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

In the matter of an Application for Leave to Appeal in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950(as amended) read with section 3 and 10 of the High Courts of Provinces (Special Provisions) Act No. 19 of 1990 from the judgement of the High Court of Negombo dated 29th March, 2018.

SC Appeal No. SC HC LA/54/18
HC Appeal No. HCA LT/86/2016
LT Case No. 21/95/2012

Nestle Lanka PLC
440, T.B. Jayah Mawatha,
Colombo 10.

Respondent-Appellant-Petitioner

Vs.

Gamini Rajapakshe
Bodiyawatte
Ambalan Watte,
Ratnapura.

Applicant-Respondent-Respondent

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. L.T.B. Dehideniya, J
Hon. S. Thurairaja, PC, J.

Counsel : Manohara de Silva, PC with Hirosha Munasinghe for the Respondent-Appellant- Petitioner instructed by D.L. & F. de Saram.

Dilip Obeysekera with Sanjeewa Dissanayake for the Applicant-Respondent-Respondent.

Argued on : 31.10.2019, 28.02.2020 and 15.05.2020

Decided on : 30.09.2020

Jayantha Jayasuriya, PC, CJ

The Respondent-Appellant-Petitioner (hereinafter referred to as the "Petitioner") filed a Petition, and an Affidavit with four annexures marked P5-P8 on 10th May 2018, at the Supreme Court Registry. The Petition and the affidavit are captioned;

> "In the matter of an Application for Leave to Appeal in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950 (as amended) read with Section 3 and 10 of the High Courts of the Provinces (Special Provisions) Act No 19 of 1990 from the Judgment of the High Court of Negombo dated 29th March 2018".

It is only on 24 July 2018, the Petitioner filed a "certified copy of the appeal brief of case bearing No. Negombo HCALT 86/2016 marked 'X'. The said brief contained documents marked as P1, P2, P3, P4, P6 & P7. On 10th August 2018, an appointment of an Attorney-at-Law and a Caveat was filed on behalf of the Applicant-Respondent-Respondent (hereinafter referred to as the "Respondent").

The Respondent on 27th August 2018 filed an affidavit and *inter alia* moved that the application be dismissed *in limine* due to non-compliance with Rule 6 of the Supreme Court Rules of 1990.

When this matter came up before Court on 27 June 2019, the Learned Counsel for the Respondent raised a preliminary objection on the basis that the Petitioner failed to comply with Rules 2, 6 and 8 of the Supreme Court Rules. This matter was thereafter, rescheduled for support on 31 October 2019 on an application by the Learned President's Counsel for the Petitioner. On 31 October 2019, the learned President's Counsel for the Petitioner in response to the preliminary objection submitted, that Rules pertaining to Special Leave to Appeal Applications are not applicable to the instant application. Furthermore, moved for time to tender an affidavit clarifying the factual positions raised by the Respondent. Accordingly, a partner of the legal firm representing the Petitioner filed an affidavit dated 22 November 2019 with an annexure marked 'Z' and thereafter the Respondent filed the counter affidavit dated 25 November 2019. Further to oral submissions, both parties filed written submissions (Petitioner on 30 June 2020 and the Respondent on 01 July 2020) in support of their respective contentions.

Petitioner's response to the preliminary objection is twofold. Firstly, it is submitted that the Supreme Court Rules are not applicable to the instant application. Therefore, he moves that the preliminary objection be over ruled and the application be determined on merits. Secondly, without prejudice to the first contention, the Petitioner moved that the explanation submitted on behalf of the Petitioner by his Registered Attorney through the affidavit dated 22 November 2019 be accepted and the preliminary objection be overruled.

Of these contentions of the parties I will consider the question whether the Supreme Court Rules are applicable to the instant application, first.

On behalf of the Petitioner it is contended that Rules 2,6 and 8 of the Supreme Court Rules (1990) which are in Part IA of the said Rules, which is titled "Special Leave to Appeal" are applicable to Special Leave to Appeal Applications filed in the Supreme Court in relation to orders, judgments decrees and sentences of the Court of

Appeal only, and has no application to the instant application as this is a "Leave to Appeal Application" against the judgment of a High Court established under Article 154P of the Constitution. Furthermore, it is contended that none of the Rules in Part IB ("Leave to Appeal") and Part IC ("Other Appeals") apply to the instant application. It is his contention that Part IB applies to instances where Court of Appeal had grated Leave to Appeal and Part IC is applicable to 'Appeals' and not to a 'Leave to Appeal Application'.

It is pertinent to note that the Supreme Court Rules (1990) were made under Article 136 of the Constitution by the Chief Justice with three other Judges of the Supreme Court nominated by him. The Constitution empowers to make such Rules regulating the practice and procedure including matters pertaining to appeals such as the terms under which appeals to the Supreme Court to be entertained and for provision for the dismissal of such appeals for non-compliance with such Rules. The Constitution that establishes the Supreme Court and makes provision relating to its jurisdiction have not made provisions relating to the practice and procedure of the Court and had left it to the Supreme Court to make provision on such matters by way of Rules under Article 136 subject to the provisions of the Constitution and any law. Prior to the Supreme Court Rules 1990 came into force, practice and procedure relating to Special Leave to Appeal and Leave to Appeal were governed by the Supreme Court Rules 1978, which were repealed later.

Part I of the Supreme Court Rules 1990 regulates the practice and procedure relating to three types of matters where jurisdiction of the Supreme Court is invoked. They are Special Leave to Appeal (Part I A), Leave to Appeal (Part I B) and Other Appeals (Part I C). Whilst Practice and Procedure relating to Applications under Articles 126 are dealt with under Part IV, General Provisions relating to Appeals and Applications are dealt with in Part II of the said Rules. Prior to the Part I A and Part I B of the 1990 Rules came in to force, practice and procedure relating to Special Leave to Appeal applications and Leave to Appeal applications in the Supreme Court were governed by Part I (a) and Part I (b) of the Supreme Court Rules 1978. Parts I (a) and (b) of 1978 Rules (along with several other parts of 1978 Rules) were repealed and Part I of

1990 Rules (along with several other parts of 1990 Rules) were brought in to operation.

Petitioner's contention, that the Supreme Court Rules 1990 has no application to the instant matter is based on the proposition (as set out in paragraph (4) of his written submissions) that "on the face of this application this is not an application from the Court of Appeal therefore, Part IA has no application".

There is no doubt that the instant application before the Supreme Court is not relating to an Order or a Judgment of the Court of Appeal. However, it is pertinent to observe that Part IA of the 1990 Rules does not contain a specific provision restricting the applicability of the provisions in the aforesaid Part to orders and judgments of the Court of Appeal. In fact the first four Rules (Rules2, 3, 4 and 5) of Part I A, that set out the mode of initiating the process, the nature of the material required and the content and the form of the pleadings do not restrict the applications to the orders or judgments of the Court of Appeal. However, there is reference to the Court of Appeal in Rule 6 and Rule 7. In Rule 6 it is said that "Where any such application contains allegations of fact which cannot be verified reference to the judgment or order of the Court of Appeal in respect of which Special Leave to Appeal is sought…..". Rule 7 deals with the time period within which a Petitioner should invoke the jurisdiction of the Supreme Court. It provides that "Every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal, in respect of which Special Leave to Appeal is sought". It is also pertinent to note that Part IA has no specific provision that excludes the applicability of Rules to the orders and judgments from the High Court or from any other court. Therefore, it is relevant to consider the legislative framework within which the instant application is made in the Supreme Court.

On 26 June 2012, the Respondent in this mater invoked the jurisdiction of the Labour Tribunal under the provisions of the Industrial Disputes Act and challenged the dismissal of service by the Petitioner. The learned President of the Labour Tribunal by his order of 09 March 2016 allowed the said application. The Petitioner being aggrieved with the said Order appealed to the Provincial High Court and tendered the Petition of Appeal dated 01 April 2016 and the learned Judge of the High Court

dismissed the said appeal on 29 March 2018. It is against the said judgment of the Provincial High Court, the Petitioner thereafter invoked the jurisdiction of the Supreme Court by way of a Petition and Affidavit filed on 10 May 2018. The caption of the said Petition and Affidavit describe the nature of the matter as an application for 'Leave to Appeal'. It is furthermore pleaded in the caption that the said application is made in terms of the provisions of the Industrial Disputes Act No 43 of 1950 (as amended) and the High Court of the Provinces (Special Provisions) Act No 19 of 1990. Section 31DD of the Industrial Disputes Act No 43 of 1950 as amended by Act No 32 of 1990 and sections 3 and 10 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 are set out as the relevant provisions of the two Acts.

It is pertinent to note that the legislative scheme in relating to the instant application emanates, mainly, from two pieces of legislation. They are the Industrial Disputes Act as amended by Industrial Disputes (Amendment) Act No 32 of 1990 and High Court of the Provinces (Special Provisions) Act No 19 of 1990.

His Lordship Justice Priyasath Dep PC J (as he then was) in **Rambanda v People's Bank** SC Spl. LA No 229/11, (Supreme Court minutes of 17.07.2014 – 'Latest Judgments of the Supreme Court and Court of Appeal', 2014 Vol II page 17) examined the legislative history relating to these two enactments in determining upon a preliminary objection in a 'Special Leave to Application' filed in the Supreme Court challenging the Order of the High Court on an appeal against the order of a Labour Tribunal. The Supreme Court in relation to the nature of the applications that are filed challenging the High Court judgments on Labour Tribunal Orders initially observed that,

> "it is clear that the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990 has similar provisions if not identical provisions". (at p 27)

Having examined the two pieces of legislation more closely, it was further observed that

> "In view of this ambiguity or confusion created by the legislation or the draftsmen, different forms of applications are filed in the Supreme Court. The litigants should not be penalized or non suited due to this ambiguity.
>
> There are Special Leave to Appeal applications filed under the High Court of the Provinces (Special Provisions) Act No 19 of 1990. In some instances, Leave to Appeal applications are filed under section 31DD of the Industrial Disputes (Amendment) Act No 32 of 1990. In Some applications due to an abundance of caution reference is made to both High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990. There has been no consistent practice in this regard" (at p 27).

His Lordship Justice Dep, having made these observations, proceeded to examine the distinction between 'Leave to Appeal Applications' and 'Special Leave to Appeal Applications' and concluded that the Supreme Court could entertain both Special Leave to Appeal Applications filed under section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as well as 'Leave to Appeal Applications' filed under section 31DD of the Industrial Disputes (Amendment) Act No 32 of 1990, in relation to a judgment of the High Court arising from an appeal from an Order of a Labour Tribunal.

It is also pertinent at this juncture to note that the jurisdiction to hear appeals from the Orders of the Labour Tribunal was vested with the Court of Appeal, prior to the coming into operation of the provisions of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990. Provisions of Chapter XXVIII of the Code of Criminal Procedure Act relating to appeals from magistrate's court were applicable to such appeals. Any party who was aggrieved with the judgment of the Court of Appeal thereafter invoked the appellate jurisdiction of the Supreme Court either by way of a Leave to Appeal application filed in the Court of Appeal or by way of a Special Leave to Appeal application filed in the Supreme Court and the Supreme Court Rules were applicable to such applications.

In the year 2017, His Lordship Justice Dep, in **Aaron Senarath v The Manager Moray Estate and another** SC SPL/LA 231/2015 (SC minutes of 19.01.2017), considered a Leave to Appeal application filed in the Supreme Court challenging the judgment of the High Court on an order of the Labour Tribunal. In the aforesaid order the Labour Tribunal held the applicant was guilty of misconduct and the termination of his services was both lawful and just. The applicant's appeal to the High Court was dismissed and the applicant invoked the appellate jurisdiction of the Supreme Court by way of a Leave to Appeal application. In the said matter, the Respondent raised a preliminary objection in the Supreme Court on the basis that the Petitioner had failed to comply with the Supreme Court Rules 1990 as he had failed to file material documents. However, the Petitioner contended that the Supreme Court Rules are not applicable as the application under consideration was not relating to a judgment of the Court of Appeal. In determining this matter His Lordship Justice Dep examined the provisions of the Industrial Disputes (Amendment) Act No 32 of 1990 and High Court (Special Provisions) Act No 19 of 1990 and observed, that those statutes

> "conferred on the High Court of Provinces concurrent jurisdiction with the Court of Appeal to hear and determine appeals and revision applications in relation to orders from the Labour Tribunal. ***There was a shift of the forum jurisdiction and the High Court of the Provinces exercise the appellate and revisionary jurisdiction hitherto exercised by the Court of Appeal***"(emphasis added).

The Supreme Court, thereafter considered the applicability of the Supreme Court Rules 1990 in relation to the application that was under consideration and concluded that the said Rules are applicable[1].

Taking into account the scope of Industrial Disputes (Amendment) Act no 32 of 1990 and High Court (Special Provisions) Act No 19 of 1990 together with the jurisprudence of this Court discussed hereinbefore, it is clear that there had been no legislative intent to bring in any change to the final appellate jurisdiction exercised by

[1] The Supreme Court in this case upheld the preliminary objection raised by the respondent. The said leave to appeal application was dismissed as the Petitioner failed to comply with Rules 2 and 6 of the Supreme Court Rules 1990.

the Supreme Court, in relation to an Order of a Labour Tribunal[2]. From the year 1978, the Supreme Court Rules of 1978 governed the practice and procedure in relation to such applications before the Supreme Court. Thereafter for the last three decades, as recognised by the jurisprudence of this Court, such procedure is being governed by Supreme Court Rules of 1990.

I am also is of the view that the absence of any specific reference to appeals from a High Court to the Supreme Court in relation to a Labour Tribunal Orders in the Supreme Court Rules of 1990 (either initiated by way of a 'Leave to Appeal application' or a 'Special Leave to Appeal application'), does not render the applicability of the said Rules to govern the practice and procedure in relation to such applications filed before the Supreme Court nugatory. The change that took place in the year 1990 through legislation was only a ***'forum change of the first appeal, shifting the jurisdiction from the Court of Appeal to the High Court'*** (emphasis added). I find no reason to deviate from the jurisprudence of this Court, as discussed hereinbefore, in this regard.

It is my view, Part I A of the Supreme Court Rules 1990 are applicable to applications that are directly filed in the Supreme Court invoking the appellate jurisdiction against an judgment of the High Court in relation to an Order of the Labour Tribunal, either by way of Leave to Appeal or Special Leave to Appeal.

In view of these findings I am unable to hold with the contention of the Petitioner that the Supreme Court Rules 1990 are not applicable to the instant application.

The significance and the importance of the procedural laws in a legal system as well as the Supreme Court Rules is succinctly described by Her Ladyship Dr Shirani Bandaranayake, Chief Justice in **Sudath Rohana and another v Mohamed Zeena and another** [2011] 2 SLR 134 at 144-145. Her Ladyship observes that,

> "When it is stated that the substantive law and procedural law are complementary, it signifies the importance of procedural law in a legal

[2] The only change that had been made effective is the 'change of forum jurisdiction from the Court of Appeal to the High Court in the context of the first appeal' in relation to such Order.

system. Whilst the substantive law lays down the rights, duties, powers and liberties; the procedural law refers to the enforcement of such rights and duties. In other words the procedural law breaths life into substantive law, sets it in motion, and functions side by side with the substantive law.

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

Now I will proceed to examine whether the Petitioner has failed to comply with the Supreme Court Rules 1990, as contended by the Respondent.

The Petitioner tendered to the Supreme Court on 10th May 2018, the Petition, Affidavit and annexures marked P5-P8 along with the motion dated 10th May 2018. The Petition and the Affidavit are dated 09th May 2018. In paragraph 7 of the said Petition the Petitioner claims that "A certified copy of the entire Appeal Brief in the High Court of Negombo bearing No HCALT 86/2016 is annexed hereto marked as X and plead as part and parcel of this Petition. The Application of the Applicant, the Answer of the Petitioner, the evidence led and the Order of the learned President are marked as P1 to P4 and annexed and pleaded as part and parcel thereof".

However, in paragraph 20 of his petition the Petitioner has sought permission of Court to "allow the Petitioner to file the petition subject to furnishing certified copies of the appeal brief". Furthermore, in the motion dated 10th May 2018, the Attorneys-at-Law for the Petitioner submits that "The Respondent-Appellant-Petitioner has applied for a certified copy of the appeal brief of case bearing No. Negombo HCALT 86/2016 marked as "X" comprising of the annexures marked as "P1-P8" and undertakes to file same as upon receiving the same and / or as otherwise directed by Your Lordship's Court".

The Petitioner by the motion dated 24 July 2018, tendered the aforementioned certified copy of the appeal brief marked 'X' comprising of the annexures marked as P1, P2, P3, P4, P6 & P7.

It is the Respondent's contention that the Petitioner failed to comply with Rules 2, 6 and 8 of the Supreme Court Rules. Furthermore, it is contended that the Petitioner by failing to disclose the true position to court deprived the Court exercising its discretion judiciously.

According to Rule 2 of the Supreme Court Rules 1990, it is mandatory that an application for Special Leave to Appeal to the Supreme Court be made by a petition together with affidavits and documents as prescribed by Rule 6 and a copy of the judgment or order in respect of which Leave to Appeal is sought. However, this Rule itself makes provision for a Petitioner to seek permission of the Court to tender such material at a later stage. The procedure for making such an application is set out (in Rule 2) as follows: "if the Petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this Rule to be tendered with his petition, ***he shall set out the circumstances in his petition***, (emphasis added) and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same". When a Petitioner prays for permission in the manner prescribed by the Rule, to tender necessary material at a later stage he is deemed to have complied with the Rule if the "court is satisfied that the Petitioner has exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control".

The Petitioner in paragraph 20 of his petition and in the motion dated 10th May 2018, failed to disclose the reason as to why he could not tender the certified copy of the appeal brief together with the petition; nor has he tendered any material to satisfy Court that he exercised due diligence and the failure is due to circumstances beyond his control. Therefore, prima facie, the Petitioner has failed to satisfy requirements of Rule 2. However, subsequently on 22nd November 2019 an affidavit of the attorney-at-law of the Petitioner was tendered to Court with permission of Court and a copy of the motion tendered to the High Court to obtain a certified copy of the brief was produced marked "Z" along with the said affidavit. According to the said affidavit,

the attorney-at-law for the Petitioner claims that at the time of filing the application on 10 May 2018 they 'verily believed that the motion for the Appeal Brief marked "Z" was actually filed of record prior to filing this application".

However, it is pertinent to note that the said motion marked "Z" is undated and therefore does not corroborate an assertion that the motion was filed prior to 10th May 2018 nor provide any reasonable basis to form 'a belief' that the said motion had in fact been filed prior to 10th May 2018. Furthermore, the date stamp of the High Court imprinted on the copy of the motion is unclear and the only date appearing there on is 06/07. Such entry is in the minute relating to the issuance of the receipt F/24 465237 confirming the payment of Rs 4350/- being the charges for issuing the copy of the brief.

The affidavit dated 22nd November 2019 further claims that there had been a considerable delay in locating the appeal brief and it was only around 7th June 2018 the said brief had been located. In this regard I observe that the impugned judgment of the High Court was delivered on 29 March 2018 and a certified copy of the same had in fact been issued on 06 April 2018. Thereafter photocopies with the date stamp of the High Court depicting 25 May 2018, has been issued and tendered by the Petitioner (the document marked 'X'). Therefore none of these facts reflect that the brief was not located until 7th June 2018. I further observe that none of the material tendered to court such as the motion dated 10 May 2018, petition dated 09 May 2018, affidavit dated 22nd November 2019 and the copy of the motion produced marked "Z" along with the said affidavit, fail to specify the date on which the application for a certified copy of the appeal brief was made to the High court. It is also observed that even if the appeal brief was located on or around 07th June 2018 the Petitioner had taken further six weeks to tender copies to this Court.

Furthermore, the Respondent in his affidavit dated 27th August 2018 claimed that it was only the Motion, Affidavit, Petition and annexures marked P5 to P8 were served on him on 6th August 2018. It is only on 28th January 2019, the Petitioner filed a motion with the proof of delivery of the copy of the brief marked 'X' on the Respondent. Therefore it is after a delay of eight months the copy of the case record (material necessary to support the application) was served on the Respondent.

In this context it is also important to examine the requirements stipulated in Rule 8 of the Supreme Court Rules 1990. Rule 8(1) of such Rules requires the Registrar to give notice of such application to the Respondents *forthwith* (emphasis added), upon an application being lodged in the Registry. It is also important to note that along with such notice a copy of the petition, a copy of the judgment and copies of all affidavits and annexures filed along with the application should be attached to such notice. As per Rule 8(3) it is the responsibility of the Petitioner to tender required number of notices and other material to the Registry to be served on the Respondent/s. The object of this Rule is to ensure that the Respondents are given sufficient time and opportunity to prepare himself to contest the matter without undue delay, if he desires so. However, the object of this Rule can be frustrated if the Petitioner fails to provide all necessary material without undue delay. The Respondent would thereby be denied the opportunity to effectively enjoy the relief granted through the impugned judgment when delay is caused. It is pertinent to note that the Learned President of the Labour Tribunal on 09 March 2016 decided that the Respondent's services had been unfairly and unjustly terminated by the Petitioner with effect from 05 March 2012 and had awarded rupees three hundred twenty thousand one hundred and fifty as compensation and the Learned High Court Judge on 29 March 2018 had dismissed the Petitioner's appeal. Therefore, if delay in the judicial proceedings are caused due to the recklessness of the Petitioner or his failure to exercise due diligence, the Respondent is denied his lawful right to enjoy the benefit of the order of the Labour Tribunal, effectively.

It is pertinent to note that the Supreme Court in **Udaya Shantha v Jeevan Kumarathunga and others** (SC/Spl/LA 49/2010- SC minute of 29.03.2012) 2012 (B.L.R) 129 at 133 observed, that

> "Supreme Court Rules, in its totality, has made provision to ensure that all parties are properly notified without any undue delay in order to give a hearing for all parties".

In **Udaya Shantha** (*Supra*.), the Court was mindful of the series of cases where it was held that the non-compliance with Rule 8(3) would result in the dismissal of an

application as well as the cases in which the proposition that mere technicalities should not be thrown in the way of the administration of justice was recognized,[3] when the Court upheld the preliminary objection and dismissed the application.

However, Learned President's Counsel for the Petitioner in his submissions emphasized that the Supreme Court has "moved towards to hearing the cases on merits rather than sticking on technicalities to reach justice". This submission was based on the judgment of this Court in **A.D Bandara and another v H.M.L.Menike and another**, SC Appeal 172/2011, SC minutes of 22-01-2014, a judgment in which a preliminary objection due to the failure to tender written submissions within the time frame stipulated as required by the Rule 30, was overruled. In **Bandara and another** (*Supra.*) Her Ladyship Justice Eva Wanasundera PC, while overruling the preliminary objection of the Respondent, observed that, "any case should be heard on merits and not stifled by technicalities to reach justice which is very much needed by the parties". This judgment in my view cannot be interpreted to the effect that all cases should be considered on merits irrespective of the nature of the non-compliance with the procedural laws, rules and practices. The non-compliance considered in this case was the failure to tender written submissions within the stipulated time period prior to the argument. Examination of the facts of this case reveal that the written submissions of the Appellant had been filed about two months prior to the date of hearing (the first date of hearing) and written submissions of both parties had been filed in or around the same time. The explanation of the appellant on the failure to tender written submissions within the stipulated time period was the lapse due to inadvertence on the part of the lawyers. Furthermore, the Court distinguished facts of the case under consideration with several other cases where matters were dismissed on the basis that the party at fault failed to prosecute the matter with due diligence as required under Rule 34.

It is pertinent to note that while Rule 34 is requiring parties to ***show due diligence*** in prosecuting an appeal in cases where leave had been granted, Rule 2 requires a party

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[3] **K.Reaindran v K.Velusomasunderan** SC Spl LA 298/99, SC minutes of 07-02-2000; **N.A.Premadasa v The People's Bank**, SC Spl LA 212/99, SC minutes of 24-02-2000; **Hameed v Majibdeen and Others**, SC Spl LA 38/2001, SC minutes of 23-07-2001; **K.M.Samarasinghe v R.M.D.Ratnayake and others**, SC Spl LA 51/2001, SC minutes of 27-07-2001; **Soong Che Foo v Harosha K. De Silva**, SC Spl LA 184/2003, SC minutes of 25-11-2003; **C.A. Haroon v S.K.Muzoor and others**, SC Spl LA 158/2006, SC minutes of 24-11-2006; **Woodman Exports (Pvt) Ltd v Commissioner General of Labour**, SC Spl LA 335/2008, SC minutes of 13-12-2010; **Tissa Attanayake v Commissioner General of Election**, SC Spl LA 55/2011, SC minutes of 21-07-2011;**Samantha Niroshana v Senarath Abeyruwan**, SC Spl LA 145/2006, SC minutes of 02-08-2007, **A.H.M.Fowzie v Vehicles Lanka (Pvt) Ltd**, SC Spl LA 286/2007, SC minutes of 27-02-2008, **Wickramatillake v Marikkar**, 2 NLR 9

who is seeking Special Leave to ***exercise due diligence*** in attempting to obtain all necessary material to submit to Court along with the Petition and the Affidavit.

Therefore, I am of the view that the judgment in **Bandara and another** (*Supra.*) cannot be considered in favour of the Petitioner in the instant matter as the Respondent claims that the Petitioner failed to comply with both Rule 2 and Rule 8.

In the absence of any evidence on the exact date on which the Petitioner in this matter made the application to obtain the certified copy of the appeal brief coupled with his conduct that caused further delay in tendering certified copies to this Court and to the Respondent, the Petitioner fails to satisfy this Court, that he exercised due diligence in obtaining a certified copy within the time period he has to file the petition and ensure service on the Respondent along with the notices, forthwith as required under Rule 8(1) and Rule 8(3). Furthermore, there is no material to conclude that the failure to tender all necessary documents along with the petition, is due to circumstances beyond his control.

In **Attanayake v Commissioner General of Elections** [2011] 1 SLR 220, this Court upheld the preliminary objection of the Respondents on the basis that the Petitioner's failure to comply with Rule 8(3) should result in the dismissal of the application and accordingly dismissed the application. In this case the Petitioner took steps to dispatch notices on the Respondents by registered post without tendering them to the Registrar of the Supreme Court along with the petition, affidavit and other annexures. The Court observed that,

> "The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms 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" (at p 234).

Further it was observed that

> "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" (at p 234).

The Supreme Court in **Peiris and another v Peiris** SC/HC CA/LA137/12, SC minutes of 25 September 2014 (Vol XXI BALJ (2015) 101) upheld the preliminary objection of the respondent and dismissed the application due to non compliance with Rule 8(3) of the Supreme Court Rules, when the petitioner failed to tender notices along with the petition and affidavit but tendered after 24 days of filing them.

In view of the foregoing reasons and jurisprudence of this Court, as discussed hereinbefore, I am of the view that the Petitioner is unable to satisfy Court that he exercised due diligence and the failure to submit all the material necessary to support his application along with the petition and the affidavit and the delay of eight months to serve all the necessary material on the Respondent was due to circumstances beyond his control. Therefore, I uphold the preliminary objection of the learned counsel for the Respondent and dismiss the Petition for Leave to Appeal, for non-compliance with Rules 2 and 8 of the Supreme Court Rules, 1990.

Chief Justice

L.T.B. Dehideniya, J
I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court