

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

In the matter of an Application for Leave to
Appeal in terms of Section 37(2) of the
Arbitration Act No. 11 of 1995.

Colombo Business School Limited,

No. 282, Galle Road, Colombo 03.

Claimant

-VS-

SC/HC/LA No. 69/2018

HC/ARB/87/2013

Sri Lanka Tea Board,

No. 574, Galle Road, Colombo 03.

Respondent

AND

Colombo Business School Limited,

No. 282, Galle Road, Colombo 03.

Claimant – Petitioner

-VS-

Sri Lanka Tea Board,

No. 574, Galle Road, Colombo 03.

Respondent – Respondent

AND NOW BETWEEN

Colombo Business School Limited,

No. 282, Galle Road, Colombo 03.

Claimant – Petitioner – Petitioner

-VS-

Sri Lanka Tea Board,

No. 574, Galle Road, Colombo 03.

Respondent – Respondent – Respondent

Hon. Attorney General,

Attorney Generals' Department,

Colombo 12.

2nd Respondent

Before: Vijith K. Malalgoda, PC. J.,
Murdu N.B.Fernando, PC. J. and
P. P. Surasena J.

Counsel: Dr.Jayatissa de Costa PC with Malka Danette for the Claimant – Petitioner – Petitioner.

Nirmalan Wigneswaran SSC, for the 1st Respondent – Respondent – Respondent and the 2nd Respondent Hon. Attorney General.

Argued on: 15-03-2019

Decided on: 25 -01-2021

Murdu N.B. Fernando, PC. J.

This is an action filed in terms of Section 37(2) of the Arbitration Act No. 11 of 1995. The Claimant-Petitioner-Petitioner by Petition dated 26-06-2018 filed in this Court moved among other relief, for granting of Leave to Appeal in respect of a judgement dated 18-05-2018 of the High Court of Colombo and for setting aside of the said judgement.

When this application was taken up for support, the learned Senior State Counsel representing the 1st Respondent-Respondent-Respondent raised the following preliminary objections;

- i. The Petitioner has failed to comply with Rule 28(3) of the Supreme Court Rules; and
- ii. The Petition is time barred.

Prior to examining the said objections, I wish to refer to certain facts and material *albeit* brief, which in my view is relevant to understand the nature of this Leave to Appeal application.

01. The Claimant-Petitioner-Petitioner (“the Claimant/ Petitioner”) and the 1st Respondent-Respondent-Respondent (“the Respondent”) entered into an indenture of lease, pertaining to a premises owned by the Claimant, which instrument provided inter-alia to refer any disagreement or difference or dispute arising under and on terms of the said Agreement for Arbitration in accordance with the provisions of the Arbitration Act No. 11 of 1995 (“the Act”).

02. Consequent to arising of certain disputes between the parties, the Claimant invoked the Arbitration Clause and the matter was referred to Arbitration. The Arbitration Tribunal inquired into the dispute and an Award was made by the Tribunal dated 14-11-2012 in favour of the Claimant. This is the genesis of this Appeal before this Court.
03. The Claimant thereafter filed an application before the High Court of Colombo (“High Court”) for the Enforcement of the Award under Section 31 of the Act and the Respondent filed an application to set aside the said Award in terms of Section 32 of the Act.
04. The learned Judge of the High Court consolidated the said two applications and after hearing the parties, by judgement dated 18-05-2018 dismissed the application of the Claimant for Enforcement of the Award on a technicality and the application for setting aside the Arbitration Award considering the merits therein.
05. Being aggrieved by the said judgement, the Claimant (naming itself the ‘Claimant-Petitioner-Appellant’) tendered a Petition and affidavit together with documents and by way of a motion dated 26-06-2018 moved this Court to accept the said papers and file it of record and to fix the matter for support on three given dates.
06. On 03-07-2018 a Judge of this Court sitting in chambers, made Order as follows,
- “Petitioner is directed to tender notices and move for leave”.***
07. Thereafter, by way of a motion dated 25-07-2018 the Claimant, submitted notices together with petition, affidavit, documents and stamped envelopes to be dispatched to the ‘Petitioner-Respondent-Respondent’ and moved Court to accept the said documents and file it of record and to fix the matter for support once again giving three days.

08. On 01-08-2018 the learned judge sitting in chambers made Order as follows,

“Support on 12-09-2018 and serve notices”.

09. On 07-09-2018 a caveat was filed in terms of the Supreme Court Rules by the Attorney-at-Law for the 1st Respondent-Respondent-Respondent and the 2nd Respondent, Hon. Attorney General.

10. Thereafter, this matter was taken up for support and the learned Senior State Counsel moved to discharge the 2nd Respondent from the proceedings as the matter in issue was a commercial transaction and the Hon. Attorney General was not a party to the said Arbitration. This Court accordingly made Order discharging the 2nd Respondent from these proceedings.

Having referred to the factual matrix of this application, let me now move onto the two preliminary objections raised before this Court.

Firstly, the failure to comply with Rule 28(3) of the Supreme Court Rules of 1990 (“the SC Rules”), and

Secondly, the Petition being time barred by virtue of Rule 7 of the SC Rules, when considering the date upon which notices to be issued to the Respondents were tendered to Court by the Claimant.

Rule 28(3) of the SC Rules 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 envelopes for the service of notice on the Respondents by registered post”. (emphasis mine)

In this application, it is not in dispute that the Claimant on 26-06-2018 did not tender with his Petition of Appeal, to this Court, the notice of appeal and the necessary number of copies for service of notice on the Respondents. The learned Judge sitting in chambers, having examined the documents tendered, categorically directed the Petitioner to tender notices and move for leave. The Petitioner by way of a motion dated 25-07-2018, tendered the notices and moved that it be served on the Respondents and also moved to support for Leave to Appeal. Thus, it is apparent on the face of the record and it is undisputed that the relevant papers required to be served on the Respondents were not tendered to this Court by the Petitioner together with the Petition of Appeal initially on 26-06-2018, but were tendered only on 25-07-2018.

Before examining the legal consequences of Rule 28(3) of the SC Rules, I wish to look at Rule 7 of the SC Rules.

Rule 7 reads as follows: -

“Every such application shall be made within six weeks of the order, judgement, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought.”

In this instant application, the impugned judgement of the High Court was delivered on 18-05-2018. The Petition of Appeal together with the relevant notices to be served on the Respondents in terms of Rule 28(3) were filed before this Court only on 25-07-2018 approximately ten weeks after the delivery of the High Court judgement.

The preliminary objection raised by the learned Senior State Counsel for the Respondent was that the application filed before this Court was not accompanied by the necessary documents and when considering the date the documents were tendered to Court the application was time barred. The learned Senior State Counsel in his submissions before this Court, relied on the judgements of:

- **A.H.M. Fowzie and others v. Vehicles Lanka (Pvt) Ltd. [2008] 1 SLR 23;**
- **Woodman Exports (Pvt) Ltd. v. Commissioner General of Labour and others 2012 (BLR) 238;** and

- **Udaya Shantha v. Jeevan Kumaratunga and others 2012 (BLR) 129**

to substantiate his position that the Leave to Appeal application should be dismissed *in limine* for non-compliance with SC Rules.

The Claimant in his written submissions filed before this Court counters the contention of the Respondent on two grounds.

Firstly, that the Leave to Appeal application was filed within the stipulated time i.e. 42 days or six weeks, although the notices were not tendered to be sent to the Respondents at the time of filing of the Leave to Appeal application and relies upon the observations of this Court in the cases of:

- **Kirwanthe and Another v. Navarathne and Another [1990] 2 SLR 393;**
- **Rasheed Ali v. Mohamed Ali and Others [1981] 2 SLR 262;** and
- **Nayar v. Tharik Ameen [2000] 3 SLR 103,**

to contend that this is a fit matter for the Court to use its discretionary power and overrule the objections raised.

Secondly, in view of the nature of the matter in dispute i.e. an Arbitration Award, technical objections should not stand in the way in achieving justice and relies on the judgement in **Kristley (Pvt) Ltd. v. State Timber Corporation [2002] 1 SLR 225** to support his contention.

Having referred to the submissions made on behalf of the parties *albeit* brief, I would move to consider the 1st preliminary objection raised before this Court pertaining to failure to comply with Rule 28(3) of the SC Rules.

Rule 28 comprises of 7 sub rules and is the sole Rule in Section C of Part I of the SC Rules. This section lays down the procedure pertaining to ‘other appeals’, whereas Sections A and B of Part I lays down the procedure pertaining to Special Leave to Appeal and Leave to Appeal applications springing forth from the Court of Appeal.

This Court has in many an instant, considered the impact of the High Court of the Provinces (Special Provisions) Act No 19 of 1990, Act No 10 of 1996 and Act No. 24 of 2006 and has quite categorically held, that when an appeal from the High Court of the Provinces is made to the Supreme Court, whether it be a direct appeal, a leave to appeal or a special leave to appeal

application, the procedure that ought to be followed is the procedure laid down in the Supreme Court Rules and especially the procedure envisaged by Rule 28(1) of the SC Rules of 1990.

In the unreported judgements of this Court, viz,

- **Rambanda v. Peoples' Bank SC/SPL/LA 229/11 – s.c. minutes of 17-07-2014;**
and
- **Aaron Senarath v. The Manager, Moray Estate SC/SPL/LA 231/2015 – s.c. minutes of 19-01-2017,**

Priyasath Dep, J. (as he then was) discussed succinctly the change or the shift of the forum jurisdiction, when considering the above stated provisions of the High Court of the Provinces (Special Provisions) Act viz-a-viz the applications filed under the Industrial Disputes (Amendment) Act No. 32 of 1990.

In **Sudath Rohana and Another v. Zeena and Another 2011 (BLR) 277**, Shirani Bandaranayake, J. (as she then was) at page 280 stated as follows,

“Rule 28 accordingly deals with the procedure that has to be followed when filing an application against the judgement of a High Court of the Province established under and in terms of Article 154 P of the Constitution. Similar to Rule 8(3), Rule 28(3) refers to the necessity of tendering notices to the Registrar.”

Discussing in detail the provisions of Rule 28(3), 27(3) and 8(3), this Court held that the purpose of the said Rule is to ensure that all necessary parties are properly notified of the matter before Court, so that all parties could participate at the hearing.

In **Sudath Rohana case** referred to above, Petition of Appeal was filed in the Registry but the Petitioner failed to tender the notices to be served to the Respondents. Nevertheless, the Petitioner served the said documents directly on the Respondents and a preliminary objection was raised by the Respondent that, Rule 28(3) had not been complied with.

This Court upheld the preliminary objection and dismissed the Petition and observed;

“When there is 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.”

In the instant case, the Petitioner did not challenge the proposition in respect of the applicability of SC Rules to Leave to Appeal applications from the High Court, nor did the Petitioner challenge the allegation that he did not and thus failed to tender the relevant notices together with the Petition of Appeal to be served on the Respondents. The record unequivocally bears the direction of the learned Judge sitting in chambers who made Order,

“Petitioner is directed to tender notices and move for leave.”

Hence in my view, it is undisputed that the **Petitioner did not tender with his Petition of Appeal, a notice of Appeal** as contemplated by Rule 28(3) required for service on the Respondents and himself and thus breached the said Rule by non-compliance of the Rule at the time of lodging of the Application.

In such a situation what should the Court do?

Dismiss the petition for non-compliance under the provisions of the SC Rules or permit a Petitioner to cure the said defect and proceed with the Application? In other words, is non-compliance a mere technicality to be excused or a mandatory provision that ought to be followed and the failure to follow, would render disastrous consequences to the Petitioner?

This Court has time and again considered this issue and held on numerous occasions the mandatory nature of this Rule.

I do not wish to wade across the multitude of cases where the effect of the non-compliance of Rule 8(3), which is the corresponding Rule in Section A of Part I of the SC Rules of 1990, to Rule 28(3) referred to earlier, has been considered and analyzed by this Court.

However, I wish to refer to the three cases the learned Senior State Counsel relied upon viz, **Vehicle Lanka case, Woodsman case and Udaya Shantha case (supra)**.

In **Vehicle Lanka Case** and **Woodman Case** this Court considered Rule 8(3) and Rule 40 of the SC Rules and held that when it is quite clear that Rule 8(3) has not been complied with by tendering the necessary documents at the point of lodging of an application and Rule 40 has not been complied with by moving for variation or an extension of time as required by Rule 8(3), then in such an instance when an objection is raised upon the basis of non-compliance with a mandatory Rule, such objection cannot be considered as a mere technical objection. The Court went on to hold that such kind of non-compliance would lead to serious erosion of well-established Court procedure and dismissed the Application.

In **Udaya Shantha case** too, this Court whilst re-iterating the purpose of Rule 8(3) i.e. to ensure all necessary parties are properly notified and could participate at the hearing, considered the impact of Rule 40 and held though a motion was filed after many months of lodging the application and an extension of time was sought and notices tendered, that such procedure cannot be considered as being in compliance with Rule 40, since a single Judge sitting in chambers as laid down in Rule 40, did not make a direction for extension of time to tender notices to Court. In the said case it was opined by Shirani Bandaranayake. C.J, that the procedure laid down by way of Supreme Court Rules, made under and in terms of Article 136 of the Constitution cannot be easily disregarded.

In the above mentioned three cases, it is observed that the contention of the respective Petitioners was that although late, the Petitioners have discharged the requirement of Rule 8(3) and hence ‘substantially complied’ with the SC Rules. In the said cases, submissions were made based upon the observations of this Court in **Kiriwanthe case (supra)** by Mark Fernando, J., and Kulatunga. J., *“that consequences of non-compliance is a matter falling within the discretion of Court to be exercised after considering the nature of default as well as the explanation in the context of the object of the rule”*; and *“that Courts should be guarded against mere technicalities that stand in the way of Courts doing justice and should bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly.”*

In the instant application before us too, the Petitioner relies upon **Kiriwanthe case**, as well as **Rasheed Ali case** and **Nayar case (supra)** to contend that ‘the Petitioner has substantially

complied' with Rule 28(3) and thus, this is an appropriate case for non-compliance of the Rule to be excused as the initial non-compliance was subsequently cured and corrected.

If I may summarize the submissions of the Petitioner and the Respondent made in the instant application, the Respondent relies on the series of cases in which the Court held that Rule 8(3) is a mandatory Rule and non-compliance of such a Rule will be fatal and the Petitioner contends that the Court should exercise its discretion in this instance and excuse the non-compliance of Rule 28(3) and permit the Petitioner to proceed with this application.

However, prior to considering the submissions of the learned Presidents' Counsel for the Petitioner, that this is a fit case for this Court to exercise its discretion and excuse the non-compliance of Rule 28 (3), for the simple reason, that this is an application arising under the Arbitration Act, I would pause for a moment, and consider the recent jurisprudence of this Court with regard to Supreme Court Rules, its effects, its compliance and mandatory nature.

The first case I wish to consider is **Rohitha Peiris v. Doreen Peiris 2015 Vol XXI BLR 101**.

In the said case, the Petitioner filed the Petition of Appeal, affidavit and annexed documents in the Registry within the stipulated six weeks, but the notices together with the stamps and envelopes to be served on the Respondents were tendered to the Supreme Court Registry, 24 days after filing of the Petition of Appeal. Hence, until the said notices were tendered no steps were taken to serve notices by the Registry, nor did the Petitioner serve the papers directly on the Respondents.

Thus, this Court held that the **'entire process' of filing of the Petition of Appeal, affidavit and documents and the notices to be served on the Respondent became complete outside the appealable six weeks period** and therefore, it was abundantly clear that the Petitioner has failed to invoke the jurisdiction of this Court in the manner provided by Rule 8 of the SC Rules.

The Court also considered the observations made in **Fowzie case (supra)** with regard to Rule 8(3) , 8(5) and also Rule 40 and held, if the Petitioner was in need of further time to comply with Rule 8(3), an application ought to have been made immediately after filing the Leave of Appeal application and considering the totality of the circumstances, went onto hold that the

Petitioner has failed to comply with Rule 8(3) and when an objection is raised with regard to non-compliance of SC Rules, made in terms of the provisions of the Constitution, **that it is not possible for a Court to exercise its discretion in favour of the Petitioner.**

In the said case, it is observed that Sripavan, J. (as he then was) considered the context and the object of Rule 8(3), which in all fours is compatible with Rule 28(3), as well as the circumstances of the default, admittedly, ‘inadvertence’ and held, that the Petitioner has failed to explain to the satisfaction of Court, reasons why the Petitioner could not tender the notices for service on the Respondent at the stage of filing of the petition and further opined that in **an appropriate case, even if non-compliance had not been explained, that the Court has a discretion to make an order, having considered the need to maintain the discipline of the law.**

The facts in the instant application are similar to the facts in **Peiris case** referred to above. In the instant case, though the Petition of Appeal was filed within the six weeks period as contemplated by Rule 7 of the SC Rules, the **‘entire process of lodging a Leave to Appeal application’ was completed far beyond the six weeks period.** No application was made under Rule 40 for an extension of time nor were the papers served on the Respondent direct. The record bears out very clearly, that notices were tendered for service on the Respondent 28 days after lodging of the Petition of Appeal and the Petitioner did not challenge the said position. The only submission made by the Petitioner before this Court, is to exercise its discretion in favour of the Petitioner and reject the preliminary objection raised by the Respondent. Thus, it is manifestly clear that the Petitioner failed to invoke the jurisdiction of this Court in the manner specified in the Supreme Court Rules.

The next case I wish to consider is a recent judgement of this Court, **Nestle Lanka PLC v. Gamini Rajapakse SC/HC/LA/54/18 – S.C. minutes of 30-09-2020**, wherein Jayantha Jayasuriya PC. CJ, in an illuminating judgement pertaining to Rule 2, 6, 8 and 34 of SC Rules, 1990 and specifically Rule 8 observed thus,

“As per Rule 8(3), it is the responsibility of the Petitioner to tender required number of notices and other material to the Registry to be

served on the Respondent. The object of this Rule is to ensure that the Respondent is given sufficient time and opportunity to prepare himself to contest the matter without undue delay [] the object of this Rule can be frustrated if the Petitioner fails to provide all necessary material.”

In the aforesaid **Nestle case** pertaining to a Labour Tribunal appeal, the Petitioner did not submit certain documents annexed to the Petition of Appeal at the time of tendering of the Petition of Appeal to this Court which resulted in the said documents not being served on the Respondents. The Petitioner’s failure to serve the said material on the Respondent and the Petitioners’ contention that the inability to obtain same was due to circumstances beyond its control was considered by Court **as not exercising due diligence as contemplated by Rule 34 of the SC Rules**. Hence, the Court held that the Petitioner was unable to satisfy Court, that it exercised due diligence and thus upheld the preliminary objection raised by the Respondent in respect of Rule 2 & 8 and dismissed the Petition for Leave to Appeal, upon the ground of non-compliance of the said SC Rules.

From the *ratio decidendi* of the above referred two cases, **Peiris Case** and **Nestle Case**, it is seen, that this Court whilst upholding the mandatory nature Rule 8 (3) of the SC Rules examined and considered the said Rule 8(3), in the light of the discretionary power of Court and also the exercise of due diligence by a defaulting party.

Corollary to the above, it is observed that this Court in the following instances, have considered the ‘unique circumstances’ pertaining to a particular case and used its discretionary power and have made Order overruling the preliminary objections raised with regard to non-compliance of SC Rules.

The first case I wish to refer to is **Menike v. Bandara SC/App /172/2011 - s.c. minutes of 22-01-2014**

In this case, Rule 30 pertaining to filing of written submissions was the contentious issue in which the Court held, that the delay of filling of written submissions will not prejudice parties and the case should be decided on merit and not stifled by technicalities and thus overruled the preliminary objection raised before Court.

Similarly, in **Sirisena v. Gunawardena – SC/SPL/LA 133/15 – s.c. minutes of 02-08-2017**, Rule 8(3) was considered by this Court. In the said case the Petitioner failed to file the Notice of Appeal, together with the Petition of Appeal. However, within 7 days of lodging the Appeal the said Notices were filed. The Respondent raised a preliminary Objection pertaining to non-compliance of Rule 8(3) and this Court overruled the said objection and held the late filing to be ‘substantial compliance’ in view of the intervening holidays and in the light of the discretion permitted by Rule 40 for this Court to grant further time to file papers under Rule 8(3). The Court further held, that Supreme Court Rules should be considered as a whole and not in isolation.

Likewise, in **Wijesinghe v. Tenderlea Farm (Pvt) Ltd. – SC/SPL/LA 159/17 – s.c. minutes of 17-09-2020** a preliminary objection was raised pertaining to non-compliance of Rule 2, 6 and 10. The failure to annex the pleadings filed in the High Court, which was the specific objection raised was considered by this Court to be ‘not a material breach’ of the Rules, for the reason that the Labour Tribunal brief and the High Court Judgement filed of record was considered sufficient to determine the appeal. Thus, the Court observed that there was ‘substantial compliance’ and ‘no prejudice was caused’ to the parties and overruled the preliminary objection.

Further, the Court went onto hold, that non-compliance with SC Rules does not necessarily result in depriving a party seeking redress from this Court and that the Court has a discretion and referred to the oft quoted dicta of Mark Fernando J., in **Kiriwanthe case**, “*that law does not require or permit an automatic dismissal of an application of a party in default*”.

Thus it could be seen, corollary to instances in which a preliminary objection was upheld like in **Peiris case**, even in instances in which it was overruled viz **Sirisena case**, discretionary power of Court has played a major role in determining matters pertaining to Rule 8(3) of the Supreme Court Rules.

This brings me to the next issue I wish to consider.

Should the Court exercise its discretion in favour of the Petitioner in the instant application and excuse the non-compliance with Rules 28(3) of the SC Rules.

The learned Counsel for the Petitioner in his written submissions filed before this Court, strenuously argued that the discretion should be used in favour of the Petitioner in view of the fact that a great injustice would be perpetrated on the Petitioner. He also submitted that if not, an undue advantage would accrue to the Respondent since the High Court unfairly dismissed the application of the Claimant for enforcement of an Arbitration Award on a mere technicality. The Petitioner relied upon the following observations of Mark Fernando, J., in **Kristley case (supra)** to substantiate his contention.

“The Claimant should have been given an opportunity to tender duly certified copies, interpreting “accompany” in section 31(2) purposively and widely [] Undoubtedly, section 31(2) is mandatory, but not to the extent that one opportunity, and one opportunity only, will be allowed for compliance.”

However, it is observed that in **Kristley case**, this Court considered the merits of the application viz-a-viz the Arbitration Act and its mandatory provisions and made Order accordingly. In the said case, no preliminary objections were raised with regard to the maintainability of the Appeal for non-compliance of a SC Rule, unlike in the instant case and thus in my view, the aforesaid observation made in respect of to the Arbitration Act as well as the said case can be distinguished from the instant case before us, in which is the mandatory nature of Rule 28(3) of the Supreme Court Rules is the matter to be determined.

At this juncture, I wish to refer to another judgement of this Court in respect of an Arbitration Award, **George Stuart & Co. Ltd. v. Lankem Tea Rubber Plantations Ltd. [2004] 1 SLR 246.**

In the said case, the Petitioner filed a Leave to Appeal application before this Court, being aggrieved by an Order made by the High Court in terms of the Arbitration Act and a preliminary objection was raised by the Respondent that the application filed was out of time and thus time barred and therefore should be rejected *in limine*. This Court whilst upholding the preliminary objection observed as follows:

“When no provision is made in the relevant Act specifying the time frame in which an application for leave to appeal is made to the Supreme Court and simultaneously when there are Rules providing for such situations, the appropriate procedure would be to follow the current Rules which govern the Leave to Appeal applications to the Supreme Court. Consequently, such an application would have to be filed withing 42 days from the date of the Award.”

Hence, there is no dispute that in respect of High Court Appeals and Leave to Appeal applications made in terms of the Arbitration Act, the time frame to file an application is 42 days and the procedure to be followed is SC Rules. An aggrieved party of a High Court Order, pertaining to an enforcement or setting aside of an Arbitration Award should in my view, pass this threshold and file relevant papers, for this Court to consider, whether Leave to Appeal should be granted or not.

There is no special mechanism this Court should follow with regard to appeals against Arbitration Awards merely because the subject matter is capable of settlement by Arbitration; which is an accepted alternative dispute resolution process and an Arbitration Award is brought before Court only for enforcement or for setting aside of such an Award. Hence, I see no merit in the submission of the learned President’s Counsel for the Petitioner, that matters pertaining to Arbitration Appeals should be viewed at from a vantage position merely because of its unique nature or that it is in an ‘Arbitration process’. In my view, it should not be the only decisive factor for this Court to exercise its discretion in granting relief to the Petitioner, who has admittedly, not complied with Rule 28(3) of the SC Rules.

Whatever maybe the genesis of an application, filed before this Court for Leave to Appeal or Special Leave, either from the Court of Appeal or from the High Court of the Provinces, in my view the procedure laid down in the SC Rules is the same and should be stringently adhered to and zealously followed.

In the instant case, the learned Senior State Counsel, raised a second objection, that the Petition is time barred, when considering the date upon which the notices to be served on the Respondents were in fact tendered to the Registry. This objection in my view is interwoven with the objection raised pertaining to Rule 28(3) and should not be considered in isolation. It should be considered and viewed taking a holistic approach in arriving at a determination.

As discussed earlier, Sripavan, J., in the **Peiris case**, categorically held that the ‘**entire process**’ of filing of the Leave to Appeal application became complete only when the Petition of Appeal, affidavit, documents and the notices to be served on the Respondents were tendered and filed of record and thus, in the said case, the said date of tender of notices was outside the appealable period and hence, upheld the preliminary objection raised by the Respondent pertaining to non-compliance of SC Rule 8(3).

In the instant appeal too as aptly seen from the record it is undisputed that the notices were not tendered to the Registry by the Petitioner to be served on the Respondent together with the Petition of Appeal at the time of lodging of the Appeal, as contemplated by Rule 28(3). Thus, the ‘**entire process**’ of lodging the application for **Leave to Appeal** by filing the Petition of Appeal, affidavit, documents and the notices to be served to the Respondents were completed after the 42nd day and thus, beyond the sixth week in which an appeal from an Order or Judgement of the High Court should be filed in the Supreme Court. Hence, I hold that the Petitioner has failed to act in compliance with Rule 28(3) of the SC Rules.

In the aforesaid circumstances, I am of the view that the Petitioner not only failed to exercise due diligence but also failed to pass the threshold condition in lodging a Leave to Appeal application and for the said reason, this Court cannot condone the failure of the Petitioner to comply with Rule 28(3) of the SC Rules.

Hence, for the reasons adumbrated above, this Court cannot exercise its discretion in favour of the Petitioner and excuse the Petitioner of its non-compliance of Rule 28(3) of the Supreme Court Rules of 1990.

Thus, I uphold the preliminary objection raised on behalf of the Respondent and dismiss the Leave to Appeal application filed by the Petitioner before this Court. However, I order no costs.

Leave to Appeal application is dismissed.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J.

I agree

Judge of the Supreme Court

P.P. Surasena J.

I agree

Judge of the Supreme Court