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

S.C. H.C. C.A. L.A. No. 111/2010
H.C. (Southern Province)
No. SP/HCCA/GA/LA/0030/2009
D.C. Galle No. 14171/L

1. L.A. Sudath Rohana,
   No. 21, Pedler Street,
   Galle Fort,
   Galle.

2. W.L. Livera,
   No. 21, Pedler Street,
   Galle Fort,
   Galle.

Respondents-Petitioners- Petitioners

Vs.

Mohamed Cassim Mohamed Zeena,
No. 5, 1st Lane,
Galle Fort,
Galle.

Plaintiff-Judgment Creditor-
Respondent-Respondent

L.A. Sudharshana,
No. 21, Pedler Street,
Galle Fort,
Galle.

Defendant-Judgment Debtor-
Respondent-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
Chandra Ekanayake, J. &
S.I. Imam, J.

COUNSEL : M. Farook Thahir with N.M. Reyaz for Respondents-Petitioners-Petitioners

Nilshantha Sirimanne for Plaintiff-Judgment-Creditor-Respondent-Respondent

ARGUED ON: 14.07.2010

WRITTEN SUBMISSIONS
TENDERED ON: Respondents-Petitioners-Petitioners : 03.09.2010

Plaintiff-Judgment-Creditor-Respondent-Respondent : 31.08.2010

DECIDED ON : 17.03.2011

Dr. Shirani A. Bandaranayake, J.

This is an application for leave to appeal from the order of the Provincial High Court of the Southern Province Holden in Galle, dated 24.03.2010. By that order the learned Judges of the High Court dismissed the application made by the respondents-petitioners-petitioners (hereinafter referred to as the petitioners). The petitioners had thereafter preferred an application for leave to appeal to this Court.

When this application was taken for support for leave to appeal, learned Counsel for the plaintiff-judgment creditor-respondent-respondent (hereinafter referred to as the respondent) took up a preliminary objection stating that the petitioners had not complied with rule 8(3) of the Supreme

Court Rules 1990 and therefore the leave to appeal application filed by the petitioners should be dismissed *in limine.*

The facts relevant to the preliminary objection raised by the learned Counsel for the respondent, as submitted by him, *albeit* brief, are as follows:

On 23.04.2010, the petitioners had filed an application seeking leave to appeal before this Court. Thereafter with an undated motion the petitioners had sent a copy of the petition, affidavit and the annexures referred to in the petition to the respondent. In that motion, the registered Attorney-at-Law for the petitioners had sought three (3) dates for the learned Counsel for the petitioners to support the said application. Learned Counsel for the respondent contended that although a motion was filed by the learned Instructing Attorney-at-Law for the petitioners, that no notice was sent to the respondent directly or through the Registry of the Supreme Court. Upon receipt of the motion filed by the learned Instructing Attorney-at-Law for the petitioners, learned Counsel for the respondent had filed a motion dated 21.05.2010 raising a preliminary objection stating that the petitioners had not complied with the mandatory requirements of Rule 8(3) of the Supreme Court Rules of 1990 and therefore to reject the petitioners' application filed in the Supreme Court, *in limine*.

Learned Counsel for the petitioners submitted that, if there is a procedure laid down with regard to the filing of applications before the Supreme Court, that such procedure should be followed. However, learned Counsel contended that since the application in question is for an appeal from the High Court of the Provinces, and only appeals from the Court of Appeal to the Supreme Court are governed by the Supreme Court Rules of 1990, that there is no requirement for the petitioners to follow the procedure contemplated in terms of Rule 8(3) of the Supreme Court Rules of 1990.

Having stated the submissions of the learned Counsel for the respondent and the learned Counsel for the petitioners let me now turn to consider the preliminary objection raised by the learned Counsel for the respondent on the basis of the Supreme Court Rules, 1990.

The objection of the learned Counsel for the respondent is based on the fact that the petitioners had not given notice to the respondent, as required by the Supreme Court Rules.

The Original Record of this application clearly shows that on 23.04.2010, the learned Instructing Attorney-at-Law for the petitioners had filed a proxy 'together with petition, affidavit and documents'. However there was no reference with regard to notice being handed over to the Registry of the Supreme Court.

Thereafter the respondent had filed a motion dated 17.05.2010 and had filed a caveat on behalf of the respondent. On 20.05.2010 the learned Instructing Attorney-at-Law for the petitioner had filed a motion along with the documents marked P1, P2, P4, P5 and P6. Soon after, on 21.05.2010 the learned Instructing Attorney-at-Law for the respondent had filed a motion stating that the respondent had not received notice in terms of Supreme Court Rules and had only received a motion including petition, affidavit and annexures and therefore had moved this Court to dismiss the petitioners' application *in limine*. That motion was to be supported in open Court on 14.07.2010 on which date both parties were heard on the preliminary objection.

A perusal of the Original Record of this application clearly shows that the learned Instructing Attorney-at-Law for the petitioner had not filed notices and what has been filed on 23.04.2010 was the petition, affidavit and documents marked P1 to P18. The said motion is as follows:

> "I tender herewith my appointment as the Attorney-at-Law for the petitioners together with the petition and the affidavit and documents marked P1 to P18 with copies of same and respectfully move that Your Lordships Court be pleased to accept same.

I further move that Your Lordships Court be pleased to accept copies of the said documents as I am unable to submit certified copies of same and I undertake to submit the said copies as soon as I receive them from the Registry of the Provincial High Court.

I further move that Your Lordships Court be pleased to call this application on any one of the following dates for Counsel to support the said application.

6th May	24th May	2nd June

Notice of this motion has been served on the respondent together with copies of the petition, affidavit and documents marked P1 to P18 by registered post and the receipts are tendered herewith" (emphasis added).

It is therefore evident that, the learned Instructing Attorney-at-Law for the petitioner had not tendered notices to the Registry of the Supreme Court along with his application, but had served the motion, which was filed in the Registry directly to the respondent.

The contention of the learned Counsel for the petitioners was that the present application is an appeal from the judgment of the High Court of the Southern Province and was filed in terms of section 5c of the High Court of the Provinces (Special Provisions) Act, No. 54 of 2006. Learned Counsel for the petitioners further contended that, although express provision was made under section 6 of the High Court of the Provinces Act, No. 10 of 1996 regarding the procedure to be followed when making applications for leave to appeal to the Supreme Court, no such provision was made regarding appeals from the High Courts of the Provinces under and in terms of the Act, No. 54 of 2006.

In the circumstances, learned Counsel for the petitioners submitted that as there are no provisions either in the Act under which the relevant application is filed or in the Supreme Court Rules of 1990, the preliminary objection raised by the learned Counsel for the respondent that no notices were served on him and therefore the petitioners had not complied with the Supreme Court Rules cannot be accepted.

It is not disputed that the present application is an appeal from the High Court of the Provinces to the Supreme Court.

Part I of the Supreme Court Rules 1990, refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in section C of Part I of the Supreme Court Rules are described in Rule 28(1), which is as follows:

> "Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal **or any other Court or tribunal**" (emphasis added).

The High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules, 1990 thus establishing the fact that section C

of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces.

Rule 28 accordingly deals with the procedure that has to be followed when filing an application against the judgment of a High Court of the Provinces established under and in terms of Article 154P of the Constitution. Similar to Rule 8(3), Rule 28(3) refers to the necessity of tendering notices to the Registrar. The said Rule 28(3) reads as follows:

> "The appellant shall tender with his petition of appeal a notice of appeal in the prescribed form, together with such number of copies of the petition of appeal and the notice of appeal as is required for service on the respondents and himself, and three additional copies, and shall also tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post."

It is important to note that Rule 28(7) provides for the applicability of Rule 27 of the Supreme Court Rules, which are applicable under the category of leave to appeal to appeals which come within the category of other appeals and similar to Rule 8(5), Rule 27(3) requires the petitioner to attend at the Registry in order to verify that notice has not been returned undelivered and in the event if such notice has been returned the steps that should be taken by him. The said Rule 27(3) is as follows:

> "The appellant shall not less than two weeks and not more than three weeks after the notice of appeal has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered, the appellant shall furnish the correct address for the service of notice on such respondent. The Registrar shall there

> upon despatch a fresh notice by registered post and may in addition despatch another notice, by ordinary post; he may, if he thinks fit, and after consulting the appellant substitute a fresh date for the attendance of parties at the Registry . . . ."

The purpose of the Rule 8(3) as well as Rule 27(3) is to ensure that all necessary parties are properly notified on the matter which is before this Court, so that all parties could participate at the hearing. Referring to the provision in Rule 8 of the Supreme Court Rules 1990, in **A.H.M. Fowzie and 2 others v Vehicles Lanka (Pvt.) Ltd.** ((2008) B.L.R. 127), I had stated that,

> ". . . . the purpose and the objective of Rule 8 of the Supreme Court Rules of 1990, is to ensure that all parties are properly notified in order to give a hearing to all parties. The procedure laid down in Rule 8 of the Supreme Court Rules, 1990 clearly stipulates the process in which action be taken by the Registrar from the time an application is lodged at the Registry of the Supreme Court. It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules 1990 and in the event that there is a need for a vacation or an extension of time, the petitioner could make an application in terms of Rule 40 of the Supreme Court Rules of 1990."

The same position applies to Rules 28(3) and 27(3) as both Rules contain provisions similar to that of Rule 8 of Supreme Court Rules 1990.

Accordingly it is quite clear that, in terms of the Supreme Court Rules, the petitioner should have tendered notices along with his petition of appeal and the other required documents to the Registrar of the Supreme Court for the service of notice on the respondents by registered post. Thereafter in terms of Rule 27(3), he should have verified form the Registry that such notice has

not been returned undelivered and if the said notice had been returned undelivered, steps should have been taken according to the said Rule 27(3) to despatch a fresh notice to the respondent.

The Original Record of this application clearly reveals that none of the aforementioned steps had been followed by the learned Instructing Attorney-at-Law for the petitioners. Instead of following the procedure laid down in terms of the Rules, learned Instructing Attorney-at-Law for the petitioners had, as stated earlier, filed a motion on 23.04.2010 moving that the case be called on any one of the dates specified by the learned Instructing Attorney-at-Law for the petitioners and the notice of the said motion was served on the respondent. It is important to note that the said motion was sent by the learned Instructing Attorney-at-Law for the petitioners by registered post. Admittedly there was no service of notice through the Registrar in terms of the Supreme Court Rules, 1990.

Considering the aforementioned there are two important issues that needs examination. Firstly, as the respondent had received the motion of 23.04.2010 sent by the learned Instructing Attorney-at-Law for the petitioners, whether that could be taken as sufficient notice being given to that party. Secondly, since the learned Instructing Attorney-at-Law for the petitioners has not followed the procedure laid down in Supreme Court Rules, whether it is possible to accept such motion as due compliance with the Supreme Court Rules.

Undoubtedly, the said questions are based on as to the necessity to follow the procedure referred to in the Supreme Court Rules of 1990. The legal system of the country consists of substantive law as well as procedural law. As clearly and accurately stated by Dr. Amerasinghe, J., in **Fernando v Sybil Fernando and others** ([1997] 3 Sri L.R. 1), procedural law is not secondary; the two branches are complimentary.

When it is stated that the substantive law and procedural law are complimentary, it signifies the importance of procedural law in a legal system. Whilst the substantive law lays down the rights, duties, powers and liberties, the procedural law refers to the enforcement of such rights and duties. In other words the procedural law breathes life into substantive law, sets it in motion, and functions side by side with substantive law.

Rules of the Supreme Court are made in terms of Article 136 of the Constitution, to regulate the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure which guides the Courts of civil jurisdiction, the Supreme Court Rules thus regulates the practice and procedure of the Supreme Court.

Learned Counsel for the petitioners referring to the decision in **Fernando v Sybil Fernando and others** (supra) and **Dulfer Umma v U.D.C., Matale** ((1939) 40 N.L.R. 474) stated that an application for leave to appeal cannot be dismissed on a mere technicality taken up by the respondents.

It is not disputed that the aforementioned decisions have referred to technicalities and had stated that merely on the basis of a technical objection a party should not be deprived of his case being heard by Court.

As I had stated in **Samantha Niroshana v Senarath Abeyruwan** (S.C. (Spl.) L.A. No. 145/2006 – S.C. Minutes of 02.08.2007) and **A.H.M. Fowzie v Vehicles Lanka (Pvt. Ltd.** (supra), I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Bonser, C.J., in **Wickramatillake v Marikar** ((1895) 2 N.L.R. 9) referring to Jessel, M.R. in **Re Chenwell** (8 ch. D 2506) that,

> "It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but when he sees that he is

> prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

Be that as it may, it is also of importance to bear in mind that the procedure laid down by way of Rules, made under and in terms of the provisions of the Constitution, cannot be easily disregarded. Such Rules have been made with purpose and that purpose is to ensure the smooth functioning of the legal machinery through the accepted procedural guidelines. In such circumstances, when there are mandatory Rules that should be followed and objections raised on non–compliance with such Rules such objections, cannot be taken as mere technical objections. When such objections are considered favourably, it is not that a judge would use the Rules as a juggernaut car which throws the petitioner out and then runs over him leaving him maimed and broken on the road (per Abraham C.J., in **Dulfer Umma v U.D.C., Matale** (supra)). As correctly pointed out by Dr. Amerasinghe, J. in **Fernando v Sybil Fernando and others** (supra), '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'.

Rules 28(3) and 27(3) quite clearly give specific instructions as to the method in tendering notices to parties. The language used in both Rules clearly shows that the said provisions are mandatory and the notice has to be served through the Registry of the Supreme Court. In such circumstances, it is apparent that the motion, which was sent by the learned Instructing Attorney-at-Law for the petitioners to the respondent is not sufficient to satisfy the provisions laid down in Rule 28(3) and therefore this has to be taken as non-compliance with Rule 28(3) of the Supreme Court Rules, 1990.

When there has been non-compliance with a mandatory Rule such as Rule 28(3), there is no doubt that this would lead to serious erosion of well established Court procedures maintained by our Courts, throughout several decades and therefore the failure to comply with Rule 28(3) of the Supreme Court Rules would necessarily be fatal.

As pointed out earlier the provisions in Rule 28(3) is similar to that of Rule 8(3); the only difference being that Rule 8(3) applies to applications for special leave to appeal and Rule 28(3) for all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal.

A long line of cases of this Court had decided that non-compliance with Rule 8(3) would result in the dismissal of the application (**K. Reaindran v K. Velusomasundram** (S.C. (Spl.) L.A. Application No. 298/99 – S.C. Minutes of 07.02.2000), **N.A. Premadasa v The People's Bank** (S.C. (Spl.) L.A. Application No. 212/99 – S.C. Minutes of 24.02.2000), **Hameed v Majibdeen and others** (S.C. (Spl.) L.A. Application No. 38/2001 – S.C. Minutes of 23.07.2001), **K.M. Samarasinghe v R.M.D. Ratnayake and others** (S.C. (Spl.) L.A. Application No. 51/2001 – S.C. Minutes of 27.07.2001), **Soong Che Foo v Harosha K. De Silva and others** (S.C. (Spl.) L.A. Application No. 184/2003 – S.C. Minutes of 25.11.2003), **C.A. Haroon v S.K. Muzoor and others** (S.C. (Spl.) L.A. Application No. 158/2006 – S.C. Minutes of 24.11.2006), **Samantha Niroshana v Senarath Abeyruwan** (supra), **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd.** (supra), **Woodman Exports (Pvt.) Ltd. V Commissioner-General of Labour** (S.C. (Spl.) L.A. Application No. 335/2008 – S.C. Minutes of 13.12.2010).

Since Rule 28(3) has been framed on the lines of Rule 8(3) and both Rules are dealing with the same matter that governs the service of notice to the parties, the decisions taken in the matters referred to above should apply to instances where there is non-compliance with Rule 28(3) of the Supreme Court Rules of 1990.

In the circumstances, for the reasons aforementioned, I uphold the preliminary objection raised by the learned Counsel for the respondent and dismiss the petitioners' application for leave to appeal for non-compliance with the Supreme Court Rules, 1990.

I make no order as to costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court