UNION APPARELS (PVT) LTD.

v.

DIRECTOR-GENERAL OF CUSTOMS AND OTHERS

SUPREME COURT
AMERASINGHE, J.,
WIJETUNGA, J. AND
BANDARANAYAKE, J.
SC APPEAL NO. 490/99
20th AUGUST AND 6th SEPTEMBER, 1999

Fundamental rights - Failure to file written submissions in terms of Rule 45(7) of the Supreme Court Rules 1990 - Whether such non-compliance amounts to a failure to prosecute the application - Application of Rule 34 - Difference between Rule 30 and Rule 45 (7) - Rule 45 (8).

The petitioner company filed its application on 3.6.1999. Leave to proceed was granted on 08.06.1999 and the hearing was fixed for 20.8.1999. The written submissions were filed by the petitioner on 19.8.1999. The petitioner thereby failed to comply with Rule 45(7) (contained in Part IV of the Rules) which requires written submissions to be filed at least "one week before the date fixed for hearing". At the hearing on 20.8.1999 counsel for the 2nd respondent took a preliminary objection that the application must stand dismissed in terms of Rule 34 (contained in Part II of the Rules) as the written submissions of the petitioner, though filed on 19.8.1999, were not filed in terms of the Rules. Rule 45(8) provides that "the provisions of Part II of these Rules shall apply, mutatis mutandis, to applications under Article 126." Rule 34 provides inter alia that where a petitioner fails to show due diligence in taking all necessary steps for the purpose of prosecuting the application the court may declare the application to stand dismissed for non-prosecution.

Held :

Having regard to the purpose of Rule 45(7) particularly when it is compared with Rule 30 and the purpose of rule 34 and the circumstances of the case, if cannot be said that the petitioner had failed to show due diligence in taking all necessary steps for the purpose of prosecuting the application. As such the preliminary objection must be overruled.

Cases referred to :

1. *Mendis v. Abeysinghe* (1989) 2 Sri LR 263 at 270
2. *Houseman v. Waterhouse* 191, App Div 850, 182 N. Y. S. 249, 251
3. *Coomasaru v. Leechamn and Company* Sc Appl.

   No. 27/73 SC Minutes 26 May 1976
4. *Samarawickrama v. Attorney-General* (1983) 1 Sriskantha's Law Reports 47
5. *Mylvagnam v. Reckitt and Colman* SC Appeal No. 154/87 SC Minutes 8 July 1987
6. *Jayasinghe v. Jayasinghe* SC Appeal No. 53/87 SC Minutes 26 May 1988
7. *All Ceylon Match Workers' Union v. Jauffer Hassan* and Others (1990)2 Sri L R 420
8. *Jayasuriya v. Sri Lanka State Plantations Corporation* (1995) 2 Sri L R 379
9. *Kiriwanthe and Another v. Navaratne and Another* (1990) 2 Sri L R 393 at 404
10. *Priyani Soyza v. Arsecularatne* (1999) 2 Sri L R 179
11. *Piyadasa and Others v. Land Reform Commission* SC (AP) No. 30/97 SC Minutes 08 July 1998.

APPLICATION for relief for infringement of fundamental rights. Preliminary objection.

Romesh de Silva P.C. with *G.G. Arulpragasam, M. Illiyas* and *H. de Alwis* for petitioner.

H.L. de Silva P. C. with *Anil Tittawella, Avindra Rodrigo* and *Ms. Shehara Vansa* for 2nd respondent.

K.C. Kamalasabeyson P. C., S. G. with *S. Fernando, SSC,* for 1st and 3rd respondents.

Cur. adv. vult.

December 07, 1999.

AMERASINGHE, J.

I have had the advantage of reading the draft of the judgment of Bandaranayake, J. I am in agreement with the conclusion reached on the issue before the Court and the order proposed.

However, I should like to add the following observations. In my view, the question whether an application should be rejected for the failure to comply with a rule of the Court depends on whether, having regard to the words of the relevant rule, the Court has a discretion to entertain or reject the application, and whether having regard to the object of the rule and the circumstances of the case the Court is justified in arriving at its decision.

In *Priyani Soysa* v. *Arseculeratne*, S. C. (Spl.) L. A. No. 141/98, S. C. Minutes 04.05.1999, for the reasons given, I was of the view that one of the preliminary objections was entitled to succeed, because the exercise of the discretion of the Court was subject to the terms of the rule invoked and such terms were not satisfied. There are no such limitations contained in the rule invoked in the matter before me, namely, rule 34. Having regard to the purpose of that rule, namely to discourage persons who do not prosecute their applications or appeals with activity and perseverance, in my view the filing of the written submissions by the petitioner on the 19th of August 1999 cannot per se be taken as evidence of a lack of due diligence. The journal entries show that the petitioner had not been negligent and had been assiduous and attentive. Learned counsel for the second respondent submitted that the purpose of requiring a party to file his or her written submissions before a prescribed date was to enable the Court and the parties to be aware of the contentions of that party. In this case, the written submissions of the petitioner were available when the matter came on for argument and there was sufficient material to inform the Court and the respondents of what learned counsel

for the second respondent described as "the rival contentions of the parties" which, of course, would have to be supplemented by oral argument, and, if necessary in the opinion of the Court, by further written submissions.

The objection of the second respondent must be overruled and the application shall be heard. The parties will bear their own costs.

SHIRANI BANDARANAYAKE, J.

The petitioner is an enterprise established under the Greater Colombo Economic Commission Law, No. 4 of 1978 and is presently under the Board of Investment of Sri Lanka (P1). The petitioner submitted that under and in terms of the agreement entered into with the Board of Investment of Sri Lanka, (P1), the facilities of import/export clearance and customs procedures were handled by the Board of Investment. According to the petitioner, this facility was withdrawn without prior notice and the petitioner became aware of it by reading the notice which appeared in the Daily News of 28.05.1999. (P7). The petitioner submitted that the withdrawal of the said facilities was done arbitrarily and thus its fundamental rights under Article 12(1) were violated by the respondents..

This matter was supported *inter partes* and the Court granted leave to proceed in respect of the alleged violation of Article 12(1) of the Constitution, on 08.06.1999. It was fixed for argument on 20.08.1999. When the matter was taken up for hearing on 20.08.1999, learned President's Counsel for the 2nd respondent took a preliminary objection that the application of the petitioner must stand dismissed in terms of rule 34, as the written submissions of the petitioner, though filed on 19.08.1999, were not filed in terms of the Rules.

Rule 34 of the Supreme Court Rules 1990 reads as follows:

> "Where an appellant, or a petitioner who has obtained leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of prosecuting

> the appeal or application, the court may, on an application in that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non prosecution, and the costs of the appeal or application and any security entered into by the appellant shall be dealt with in such manner as the Court may think fit."

Learned President's Counsel for the petitioner submitted that his application should not stand dismissed in terms of Rule 34, for the following reasons :-

Firstly, learned President's Counsel for the petitioner submitted that Rule 34 has no application to the filing of written submissions and the rule, if applicable, dealing with written submissions is Rule 30 and not Rule 34. His position was that, if written submissions were not tendered by the due date, at most that party would not be entitled to be heard. In any event, he submitted that, due to the non-filing of written submissions, the application could not be dismissed in *limine*. Regardless of the non-filing of written submissions, learned President's Counsel contended that "in appropriate instances" the Court would permit the petitioner to be heard. In support of this submission, learned President's Counsel for the petitioner referred to *Mendis* v. *Abeysinghe*[1] where H. A. G. de Silva, J., had stated that,

> "The Rule contemplates that this Court will proceed to hear the appeal: all that it does is to disentitle the party in default from claiming a right to be heard, but preserves the undoubted discretion of this Court to give such party such hearing as it thinks appropriate. If that be the only consequence of the failure to lodge written submissions, it is impossible to interpret the Rule as requiring a more severe penalty for a far less serious default, namely the failure to give notice of the lodging of written submissions to the respondent together with a copy thereof in terms of Rule 35(e)."

Secondly, he contended that Rule 34 has no application to fundamental rights applications. Referring to the wording of Rule 34, it was submitted that this Rule only applies to cases where a party has obtained leave to appeal and not leave to proceed. The position of learned President's Counsel for the petitioner was that, according to Article 126(2) of the Constitution, in a fundamental rights application leave to proceed has to be obtained from the Supreme Court. In terms of Article 128(i) of the Constitution, the Court of Appeal may grant leave to appeal to the Supreme Court and under Article 128(ii), the Supreme Court may grant special leave to appeal. In these circumstances, learned President's Counsel submitted that there is a clear distinction between leave to appeal and leave to proceed. In a fundamental rights application, there is no question of leave to appeal but leave to proceed has to be obtained. Rule 34 only deals with leave to appeal and therefore this Rule cannot be applied to fundamental rights applications.

Thirdly, it was submitted that in any event the petitioner has not failed to show due diligence in terms of Rule 34. Fourthly, it was contended that under Rule 34, there is an unfettered discretion vested in the Supreme Court.

Learned President's Counsel for the 2nd respondent, however, submitted that these Rules are equally applicable to applications made under Article 126 of the Constitution. He referred to Rule 45(8) which states that "the provisions of Part II of these Rules shall apply, *mutatis mutandis*, to applications under Article 126." He further submitted that, "the expression *'mutatis mutandis'* is commonly used in legal drafting indicating the power to adapt statutory language applied in one context to a wholly different situation which necessitates the making of changes where necessary." His position was that the whole of Part II of the Rules, which comprises Rules 29 to 41, applies "in so far as they are capable of being applied." Therefore, his contention was that Part II of the Rules would be applicable to applications made under Article 126 of the Constitution too.

Learned President's Counsel for the 2nd respondent also submitted that compliance with the Rules relating to the filing of written submissions is imperative. Referring to Rules 30(5) and 30(6) it was submitted that the Rules have laid down what the written submissions should contain and the time within which the submissions must be filed in Court. Accordingly the written submissions of the petitioner must be filed within 6 weeks of the grant of leave to proceed and the petitioner must give the respondent notice of it by serving a copy on the respondent. This in his view is to enable the respondent to prepare his reply before the hearing commences, so that the Court may be apprised of the contentions of the respondent. He conceded that in the event of default there is provision for the defaulting party to make an application for extension of time. In such an event, a judge would have the discretion to consider the reasons as to why he was unable to comply with the rule and may grant an extension. However, counsel disagreed with the contention that the filing of written submissions is not an imperative requirement.

Learned President's Counsel for the 2nd respondent relied on Maxwell, Interpretation of Statutes, 12th edition, pg. 321, where it is stated that.

> "Notwithstanding that the Rules of the Supreme Court provide that non-compliance with the Rules shall not render proceedings void unless the Court so directs, in several cases it has been held that a defect in following the procedure laid down by the Rules may be so grave that it renders the entire proceedings, a nullity, not curable by any order of the Court."

Learned President's Counsel for the petitioner contended that Rule 34 has no application to fundamental rights applications as the very wording of Rule 34 refers to "an appellant or a petitioner who obtains leave to appeal" and there is no reference to a petitioner who obtains "leave to proceed." Therefore, learned President's Counsel for the

petitioner expressed the view that Rule 34 applied only to cases where a person has obtained leave to appeal and referred to Article 126(2) of the Constitution which states that,

> "Such applications may be proceeded with only with leave to proceed first had and obtained from the Supreme Court . . ."

Article 128(1) and (2) on the other hand refers to the Court of Appeal granting leave to appeal to the Supreme Court and the Supreme Court granting special leave to appeal, respectively. In an application under Article 126, there is no leave to appeal but, leave to proceed and therefore his position was that Rule 34 does not apply to fundamental rights applications. Rule 34 is in Part II of the Rules of the Supreme Court, which refers to "general provisions regarding appeals and applications." Rule 45(8) states that,

> "the provisions of Part II of these Rules shall apply, *mutatis mutandis*, to applications under Article 126."

Black's Law dictionary, (4th edition, 1951, pg. 1172) refers to the meaning of the word, "*mutatis mutandis*" in the following terms:

> "with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like. *Housman* v. *Waterhouse*[2]."

I shall now consider the matter before us in the light of these submissions. Rule 45(8) is in Part IV of the Rules of the Supreme Court, which deals with applications under Article 126 of the Constitution. Certain Rules in Part II refer specifically to applications made under Article 126 of the Constitution (eg. Rule 37). If we are to restrict the application of Rule 45(8) only to such Rules which appear in Part II, then in my view it would render the whole of Rule 45(8) meaningless. The purpose of Rule 45(8) is to provide for the application

of the general provision regarding appeals and applications in Part II of the Rules to applications made under Article 126 of the Constitution.

There is no doubt that the tendering of written submissions is a mandatory requirement in respect of appeals under Rule 30 of the Supreme Court Rules. However, it is necessary to consider whether the provisions applicable to appeals under Article 128 must be applied to applications under Article 126 of the Constitution as well. Rule 45(7) states that the petitioner and respondents must file their written submissions at least "one week before the date fixed for hearing" with notice to every other party. Rule 30, which deals with appeals states that :

> "No party to an appeal shall be entitled to be heard unless he has previously lodged five copies of his written submissions . . . complying with the provisions of this Rule."

In respect of appeals, the appellant is required to tender written submissions within six weeks of the grant of special leave to appeal or leave to appeal. On the other hand, in an application under Article 126, written submissions have to be filed at least one week before the date fixed for hearing. Accordingly, in the case of an appeal, the period commences from the date on which leave is granted and the date fixed for hearing is not a relevant consideration. Moreover, Rule 30 provides a penalty for non-tendering of written submissions, whereas there is no such provision made under Rule 45(7) with regard to the failure to file written submissions in applications under Article 126 of the Constitution. Furthermore, in an application under Article 126, written submissions have to be filed by each of the parties having regard to the date of hearing.

Preliminary objections taken in several cases of non-compliance with the Rules have been the subject of decisions of this Court. In *Coomasaru v. Leechman and Company*[3] it was held by the majority (Tennekoon, C.J., Vythialingam,

Sharvananda and Colin Thome, JJ., Rajaratnam, J. dissenting) that where an appellant had failed to comply with the Rule without excuse, the appeal should be dismissed. In *Samarawickrame* v. *Attorney General*[4] and in *Mylvagnam* v. *Reckitt and Colman*[5] and the appeals were dismissed for failure to comply with Rule 35 of the Rules of 1978. In *Jayasinghe* v. *Jayasinghe*[6], no written submissions were tendered "at all" by the appellant after he obtained special leave to appeal to this Court. In fact, even on the day the matter was taken up for hearing, no written submissions were tendered by the appellant. In view of the provisions of Rule 35(b) of Supreme Court Rules of 1978, Ranasinghe, C.J. upheld the preliminary objections taken by the respondent and dismissed the appeal. In *All Ceylon Match Worker's Union* v. *Jauffer Hassan and others*[7], a preliminary objection was taken that the petitioner had not filed any written submissions and there was therefore a failure on the part of the appellant to comply with Rule 35(b) of the Supreme Court Rules. Amerasinghe, J. upheld the objection and dismissed the appeal with costs. In *Jayasuriya* v. *Sri Lanka State Plantations Corporation*[8], the written submissions of the respondent which were required to be filed within 30 days by Rule 35 were delayed and the excuse for the delay in lodging them was that learned Counsel to whom a draft of the submissions was given "generally practices in the outstations and has periodically fallen ill in the last few months." It was held by Amerasinghe, J., that the respondent's delay to file written submissions in compliance with Rule 35 was inexcusable and he could not be heard.

In *Kiriwanthe and another* v. *Navaratne and another*[9] the question of failure to comply with the Rules of the Supreme Court was considered comprehensively. Fernando, J., was of the view that,

> "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."

The question of failure to comply with the Rules of the Supreme Court was considered by this Court in *Priyani Soysa* v. *Arsecularatne*[10], where the petitioner as well as the respondent took preliminary objections in regard to non-compliance with the Rules of the Supreme Court. The petitioner submitted that the respondent had not complied with Rule 8(6) whereas the respondent raised an objection that the petitioner had not complied with Rule 2 read with Rule 6 of the Rules of the Supreme Court. It was held by the majority (Wijetunga and Bandaranayake JJ., Amerasinghe, J. dissenting) that it was an appropriate case for both preliminary objections to be overruled. Wijetunga, J., stated there that.

> "*Kiriwanthe's* case, to my mind, is a watershed in judicial thinking in regard to the question of non-compliance with the Rules of the Supreme Court."

I am in complete agreement with this view.

Moreover, there are other instances where this Court has overruled such preliminary objections. In *Piyadasa and others* v. *Land Reform Commission*[11], a preliminary objection was taken by learned counsel for the petitioner that the respondents had filed their written submissions 197 days after the date on which they were required by Rule 30(7) to be filed. It was submitted that the respondents' belated submissions should not be accepted and that the respondents should not be heard. Although there was no explanation offered regarding the delay, Amerasinghe, J., overruled the preliminary objection and stated that,

> "In my view Rule 30 is meant to assist the Court in its work and not to obstruct the discovery of the truth. There were numerous documents that had to be considered; and, in our view, we needed the assistance of learned counsel for the petitioner as well as the respondents, including their written submissions to properly evaluate the information that we had before us. It was, therefore, decided that the preliminary objection should be overruled."

In the instant case, the petition was filed on 03.06.1999. It was supported for interim relief on 04.06.1999 and order was made in terms of paragraph "c" of the prayer to the petition, valid only up to 09.06.1999. When the matter was supported on 08.06.1999, leave to proceed was granted and the interim order was extended until the final hearing and determination of the application. An early date was given for the hearing, considering the gravity of the violation complained of; the hearing was thus fixed for 20.08.1999. A motion was filed by the Attorney-at-law for the 2nd respondent seeking to support an application to vacate or set aside the interim order issued against him. This was supported on 09.07.1999. On that day when learned President's Counsel for the 2nd respondent moved to make submissions with regard to the interim order, on the ground that the 2nd respondent was absent and unrepresented, learned President's Counsel for the petitioner objected on the ground that notice had been issued on the parties and the Solicitor-General had represented all the respondents. The learned Solicitor-General submitted that he had represented only the 1st and the 3rd respondents as stated in the record. The objection taken by learned President's Counsel for the petitioner was overruled and learned President's Counsel for the 2nd respondent was heard. This Court made order on that day that no variation of the order in relation to the interim order, in any respect, should be made. The petitioner was given two weeks' time to file counter affidavit, if any. On 23.07.1999, the petitioner moved for one week's time to file the counter affidavit and this was allowed. The counter affidavit of the Director/

General Manager of the petitioner Company was filed on 30.07.1999. The written submissions were filed by the petitioner on 19.08.1999. The written submissions had been forwarded to the judges along with the briefs and therefore the written submissions were available with the judges when this matter was taken up for argument on 20.08.1999. Learned President's Counsel for the 2nd respondent submitted that the requirement that the petitioner should file written submissions within a prescribed time was to "enable the respondent to make reply before the hearing commences, so that the Court may be apprised of the rival contentions." If this is the purpose of having the written submissions well before the hearing commences, it is my view that there was sufficient material provided by the petitioner for the 2nd respondent to know the position of the petitioner well before the date of hearing. It is to be noted that, in addition to the documents already filed, the petitioner had filed his counter affidavit on 30.07.1999. Furthermore, if and when the need arose, this Court has allowed parties to file written submissions as well as further written submissions, even after a full hearing has been afforded to both parties.

I therefore find it difficult to agree with learned President's Counsel for the 2nd respondent that this matter must stand dismissed for "non-prosecution". Taking into consideration all the circumstances of this case, it cannot be said that the petitioner had "failed to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application."

For the reasons aforesaid, I am of the view that the preliminary objection must be overruled and the application set down for hearing. There will be no costs.

WIJETUNGA, J. - I agree.

Preliminary objection overruled; Application set down for hearing.