

PERERA

v.

PERERA

COURT OF APPEAL
JAYASINGHE, J.
UDALAGAMA, J.
C.A.L.A 335/2000
D.C. MT. LAVINIA NO. 729/95/D
MARCH 7TH, 2001.

*Supreme Court Rules - 3(1) of 1990 Civil Procedure Code S.754(2) -
Leave to Appeal Absence of originals/certified copies - Is it fatal.*

Held :

- (i) The absence of the originals of the documents material to the order or duly certified copies or in the event of the inability to obtain such documents and the absence of satisfactory explanation of such non compliance is fatal.
- (ii) In an application for Leave to Appeal compliance with Rule 3(1) S.C. Rules of 1990, pertaining to Appellate Procedure is mandatory.

APPLICATION for Leave to Appeal from an order of the District Court of Mt. Lavinia.

Case referred to :

Kiriwanthe v. Navaratne and others - 1990 - 2 SLR 393

Nihal Somasiri with Sisira Abeywickrema for Plaintiff Respondent Petitioner.

S.S. Sahabandu P.C., with Lakshman Walihinde for Defendant Petitioner Respondent.

Cur. adv. vult.

April 06, 2001.
UDALAGAMA, J.

In this case the plaintiff-respondent-petitioner-petitioner seeks leave to appeal against the order of the learned District

Judge dated 20.10.2000 conditionally granting temporary custody of the minor child to the defendant-petitioner-respondent-respondent. At the hearing of this matter a preliminary objection was taken on the basis that of the documents said to be tendered with the petition, whilst some documents were not even produced (e. g. A16) a number of documents so tendered were not certified. The defendant-petitioner-respondent-respondent, vide a list filed on 09.02.2001 has brought to the notice of this court the details of the documents filed with the petition.

Although written submissions have been tendered by the plaintiff-respondent-petitioner-petitioner on 07.03.2001 the veracity of the contents of this list had not been denied nor contradicted.

This court has on numerous occasions held that in applications for leave to appeal compliance of Rule 3 (1) of the Supreme Court Rules of 1990 pertaining to appellate procedure is mandatory.

Furthermore in instances where the petitioner had difficulty in obtaining and tendering such certified copies or originals of documents within the prescribed period of 14 days the petitioner was well entitled to do so at a later date provided reasons for such inability was stated in his petition.

In the instant case such reasons are not found in the petition and admittedly a large number of documents annexed to the petition consists of uncertified copies apart from the documents not tendered. Some of the documents so tendered appeared to be photo copies not even certified by an Attorney-at-law as true copies. The medical certificate dated 29.05.2000 by one Dr. J.G. Hittotuwa is one such example. Uncertified proceedings in the lower court with portions highlighted and various remarks on the margin is another. While a certified copy of A14 and an uncertified copy of A15 and an uncertified copy of A17 are to be found in the record. A16 is not even tendered and filed of record.

In C.A. Application No. 18/91 decided on 26.11.1991, Justice Grero on the question of whether the imparative provisions of the Supreme Court Rules whereby a petition shall be accompanied by originals of documents material to the action and duly certified copies need be filed as exhibits held the view that where the documents are essential and when the court is required to go into the merits of the application, non compliance of requirements regarding the tendering of such documents without satisfactory explanation for such non compliance is a violation of the provisions of the Supreme Court Rules and was fatal to the application.

Section 754(2) enables an applicant to gain access to the Court of Appeal in respect of orders made in the course of proceedings. Having had access the petitioner needs to present his case effectively. While the impeached order or a certified copy thereof must necessarily be filed, that order cannot be reviewed in isolation or in the abstract. An impugned order flows from proceedings had and evidence placed before the lower court. Impliedly those proceedings of evidence, oral or documentary, necessary to consider the said order must be filed in compliance with the Supreme Court Rules referred to above. The absence of the originals of the documents material to the order or duly certified copies or in the event of the inability to obtain such documents and the absence of satisfactory explanation of such non compliance is, as held by Justice Grero in the case referred to above, is fatal to the application.

The plaintiff-respondent-petitioner-petitioner referred this court to the case of *Kiriwante and another vs. Navaratna and another*.⁽¹⁾ Apart from the fact that the decision of Kiriwante's case referred to above pertained to the rules as existing as at the time of the institution of that action in the original court which was prior to the rules applicable to this case Kulatunga J. in that case, while holding that a court exercising its discretion need bear in mind to keep the channel of procedure opened for justice to flow freely and smoothly also stressed the need to maintain discipline of the law. Fernando J. in the same case

held that non compliance by reason of impossibility or for any other reason is a matter falling within the discretion of court to exercise after considering the matter of default. In the instant case, not even the basic requirement of stating to court the reason for non compliance with the rules is forthcoming to enable even to consider the nature of default. It must also be mentioned that even at a later date when written submissions were called for no attempt has been made to comply with the Supreme Court Rules which as stated above and accepted by this court was mandatory.

In the circumstances of the instant case and considering the earlier decisions of this court and the facts as set out in this case, I am compelled to hold that the non compliance of the Supreme Court Rules is fatal to the application and proceed to sustain the preliminary objection raised by the defendant-petitioner-respondent-respondent and dismiss this application with costs.

JAYASINGHE, J. - I agree.

Application dismissed.