

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an Application for Special Leave to Appeal under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Plexus Cotton Limited,  
265/279, Martins Building,  
4, Walter Street,  
Liverpool,  
England.

Presently at;  
Cotton Place  
2, Ivy Street,  
Brittenhead, Wirrel,  
CH41 5EF

**Petitioner**

-VS-

**SC/SPL/LA No.27/2012  
CA Revision No. 1865/05  
DC Colombo No. 6375/SPL**

Dan Mukunthan,  
No.76, Davidson Road,  
Colombo 04.

Presently at;  
No. 3, Charles Place,  
Colombo 3.

**Respondent**

**AND**

Plexus Cotton Limited,  
265/279, Martins Building,  
4, Walter Street,  
Liverpool,  
England.

Presently at;  
Cotton Place  
2, Ivy Street,  
Brittenhead, Wirrel,

CH41 5EF

**Petitioner - Petitioner**

-VS-

Dan Mukunthan,  
No.76, Davidson Road,  
Colombo 04.

Presently at;  
No. 3, Charles Place,  
Colombo 3.

**Respondent – Respondent**

**AND NOW BETWEEN**

Dan Mukunthan,  
No.76, Davidson Road,  
Colombo 04.

Presently at;  
No. 3, Charles Place,  
Colombo 3.

**Respondent – Respondent – Petitioner**

-VS-

Plexus Cotton Limited,  
265/279, Martins Building,  
4, Walter Street,  
Liverpool,  
England.

Presently at;  
Cotton Place  
2, Ivy Street,  
Brittenhead, Wirrel,  
CH41 5EF

**Petitioner - Petitioner – Respondent**

Before: Jayantha Jayasuriya, PC. CJ.,  
Vijith K. Malalgoda, PC. J., and  
Murdu N. B. Fernando, PC. J.

Counsel: Uditha Egalahewa PC with N. Ashokbharan and Amaranath Fernando instructed by K.U. Gunasekera for the Respondent- Respondent - Petitioner.  
Shammil Perera PC with Primal Ratwatte and D. Perera for the Petitioner- Petitioner- Respondent.

Argued on: 12-06-2019

Decided on: 03-03-2021

**Murdu N.B. Fernando, PC. J.**

This is a Special Leave to Appeal application filed against the judgement of the Court of Appeal dated 13-01-2012. By the said judgement the Court of Appeal set aside the Order made by the District Court pertaining to the refusal of an application for registration of a foreign judgement obtained from a Court in the United Kingdom, under the provisions of the Reciprocal Enforcement of Judgements Ordinance No 41 of 1921.

When this application was taken up for granting of Special Leave to Appeal before us, the learned Presidents' Counsel for the Petitioner – Petitioner – Respondent (“the Respondent”) and the Respondent – Respondent – Petitioner (“the Petitioner”) appraised the Court of the preliminary objection raised by the Respondent, when this matter was initially taken up for support on 28-05-2012 with regard to non-compliance with Rule 8(3) of the Supreme Court Rules of 1990 by the Petitioner and moved that the said objection be taken up for determination in the first instance.

Having heard the parties before this Court with regard to the said preliminary objection and also having considered the many sets of written submissions tendered to Court prior to the said date and subsequent to the hearing of submissions on the said date, I now proceed to consider the said preliminary objection.

However, prior to examining the said preliminary objection raised by the learned Presidents' Counsel for the Respondent, I wish to refer to certain facts, *albeit* brief, relevant to this application which in my view is important to understand the nature of this Special Leave to Appeal application.

01. The Respondent, a company registered in the United Kingdom entered into a contract of sale of cotton yarn with Veyangoda Textiles Mills Limited, a company incorporated in Sri Lanka, in the year 1998.
02. The Petitioner being a shareholder of the said Veyangoda Textiles Mills Limited guaranteed the performance of the said contract of sale, by way of a guarantee agreement.
03. In the year 1999, the ownership and management of Veyangoda Textiles Mills was vested with Peoples' Bank, in view of default of payment of loans obtained by Veyangoda Textiles Mills Limited and the Mills continued to function under the aegis of a Competent Authority appointed by the Bank.
04. Veyangoda Textiles Mills Limited failed to honour the terms of the said contract of sale and the **Respondent filed action in the High Court of the Royal Court of Justice in the United Kingdom** against the Petitioner, upon the Guarantee Agreement executed between the parties.
05. The Respondent also resorted to the provisions of the Mutual Assistance in Civil and Commercial Matters Act No.39 of 2000, by filing an application in Sri Lanka before the Court of Appeal to obtain Orders of Court to serve notice on the Petitioner and record his evidence in Sri Lanka.
06. Whilst the said application filed in the Court of Appeal was still pending, the Respondent obtained a **'default judgement' against the Petitioner dated 04-10-2001 from the Royal Court of Justice (Queens Bench Division) in the United Kingdom.**
07. The Respondent thereafter filed an action in the District Court of Colombo to **register the said default judgement in terms of Section 3(1) of the Reciprocal Enforcement of Foreign Judgements Ordinance No 41 of 1921** ("the Ordinance") and that case is the genesis of the application before us.
08. The Petitioner too, filed an action in the District Court of Colombo and prayed for an Order of Court to refuse registration of the default judgement in terms of Section 3(2) of the said Ordinance, for the reason that the said default judgement has been obtained without summons being served on the Petitioner.

09. The learned District Judge by Order dated 07-06-2005 **refused the application filed by the Respondent to register the default judgement** obtained from the High Court of the United Kingdom, **upon the ground of non-service of summons** on the Petitioner and dismissed the application.
10. Being aggrieved by the said judgment, the Respondent went before the Court of Appeal by way of a revision application. The Court of Appeal, set aside the said District Court judgement and directed the District Judge to proceed to register the judgement under the provisions of the Ordinance.
11. It is against the said Court of Appeal judgement that the Petitioner has now come before this Court having filed a Special Leave to Appeal application dated 22-02-2012.
12. Upon filing of the said application, **this Court, by Order dated 24-02-2012 directed that this matter be listed for support on 28-05-2012. It also made order to issue notice on the Respondent.**
13. The Respondent thereafter filed a motion dated 17-04-2012 together with a proxy and caveat and moved that it be accepted.
14. On 28-05-2012, when this application was taken up for granting of Special Leave to Appeal, the journal entry indicates that the learned Counsel for the Respondent informed Court that he intends to take up a preliminary objection and the matter was re-fixed for support for 17-09-2012.
15. On the said date the Presidents' Counsel for the Respondent raised the preliminary objection pertaining to non-compliance of Rule 8(3) of the Supreme Court Rules of 1990 and the matter was once again re-fixed for support.
16. The record bears out, that this application was taken up for inquiry on three occasions, parties heard, written submissions filed and judgement reserved prior to this matter being taken up before this bench.

Having referred to the facts pertaining to the application, I now wish to look at Rule 8(3) of the Supreme Court Rules - 1990.

The said Rule 8(3) reads as follows: -

**“The Petitioner shall tender** with the application such number of **notices as is required for service on the Respondent** and himself together with such number of copies of the documents referred to in Sub- Rule (1) of this rule as is required for service on the Respondent and shall tender the required number of stamped envelopes for the service of notice on the Respondents by registered post....” (emphasis mine)

For easy reckoning, I wish to refer to the corresponding Rule 8(1) and Rule 8(2) which reads as follows: -

**Rule 8(1)**

“Upon an application for Special Leave to Appeal being lodged in the Registry of the Supreme Court, the **Registrar shall forthwith give notice**, by registered post, of such application to each of the Respondents in the manner hereinafter set out. There shall be attached to the notice, a copy of the petition, a copy of the judgment against which an application for Special Leave to Appeal is preferred and copies of affidavits and annexures filed therewith.” (emphasis mine)

**Rule 8(2)**

“Such notice shall be in the prescribed form and shall specify,

- a) That the Respondent, **if he intends to oppose the grant of Special Leave**, shall lodge within fourteen days of the receipt of such notice, **a caveat** indicating such intentions; and
- b) **The date of hearing.....**”(emphasis mine)

Thus, Rule 8 (3) clearly indicates **a Petitioner to tender required notices for service on the Respondent and himself** and **Rule 8 (1) spells out the Registrar to forthwith give notice** specifying,

- (i) if the Respondent intends to oppose the grant of Special Leave, to lodge a caveat indicating his intentions;
- (ii) and the date of hearing.

Hence, the primary obligation laid down in the said Rule 8 (3) is for a Petitioner to tender such notice. Upon the tender of such notice, the Registrar is required to give notice, under Rule 8(1).

The preliminary objection raised by the Respondent as clearly laid down in the written submissions is, **that the Petitioner failed to tender the relevant notices, which triggered such notice not being served on the Respondent, through the Supreme Court Registry**, although admittedly such notice was served directly by the Petitioner on the Respondent, under registered cover at its registered address in the United Kingdom.

Thus, the contention of the Respondent, before this Court, was that **firstly, no notice was tendered by the Petitioner and secondly, no notice was served on the Respondent through the Registry** as spelt out in Rule 8(3) and thereby the Petitioner failed to comply with a mandatory rule.

Countering the said position, the **Petitioners contention was that five copies**, corresponding to the number of copies required for the record or the docket as is commonly called and the three judge's brief and to serve on the Respondent of the petition, affidavit and marked documents **were tendered to the Registry of the Supreme Court together with the motion dated 22-02-2012 and** as an additional precaution a set of documents was also directly dispatched to the Respondent, as the Respondent was in a foreign country on the said date itself. The Registered Attorney for the Petitioner furnished the postal article in proof of such posting upon the Respondent, **and hence** contended that **the necessary copies were tendered to the Registry and Rule 8(3) was complied, by the Petitioner** for all intents and purposes.

Both parties in the written submissions filed before this Court, relied on the entries made in the Motion Books and Day Books maintained at the Supreme Court Registry to justify their respective contentions. The extracts of the said records and entries were annexed to the written submissions and quoted extensively by both Counsel.

The parties also drew the attention of Court to a number of judgements to substantiate its respective positions.

The Respondent relied on a series of cases of this Court to establish the mandatory nature of Rule 8(3) and especially referred to the following judgments, in which *admittedly*, notices were not tendered to the Registry by the Petitioner in the first instance.

- **Woodman Exports (Pvt) Ltd. v. Commissioner General of Labour and others [2012] BLR 238,**
- **A.H.M. Fowzie and 2 others v. Vehicle Lanka (Pvt) Ltd. [2008] 1 SLR 23;** and
- **Sudath Rohana and another v. Mohammed Cassim Mohammed Zeena and another [2011] BLR 277.**

The Petitioner on the other hand, pleaded that the preliminary objection raised should be rejected *in limine*, based upon many contentions.

Firstly, that for all intents and purposes the Petitioner has complied with Rule 8(3).

Secondly, the Petitioner relied on the observations made in;

- **Tissa Attanayake v. Commissioner General of Elections and others – [2011] 1 SLR 220;** and
- **Samantha Niroshana v. Senarath Abeyruwan – SC/SPL/LA 145/2006 – s.c. minutes of 02-08-2007,**

to justify its proposition that the *purpose of the said Rule is to ensure that all necessary parties are properly notified in order to give a hearing*. Further, the rationale of giving notice is to adhere to rules of natural justice and in this instance the said purpose was achieved, the Respondent received notice, filed a caveat indicating its intention to resist granting of Special Leave to Appeal and on the first day itself when the application was supported for leave, a Counsel represented the Respondent.

Thirdly, no disadvantage or prejudice was caused to the Respondent by the alleged non-compliance of Rule 8 (3) and heavily relied on the observations made by a Divisional Bench of this Court in **AG v. Dr. Shirani Bandaranayake and others SC Appeal 67/2013 - s.c. minutes of 28-06-2013** in rejecting a preliminary objection raised pertaining to Rule 8 (3).

In addition to the above, another contention of the Petitioner was that the Respondent relied on a 'misconceived fact' that the Petitioner has failed to tender the

required number of documents to the Registry and in accordance with the provisions of Section 101 of the Evidence Ordinance submitted that 'he who asserts must prove' and shifted the burden to the Respondent to prove 'that the required number of copies were not tendered by the Petitioner to the Registry'. The Petitioner also relied on Rule 9 of the Supreme Court Rules which state that 'the Registrar may call upon the parties to furnish additional copies if he deem necessary for proper determination of the application' and submitted that in this instance, the Registrar did not call for additional copies as the Petitioner, at the relevant time had tendered the necessary number of copies.

Having referred to the submissions made by both Counsel, *albeit* brief, I would, now move to examine the record before us and the entries therein to ascertain the correct perspective of this application. However, I do not intend to go on a voyage of discovery and examine motion books and day books of the Registry to investigate and come to a finding as to the nature of documents filed, the number of copies filed, the date it was filed, or what was not filed. I will restrict myself to examine and peruse only the record before Court and the judges' brief.

The record bears out that the jurisdiction of this Court was invoked by the Petitioner by filing a motion. Let me begin by examining the said **motion dated 22-02-2012**. It was filed by the Attorney-at-Law for the Respondent-Respondent-Petitioner and it indicates that *the proxy, petition and affidavit of the Respondent-Respondent-Petitioner and marked documents are annexed thereto and moved Court to accept and file it of record*. The motion also gives the name of the Counsel retained on behalf of the Petitioner to support the said application and three dates to get this matter fixed for support. It also bears out, that the copies of the documents have been posted under registered cover to the Respondent and the relevant postal receipt dated 22-02-2012 annexed as proof of same.

**The motion bears the seal of the Supreme Court dated 22-02-2012 and significantly has a minute therein dated 24-02-2012 and initialed,**

***"List for support on 28-05-2012."***

The **first journal entry** of the record also sheds light to the matter in issue. The minute of the Registrar of the Supreme Court appearing below the notation; 'Attorney-at-Law files proxy from the Petitioner, petition, affidavit and documents' reads as follows;

*i. File*

***ii. Issue notice on Respondent for 28-05-2012'***

However, the journal entries do not indicate whether notices were tendered or dispatched but the next journal entry dated 24-04-2012 demonstrates that 'Attorney-at-Law for the Petitioner – Petitioner – Respondent has filed a motion dated 17-04-2012 with proxy and caveat and moved to accept same'.

It is observed that the said motion is worded thus:

*"Whereas a notice of an application for Leave to Appeal on behalf of the Respondent-Respondent- Petitioner abovenamed **have been issued to Petitioner-Petitioner-Respondent in terms of Rule 8 (1) of the Supreme Court Rules**, I do hereby lodge caveat on behalf of Petitioner-Petitioner- Respondent indicating the Respondent's intention to oppose the grant of Leave to Appeal."* (emphasis mine)

Further, it is observed that, the proxy annexed to the said motion and filed of record is signed by the Chairman of the Respondent Company on 03-04-2012 in Liverpool, United Kingdom.

It is also observed that although the original motion of the Petitioner dated 22-02-2012 refers to the 'petition' in singular form, that the Judges' briefs have copies of **petition and other documents with an original seal (in purple ink) of the Supreme Court Registry bearing the date 22-02-2012 on the motion annexed to the petition itself, thus, giving credence to the fact, that more than one set of papers were filed.**

Therefore, the record in my view, bears out that **a judge of this Court**, after examining the documents filed by the Attorney-at-Law for the Petitioner and been satisfied of the said documents **directed that the matter be listed for support on 28-05-2012 and the Registrar of the Supreme Court made order to issue notice on the Respondent for 28-05-2012.**

Thus, excepting the above minutes, all the other matters which the parties made reference to relying upon motion books and day books, pertaining to number of notices

tendered, the date of tender and the date of dispatch in my view, are all disputed facts, and I do not intend to rely on same.

**What is undisputed, relevant and significant is that the Court listed this application for 'Support' and directed to issue notice on the Respondent; the Respondent filed proxy and caveat six weeks prior to the date of Support and was before this Court on 28-05-2012, the first day the case was listed for Support, and on the said date itself raised a preliminary objection with regard to non-compliance of Rule 8(3) by the Petitioner.**

Having examined the record before Court, **I would now proceed to consider Rule 8(3)** in the light of the submissions made before this Court.

Let me begin by summarizing the arguments put forward by the two parties. The Respondents contention is that, Rule 8 (3) is mandatory in nature and since the Petitioner has failed to comply with the provisions of the said Rule, the application should be dismissed *in limine*. The contention of the Petitioner on the other hand is the Petitioner has complied with the provisions of Rule 8 (3) for all intents and purposes and hence the said objection has no force or effect in law and should be overruled. Without prejudice to the above argument, the Petitioner also contends, that **the purpose of the Rule has been achieved and no prejudice has been caused** to the Respondent and hence the objection raised, should in any event be overruled.

Hence, with regard to the first argument of the Petitioner, it is apparent that this case revolves around the documents that were tendered to Court, at the point of invoking its jurisdiction.

As already emphasized, I do not wish to come to a finding with regard to disputed facts or matters that are highly contentious between parties. Hence, I make no pronouncement on the contention of the Petitioner, that the Petitioner has for all intents and purposes complied with Rule 8(3), based upon the record before Court.

Thus, I limit myself to answer the question **with regard to the instant application, is Rule 8(3) mandatory in nature which would result in dismissal of the application for non-compliance of Rule 8(3), or Could this Court use its discretionary power and excuse the Petitioner for non-compliance of the mandatory provisions of Rule 8(3)?**

The plethora of Judgements of this Court, recognize the mandatory nature of Supreme Court Rules and especially Rule 8 (3). Nevertheless, in certain cases, the Court has examined the facts pertaining to the matters before Court and excused a Petitioner for non-compliance of the said Rule 8 (3).

In the said background, I wish to consider the authorities relied upon by the learned Presidents' Counsel for the Respondent **to establish the mandatory nature of Rule 8(3)** and I wish to examine certain material facts of the said authorities in detail, since in my view, the factual matrix of the said authorities can be distinguished from the facts of the instant application before this Court for determination.

The first case relied upon by the Respondent is **Woodman Exports (Pvt) Ltd. v. Commissioner General of Labour and others (supra)**

The Petitioner in the said case, filed a Special Leave to Appeal application without annexing a single document on 23-12-2008 and one month hence, by way of a motion, tendered the documents and moved to list the application for support. Two weeks thereafter, the Registrar minuted that the notices have still not been tendered. On 20-03-2009 the day the application was listed for support, Court made Order, 'notices not given to Respondents' and **directed the Petitioner to support the application with notice to the parties** and re-fixed the case for a date two months hence. Six days prior to the 2<sup>nd</sup> date of support, notices were tendered and sent by registered post to the first to sixth Respondents, Commissioner General of Labour and Five others and when the matter came up for support on the 2<sup>nd</sup> day; viz 20-05-2009 there was no appearance for the Respondents and the matter was once again re-fixed. Meanwhile, notices sent to the fourth to sixth Respondents were returned and re-issued. The case was taken up on 15-07-2009 the third day of support and seven months after the lodging of the application and on the said date, the first and second Respondents were represented by State Counsel, and a preliminary objection was raised, that the notices were tendered to the Supreme Court only five months after date of filing of petition and that too, nearly two months after the direction of Court and thus, the Petitioner has not complied with Rule 8(3) of the Supreme Court Rules. Based on the aforesaid circumstances, the Court upheld the preliminary objection and dismissed the application of the Petitioner.

In my view, the facts of **Woodman case** can be distinguished from the instant application, in which the Respondent, a foreign company was very much aware of the Special Leave to Appeal application and filed caveat stating that it was in receipt of notice in terms of Rule 8(1) six weeks prior to the first date of support of the said application and indicated its intention to oppose the application for Special Leave to Appeal.

The *second case* relied upon by the Respondent, to establish the mandatory nature of Rule 8(3) was **A.H.M. Fowzie and 2 others v. Vehicle Lanka (Pvt) Ltd. (supra)**

In the said case too admittedly, the Petitioner failed to file the notices together with the application for Special Leave to Appeal. The Respondent, a local company however became aware of the Special Leave to Appeal application a day prior to the date of support of the Special Leave application when a case against the same party was taken up in the Court of Appeal and filed a motion and moved Court to reject the application *in limine* for the reason that Rule 8(3) had not been complied with.

The Court upheld the preliminary objection and rejected the Application of the Petitioner and held, that the purpose of Rule 8 is to ensure that all parties are properly notified in order to give a hearing to all parties and such purpose has not been achieved by the actions of the Petitioner in not adhering to the Supreme Court Rules, although the Petitioner, consequent to the motion filed by the Respondent to reject the application, filed papers and served it on the Respondent. The Court went onto hold, that filing of papers on a subsequent date cannot be considered as discharging the requirement under Rule 8(3) or substantial compliance with Rule 8(3) or as an application for extension of time under Rule 40 of the Supreme Court Rules.

This case too, in my view can be distinguished from the instant application before us, in which no motion was filed for the dismissal of the case *in limine* and in any event, the Respondent, the foreign company was put on notice and was very much aware of the Special Leave to Appeal application and the date fixed by Court for support of the application and as stated earlier also filed a caveat and a motion and more over indicated in the motion filed in Court that Papers were served under Rule 8 (1) and indicated the opposition to the application and was present in Court on the said date.

The *third case* relied upon by the Respondent with regard to the mandatory nature of Rule 8(3) is **Sudath Rohana and another v. Mohammed Cassim Mohammed Zeena and another (supra)**

The said case was a Leave to Appeal application filed against the Order of the Provincial High Court, wherein the Petitioner admittedly failed to file notices together with the said application but served a set of documents on the Respondent direct and not through the Supreme Court Registry. The Respondent filed a motion raising a preliminary objection with regard to the mandatory requirement of Rule 8(3) and moved to reject the application *in limine*. In the said case, response of the Petitioner to the said contention was that there was no requirement for the Petitioner to follow the procedure laid down in Rule 8(3) as it was not an appeal from the Court of Appeal.

Shirani Bandaranayake, J. (as she was then) after a careful consideration of the appeal procedure viz-a-viz the Supreme Court Rules held that it is Rule 28 (3) of Section C of Part I of the Supreme Court Rules that is applicable for appeals from the Provincial High Court and not Rule 8 (3) of Section A of Part I of the Rules. The Court went on to hold that Rule 28(3) too, is mandatory and thus, upheld the preliminary objection and dismissed the appeal.

Whilst, I am in agreement with the *ratio-decidenti* of the aforesaid **Sudath Rohana case** pertaining to appeals from the Provisional High Court to the Supreme Court, the applicability of Supreme Court Rules and the mandatory nature of Rule 28(3), in my view, the said case is not on 'all fours' similar to the instant application, since the Respondent in the instant application did not take any constructive steps, prior to the date of support either to file a motion and move for rejection of the application *in limine* for non-compliance of Rule 28(3) or for dismissal of the application and thus the aforesaid case relied upon by the Respondent too, in my view can be distinguished from the instant application.

Having referred to the three judgements relied upon by the Respondent, I wish to refer to two other judgements which are often cited before this Court, where Rule 8(3) has been meticulously analyzed.

The first case is **Tissa Attanayake v. Commissioner General of Elections and others (supra)** wherein, this Court upheld the preliminary objection raised with regard to non-compliance of Rule 8(3). This case too, in my view, can be distinguished from the instant

application since, it is apparent from the facts of the said case, that the Petitioner therein moved to serve notice on several of the Respondents, only after the first day the matter was fixed for support and moreover after such objection was raised on behalf of the Respondents. In the said case, the Court held that the purpose of Rule 8(3) was to ensure that parties are properly notified in order to give them a hearing, prior to determining a Special Leave to Appeal application.

Secondly, **Udaya Shantha v. Jeewan Kumaratuga and others 2012 [BLR] 129** wherein this Court upheld the preliminary objection raised pertaining to non-compliance of Rule 8(3) of the Supreme Court Rules and reference was made to the entire gamut of the cases delivered by this Court pertaining to the mandatory nature of the said Rule. However, from the facts of the said case it is apparent that at the time the said case was lodged, admittedly no notice was tendered and for a period of six months no steps what so ever were taken by the Petitioner to tender notices. Thereafter only steps were taken, to amend the petition, file annexures to the petition, and seek extension of time in terms of Rule 40 and to get the case fixed for support and serve notice on the Respondents and at that point of time the Respondents filed a motion moving Court to dismiss the application *in limine* for controverting Rule 8(3) and failing to prosecute the application with due diligence. Thus, in my view, the said case too can be distinguished from the instant application before this Court for determination.

Likewise, in **Colombo Business School Ltd v. Sri Lanka Tea Board – SC/HC/LA 69/2018 - s.c. minutes of 25.01.2021** a recent judgment of this Court, pertaining to Rule 28(3) of the Supreme Court Rules, this Court placed much reliance and weight on the minute of the learned Judge of this Court, in determining the crucial issue with regard to tendering of notice. In the said case, the relevant minute of the Judge sitting in chambers viz. “*Petitioner is directed to tender notice and move for leave*” was considered the pivotal point in coming to the conclusion that no notice was tendered by the Petitioner, at the time of lodging of the Leave to Appeal application which in turn resulted the Court to uphold the preliminary objection raised with regard to non-compliance of Rule 28(3) and dismiss the case *in limine*.

Furthermore, in the aforesaid case, it is observed that the fact of notices not being tendered which resulted in notice not being issued on the Respondent was not a disputed fact between the parties, unlike in the present case, **where tender and issuance of notice is**

**the bone of contention between the two parties.** Hence, the said case too, can be distinguished from the instant application.

In all the cases discussed above, although the focal point or the pivotal issue is Rule 8(3) and its mandatory nature, the facts pertaining to tender and issuance of notices in the said cases are distinct and different and hence in my view not comparable and can be distinguished from each other and more so with the instant application. Hence, though the thread that runs through the fabric is Rule 8(3) and the said cases speak of the mandatory nature of Rule 8 (3), it has no direct bearing, in so far as the instant application is concerned, since in the instant application the Petitioner and the Respondent are at variance with regard to the tender and issuance of notice.

Furthermore, in the cases discussed above without any exception, admittedly, notices were not tendered together with the Petition of Appeal, whereas in the instant matter, the Petitioner emphatically adverts that notice was tendered to Court together with the Petition of Appeal and contends that for all intents and purposes the Petitioner has complied with Rule 8(3). Hence, there is a material difference between the instant application and the rest of the cases considered and analyzed in this judgement.

Thus, whilst appreciating the submissions of the learned Presidents' Counsel for the Respondent with regard to the mandatory nature of Rule 8(3) of the Supreme Court, I am of the **view that the instant application is unique and this application should be looked at and examined independently from its precise facts and context.**

At this stage, I wish to draw attention to another judgement of this Court.

In **AG v. Lokugalappathilage Cyril SC/SPL/LA 272/2013 - s.c. minutes of 10-10-2016** wherein a preliminary objection pertaining to Rule 3, 6 and 10 of the Supreme Court Rules was raised, this Court observed that there is a necessity to give a strict interpretation to Supreme Court Rules and also that matters concerning Rules need to be considered on a case by case basis.

Whilst I am in agreement with the said observation, I am of the view that each case is unique and when a Court is considering a preliminary objection, the object of the rule, the circumstances of default, the explanation of the Petitioner for the default, should be carefully

analyzed and examined on a case by case basis, in deciding whether a case should be dismissed *in limine*, for failure to comply with a Supreme Court Rule.

Having said that, I pause at this moment to examine the submissions of the learned Presidents' Counsel for the Petitioner pertaining to Rule 8(3).

First and foremost, the learned Presidents' Counsel for the Petitioner emphatically contends, the authorities relied upon by the Respondent has no relevance to this matter, since the Petitioner has fully complied with the mandatory provisions of Rule 8(3) and tendered the necessary papers to Court and that in the first instance when this matter was taken up before Court, the instructing Attorney personally informed this Court, that five copies were tendered to Court and in addition a copy was directly served on the Respondent. However, as stated earlier the record before us, does not bear out the said facts and the said facts are the 'disputed facts' that I will not endeavor to investigate or rely upon in determining this case.

Thus, I will confine myself to the record before Court and only rely upon the minutes in the record, which I believe was entered after examining the documents before Court and which unambiguously state "List for Support on 28-05-2012" and "issue notice on the Respondent."

The next contention of the Petitioner before this Court was twofold.

**Firstly, that in any event the Respondent is before Court and the purpose of the Rule has been achieved; and**

**Secondly, no prejudice whatsoever has been caused to the Respondent by the alleged non-compliance of Rule 8(3) by the Petitioner.**

In order to substantiate the first contention with regard to **the purpose of the Rule**, the learned Counsel for the Petitioner relies on the below mentioned observations made by Shirani Bandaranayake, J. in **Tissa Attanayake case (supra)** and in **Saman Niroshana case (supra)** wherein it is stated as follows;

*"the purpose of Rule 8(3) is to ensure that all necessary parties are properly notified and to give a hearing to all parties"*

Likewise, in order to substantiate its second contention **that no prejudice was caused to the Respondent** by the Petitioners' alleged non-compliance of Rule 8(3), the learned Counsel for the Petitioner relies on the Order made by a Divisional Bench of five Judges of this Court, in **AG v. Dr. Shirani Bandaranayake and Others (supra)** wherein it is observed,

*“that no prejudice whatsoever has been caused to any of the parties in this case by reason of non-compliance of Rule 8(3).”*

I wish to consider the Order made by the Divisional Bench first, in the aforesaid **AG v. Dr. Shirani Bandaranayake** case. The Petitioner of the said case was the Hon. Attorney General and it was a Special Leave to Appeal application against the Judgement of the Court of Appeal. Consequent to support of the case by the Petitioner, the Court granted Special Leave to Appeal against all the Respondents. Subsequently, at the hearing of the appeal before the Divisional Bench, two of the Respondents brought to the attention of Court, that they could not file caveat nor appear in Court on the date on which the matter was first taken up for granting of Special Leave to Appeal as the said two Respondents were not served with any notice, pursuant to filing of the application for Special Leave to Appeal by the Petitioner; i.e. non-compliance of Rule 8(3) of the Supreme Court Rules.

The Court examined the record and held that there **was substantial compliance by the Petitioner of Rule 8(3) of the Supreme Court Rules**. However, in the interests of justice, the said two Respondents who were initially not heard at the time of granting of special leave *were granted an opportunity to participate in the proceedings for granting of Special Leave to Appeal* and accordingly the Court set aside the earlier Order and set down the matter for granting of Special Leave to Appeal against the said two Respondents. Thereafter, when the case was taken up for the said purpose of granting of Special Leave against the said two Respondents, the two Respondents once again raised an objection pertaining to non-compliance with Rule 8(3). The Divisional Bench of this Court examined the said issue and then held, that **no prejudice whatsoever was caused to any of the parties by reason of non-compliance of Rule 8(3) by the Petitioner** and overruled the objection raised pertaining to Rule 8(3) of the Supreme Court Rules. Thus, in the aforesaid case it is observed that a **Divisional Bench of this Court, when examining the mandatory nature of Rule 8(3)**

**considered ‘substantial compliance’ as well as ‘no prejudice rule’ in arriving at its determination.**

The contention of the Petitioner pertaining to ‘purpose been achieved’ and ‘no prejudice been caused to the Respondent’ in my view, is a significant factor that should be borne in mind when considering matters of this nature.

Thus, having referred to the contentions of both parties, I now come to the fundamental question that begs an answer in this application.

**If the purpose of the Rule has been achieved and no prejudice has been caused to the Respondent, then in such a situation should the Court uphold a preliminary objection raised, with regard to non-compliance of Rule 8(3) or ,** if I may be more explicit, if the Respondent is before Court, very much prior to the first day of support, having indicated that notices were issued on the Respondent in terms of Rule 8(1) of the Supreme Court Rules and it is apparent that the purpose of the Rule has been achieved and no prejudice whatsoever has been caused to the Respondent, then should a Court uphold a preliminary objection raised based exclusively upon the mandatory nature of Rule 8(3) and dismiss a Special Leave to Appeal application *in limine*, notwithstanding the position taken up by the Petitioner, that he has complied with the provisions of Rule 8(3).

The foremost duty of a Court is to administer justice and in the pursuit of seeking justice, I do not think that a Court should take such a drastic action of dismissal of an action. The circumstances of this case in my view, does not warrant such a course of action to be taken at this point of time. Undoubtedly, this Court in many an instance has held that the Supreme Court Rules are mandatory in nature and I am in agreement with that view.

The question before this Court now, is the consequences of non-compliance. Can the Court use its inherent power and excuse such a non-compliance? Is it a matter where the discretion of Court can be resorted to? In order to find answers to such queries, I wish to consider the recent jurisprudence of this Court, with regard to Supreme Court Rules and specifically, the consequences of non-compliance of a specific Supreme Court Rule.

The first case, I wish to consider with regard to the *exercise of discretion of Court* is the case of **Rohitha Peiris and another v. Doreen Peiris 2015 Vol XXI [BLR] 101**. In this case,

admittedly the Petitioner failed to file the notices to be served on the Respondents together with the Petition of Appeal and an objection was raised pertaining to non-compliance of Rule 8(3). This Court whilst re-iterating the mandatory nature of Rule 8(3), observed that *the Court has a discretion to make Order in an appropriate case even if non-compliance had not been explained*. In this **Peiris** case, the only explanation for non-compliance was ‘inadvertence’. Sripavan, J., (as he then was) considered the said position in order to exercise the discretion in favour of the Petitioner and also examined the entire appeal process resorted to by the Petitioner, the failure to adhere to Rule 7 and 40 and specifically the time bar of lodging the appeal and held that the **Court was not inclined to exercise the discretion** in favour of the Petitioner and upheld the preliminary objection and dismissed the application.

The next case, I wish to consider is **Nestle Lanka PLC v Gamini Rajapakse SC/HC/LA No.54/2018 – s.c. minutes of 20.09.2020** in which the preliminary objection raised was with regard to the failure of the Petitioner to comply with Rule 2, 7 and 8 of the Supreme Court Rules. This Court in its judgement pronounced by his Lordship the Chief Justice emphasized the importance and mandatory nature of the Supreme Court Rules and the consequences that would follow in case of a breach of a Rule.

His Lordship also considered in detail, the series of cases where this Court held that non-compliance of Rule 8(3) would result in the dismissal of an application and also the cases which recognized the proposition that mere technicalities should not be thrown in the way of administration of justice and specifically Rule 34 and 2 respectively, which require a party to show due diligence in prosecuting an appeal as well as a party seeking Special Leave to exercise due diligence in obtaining necessary material to submit to Court at the time of filing papers and observed that the Petitioner in the aforesaid case was **unable to satisfy Court that it exercised due diligence** and thus upheld the preliminary objection raised by the Respondent and dismissed the application.

Similarly, in **Colombo Business School case** discussed earlier, this Court examined the threshold provisions of timeline referred to in Rule 28 (3) and 7 of the Supreme Court Rules and held, the consequences of the failure of the Petitioner to comply with Rule 28(3) would necessarily result in upholding the preliminary objection raised pertaining to the mandatory nature of Rules 28(3). Nevertheless, the Court considered the ‘due diligence rule’ to ascertain whether the Court could excuse the Petitioner of its non-compliance and came to the

conclusion, that the **Court cannot exercise its discretion** in favour of the Petitioner, when the Petitioner failed to adhere to the time line in filing an application for Special Leave to Appeal and based upon the said factors upheld the preliminary objection raised pertaining to Rule 28(3) and dismissed the application.

From the afore discussed cases, it is manifestly clear, that this **Court in determining matters pertaining to Supreme Court Rules, not only considered the mandatory nature of such Rules, but also explored the possibility of exercising the discretionary power** it inherits and looked into the circumstances of the case to examine whether the actions or the failure to comply with the provisions of the Supreme Court Rules can be excused in favour of a Petitioner.

Similarly, the **Court has also explored the ‘due diligence rule’ incorporated in Rule 34 of the Supreme Court Rules** *viz-a-viz* the course of action followed by a Petitioner, to determine whether the steps taken by a Petitioner is sufficient or to the satisfaction of Court, in order to excuse a Petitioner from non-compliance of a Supreme Court Rule.

Nevertheless, it is significant that in the aforesaid cases having discussed the discretionary power of Court, this Court upheld the said preliminary objection raised by the Respondents pertaining to non-compliance of Rule 8(3) and 28(3) respectively. Thus, the Court did not exercise its discretion in favour of the Petitioner in the said instances.

However, it is seen in certain cases determined by this Court, in the recent past, the discretionary power has been exercised in favour of the Petitioner. The Courts have taken this path when the purpose of the Rule has been achieved; when no prejudice has been caused to the Respondent; and when there is substantial compliance of the Rule. The learned Counsel for the Petitioners’ main contention before this Court was also based upon this ground.

Hence, I wish to examine some of the said judgements at this juncture.

In **Wijesinghe v. Tenderlea Farm (Pvt) Ltd. SC/SPL/LA No. 159/2017 - s.c. minutes of 17-09-2020**, a preliminary objection was raised by the Respondent pertaining to the Petitioner not tendering certain documents together with the Petition and thus, not complying with Rule 2 and 6 of the Supreme Court Rules of 1990. The Court held that there was ‘no material breach’ of Rule 2 and 6 on the part of the Petitioner. The Court further

observed that the Petitioner has ‘substantially complied’ with the Rules in filing the said case and also ‘**no prejudice has been caused**’ to the Respondent. Hence, the preliminary objection raised by the Respondent pertaining to the non-compliance of Supreme Court Rule was overruled by this Court.

In the said judgement, reference was made to the case of **Kiriwanthe v. Navaratne [1990] 2 SLR 393**, wherein observations were made in respect of Supreme Court Rules of 1978 as follows:-

*Rules must be complied with but the law does not require or permit an automatic dismissal of the party in default and that consequences of non-compliance is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default as well as the excuse or explanation therefore, in the context of the object of the Rule.*

Similarly, in **Ediriwikrama v. Rathnasiri SC App 85/2004 – s.c. minutes of 18-12-2012**, this Court overruled an objection taken pertaining to Rule 8(3). It was upon the basis that the objection was raised not at the initial stage of granting of leave but ten years thereafter when the hearing of the appeal was taken up. The Court was inclined to accept the submission that **no prejudice has been caused** to the Respondent by the failure of the Petitioner in non-tendering of notices as stipulated in the Supreme Court Rules. In overruling the submission of the Respondent with regard to the mandatory nature of Rule 8(3), the Court observed and highlighted that in the special circumstance of the said case that to achieve the smooth function of Court, it was not desirable to do otherwise since no prejudice whatsoever has been caused to the Respondent.

Likewise, in **Sirisena v. Gunawardena – SC/SPL/LA 133/15 – s.c. minutes of 02-08-2017**, a case in which the notices were not tendered as required under Rule 8(3), but were tendered seven days thereafter and a preliminary objection was raised pertaining to non-compliance of Rule 8(3) and 40 of the Supreme Court Rules, the purpose of Rule 8 was considered by this Court in the light of discretion enumerated in Rule 40 and held, though delayed, there was ‘substantial compliance’ and such compliance was considered sufficient

to overrule the preliminary objection raised and entertained the application. Further, the Court went on to observe that in considering matters of this nature, it is necessary to consider whether non-compliance with the Rules has adversely affected a party to the case and the functioning of justice in coming to its determination.

Thus, it could be seen in an appropriate case, this Court has used its discretion and overruled the objections raised pertaining to Rule 8(3), although in a multitude of cases, this Court has upheld the mandatory nature of Rule 8(3), thus giving credence to the fact that every case should be looked at and considered on its own merits, in order to administer justice and to maintain the smooth function of the Court procedure.

It is also apparent with regard to Rules, that the jurisprudence of this Court has been vibrant and diverse. On one hand this Court has accepted the mandatory nature of Rule 8(3) and on the other hand has considered due diligence, no prejudice rule and discretion of Court in determining a preliminary objection raised before Court pertaining to complying with Supreme Court Rules. This in my view, is giving a holistic approach to the consideration and examination of the Supreme Court Rules, based upon the facts of each case independently on a case by case basis.

At this juncture, I also wish to refer to the oft-quoted observation made by Mark Fernando J., in **Kiriwanthe v Navaratne case (supra)** with regard to Supreme Court Rules of 1978.

“I am content to hold that the requirement of Rule 46 must be complied with, but strict or absolute compliance is not essential, it is sufficient if there is compliance which is

“substantial”- this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied [ ] the Court should first have determined whether the default has been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance or to impose a sanction.”

The above observation made in respect of Supreme Court Rules of 1978 was referred to and meticulously analyzed and evaluated by Shirani Banadaranayake J., in **Fowzie v Vehicle Lanka case (supra)** viz-a-viz the Supreme Court Rules of 1990, in coming to the conclusion, inter alia that the purpose and the objective of Rule 8, is to ensure that all parties are properly notified in order to give a hearing to all parties, which school of thought has run through the gamut of cases in respect of Rule 8(3), wherein this Court has upheld its mandatory nature and I am in agreement with such school of thought.

Nevertheless, as discussed earlier, this Court has categorically upheld the inherent power of Court to look at Rule 8(3) from the perspective of achieving the purpose of the Rule as well as no prejudice being caused to the Respondent as specifically observed in the **Divisional Bench decision of this Court in AG v Shirani Bandaranayke (supra)** and thus unequivocally accepted the discretionary power vested with this Court to look at a matter pertaining to Supreme Court Rules independently and sacrosanctly.

This brings me back to the case before us for determination.

In the instant application, filed almost a decade ago, the Honourable Judge of this Court sitting in chambers, directed that the matter be supported with notice to the Respondent. The Respondent, a foreign company filed caveat upon the basis that notice was received in terms of Rule 8(1) and indicated its intention to oppose the Special Leave to Appeal application pertaining to *an Enforcement of a default judgement obtained from the Royal Courts of Justice in the United Kingdom*. On the first day the case was taken up for support, the Respondent was present in Court and raised the preliminary objection pertaining to Rule 8(3), upon the premise that the Respondent was not served notice through the Supreme Court Registry. It is admitted and not in dispute that notice was served directly by the Petitioner on the Respondent, whereas tender of notice and issuance of notice on the Respondent through the Supreme Court is the matter in dispute, upon which the entire case revolves.

Eight long years have passed and the case is still at the starting block. The issues that spring from the Court of Appeal judgement with regard to registering of a default judgement in terms of the Reciprocal Enforcement of Foreign Judgement Ordinance, and the merits of the application viz-a-viz the provisions of the Mutual Assistance in Civil and Commercial

Matters Act, have still not been considered by this Court, to determine in the first instance, whether this application is a fit and proper case to grant Special Leave to Appeal or not.

Whilst emphasizing the mandatory nature of Rule 8(3) of the Supreme Court Rules and that the said Rules, made under and in terms of the Constitution should be followed and cannot be easily disregarded, I wish to consider this unique case independently and on its own steam. I am also mindful of the length of time and the delay in administering of justice to the parties before Court.

I place no reliance on disputed facts as discussed earlier in the judgement and rely only on the Order made by the Judge of this Court directing to 'list this matter for support and to notice the Respondent'. Thus, I observe that there is no clear evidence before this Court to establish the principal assertion of the Respondent, that the Petitioner failed to 'tender notice' and did not 'tender notice' when lodging the instant application and hence failed to act diligently and thereby breached or failed to comply with Rule 8(3) of the Supreme Court Rules. Unlike in most or almost all the judgements referred to herein where the non-tender of notice together with the Petition of Appeal is an admitted fact, in the instant application, the Respondent has failed to establish on the face of the record, the main ingredient required to raise a preliminary objection pertaining to Rule 8 (3), namely failure to 'tender notice' to the Supreme Court together with the Petition of Appeal. As discussed earlier in this judgement it is a matter in dispute and not an admitted fact in the instant application.

On the other hand, the purpose of Rule 8(3) is to ensure that parties are notified and given a hearing and in this application, undoubtedly such purpose has been fulfilled. The Respondent filed caveat very much prior to the day the application was first fixed for granting of Special Leave to Appeal and in its motion indicated that notices were issued in terms of Rule 8(1) and on the first date itself, was before this Court and was represented by Counsel who himself was the competent authority of the British Company.

Thus, I am of the view that no prejudice whatsoever has been caused to the Respondent. In fact, substantial compliance of Rule 8(3) is accepted by both parties and the purpose and the object of the Rule has been achieved. Hence, I see no reason whatsoever, not to excuse the Petitioner, from non-compliance of Rule 8(3) as contended to by the Respondent. I am of the view, that this is a fit case for this Court to use its inherent power in

determining this application, and excuse the Petitioner in the circumstances of this case, for non-compliance of Rule 8(3) as adverted to in this application.

Thus, for reasons more fully adumbrated in this judgment, I hold that this case is a unique and a stand-alone case, fit and substantial enough for this Court to exercise its judicial discretion in favour of the Petitioner. Thus, I overrule the preliminary objection raised before this Court by the Respondent pertaining to Rule 8 (3) of the Supreme Court Rules of 1990 and reject the application made by the Respondent to dismiss this Special Leave to Appeal application *in limine*.

The preliminary objection is thus overruled and rejected. In the circumstances of this case I order no costs.

Judge of the Supreme Court

**Jayantha Jayasuriya PC, CJ.**

I agree

Chief Justice

**Vijith K. Malalgoda PC, J.**

I agree

Judge of the Supreme Court