defendant-Respondent-Respondent on 10.12.2014

DECIDED ON : **24. 03 .2015**

* * * * * *

S. Eva Wanasundera, PC.J.

When this matter was taken up for hearing on 11.11.2014 the Counsel for the 2nd Defendant-Petitioner-Respondent (hereinafter referred to as the "2nd Respondent"), as well as the Counsel for the 1st Defendant-Respondent–Respondent (hereinafter referred to as the "1st Respondent") submitted that they are raising a preliminary objection to be

considered by this Court before hearing the main Appeal,i.e. "that the written submissions of the Petitioner has been **filed out of time** in this Appeal and as such the Appeal **should be dismissed** on that ground".

This Court decided to hear the oral submissions with regard to the preliminary objection on that date itself and at the end of oral submission, directed parties to file written submissions on the preliminary objection. Accordingly, the 1st Respondent and the 2nd Respondent as well as the Appellant have filed written submissions on the same.

Leave to Appeal was granted on the main Application on 14th November 2012 in terms of the Supreme Court Rules [Rule 30(6)] . The Appellant was obliged to file her written submissions on or before 26th December 2012, ie. within 6 weeks from 14th November 2012. The 2nd Respondent filed written submissions in compliance with the Supreme Court Rule 30(7) on 6th February 2013. While filing written submissions the 2nd Respondent drew the attention of Court to the Appellant's failure to file written submissions within 6 weeks. The Appeal was listed for hearing on 20th June 2013. The Appellant's written submissions were filed with a motion dated 20th June 2013. The appeal was taken up for hearing finally on 11.11.2014 due to the case having got postponed a few times for different reasons.

The Supreme Court Rules applicable in this instance are contained in Part II of the Supreme Court Rules Under General Provisions Regarding Appeals and Applications.

Rule 30(1)- 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.

(2) The submissions shall be typewritten, printed or lithographed, and shall be in the form of paragraphs numbered consecutively.

(3) The submissions of the appellant shall contain as concisely as possible-

(a) a chronological statement of the relevant facts, referring to the evidence, both oral and documentary,(and wherever possible, the pages of the brief at which such evidence appears), indicating also

which facts are agreed, or have been established, or are otherwise no longer in dispute and which facts are disputed;

(b) the questions of law or the matters which are in issue in the appeal;

(c) a specification of the errors alleged to have been committed by the Court the judgment of which is under appeal; and reference to and discussion of the authorities (judicial decisions, text books, statutes and subordinate legislation) relied on to justify the reversal, variation or affirmation of the judgment (or any part thereof) under appeal; and

(d) a conclusion specifying the relief which the appellant claims.

(4) The submissions of the respondent shall contain as concisely as possible-

(a) a statement, in reply to the appellant's statement of facts, confirming whether, and if not to what extent, the respondent agrees with such statement of facts; and a statement of the other relevant facts, referring to the evidence, both oral and documentary, (and wherever possible the pages of the brief at which such evidence appears, indicating which of such facts, according to the respondent, have been established or are otherwise no longer in dispute, and which facts are disputed;

(b) the questions of law or the matters which are in issue in the appeal;

(c) reference to and discussion of the authorities (judicial decisions, text books, statutes and subordinate legislation) relied on for the dismissal of the appeal or to justify the affirmation of the judgment (or any part thereof) under appeal; and

(d) a conclusion specifying the relief which the respondent claims.

(5)- 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.

(6)- 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.

(7)- 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".

(8)- Every party shall tender to the Registrar, not less than one week before the date first fixed for the hearing of an appeal, a complete list of the authorities which he proposes to refer to or rely on at the hearing, so as to ensure that there is full disclosure and to preclude surprise, together with at least one set of copies or photocopies of such authorities or the relevant portions thereof (other than statutes of Sri Lanka, subordinate legislation published in the Subsidiary Legislation of Ceylon), Law Reports published in Sri Lanka, and such other authorities as may be specified by the Chief Justice from time to time.

Rule 34 - 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.

According to Rule 40, the Appellant can apply for an extension of time for the filing of written submissions. It reads as follows:-

Rule 40 - An application for a variation, or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in Chambers:

(a) tendering notices as required by rules 8(3) and 25(2);
(b) deposit of brief fees as required by rules 16(5) or 27(5);
(c) filing written submissions as required by rule 30;
(d) furnishing the address of a respondent as required by rules 8(5) and 27(3);
(e) filing counter-affidavits and counter-submissions as required by rule 45;
(f) furnishing material as required by rule 38.

(c) filing written submissions as required by Rule 30;

The 1st and 2nd Respondents supporting the preliminary objections have directed the attention of Court to the following cases.

1. Balasingham vs. Puranthiran (minor) by his next friend Sivapackyam (2000) 1 SLR 163,
2. Wijesooriya vs. Pussadeniya, Commissioner of National Housing (1983) 2 SLR 42.
3. Samarawickrema vs. AG. (1983) 2 SLR 162.
4. Gunawardenavs. Pussadeniya Commissioner of National Housing 1983 2 SLR 458.
5. Mendis vs. Abeysinghe (1989) 2 SLR 262
6. Jayawickrema, Someswaran and Mantry& Co. vs. Jinadasa(1994) 3 SLR 185.
7. Fernando vs. Francis Fernando (2010) 1 SLR 25.

8. Sudath Rohana Vs. M.C.M. Zeena (SC/HCCA/LA 111/2010, SC. Minutes of 17.03.2011)

9. Muthappan Chettiar Vs. Karunanayake and another (2005) 3 SLR 327.

10. Samarasinghe Arachchige Premasiri vs. Adamjee Lukmanjee and Sons Ltd. (SC./CHC Appeal 19/2009, SC. Minutes of 29.09.2014)

The Respondents' argument was that due to the Appellant not having complied with the Supreme Court Rules, the Appeal should stand dismissed for not prosecuting diligently, under Rule 34. They submit that even though written submissions were filed by the Appellant very late, she has not given any excuse for the delay in filing the written submissions. They further submit that the Appellant neglected to cure the defect in spite of the Respondents' pointing out that the written submissions were delayed and that the Appellant did not obtain an extension of time to file written submissions under Rule 40.

The Appellant has directed the attention of Court to the following cases.

1. Piyadasa and others vs. Land Reform Commission (SC. Appeal 30/97 SC. Minutes of 08.07.1998)
2. Fernando vs. Francis Fernando (2010) 1 SLR 25.
3. Ananda Dharmasiri Bandara vs. Leelawathie Menike (SC/ 172/2011, SC. Minutes of 22.01.2014)
4. Union Apparels (Pvt.) Ltd. Vs. Director General of Customs (2000) 1 SLR 27.
5. Mendis vs. Abeysinghe(1989) 2 SLR 270.

Let me analyze Rule 30(1), which says that any party shall not be entitled to be heard unless 5 copies of his written submissions are filed, complying with the Provisions of Rule 30.

If the Appellant fails to file written submissions as aforesaid, "he shall not be heard". Court can disallow him to make oral submissions at the hearing of the appeal. What happens, when Court disallows him to make oral submissions? The Court will not be able to hear that party, i.e. one of the parties to the case. Other parties who have filed written submissions on time shall speak up in Court.

Finally Court looses the chance of hearing the argument of one side, which means firstly, as much as that party is at a disadvantage of not being able to place his case before Court, the Court hearing the case will not have his assistance in arriving at a justifiable decision with regard to the case before Court.

Court has to write a judgment anyway. Court gets to hear only one side. It is the duty of Court to arrive at a proper decision considering the legal provisions, the pertinent facts leading up to the legal issues etc. and with one party being unable to contribute to the arguments, Court is at a disadvantage to arrive at the correct decision. After all, the Supreme Court is the Apex Court and there's no other appeal from thereto anywhere else. Therefore this Court is duty bound to give its mind to all matters before it.

Before arriving at a justifiable decision, I am of the opinion that disallowing one party from being heard, Court is taking upon itself a bigger burden of finding the position of that party. It will be an added burden to the Judges hearing the case even though Rule 30(1) means well to regulate Court procedure. The punishment given by the Rule to one party boomerangs on the Court sitting in judgment trying to do justice.

It so happened in a case where I had to deliver the judgment where the party failing to file written submissions was not allowed by Court to make oral submissions, of course according to the Supreme Court Rules. I do not wish to place on record the case number etc. of the said matter. Yet, justice conveyed by me , with my two other colleagues agreeing with me, was in favour of the party who failed to file written submissions and thus not allowed to make oral submissions. Who had to find authorities and write the arguments in favour of the party who got judgment in its favour? It was none other than the Court. It was the burden on the judge writing the judgment which means that the Court is burdened more, having disallowed that party to at least make oral submissions.

When the Appellant fails to file written submissions, the Respondent's application always, is to dismiss the Appeal for ' not prosecuting diligently ' under Rule 34. Let me analyze this situation also. Leave to Appeal is granted after the Supreme Court has gone through the hearing of both parties at the commencement of the procedure of the

case before Court. Is it a simple task for the Petitioner to support his application to get leave or as against that matter, is it a simple task for the Respondent to oppose the granting of leave? Both the tasks are not easy. I would say it is difficult. More over, it takes a lot of valuable time of Court.

Then Court grants leave. Next step is to file written submissions. It is when Court thinks that the Appellant has a grievance on one or two or several points of law which should be gone into thoroughly that leave is granted. This is the terminal point where Court decides that " there is some good reason to look into the decision of the lower Court which might have considered the law in the wrong way ".

After granting leave, i.e. when Court has made up its mind to look into the matter more deeply, can this Court at a later stage, turn a blind eye to the grievance of the litigant who has managed to spend so much and finally has brought it before the eyes of this Court to be looked into more carefully**, just because** his Attorney at Law on whom the client had placed all his trust upon, to do the right thing by filing written submissions has failed to do his part of the work ? The intention of the Court should be to do nothing but justice. Is it right for Court to dismiss the Appeal without hearing the Appellant? Would justice be done, if Court fails to hear him.

The litigant might have been jubilant on the day Court granted leave. Then his lawyer does not file written submissions on time and Court dismisses the Appeal for not prosecuting diligently. Whose fault is it? Whom are we punishing? It is none other than the Appellant himself who gets punished for no fault of his that he knows of. It is the litigant, the part of the public whom the judges are serving who gets thrown out of Court without " an effort being made to reach justice " It is not within my conscience to turn down a litigant who has almost reached the peak of the uphill task of litigation to the end, having come before the Supreme Court to reach justice.

On the other hand, the litigants are given the chance to chase behind the lawyers for negligence, if and when an appeal is dismissed for not prosecuting diligently. Would that be welcome by the lawyers? Is that something which should be encouraged? It might have a deterrent effect on the lawyers who are negligent but does the Supreme Court , by dismissing the Appeal make its way for the development of the law or serve the

public to meet the ends of justice. I am of the opinion that dismissing the Appeal for ' not diligently prosecuting' does not serve the litigants who are aggrieved and who have been granted leave in the first instance. I am further of the view that the Supreme Court should give priority to the litigants and their aspect of the problem before court.

The present Rules of the Supreme Court have been laid down on 07. 06. 1991.and named as Supreme Court Rules 1990. Part II of the said Rules set down " General Provisions Regarding Appeals and Applications ". Rule 30(6) and 30(7) read with Rule 34 are the relevant Rules pertinent to the matter in hand. These Rules have been made under Article 136(1) (a) of the Constitution which reads as follows:-

Article 136 (1) – Subject to the provisions of the Constitution and of any law the Chief Justice with any three Judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and procedure of the Court including:-

(a) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non – compliance with such rules;

(b) ………..

The rules are definitely made for regulating the work of the work to be done by Court. Without the rules the Supreme Court cannot function. If the work is done according to the rules, working in Court is not difficult. It is a healthy way of conducting the work to be performed to reach the ends of justice. It is well and good if everyone does their part properly. If they do not do their part, the Supreme Court should give priority to the interests of the litigants. Court must look at the big picture which includes the lay people, the parties to the case, the bone of contention in the case, the repercussions which would give rise to more serious humane problems etc. rather than look at the limited picture with only " the rules which are not complied with by the lawyers ". The lawyers are responsible for non – compliance of the rules. The litigants are not. Where lawyers are formally responsible for non-compliance of the rules, it is unfair and unjustifiable to penalize the litigants.

Do the clients of the lawyers know that written submissions have to be filed within a particular time? They do not. Do they have a say in how to get it done? They do not. If and when an Appeal is dismissed for non–compliance of the Rules, what is the message the Supreme Court gives the public? The public expects the Apex Court to look into their grievances with regard to the decisions of the lower courts and they do not expect anything more. Both and/or all parties to a case do not understand about the Rules. Only the lawyers should understand about the rules and what those rules are in place for. The litigants expect nothing but justice regarding the main Appeal before Court.

The scenario is different when cases are dismissed for not prosecuting diligently, for other reasons except for "not having filed written submissions according to rules". When court can fully well observe that the application is of a frivolous nature and /or on a technical point taken up just to delay legal process taking place to reach justice as laid down by any law of this country, and the Petitioner has not moved forward in any way after filing the leave or special leave to appeal application, then the Supreme Court is at liberty to dismiss the application for "not prosecuting diligently".

I have given my mind to and considered all the authorities which both parties have submitted as enumerated above. For the aforementioned reasons I decide that this Appeal should be heard on the merits accepting the written submissions on record by all parties to this appeal.

I overrule the preliminary objection taken up by the Respondents. This matter is re-fixed for hearing on the merits, having accepted all the written submissions filed by all the parties to this Appeal on the main matter. This matter will be mentioned on a date convenient for the parties to be fixed for hearing on a date convenient to counsel representing the parties.

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