

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

**S.C. (Spl.) L.A. No. 55/2011
C.A. Writ Application No. 155/2011**

Tissa Attanayake,
General Secretary,
United National Party,
“Sirikotha”,
No. 400, Pita Kotte Road,
Pita Kotte.

Petitioner-Petitioner

Vs.

1. Commissioner General of Election,
Election Secretariat,
No. 365, Old Kotte Road,
Rajagiriya.
2. M. Kinsley Fernando,
Returning Officer,
Puttalam District,
Divisional Secretariat,
Puttalam.
3. Assistant Commissioner of Election for the
Local Government Election of Chilaw
Pradesheeya Sabha,
Puttalam.
4. S.A.D. Susil Premajayantha,
Secretary,
United People’s Freedom Alliance,
No. 301, T.B. Jaya Mawatha,
Colombo 10.
5. Chalindu Dinu De Silva,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

6. Tilvin Silva,
Secretary,
"Janatha Vimukthi Peramuna,"
No. 464/20, Pannipitiya Road,
Pelawatta,
Battaramulla.
7. I.M. Samson,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
8. Ashoka Silva Pilippange Nihal Ashoka Silva,
No. 301, Jayah Mawatha,
Colombo 10.
9. R.D. Sudath Premalal,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
10. R. Rangajeewa Mendis,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
11. M.M. Sunil P. Paaris,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
12. L. Kalana Gisara Perera,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
13. H.A.J.J. Nishantha Kumar,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
14. Kimbulapitiya Dharmarathana Thero,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
15. Gauful Amir Mohamed Shishan,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

16. Chinthaka Hansa,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

17. Jayamanne Mudalige Janitha Devapriya,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

18. Jayaweera Wickramathne Rankoth Jedige,
No. 301, T.B. Jaya Mawatha,
Colombo 10.

19. Jayasinghe Arachchilage Induka
Jayasinghe,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

20. Jayasuriya Kuranage Gayan Ranga Perera,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

21. W.S. De Soysa,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

22. Ranasinghe Arachchige Jayasiri,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

23. Ran Arumage Janaka Manju Sri Senarathne,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

24. Warnakulasuriya Sanjeewa Thisera,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

25. Samaranayake Mudiyanselage Dunesh
Rohana,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

26. Sarath De Silva,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

27. Herath Mudiyanselage Lakshika Prasadini
Herath,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

28. Hon. The Attorney-General,
Attorney General's Department,
Colombo 12.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
P.A. Ratnayake, PC., J. &
Priyasath Dep, PC., J.

COUNSEL : Upul Jayasooriya with M. Ariyadasa for Petitioner-Petitioner
Nihal Jayamanne, PC., with Kushan D' Alwis, K. Ratwatte,
Dilshan De Silva and Chamath Fernando for 4th Respondent-
Respondent.
N. Pulle, SSC, for 1st, 2nd, 3rd and 28th Respondents-
Respondents

ARGUED ON: 04.07.2011

WRITTEN SUBMISSIONS

TENDERED ON: Petitioner-Petitioner : 13.07.2011
4th Respondent-Respondent : 08.07.2011
1st, 2nd, 3rd and 28th
Respondents-Respondents : 08.07.2011

DECIDED ON: 21.07.2011

Dr. Shirani A. Bandaranayake, CJ.

This is an application for special leave to appeal from the judgment of the Court of Appeal dated 04.03.2011. By that judgment, the Court of Appeal had refused to issue notice and interim relief, on the application filed by the petitioner-petitioner (hereinafter referred to as the petitioner) for a writ of certiorari quashing the decision of the 2nd and 3rd respondents-respondents (hereinafter after referred to as 2nd and 3rd respondents) in accepting the nomination paper of the United People's Freedom Alliance for Chilaw Pradeshiya Sabha 2011, a writ of mandamus directing the 1st to 3rd respondents-respondents (hereinafter referred to as 1st to 3rd respondents) to conduct the election for Chilaw Pradeshiya Sabha consequent to the rejection of the nomination paper submitted by the said United People's Freedom Alliance and a writ of Prohibition prohibiting the 5th respondent-respondent (hereinafter referred to as the 5th respondent) and others contained in the same list, from contesting as candidates of the United People's Freedom Alliance for the Chilaw Pradeshiya Sabha Election 2011 and /or sitting and voting as Members of the Chilaw Pradeshiya Sabha on the basis of preliminary objections raised on behalf of the 4th respondent-respondent (hereinafter referred to as the 4th respondent).

The petitioner preferred an application before this Court for special leave to appeal and when this matter came up for support, learned Senior State Counsel for 1st, 2nd, 3rd and 28th respondents took up a preliminary objection that the application for special leave to appeal before this Court should be dismissed as the petitioner had not complied with Rule 8(3) and Rule 40 of the Supreme Court Rules 1990.

Learned President's Counsel for the 4th respondent also raised the same preliminary objection stated above and submitted that the petitioner's application for special leave to appeal should be dismissed *in limine*.

Since preliminary objection was raised at the stage when the application was listed for support, all parties were heard on the said preliminary objection and the order on the said preliminary objection was reserved.

The facts relevant to the preliminary objection raised by the learned Senior State Counsel and the learned President's Counsel as presented by them, *albeit* brief, are as follows:

On 03.05.2011, the petitioner's application for special leave to appeal came up for support before this Court with an undated petition and incomplete documents. This Court at that stage had directed the petitioner to file fresh documents and the matter was fixed for support for 27.05.2011. On 23.05.2011, the petitioner had issued notice on the 4th respondent through the Registry. Although the application was fixed for support on 27.05.2011, the said date was later declared as a public holiday in the Western Province and this matter was fixed for support on 07.06.2011 and later for 21.06.2011.

When it came up for support on 21.06.2011, objections were raised by the learned Senior State Counsel and the learned President's Counsel for the 4th respondent that notices were not tendered to the Registry and therefore the petitioner had not complied with the Supreme Court Rules, 1990.

Thereafter the petitioner made an application to tender notices to the 5th to 27th respondents on 21.06.2011, after having been informed by Court that notices had not been issued on the respondents in terms of Supreme Court Rules, 1990. Learned Senior State Counsel referred to the motion filed by the Instructing

Attorney-at-Law for the petitioner dated 27.06.2011 that there had been failure on the part of the petitioner to tender notices in compliance with the Supreme Court Rules, 1990.

Learned Senior State Counsel referred to the long time of cases, which had clearly stated the need to follow the Supreme Court Rules, when invoking the jurisdiction of this Court and drew our attention to the position taken by Tennekoon, C.J. in **C. Coomasaru v M/s Leechman and Co. Ltd. and others** (S.C. (Applications) No. 217/72 and 307/72 - S.C. Minutes of 26.05.1976) referred to in **Nicholas v O.L.M. Macan Markar Ltd. and others** ([1981] 2 Sri L.R. 1)

"Rules of procedure must not always be regarded as mere technicalities which parties can ignore at their whim and pleasure."

Several other judgments commencing from **K. Reaindren v K. Velusomasunderam** (S.C. (Spl.) L.A. Application No. 298/99 – S.C. Minutes of 07.02.2000) were referred to in support of the position that non-compliance with Rule 8(3) of the Supreme Court Rules, 1990 would result in the dismissal of the application for special leave to appeal.

Learned President's Counsel for the 4th respondent associated himself with the submissions of the learned Senior State Counsel and referred to several judgments of this Court, which indicated the need to give notice to the respondents in terms of Supreme Court Rules of 1990.

Learned Counsel for the petitioner contended that although the learned Senior State Counsel for 1st to 3rd and 28th respondents and the learned President's Counsel for the 4th respondent had raised the preliminary objection that the

petitioner has not complied with Rule 8(3) of the Supreme Court Rules, 1990 that such errors could be rectified and that justice would be denied if the application is dismissed on such minor mistakes. In support of this contention, learned Counsel for the petitioner referred to Rule 30 of the Supreme Court Rules and stated that the said Rule 30 is mandatory as the consequences of its non-compliance is specifically stated in the said Rule. Learned Counsel for the petitioner contended that the Supreme Court Rules do not indicate such consequence with regard to Rule 8(3) and therefore if the petitioner has taken steps to communicate that an application is pending before this Court to other parties, then the requirement of the provisions in Rule 8(3) could be fulfilled. In such circumstances, learned Counsel for the petitioner stated that, any non-compliance of Rule 8(3) of the Supreme Court Rules would be rectifiable. In support of his contention, learned Counsel for the petitioner relied on, the decisions in **Union Apparels (Pvt.) Ltd. v Director-General of Customs and others** ([2000] 1 Sri L.R. 27), **Piyadasa and others v Land Reform Commission** (S.C. (Application) No. 30/97 – S.C. Minutes of 08.07.1998), **Kiriwanthe and another v Navaratne and another** ([1990] 2 Sri L.R. 393), **Priyani Soysa v Rienzie Arsecularatne** ([1999] 2 Sri L.R. 179) and **Bank of Ceylon v The Ceylon Bank Employees' Union (on behalf of Karunatilake)** ([2003] 1 Sri L.R. 47).

Having stated the submissions made by all learned Counsel, let me now turn to consider the legal position with regard to the preliminary objection that was raised before this Court.

The contention of the learned Counsel for the petitioner is that although Rule 8(3) of the Supreme Court Rules, 1990 had laid down provisions that are mandatory, the non-compliance of such mandatory provision does not result in a dismissal of the application, as it is possible to cure that defect and the petitioner

had taken such steps in order to rectify the mistake. He referred to the applicability of Rule 30 in support of this contention.

Rule 8(3) of the Supreme Court Rules is contained in part I(A) of the said Rules, which deals with special leave to appeal applications. The said Rule 8(3) is as follows:

"The petitioner shall tender with his application such number of notices as is required for service on the respondents 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 respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-Law, if any, and the name, address and telephone number, if any, of the Attorney-at-Law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any charge in such particulars."

It is to be noted that Rule 8(3) of the Supreme Court Rules, 1990, clearly provides for the need to tender the relevant number of notices along with the application for special leave to appeal. The said Rule also specifies the details that should be entered in such notices, with the requirement that stamped addressed envelopes for the service of such notices on the respondents also

should be tendered along with the said notices. A careful examination of Rule 8(3) clearly shows that the purpose of the said Rule is to ensure that the respondents are given notice through the Registrar of the Supreme Court that there is a special leave to appeal application lodged in the Supreme Court. This position is clearly enumerated by the fact that it is stated in Rule 8(3) that in the event if there is any change in the particulars given by the petitioner along with the notices which were tendered, changes in such particulars has to be forthwith notified to the Registrar.

Rule 8 contains 7 sub-Rules and all of them deal with the purpose of serving notice and the steps that have to be taken by the petitioner, respondents and the Registrar of the Supreme Court. The sequence of relevant steps would commence with the tendering of notices with the relevant details as referred to in Rule 8(3). This position is emphasized in Rule 8(5), which clearly shows the need to issue notice in terms of Rule 8(3) of the Supreme Court Rules 1990; wherein it is referred to the need that the petitioner should attend at the Registry to verify whether notice has not been returned undelivered and the steps that should be taken if it had been so returned. Considering all these objections, in **Samantha Niroshana v Senarath Abeyruwan** (S.C. (Spl.) L.A. No. 145/2006 – S.C. Minutes of 02.08.2007) it was clearly stated that,

". . . the purpose of the Supreme Court Rules is to ensure that all necessary parties are properly notified in order to give a hearing to all parties and Rule 8 specifically deals with this objection."

Learned Counsel for the petitioner contended that the petitioner had fulfilled the objective and discharged the requirements of Rule 8(3), although it may not have been in such compliance with Rule 8(3) of the Supreme Court Rules, 1990. A similar argument was taken by the learned Deputy Solicitor General in **Fowzie**

and others v Vehicles Lanka (Pvt.) Ltd. ([2008] 1 Sri L.R.23), where it was stated that in the event an applicant "fails to strictly, but manages to substantially comply with a Rule, and in doing so causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application."

In support of the said submissions, several decisions including the decision in **Kiriwanthe v Navarathna** (supra) was cited by the learned Deputy Solicitor General in **Fowzie's** (supra) case. Considering the rationale in **Kiriwanthe's** (supra) decision and the fact that **Kiriwanthe's** case was decided on 18.07.1990 on the basis of the Supreme Court Rule of 1978, it was decided in **Samantha Niroshana** (supra) the need to evaluate the provisions of the relevant Rule, before considering the effect of any non-compliance.

Rule 8(3) as stated earlier clearly specifies that,

"The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself . . ."

The petitioner has filed his petition and affidavit on 31.03.2011 and had moved this Court to list this matter on one of the three (3) given dates. Admittedly there is no reference to the effect that the petitioner had tendered notices to the Registry along with the petition and instead it appears that the copies of the notices along with the documents were sent to the respondents directly by the petitioner. The said notice is as follows:

"I tender herewith my appointment as Attorney-at-Law on behalf of the petitioner together with her

petition, affidavit, documents marked X1 and the documents marked X2 which is the case record of the case number C.A. Writ 155/2011 will be filed in due course and respectfully move that Your Lordships Court be pleased to accept same and file of record (sic).

And I further respectfully move that Your Lordships Court be pleased to list this matter on 26th April, 2nd May or 3rd May.

Copies of this motion together with the petition, affidavit, marked documents were sent to the Respondent-Respondents by Registered post and the postal article receipts are annexed hereto.

Sgd.

Attorney-at-Law for the
Petitioner-Petitioner."

It is therefore evident that the petitioner had not tendered along with the application the required number of notices to the Registry in terms of Rule 8(3) of the Supreme Court Rules, 1990 to be served on the respondents. Instead, the petitioner had sent the relevant documents by registered post to the respondents.

There is another important aspect that is revealed through the aforementioned motion. It is obvious that the said motion is sent by the registered Attorney-at-Law for the petitioner, who had filed the special leave to appeal application. In that she had given 3 dates, convenient to the petitioner's Counsel for this matter

to be taken for support. On the other hand, if the petitioner had complied with the Supreme Court Rules then she would have given these 3 dates to the Registrar along with the motion and the Registrar would inform the respondents when serving the notice as to when the matter is fixed for support. It is necessary at this point to take serious note of the fact that there is a significant difference between the notice tendered directly by a party to the others and the notice tendered by the Registrar of the Supreme Court to the relevant parties. That is the difference, which is clearly stipulated through the provisions of the Supreme Court Rules in order to streamline and regulate the Court procedure dealing with applications before the Supreme Court.

The importance of adhering to the several steps that has to be taken in tendering notices is emphasized by the provisions contained in Rule 40 of the Supreme Court Rules, 1990. In terms of Rule 40, where there is an application for extension of time for the purpose of Rule 8(3), the Registrar cannot entertain such an application, but he should submit it to a single Judge, nominated by the Chief Justice, in Chambers to decide on such grant of extension of time.

"An application for a variation, or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single Judge, nominated by the chief Justice, in Chambers:

- a) tendering notices as required by rules 8(3) and 25(2);

. . . .

- d) furnishing the address of a respondent as required by rules 8(5) and 27(3);

...."

It is not disputed that at the time of the filing of the application, the petitioner had not issued notices on the respondents through the Registrar of the Supreme Court. It is also not disputed that the petitioner had not made any application in terms of Rule 40 for an extension of time. It is also common ground that only after the first date of support the petitioner had served notice to the 4th respondent through the Registry. Therefore this matter had come up on two occasions for support without issuing notices to the other respondents and when it came up on 21.06.2011, the 5th to 27th respondents were absent and unrepresented and no notices had been issued on them.

It is therefore clearly evident that the petitioner had not complied with Rule 8(3) of the Supreme Court Rules, 1990.

The petitioner contended that even though the petitioner had not complied with Supreme Court Rules, since the respondents were notified, that the defect in not serving notices through the Registry had been rectified.

A careful perusal of Supreme Court Rules 8(3) and 40 indicates that the petitioner should tender notices to the Registry of the Supreme Court along with his application and in the event if there is a need for an extension of time to tender such notice that it should be done following the procedure laid down in terms of Rule 40 of the said Rules.

The decisions in **Union Apparels (Pvt.) Ltd. v Director-General of Customs and others** (supra), and **Piyadasa and others v Land Reform Commission** (supra) were based on the preliminary objections raised in terms of Rule 30 of the Supreme Court Rules of 1990. In **Priyani Soysa v Rienzie Arsecularatne**

(supra) the question arose clearly with Rules 2, 6 and 8(6) of the Supreme Court Rules. In **Bank of Ceylon v The Ceylon Bank Employees' Union (on behalf of Karunathilaka** (supra), the preliminary objection was based on the failure of the respondents to file a Caveat and had not considered the tendering of notices in terms of Rule 8(3). Accordingly for the purpose of the preliminary objection based on this application, the petitioner cannot rely on the said decisions.

The provisions laid down in Rule 8 clearly deal with the need to issue notice on the respondents through the Registry and had set out clear guidelines to ensure that steps are taken at several stages to ensure that the respondents are so notified. The guidelines are given not only for the petitioner, but also for the Registrar of the Supreme Court and even for the respondents to see that the application is properly instituted, notices are correctly tendered and relevant parties are properly notified. 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.

As clearly referred to in **L.A. Sudath Rohana v Mohamed Cassim Mohamed Zeena** (S.C. H.C. C.A. L.A. No. 111/2010 – S.C. Minutes of 17.03.2011),

"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 regulate the practice and procedure of the Supreme Court."

It is not disputed that even at the date of the preliminary objection was raised, no notices were tendered to the Registry in terms of Rule 8(3) for service on the respondents.

Through a long time of cases decided by this Court, a clear principle has been enumerated that where there is non-compliance with a mandatory Rule, serious consideration should be given for such non-compliance as such non-compliance would lead to a serious erosion of well established Court procedure followed by our Courts throughout several decades. **(K. Reaindran v K. Velusomasundaram** (supra), **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 Senerath Abeyruwan** (supra), **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd.** (supra) and **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).

The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections.

As correctly referred to by Dr. Amerasinghe, J., in **Fernando v Sybil Fernando and others** ([1997] 3 Sri L.R. 1),

"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."

If a party so decides to act recklessly it is needless to say that such a party would have to face the consequences which would follow in terms of the relevant provisions.

For the reasons aforementioned, I uphold the preliminary objection raised by learned Senior State Counsel for the 1st to 3rd and 28th respondents and the learned President's Counsel for the 4th respondent and dismiss the petitioner's application for special leave to appeal for non-compliance with Rule 8(3) of the Supreme Court Rules, 1990.

I make no order as to costs.

Chief Justice

P.A. Ratnayake, PC., J.

I agree.

Judge of the Supreme Court

Priyasath Dep, PC., J.

I agree.

Judge of the Supreme Court