KARUNASEKERA
v
REV. CHANDANANDA

COURT OF APPEAL
AMERATUNGA, J. AND
BALAPATABENDI, J.
C.A. NO. 526/99
D.C. KURUNEGALA 320/L
OCTOBER 31, 2002
NOVEMBER 8, 2002

Court of Appeal (Appellate Procedure) Rules of 1990, Rule 3(1)a, 3(1) (9), Constitution, Articles 138, 140 and 141 – Supreme Court Rules of 1978, Rule 46 – Failure to comply with mandatory provisions – Is the sanction which follows the failure to comply automatic? – Writ pending appeal – Substantial loss – Substantial questions of law – Judicature Act, section 23 – Amendment Act, No. 16 of 1989 – Civil Procedure Code, sections 757, 758, 761, 762, 763 and 763(2) Amendment Act, No. 53 of 1980.

Pending appeal the plaintiff-respondent Viharadhipathi of the Ethkanda Viharaya made an application for the execution of the decree, which was allowed.

The defendant moved in revision.

The plaintiff-respondent raised a preliminary objection *in limine* to the maintainability of the application on the failure to produce copies of documents material to the application.

Held:

i) In the statement of objections of the plaintiff judgment creditor respondent, the petitioner's failure to file the necessary documents has been specifically raised but even thereafter the petitioner has not taken steps

to file those documents. Thus there is a clear failure to comply with the mandatory provisions of Rule 3(1) (b), Court of Appeal Rules, 1990.

ii) All material relevant to review the trial judge's finding on the absence of proof relating to substantial loss, had been placed by the petitioner; however, as regards the existence or the non-existence of a substantial question of law, the judgment and the material evidence led, had not been produced. It is fatal.

iii) Sanction which follows the failure to comply with a mandatory rule is not automatic; the imposition of the sanction is a matter to be judiciously decided.

Per Gamini Amaratunga, J.

"This court will take into account the question of law set out in the petition of appeal but this court cannot rest its decision solely on what is stated in the petition of appeal. Any one drafting a petition of appeal is free to set down therein any number of questions of law, but whether such questions of law in fact exist is a finding a judge has to make before exercising the discretion given to him under section 23 of the Judicature Act."

APPLICATION in revision from an order of the District Court of Kurunegala.

Cases referred to:

1. *Navaratnasingham* v *Arumugam* – (1980) 1 SRI LR 1
2. *David Appuhamy* v *Yassassi Thera* – (1987) 1 SRI LR 254(CA)
3. *Kiriwante and another* v *Navaratne and another* (1990) 2 SRI LR 393 (SC)
4. *Cooray* v *Illukkumbure* – (1996) 2 SRI LR 263 (SC)
5. *Harte* v *Framton* – (1947) 2 All ER 604
6. *Mack* v *Sanmugam* – Sri Kantha Law Reports – Vol. III – 89 at 95.
7. *Saleem* v *Balakumar* – (1981) 2 SRI LR 74
8. *Kandasamy* v *Gnanasekeram* – CALA 78/81 – CAM 17.7.81
9. *Charlotte Perera* v *Thambiah* – (1983) 2 Sri LR 352
10. *Sideek* v *Fuard* (1997) 1 SRI LR 42
11. *Hunsaira* v *Samaranayaka* – (1998) 1 SRI LR 141
12. *Amarange* v *Seelawathie Weerakoon* – (1990) 2 SRI LR 232
13. *Brooke Bond (Ceylon) Ltd.*, v *Gunasekera* – (1990) 1 SRI LR 71

Manohara R. de Silva for petitioner

P.A.D. Samarasekera, P.C., with *Kirthi Sri Gunawardena* for plaintiff.

Cur.adv.vult

January 20, 2003

GAMINI AMARATUNGA, J.

This is an application for revision against the order of the learned Additional District Judge of Kurunegala allowing the application of the plaintiff-respondent to execute decree pending appeal. 01

The plaintiff-respondent, who is Viharadhipathi of the Ethkanda Raja Maha Viharaya situated in Kurunegala, filed action in the District Court of Kurunegala seeking a declaration that the land where the 'Devalaya' called the Gale Bandara Devalaya is situated and the material objects kept in the said Devalaya belong to the Ethkanda Raja Maha Viharaya and an order for the ejectment of the petitioner (who claimed that she is the present incumbent of the 10 office of the 'Kapurala' of the said Devalaya) from the said Devalaya. After trial, at which both parties have adduced and produced evidence in support of their respective claims to this Devalaya, the learned District Judge has entered judgment in favour of the plaintiff-respondent. The present petitioner, who was the defendant has not filed a copy of the judgment of the District Court along with this revision application or at any time thereafter. In the absence of the copy of the judgment this court has to be content with the petitioner's own assertion, contained in paragraph 7 of her petition, that "the learned District Judge delivered his judgment 20 holding that the Gale Bandara Devale land and the Devale belonged to the Ethkanda Raja Maha Vihara and entered judgment for the substituted plaintiff-respondent". The present petitioner has preferred an appeal against this judgment which is now pending in this court bearing number C.A. 860/97.

Pending appeal the present-respondent who is the plaintiff Viharadhipathi of the Ethkanda Viharaya made an application to the District Court, Kurunegala, for the execution of the decree pending appeal. After inquiry, having considered the evidence and material that was before him the learned Additional District Judge made 30 order dated 31.5.1999 allowing execution of the decree pending appeal. This revision application is against that order.

The learned President's Counsel for the respondent raised a preliminary objection *in limine* to the maintainability of this application. He submitted that the petitioner's failure to produce copies of

documents material to this application is fatal in view of the mandatory provisions of Rule 3(1)(b) (read with Rule 3(1)(a)) of the Court of Appeal (Appellate Procedure) Rules of 1990.

Rule 3 (1)(b) is as follows: "Every application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced) in the Court of First Instance, Tribunal or other institution to which such application relates." 40

The words 'in like manner' refers to Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules of 1990. For the purposes of this judgment it is not necessary to quote rule 3(1)(a) here.

Rule 46 of the Supreme Court Rules of 1978, published in Gazette 9/10 of 8.11.78 is the precursor of the present rule 3. Rule 46 is as follows: 50

> "Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Article 140 and 141 of the Constitution shall be by way of petition and affidavit in support of the averments set out in the petition and shall be accompanied by originals of documents material to the case or duly certified copies thereof, in the form of exhibits. Application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner and shall be accompanied by two sets of copies of the proceedings in the Court of First Instance, tribunal or other institution." 60

In a series of cases, commencing from the case of *Navaratnasingham* v *Arumugam*[1] this court and the Supreme Court has held that in an application made to the Court of Appeal under Article 140 of the Constitution (writ jurisdiction) and Article 138 (revisionary jurisdiction), a petitioner's failure to annex "proceedings", (which within the meaning of Rule 46 means and includes "so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context.... and often this expression would include pleadings, statements, evidence and the judgment) is fatal and the application is 70 liable be rejected for non compliance with the Rule. I have taken

those words set out above in brackets from the judgment of Soza, J. in *Navaratnasingham* v *Arumugam* (*Supra*). In the case of *David Appuhamy* v *Yasassi Thero*(2), Wijetunga, J. having considered the view of Soza J. said "I am in respectful agreement with the view of Soza, J." (page 255).

The decided cases therefore establish two clear propositions of law relating to Rule 46 and those propositions are equally applicable in respect of the present Rule 3(1)(a) and 3(1)(b). Those propositions are as follows:- 80

(1) Rule 46 is mandatory and the failure of a petitioner, in an application filed under Articles 138, 140 and 141 of the Constitution to comply with the mandatory requirements of that Rule, is fatal.

(2) What is required to be produced under Rule 46 is "so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context and would include pleadings, statements and the judgment."

The petitioner along with her petition has annexed the following documents: 90

P1- Certified copy containing petition of appeal, plaint, amended plaint, answer, amended answer and the evidence of the plaintiff;

P2- a certified copy of the issues framed at the trial;

P3a A notice sent by this court to deposit brief fees;

P3b Copy of the receipt for brief fees;

P4- Copy of the petitioner's objections to the application for the execution of the decree;

P5- A copy of the proceedings of the inquiry into the application for execution of the decree; 100

P6- Written submissions of the defendant-judgment-debtor filed after the said inquiry;

P7- Order of the learned Additional District Judge allowing execution of the decree.

The petitioner has not filed the following documents along with her petition.

(a) A copy of the other evidence led at the trial especially the evidence given by the petitioner;

(b) A copy of the learned trial Judge's answers to the issues; 110

(c) A copy of the judgment;

(d) A copy of the plaintiff-respondent's application for the execution of the decree.

The petitioner, in paragraph 1 of her petition has stated that "she does not have certified copies of all documents necessary for this application at present. She has applied for copies of the same and in the circumstances seeks Your Lordships' permission to submit the same subsequently". Paragraph 10 of the petition also contains a similar averment. But at any time thereafter the petitioner has not filed those documents which according to her own assertion are 120 'documents necessary for this application.'

In the statement of objections of the plaintiff-judgment-creditor-respondent, dated 31.01.2000, the petitioner's failure to file the necessary documents has been specifically raised. But even thereafter the petitioner has not taken steps to file those documents. Thus there is a clear failure to comply with the mandatory provisions of rule 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules of 1990. However the sanction which follows the failure to comply with a mandatory rule is not automatic. The imposition of the sanction is a matter to be judiciously decided. 130

A Court's approach in a situation of this nature has to be positive in order to strike a balance between the competing interests created by the mandatory nature of some of the rules and the need to keep the channels of procedure open for justice to flow freely and smoothly.

In *Kiriwanthe and another* v *Navaratna and another* [(3)], Their Lordships Justices Fernando and Kulatunga have made valuable observations with regard to the consequences of the failure to comply with a mandatory Rule. Fernando, J. said as follows:

> "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 an 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". (page 404)

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Kulatunga, J. in the same case said "The court will not condone non-compliance with the rule or a failure to show *uberrima fides* referable to such non-compliance. In exercising its discretion the court will bear in mind the need to keep the channels of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. At the same time the court will not permit mere technicalities to stand in the way of the court doing justice."

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"No discretion can be allowed to either party to decide what and what are the necessary documents that should be tendered with the petition or even later, where an objection is taken on the ground of non-compliance."

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"A total non compliance will render the application liable to dismissal. Such dismissal is not a punishment but a consequence of non-compliance with the mandatory requirements of the rule". (page 416)

In accordance with the above quoted observations it is necessary to see how material are those documents which the petitioner has failed to produce for a just and correct decision in this application.

In making his order the learned District Judge has addressed his mind to both matters to be considered in deciding an application under section 763 of the Civil Procedure Code. Those two matters are whether substantial loss would be caused to the judgment debtor if execution pending appeal is allowed and whether there is a substantial question of law to be decided in the appeal.

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The petitioner has produced a complete copy of the proceedings of the Inquiry in to the application for execution pending appeal. In paragraph 9 of the petition the petitioner has stated that at the inquiry her son Premalal gave evidence as she was bed ridden. Premalal's evidence was the only evidence led on behalf of the petitioner to prove substantial loss. According to his evidence he is an employee of the Kurunegala Peopolized Transport Service drawing a monthly salary of Rs. 4000/-. He has said that whilst being so employed, he performed services and poojas as Kapurala of the Gale Bandara Devalaya. According to his evidence he derived a monthly income of about Rs. 1500/- (after deducting expenses) or sometimes less than that as the Kapurala. At the time this witness gave evidence he was 40 years of age but at any time prior to that he has not sought to intervene in the main case or in the application for execution either as Kapurala or as a co-kapurala performing services with his mother. He is not the judgment debtor. The learned Additional District Judge in his Order has rightly observed that he has not said how much money he gave to his mother out of the monthly income of Rs. 1500/- he received from the Devala. He has not at least said that he used this money to maintain his mother, the present petitioner. In fact he has stated that he needs the income he derives from this Devale to maintain his family! Thus there was no any evidence before court that substantial loss would be caused to the judgment debtor if the execution of the decree pending appeal is allowed. Accordingly the Judge has rightly held that no substantial loss would be caused to the petitioner by allowing execution pending appeal.

The learned Judge has also held that no substantial loss would be caused even to the petitioner's son by allowing execution pending appeal. As I have stated above since the petitioner's son was not a party to the case he is a 3rd party. In delivering the judgment of the Supreme Court in *Cooray* v *Illukkumbura* [4] Wijetunga, J. has quoted the words of *Asquith LJ, in Harte* v *Framton*[5] to the following effect. "The true view ....is that the ....judge should take into account hardships to all who may be affected by the grant or refusal of an order of possession – relatives dependents, lodgers, guests and the strangers within the gates but weigh such hardship with due regard to the status of the persons affected and

their proximity to the tenant or landlord and the extent to which consequently, hardship to them would be hardship to him." (page 267).

In *Cooray* v *Illukkumbura* (*Supra*) Wijetunga, J. has quoted the above words in dealing with the question whether hardships caused to 3rd parties such as the employees of a business carried out by the judgment debtor in the premises from which he is sought to be ejected is a relevant consideration in deciding the hardship that would be caused if execution pending appeal is permitted. His Lordship in that case held that in relation to business premises, hardships that may be caused to the employees of the judgment debtor is also a factor relevant in deciding the hardships resulting to the judgment debtor in the event of allowing execution pending appeal.

As I have stated earlier, the petitioner's son Saratchandra is a third party as far as this case is concerned. However from his evidence it was clear that he was performing the services of the Kapurala with the approval or permission of his mother. Though the Kapurala's services in a Devale is not a business with the strict sense or the word, it has a monetary value in that it gave him an additional income of about Rs. 1500/- per mensum which he used to maintain his family. He has thus quantified his damage at Rs. 1500/- per mensum. This is the normal monetary damage resulting to him in the event of execution pending appeal. This is the usual damage or loss caused to any judgment debtor. But substantial loss does not carry with it a mere monetary connotation. It has a relative meaning. See *Mack* v *Shanmugam*(6) – *per* Siva Selliah, J.

A Kapurala of a popular and a famous devale, to which devotees flock to seek the assistance of and relief from the deity worshiped in that devale, is a man held in very high esteem in the locality where that devale is situated. The position of Kapurala of such a Devalaya is a social status. The loss of such a status may properly be classified as substantial loss within the meaning of section 763 of the Civil Procedure Code. There isn't a single word in the evidence of Sarathchandra that he or his mother (the petitioner) enjoy such high social status in view of their role as the Kapuralas of the Gale Bandara Devalaya, the subject matter of this application. Sarathchandra's claim is that he would suffer monetary loss in

a sum of Rs. 1500/- per mensum if execution pending appeal is allowed. No other loss was urged.

In this case, apart from the quantified monetary loss, there was no evidence that substantial loss would be caused to the petitioner or to her son if application for execution pending appeal is allowed. Therefore I hold that the learned Judge's finding that no substantial loss would be caused even to the son of the petitioner is a correct finding both on the facts and the law.

This now brings me to the question of considering the learned Judge 's finding that there is no serious question of law to be decided in appeal. In *Saleem* v *Balakumar,*[7] this court has held that the existence of a substantial question of law to be adjudicated in the appeal is a good ground for staying execution pending appeal. Section 763 of the Civil Procedure Code does not say that the existence of a substantial question of law to be adjudicated in appeal is a ground for refusing an application for execution pending appeal. When this submission was made in the case of *Mack* v *Shanmugam* (*supra*) Siva Selliah, J. rejected it with the following words. 260 270

> "This submission is unacceptable. In the exercise of his discretion (the trial Judge) he must consider whether in the given circumstances the appeal is a frivolous one designed to stall the decree or one that contains substantial questions of law for determination by the 'Court of Appeal' and where substantial questions of law await determination of the Court of Appeal....such questions are not irrelevant."

Having referred to the case of *Saleem* v *Balakumar* (*supra*) Siva Selliah, J. went on to say as follows. "The case of *Kandasamy* v *Gnanasekeram*[8] is relevant. There Soza, J. stated 'therefore stay of execution pending appeal will be granted if there is some doubt of the justice of the decision and if execution will cause damage to the appellant which is both irreparable and exhaustive" (page 97). 280

In the case of *Charlotte Perera* v *Thambiah* [9] Samarakoon, CJ. with Justices Wanasundara, Wimalaratna and Ratwatte agreeing (Sharvananda, J. dissenting) has said as follows:

"It appears to me as the law as it stands is somewhat wider than the provisions of section 761 of (cap 86). Under that section a court could stay writ for "sufficient case" but whatever that cause may be it must be shown to the satisfaction of court that it may result in "substantial loss". Then and only then, can the order be made. Today the matter is governed by the provisions of section 23 of the Judicature Act (as amended by Act, No. 37 of 1979) read with section 763 (2) of the Civil Procedure Code (as amended by Act No. 53 of 1980). Section 23 permits the court to stay writ of execution *if it sees fit* and section 763(2) permits it to stay writ if the judgment debtor satisfies the court that *substantial loss may result.* The two provisions are not linked as in section 761". (emphasis added)

Wijetunga, J. in delivering the judgment in *Cooray* v *Illukkumbura* (*supra*) having referred to the aforesaid case of *Charlotte Perera* v *Thambiah* has stated that "section 23 permits the court to stay writ of execution if it sees fit, while section 763 (2) permits it to stay writ if the judgment debtor satisfies the court that substantial loss may result; and these two provisions are not linked. The court is thus empowered to act under either of these sections".

Thus it is clear from the decisions in *Saleem* v *Balakumar* (*supra*) *Mack* v *Shanmugam*(*supra*) *Kandasamy* v *Gnanasekeram* (*supra*) *Charlotte Perera* v *Thambiah* (*supra*) *Cooray* v *Illukkumbura* (*supra*) and *Sideek* v *Fuard* [10] that the principle "execution pending appeal may be stayed if there is a substantial question of law to be decided in appeal is well established in the law of Sri Lanka even in situations where there is no proof before court to show substantial loss to the judgment debtor if execution pending appeal is allowed. A Judge's discretion to stay execution on this ground is referable section 23 of the Judicature Act, No. 2 of 1978 as amended by Act, No. 37 of 1979.

Section 23 of the Judicature Act was repealed and replaced by a new provision by Judicature (Amendment) Act, No. 16 of 1989. The new section does not contain any reference to a District Judge's power to stay execution pending appeal when he sees it fit to do so. According to section 1 of the amending Act, the amend-

ment comes into operation on a date appointed by the Minister by Order published in the Gazette. So far no such Gazette Notification has been issued to bring Act, No. 16 of 1989 into operation. Therefore section 23 as it appeared originally in the Judicature Act, No. 2 of 1978 (as amended by Act, No. 37 of 1979) is still in force 330 and G.P.S. de Silva CJ., in *Husaira* v *Samaranayake* (11) held that a District Judges discretion to stay execution when he sees 'it fit to do so' still exists. Therefore independently of the provisions of section 763 of the Civil Procedure Code, the District Court has power under section 23 of the Judicature Act to stay execution pending appeal if the court is of the view that there is a substantial question of law to be decided in appeal.

In this case the learned District Judge has held that the material placed before him did not disclose a substantial question of law to be decided in the appeal. In these proceedings this court is 340 called upon to review the correctness of this finding. This court needs to have before it at least the same material available to the learned District Judge when he made his order. Document P5 produced by the petitioner is a complete copy of the Inquiry held in respect of the judgment creditor's application for execution of the decree pending appeal. The proceedings indicate that at the conclusion of the Inquiry copies of the amended plaint, amended answer, issues, judgment and the petition of appeal had been tendered to court on behalf of the present petitioner. Thus it is clear that when the learned District Judge held that there was no sub- 350 stantial question of law to be decided in the appeal, he had before him the judgment and the petition of appeal. But alas! the judgment is not avialable to us. The petitioner has not produced a copy of the judgment.

The learned Counsel for the petitioner has in his written submissions stated that the learned District Judge's task is not to ascertain the intricacies of the questions of law formulated but to see whether the petition of appeal *ex-facie* contains substantial questions of law. The tenor of his argument is that it is not necessary to produce a judgment before this court. I regret my inability to 360 agree with this submission.

The lodging of an appeal from a judgment of the District Court by an aggrieved party does not *ipso facto* have the effect of stay-

ing the execution of judgtment. *Amarange* v *Seelawathie Weerakoon*(12). A court should not lightly interfere with a decree holder's right to reap the fruits of his victory as expeditiously as possible. *Brooke Bond (Ceylon) Ltd.* v *Gunasekera*(13). The law of this country, under section 761-763 of the Civil Procedure Code and section 23 of the Judicature Act, is that execution pending appeal is the rule and stay of execution is the exception. There are 370 two situations where the exception can defeat the rule. The situation applicable to the present discussion is where the court is of the view that there is a substantial question of law to be decided in the appeal. How and on what material the court has to decide whether there is a substantial question of law? The contention of the learned counsel for the petiioner is that the questions of law set out in the petition of appeal *ex facie* indicate the existence of substantial questions of law to be decided in appeal and therefore the District Judge is not expected to go beyond the petition of appeal.

Anyone drafting a petition of appeal is free to set down therein 380 any number of questions of law. But whether such questions of law in fact exist is a finding a judge has to make before exercising the discretion given to him under section 23 of the Judicature Act. This is a part of his judicial functions and he cannot and is not expected to leave this aspect of his function in the hands of the person who drafted the petition of appeal and mechanically say that there are substantial questions of law to be decided in the appeal. He should at least examine whether the existence of such questions are borne out by the findings of the trial Judge in his judgment.

In a revision application when this court is invited to set aside 390 the learned District Judge's finding that there is no substantial question of law to be decided in the appeal, this court must have before it sufficient material necessary to test the correctness of the learned Judge's finding. This court will certainly take into account the questions of law set out in the petition of appeal but this court cannot rest its decision solely on what is stated in the petition of appeal. We have to bear in mind that there is no requirement under sections 757 and 758 for an attorney-at-law to certify (as is required by section 322(1) of the Code of Criminal Procedure Code Act, No. 15 of 1979) that the matter of law to be argued in appeal is a fit 400 question to be adjudicated by the Court of Appeal.

In deciding whether there is a substanital question of law the court must have before it at least the judgment which is in appeal. In my opinion in considering whether there is a substantial question of law to be decided in the appeal a court must consider the following matters.

I How strong was the appellant's case (placed before the trial court as against his opponents' case) at the trial. For this purpose the court has to examine the evidence given by and on behalf of the appellant at the trial, including the evidence given under cross examination. 410

II The trial Judge's answers to the issues framed at the trial.

III The trial Judge's reasons for answering the issues in the way he has done. This is the judgment.

After examining the material I have set out above, if the court is of the view that *prima facie it appears* that there is a substantial question of law to be considered in the appeal, then the court's task is over and it has to make a finding in favour of the party who asserts that there is a substantial question of law to be decided in the appeal. Here I agree with the submission of the learned counsel for the petitioner that the court is not expected to go into the intricacies of the question of law to be decided in the appeal: it is sufficient if the court is satisfied that it *prima facie* appears that there is a substantial question of law to be decided in the appeal. 420

When Their Lordships in *Saleem* v *Balakumar* (*supra*) laid down the proposition that the existence of a substantial question of law to be decided in appeal as a ground for staying the executing of the writ pending appeal had before them the clear question of law to be decided in the appeal. My observations set out above apply to cases where the substantial question of law to be decided is not so glaringly visible. 430

Having made all those observations and keeping in mind the guidelines set out by Their Lordships Fernando, J. and Kulatunga,J. in *Kiriwanthe* v *Navaranta* (*supra*), I now turn my attention to the preliminary objection raised by the learned President's Counsel that the petitioner has failed to comply with the mandatory provi-

sions of Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990 and for that reason this application is liable to be dismissed in *limine*.

As I have pointed out above, all material relevant to reivew the learned Judge's finding on the absence of proof relating to substantial loss, had been placed by the petitioner before this court and therefore the preliminary objection relating to that ground of review is hereby overruled. 440

With regard to the existence or the non-existence of a substantial question of law to be decided in the appeal, I have above indicated the need for this court to have before it the material namely the petitioner's evidence led at the trial, the learned Trial Judge's answers to the issues and his reasons for his findings. The petitioner has failed to produce the above stated material to this court which are material to this application. 450

The petitioner has failed to explain to this court as to why she failed to comply with the mandatory provisions of the said Rule 3(1)(a) and (b). Her failure is in-excusable. I therefore uphold the preliminary objection in relation to this court's task of reviewing the learned Judge's finding relating to substantial question of law and dismiss her application, not as a punishment to her, but as a consequence of her failure to comply with the mandatory requirement of the said Rule.

The respondent is entitled to costs in a sum of Rs. 10,500/- as costs of this application. 460

BALAPATABENDI, J. - I agree.

Application dismissed.