

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

*In the matter of an Application
under and in terms of section 37 of
the Arbitration Act No. 11 of 1995.*

SC/HC/LA No:

06/2020

HC/ARB No:

294/2018

SLNAC/22-6-2017

Ceylon Electricity Board,

No. 50,

Sir Chithampalam A Gardiner

Mawatha,

Colombo 2,

Sri Lanka.

CLAIMANT

Vs.

Poyry Switzerland Limited,

(Formerly Poyry Energy Limited),

Herostrasse 12,

8048 Zurich, Switzerland.

RESPONDENT

AND BETWEEN

Poyry Switzerland Limited,
(Formerly Poyry Energy Limited),
Herostrasse 12,
8048 Zurich, Switzerland.

RESPONDENT-PETITIONER

Vs.

Ceylon Electricity Board,
No. 50,
Sir Chithampalam A Gardiner
Mawatha, Colombo 2,
Sri Lanka.

CLAIMANT-RESPONDENT

AND NOW BETWEEN

Ceylon Electricity Board,
No. 50,
Sir Chithampalam A Gardiner
Mawatha, Colombo 2,
Sri Lanka.

**CLAIMANT-RESPONDENT-
PETITIONER**

Vs.

Poyry Switzerland Limited,
(Formerly Poyry Energy Limited),
Herostrasse 12,
8048 Zurich, Switzerland.

RESPONDENT-PETITIONER-

RESPONDENT

SC/HC/LA No:

07/2020

HC/ARB No:

629/2017

SLNAC/22-6-2017

Ceylon Electricity Board,
No. 50,
Sir Chithampalam A Gardiner
Mawatha,
Colombo 2,
Sri Lanka.

CLAIMANT

Vs.

Poyry Switzerland Limited,
(Formerly Poyry Energy Limited),
Herostrasse 12,
8048 Zurich, Switzerland.

RESPONDENT

AND BETWEEN

Ceylon Electricity Board,
No. 50,
Sir Chithampalam A Gardiner
Mawatha, Colombo 2,
Sri Lanka.

CLAIMANT-PETITIONER

Vs.

Poyry Switzerland Limited,
(Formerly Poyry Energy Limited),
Herostrasse 12,
8048 Zurich, Switzerland.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Ceylon Electricity Board,
No. 50,
Sir Chithampalam A Gardiner
Mawatha, Colombo 2,
Sri Lanka.

CLAIMANT-PETITIONER-

PETITIONER

Vs.

Poyry Switzerland Limited,
(Formerly Poyry Energy Limited),
Herostrasse 12,
8048 Zurich, Switzerland.

RESPONDENT-RESPONDENT-
RESPONDENT

Before

: Janak De Silva, J.
: Mahinda Samayawardhena, J.
: Sampath B. Abayakoon, J.

Counsel

: Kuvera de Zoysa, P.C. with Samuditha
Kumarasinghe for Claimant-Respondent-Petitioner
in SC/HC/LA/06/2020 and Claimant-Petitioner-
Petitioner in SC/HC/LA/07/2020 instructed by
Achini Wickremasinghe.
: Avindra Rodrigo, P.C. with Kasuni Jayaweera for
Respondent-Petitioner-Respondent in
SC/HA/LA/06/2020 and Respondent-
Respondent-Respondent in SC/HC/LA/07/2020
instructed by F J & G de Saram.

Inquiry on

: 07-05-2025

Written Submissions : 27-05-2025 (By the Claimant-Respondent-
Petitioner in SC/HC/LA/6/2020)

: 27-05-2025 (By the Claimant-Petitioner-Petitioner
in SC/HC/LA/7/2020)

Decided on : 09-07-2025

Sampath B. Abayakoon, J.

The above two Leave to Appeal Applications, namely SC/HC/LA/6/2020 and SC/HC/LA/7/2020, were taken up for consideration in relation to the preliminary objection raised by the respondent-petitioner-respondent as to the maintainability of the applications before the Court on the basis of the claimant-respondent-petitioner's failure to adhere to mandatory Supreme Court Rules as to appellate procedure.

At the hearing, both parties mutually agreed that the two applications can be consolidated and heard together, and a single amalgamated judgment could be pronounced.

Accordingly, this Court heard the submissions of the learned President's Counsel on behalf of the respondent-petitioner-respondent (hereinafter referred to as the respondent) in relation to the preliminary objection raised, and also the submissions of the learned President's Counsel who represented the claimant-respondent-petitioner (hereinafter referred to as the petitioner) as to their respective stands.

In both these Leave to Appeal Applications, the petitioner is seeking leave to appeal in order to challenge the judgment pronounced on 29-11-2019 by the learned Judge of the Commercial High Court of the Western Province holden in Colombo, which was a judgment pronounced by consolidating the High Court Case No. 629/2017 and Case No. 294/2018 with the agreement of all parties relevant to the said actions.

In case No. 629/2017, the application by the petitioner had been in terms of section 32(1) of the Arbitration Act No. 11 of 1995, seeking to set aside the

arbitral award dated 23-10-2017 marked and produced as P-07 along with the petition filed before the High Court.

In case No. 294/2018, the respondent has instituted proceedings to enforce the same arbitral award made by the arbitrators on 23-10-2017 marked and produced as P-13 along with the respondent's petition.

From the impugned judgment, the learned High Court Judge had determined that he has no reasons to refuse the enforcement order in Case No. 294/2018, and had proceeded to order the enforcement of the said award according to the award dated 23-10-2017, subject to the limitation of the legal fees that can be claimed to a sum of Rs. 500,000/- and restricting the compensation awarded to a sum of USD 10,000/-.

Being aggrieved of the said judgment, the petitioner has instituted both these Applications for Leave to Appeal before this Court on 09-02-2020.

When both the matters were taken up on 27-09-2023 for the consideration of granting leave, the learned Counsel for the respondent in both the cases drew the attention of the Court to the motion dated 18-01-2023 filed on behalf of the respondent, where the respondent has raised preliminary objections as to the maintainability of these applications and has sought permission of the Court to support the said preliminary objections.

Accordingly, the matter was fixed for inquiry in relation to the said preliminary objections and both the learned President's Counsel were heard on 07-05-2025, and this Court also granted an opportunity to the parties to file written submissions, if any, together with legal authorities.

Although it has been contended in the motion dated 18-01-2023 filed on behalf of the respondent that the petitioner has failed and/or neglected to act in compliance with Rules 8 and 34 of the Supreme Court Rules of 1990, at the hearing, the learned President's Counsel agreed that considering the objections in terms of section 34 of the Rules would not arise, and would only limit his objections as to the compliance of Rule 8.

For matters of clarity, I will now reproduce the said objections raised in terms of Rule 8 as stated in the motion where it was alleged that the petitioner has failed to follow the said Rules:

- a. Cause notice of the caption Leave to Appeal Application to be served on respondent-respondent-respondent (respondent) through the Registrar of Your Lordship's Court as required under and in terms of Rule 8(1).
- b. Tender notices and other necessary documents to the Registrar, along with the Leave to Appeal Application for service on the respondent as required under and in terms of Rule 8(3).
- c. Attend at the Registry and verify that notices have been delivered to the respondent as required under and in terms of Rule 8(5); and
- d. In any event, show due diligence in the prosecution of his appeal.

The relevant Rules, where the respondent submits that the petitioner has failed to adhere, read as follows;

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 the application for special leave to appeal is preferred, and copies of affidavits and annexures filed therewith.

8.(3) 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, addresses 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 change in such particulars.

8.(5) The Petitioner shall, not less than two weeks and not more than three weeks after the application has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered, the Petitioner shall furnish the correct address for the service of notice on such Respondent. The Registrar shall thereupon dispatch a fresh notice by registered post, and may in addition dispatch another notice, with or without copies of the annexures, by ordinary post.

He may, if he thinks fit, and after consulting the Petitioner, substitute a fresh date of hearing, or direct that the matter be called in the Registry, on the date originally fixed for the hearing, for the purpose of fixing a fresh date of hearing.

It was the position of the learned President's Counsel for the respondent that the case record bears testimony that the Registrar of the Court has entered a minute in both the case records indicating that the relevant notices have not been tendered by the petitioner to be served on the respondent. It was his position that even after a lapse of nearly 3 years from the institution of the Leave to Appeal Applications in both the cases, the petitioner has, even up until 18-01-2023 (the date of the motion filed by the respondent raising the preliminary objections), failed to serve relevant notices with the relevant documents.

In the motion, the respondent has averred that the Registered Attorney-at-Law of the respondent received a copy of a motion dated 15-12-2022 filed by the petitioner indicating that the instant application is to be mentioned before the Supreme Court, which alerted the respondent, and upon perusal of the

case record, the respondent came to know that the matter is listed for support on 16-02-2023.

This has resulted in the respondent submitting the motion dated 18-01-2023 in both the cases, raising the preliminary objections as to the maintainability of the applications, moving that both Leave to Appeal Applications should be dismissed *in limine* as the petitioner has failed to follow the mandatory rules of procedure laid out in Supreme Court Rules.

At the hearing, the learned President's Counsel substantiated his argument citing several decided cases of this Court, and argued that the failure by the petitioner to prosecute its case with due diligence is a matter that should be considered by this Court in dismissing the Leave to Appeal Applications *in limine*.

It was the submissions of the learned President's Counsel who represented the petitioner in both the cases that the petitioner at all times acted in full compliance of the Supreme Court Rules of 1990 and caused and tendered the relevant documents to the Registrar of this Court, when the Leave to Appeal Application was filed on 09-01-2020.

It was further claimed that the Supreme Court Registry also confirmed this fact to the Registered Attorney of the petitioner.

However, the learned President's Counsel also agreed that there was no minute which indicates that the notices and the other relevant documents have been tendered to Court in both the case records.

He went on to submit that this should be considered as, if at all, a thing that occurred due to the restrictions imposed upon the judicial system due to the Coronavirus disease that was prevalent in the country during the period, and that should be taken into consideration in determining these objections. He was of the view that, as the respondent has been served with the relevant material since then, no prejudice would be caused to the respondent, and hence, the preliminary objections should stand overruled. It was his view that the Leave to Appeal Application in both the cases should be considered on its merits by the Court, rather than on technicalities.

With the above arguments advanced by both the learned President's Counsel and the relevant factual matrix in mind, I will now proceed to consider whether the preliminary objections have merit or on the other hand, whether the Leave to Appeal Applications in both the cases should be considered despite the said failure to follow the Supreme Court Rules as required.

Having scrutinized both case records, I find that in case No. SC/HC/LA/06/2020, the petitioner has instituted proceedings seeking Leave to Appeal as discussed earlier on 09-01-2020. The minute dated 14-01-2020 reveals that a minute has been made to the effect that the Attorney-at-Law has not tendered notices to be issued to the respondent in order to support the application. The next minute that appears on the case record is on 11-01-2023, where the Attorney-at-Law for the petitioner has filed a motion dated 15-12-2022 with a certified copy of the written submission marked as "X3(b)", moving to accept the same and file of record.

A request has also been made for the matter to be listed for support, informing the Court that a copy of the said motion was sent to the respondent under registered cover.

Accordingly, the Court has ordered that the matter be supported on 16-02-2023. The next minute which was dated 25-01-2023 shows that the Attorney-at-Law of the respondent has filed a motion dated 18-01-2023 raising preliminary objections as to the maintainability of the Leave to Appeal Application filed by the petitioner on the basis that the application should be dismissed due to the failure by the petitioner to prosecute the action with due diligence even after a lapse of over 3 years from the date of the application.

It is quite apparent that the respondent has filed the motion raising preliminary objections once it received the notice issued as for the request made in the motion dated 15-12-2022 by the petitioner. When the matter was mentioned on 16-02-2023 as previously directed, it has been ordered that the connected matter, namely SC/HC/LA/07/2020, should also be taken up together, where the same preliminary objection has been raised.

The said case, namely Case No. 07/2020, has also been filed by the petitioner on the same date, that is, 9-01-2020. The 1st minute that appears in the case record entered on 14-01-2020 shows that in this case as well, a minute has been made to the effect that the Attorney-at-Law has not tendered notices to be sent to the respondent in order to support the application.

However, in this application, the Registrar of the Court on 04-05-2022 has brought to the attention of the Hon. Chief Justice that, although the case has been filed on 09-01-2020, the Attorney-at-Law for the petitioner has not taken any step up to date, and has sought the Lordship's direction in that regard.

This has resulted in the Hon. Chief Justice giving directions to the Registrar to mention the matter on 06-12-2022, and accordingly, the Court has sent notices to the petitioner as well as the Attorney-at-Law who filed the action under registered cover on 21-11-2022.

The case record bears testimony that it was only after the said notices were issued by the Court, the petitioner has got activated and has stated when the matter was mentioned in open Court that Case No. 06/2020, which is a connected matter, has not been listed yet. As a result, the Court has ordered that both the cases should be mentioned on 18-01-2023. It has been directed further that the matters should be listed before a bench where the Hon. Chief Justice presides, apparently for the Hon. Chief Justice to take a decision in this regard.

The minute dated 11-01-2023 shows that the Attorney-at-Law for the petitioner has filed a motion dated 15-12-2022 with a certified copy of the written submission marked as "X3(b)" and moving it to be accepted and filed of record, which is the same application that appears in the 2nd minute of the case record in Case No. 06/2020. This has resulted in the Court giving a direction for this case also to be taken up on 16-02-2023.

However, when the case was mentioned on 18-01-2023 as originally scheduled, the Attorney-at-Law representing the respondent has informed the Court that the respondent is appearing before the Court after receiving the notices of the motion dated 15-12-2022, and the respondent has not been

served with any other papers in relation to the application by the petitioner as yet.

The Counsel who represented the petitioner has informed the Court that he has instructions to say that all the necessary papers were submitted when this application was originally filed before the Court, other than the document filed along with the motion dated 15-12-2022. He has undertaken to attend the Registry and verify matters at that stage. The respondent has reserved its right to raise objections, and both the matters have been fixed for consideration on 17-05-2023.

The minute made on the case record on 14-02-2023 shows that the respondent, by the motion dated 18-01-2023, has raised the same preliminary objections as in Case No. 06/2020 praying that the application in this case also should be dismissed for want of due diligence by the petitioner.

As stated earlier, although it was submitted that the relevant necessary papers were filed in both the cases when the actions were instituted on 09-01-2020, as the learned President's Counsel who represented the petitioner rightly agreed, this Court has to go by what the respective case records indicate.

In the written submissions filed before this Court, the petitioner has heavily relied on the cases pronounced by this Court to the effect that mere technical defects in relation to matters of procedure should not be considered as a reason to refuse an application. It was also submitted that the adverse effects of the COVID-19 pandemic and travel restrictions imposed, which resulted in the limited functioning of the judicial system, should be considered as a reason as to why the matter was not listed for support until 06-12-2022 when it comes to Case No. 07/2020. He moved that the preliminary objections be overruled, and the matter be taken up for the granting of Special Leave to Appeal.

Having considered the arguments advanced before the Court, and also the written submissions tendered in relation to the maintainability of the preliminary objections, I find it necessary to consider whether the COVID-19 pandemic has prevented the Attorney-at-Law for the petitioner attending Court as required in terms of the Appellate Procedure Rules and submitting the necessary papers.

The certified copy of the High Court case record shows that the impugned judgment has been pronounced by the learned High Court Judge of the Commercial High Court on 29-11-2019 during the period the COVID-19 pandemic was emerging in the world. It is common knowledge that it started to affect the day-to-day life of Sri Lankans during the 1st quarter of the year, which was after the judgment was pronounced. A certified copy of the entire case record has been issued by the Registrar of Commercial High Court on 20-12-2019, which amply demonstrates that there has been no difficulty in obtaining relevant copies, or for any party to attend the Court under any circumstances. Both the applications filed this Court on 09-01-2020 also shows that there had been no impediment for the petitioner to access justice, and the judicial system was functioning during the period.

The preliminary objections before this Court are to the effect that the petitioner has failed to file the necessary notices and the copies of the petition, and relevant documents to be served on the respondent, and thereby, has failed to exercise due diligence in that regard.

I find that after having filed the petition and the other documents relied on by the petitioner in both the cases on 09-01-2020, there can be no basis for the petitioner to argue that the COVID-19 pandemic prevented taking further action to issue notice of the case.

In terms of Rule 8(3), as I have reproduced previously, it was the duty of the petitioner to tender the relevant notice required to be served on the respondent together with the copies of the petition and documents, which the petitioner has failed to fulfill. If that was done, there was no reason for the Court not to issue notices to the respondent promptly, nominating a date for

both the cases to be mentioned before the Court as it would be the normal process.

I find no reason to accept the petitioner's contention that the relevant notices were tendered, as this Court is bound by what the case record reflects in that regard.

If the relevant notices were tendered accordingly, the Attorney-at-Law of the petitioner should have a written acknowledgment in that regard as provided for in Rule 8(4) of the Supreme Court Rules, which reads thus;

8.(4) Upon an application for special leave to appeal being lodged, the Registrar shall insert in the notices tendered by the Petitioner the Supreme Court number allotted to the said application, and the date of hearing of the application, after consulting the Petitioner. He shall issue one copy to the Petitioner upon request, obtaining a written acknowledgment on the record itself; a copy of such notice shall not be posted to the Petitioner.

The minute made by the relevant officer of the Court on 14-01-2020 in both the cases shows that no date has been given to the petitioner for the case to be mentioned because of the failure by the petitioner to submit the relevant notices.

It needs to be noted further that even for the argument's sake, if this Court is to accept the version that the notices were tendered, it shall be the duty of the petitioner's registered Attorney-at-Law to attend the Court Registry and verify whether such notices were issued, served or not, in terms of Rule 8(5), which obviously has not happened in this case.

What is clear to me is that the petitioner, after instituting the two Leave to Appeal Applications, has never bothered to inquire the status of the cases until the Registrar of the Court issued a notice to the petitioner and the Registered Attorney, 3 years after the initial filing of the applications.

In Case No. 07/2020, it appears that even after the receipt of the notice, the petitioner has never thought it fit to inquire from the Court Registry as to why

the case was not mentioned previously, or to inquire into the status of the other case until it was stated when Case No. 07/2020 was mentioned in open Court on 06-12-2022, that Case No. 06/2020 has not been listed yet. This clearly goes on to show the interest the petitioner has exhibited as to the applications filed before the Court.

It is clear that even after the case was mentioned nearly 3 years after filing of the same, the Registered Attorney or the petitioner has still failed to realize or inquire whether the notices that should have been issued at the time of filing of the action has gone out or been served. This was despite the direction given by Court on 06-12-2022, directing the Counsel who represented the petitioner to take all necessary steps in relation to both the matters within 2 weeks from the day.

It appeared that instead, the only step taken had been to file a motion on 15-12-2022 together with a copy of the written submissions marked "X3(b)", and that has been the only notice served on the respondent without serving the initial petition or the documents filed.

I am in full agreement with the submissions of the learned President's Counsel for the petitioner that the Court should not rely on mere technical objections to decide on a matter that needs adjudication from the Court, if such technicality had not prejudiced the substantial rights of the parties. I am in full agreement with the observations made by this Court in previous decisions cited by the learned President's Counsel in this regard.

However, it is my considered view that disregarding a preliminary objection of this nature should not allow a party who has shown no regard to the Rules of Procedure and is clearly guilty of lapses and negligence, to benefit from such action of its own making. I am also of the view that each default has to be considered on a case-by-case basis in the context of the purpose of the Rule that has been violated.

In the case of **Kiriwanthe and Another Vs. Nawarathne and Another (1990) 2 SLR 393**, it was observed;

“The weight of authority thus favours the view that while all these Rules must be complied with the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) 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 therefor, in the context of the object of the particular Rule”

Having considered the facts and the circumstances relevant to both the Leave to Appeal Applications, I’m of the view that the relevant default by the petitioner would not fall under the category of a mere oversight or taking the relevant steps without undue delay.

This is a clear situation where the petitioner has failed to follow the relevant Supreme Court Rules and get the notices issued to the respondent in both the cases, so that the respondent can enter an appearance and file the necessary papers without delay. Getting activated nearly 3 years after the initial filing of the application, and that was also only after the Court issued notices on the petitioner and the registered Attorney-at-Law cannot be considered under any circumstances as a default that can be excused under the cover that it amounts to a mere technicality.

Under the circumstances, it is my view that the petitioner has failed to follow the relevant Supreme Court Rules in relation to the Leave to Appeal Applications, and has failed to prosecute the said applications with due diligence for nearly 3 years, which amounts to the petitioner being guilty of lashes.

At this juncture, I am reminded of the well-known Latin maxim *“Vigilantibus Non Dormantibus Jura Subveniunt”* which means *“law assists those who are vigilant, not those who sleep over their rights”*.

In the case of **Liyanage and Another Vs. Rathnasiri – Divisional Secretary Gampaha and Others (2013) 1 SLR at 6**, the Supreme Court considered the above Latin maxim as relevant in a Fundamental Rights Application filed before the Court, and held that negligence in following the direction given by Court would disentitle an applicant to claim that Fundamental Rights were violated under the given circumstances.

In the case of **Gunasekara and Another Vs. Abdul Lathif (1995) 1 SLR 225**, it was observed that delay alone will not bar a person from obtaining relief which he may be entitled to, but the Court will grant relief only if the delay can be reasonably explained;

It was observed by **Ranaraja, J.**,

“The word “lashes” is a derivative of the French verb Lacher, which means loosen. Laches itself means slackness or negligence or neglect to do something which by law a man is obliged to do. Stroud’s Legal Dictionary 5th Ed pg 1403) It also means unreasonable delay in pursuing a legal remedy, whereby a party forfeits the benefit upon the principle Vigilantibus Non Dormantibus Jura Subveniunt. The neglect to assert one’s rights or the acquiescence in the assertion ‘or adverse’ rights will have the effect of barring a person from the ‘remedy which he’ might have had if he resorted to it in proper time. (Mozley & Whiteley’s Law Dictionary 10th Ed pg 260). When it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equal to waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted, in either of these cases lapse of time and delay are most material.(Lindsay Petroleum Co Vs. Hurd (1874 LRPC 221,239).”

Having considered the facts and the circumstances relevant to both these cases, I am of the view that since the petitioner has initiated these applications in order to seek Leave to Appeal to challenge a judgment

pronounced by the High Court in which the respondent was granted relief, this is a matter where delay in duly prosecuting the matter by the party who wanted to appeal against the judgment becomes a very much relevant factor.

As I have deliberated before, the petitioner had slept over its rights for almost 3 years without bothering to find out what happened to the two Leave to Appeal Applications filed. I am unable to find any justification for attributing that to the COVID-19 Pandemic.

Therefore, I am of the view that this is a matter where the petitioner has failed to duly follow the relevant Supreme Court Rules and is guilty of lapses in prosecuting the matter with due diligence.

Hence, I accept the preliminary objections raised by the respondent as to the maintainability of these applications any further, and dismiss the applications in both cases *in limine*.

The preliminary objections upheld. Both applications dismissed.

The parties shall bear their own costs.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

Judge of the Supreme Court