## BROWN & CO. LTD. AND ANOTHER
v.
## RATNAYAKE, ARBITRATOR AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J.
KULATUNGA, J.
WADUGODAPITIYA J.
S.C. APPEAL NO. 18/90
S.C. SPL.L.A. 59/90
C.A./L.A./S.C. 15/89
C.A. APPLICATION NO. 566/85
JANUARY 17 AND APRIL 03,1992.

*Certiorari – Non-compliance with Rule 46 of the Supreme Court Rules of 1978 – Failure to file certified copy of proceedings where impugned award of Arbitrator was made in respect of services – Rule 50 of the Supreme Court Rules – Interest on amount awarded.*

**Held:**

Rule 46 of the Supreme Court Rules of 1978 requires the petition to be supported by affidavit and to be accompanied by original or duly certified copies of documents material to the case in the form of exhibits. The burden of presenting a proper application is on the party that seeks the intervention of the Court. The

procedure is specified for this threshold stage. The Rule regulates the mode of enforcing a legal right. The petitioner has to tender all relevant material to the Court in order to invoke its jurisdiction. If he fails to do this there is a failure to comply with a substantial aspect of the Rule. The fact that the Court is empowered by Article 140 to inspect and examine the record does not absolve the petitioner of his duty to invoke jurisdiction properly.

The fact that the record was subsequently made available to court is not an excuse for failure to comply with basic requirements of the Rule. One cannot claim a right to proceed to the next step without compliance with a valid invocation or jurisdiction in the first place. Such would lead to uncertainty, unreasonableness and oppressive results. In this sense the rule is mandatory.

In this view of the matter dismissal for want of compliance with necessary basics is an order that may be made within the Rule, a necessary corollary to it and does not amount to an amendment, alteration or revocation of the Rule approved by Parliament. The Court here is only articulating the real scope of the Rule to give effect and expression to it. This interpretation does not widen the ambit of the Rule.

Although the Rule does not expressly provide for dismissal the question of obtaining the approval of Parliament to make an order for dismissal does not arise. Dismissal is in the scheme of the Rule.

No effort was made by the petitioner's to seek permission of the Court of Appeal to tender additional documents as they may have done under Rule 50. Under rule 50 the Court of Appeal has discretionary powers where appropriate, to admit material not tendered with the petition. In these circumstances the Court below was entitled to refuse to proceed further with the application.

In view of the fact that the Arbitrator's award was as far back as 1985, legal interest on the aggregate sum payable is awarded.

**Cases referred to:**

1. *Nicholas v. Macan Markar* (1981) 1 Sri L.R. 1.
2. *Rasheed Ali v. Mohamed Ali* (1981) 2 Sri L.R. 29.
3. *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri L.R. 262.
4. *Koralage v. Mohamed* (1988) 2 Sri L.R. 299
5. *Mary Nona v. Francina* (1988) 2 Sri L.R. 250
6. *Paramanathan v. Kodituwakkuaratchi* (1988) 1 Sri L.R. 315, 333.

**Appeal** from order of the Court of Appeal.

*H. L. de Silva P.C.* with *Desmond Fernando P.C.* and *Nigel Hatch* for plaintiff-appellant.

*Romesh de Silva P.C.* with *Geethika Gunewardena* for defendant-respondent.

*Cur adv vult.*

November 26, 1992.

**BANDARANAYAKE. J.**

1. This is an appeal from an Order of the Court of Appeal dismissing an application for a Writ of Certiorari for non-compliance with Rule 46 of the Supreme Court Rules 1978. The Award sought to be quashed was made by an Arbitrator appointed by the Minister under the Industrial Disputes Act.

2. The dispute referred for Arbitration related to the termination of the 3rd Respondent's services by the Petitioners.

3. By paragraph 15 of the Petition filed before the Court of Appeal the Appellants averred that the Award was bad in law and/or discloses errors of law on the face of the record, in that (among other averments):-

   (a) conclusions drawn from the primary evidence are perverse and/or are such that no reasonable person duly versed in labour relations law could have drawn, in particular:

      (i) taking into account irrelevent evidence and circumstances such as that the 3rd Respondent was a shareholder in justifying his misconduct;

   (b) the failure to take into account relevant evidence in arriving at findings, in particular:

      (ii) the poor performance of the 3rd Respondent in cross-examination and his admission .....

4. It was also averred by the Appellants that the parties had, in accordance with the practice and direction of the Arbitrator, tendered (to the Arbitrator) written statements setting out in full

their respective cases. The Appellants led evidence of an Executive Officer and marked documents R 1 to R 20 and the 3rd Respondent gave evidence and called two witnesses on his behalf at the inquiry before the Arbitrator. After conclusion of the evidence, oral and documentary written submissions were made by the parties.

5. Along with the proxy, petition and affidavit tendered by the Appellants in the application made to the Court of Appeal on 16.5.85 the Petitioners only annexed and tendered 10 documents marked "A" to "J". The proceedings had before the Arbitrator or other documents were not tendered to the Court of Appeal.

6. The application was first taken up for hearing by the Court of Appeal on 4.7.88. A preliminary objection was taken on behalf of the 3rd Respondent to the application on the ground that Rule 46 of the Supreme Court Rules 1978 has not been complied with by the Appellants, in that a certified copy of the proceedings had not been filed. Counsel for the 3rd Respondent submitted that a certified copy of the proceedings was neessary for a proper adjudication, but the Appellants insisted that all documents material to the case has been filed and that they would stand or fall by those exhibits. The Court took the view at that initial stage that it would become necessary for the Court to decide whether a particular document was material to the case or not and to decide that the Court had to enquire into the application as it can be decided only in the course of the hearing. The Court thus taking the view that it was premature to decide this question as a preliminary issue, overruled the preliminary objection aforesaid and made order on 27.09.88 that ... "the application be listed for hearing in due course".

7. The journal entries of 10.10.89 and 11.10.89 of the Court of Appeal Record show as follows:

10.10.89 – Appearances marked (Senior Counsel had appeared for both sides.
Case proceeding further inquiry on 11.10.89 (tomorrow)

11.10.89 – Same appearances as before. Order reserved for 15.10.89

8. on 15.10.89 order was delivered by the Court of Appeal. By that Order the Court dismissed with costs the appellants application for a writ of certiorari. This appeal is from that order. In doing so the Court made the following observations and gave the following amongst other reasons for its order:

**Quote** :-

."The Award was made on 13.01.85 and gazetted on 15.03.85. This application was made on 16.05.85. the pleadings show the Petitioner relied only on the exhibits annexed to the petition and not on the proceedings (vide paragraphs 15 and 17 of the petition) . . . No reason is pleaded in the petition as to why the proceedings are not annexed; nor does the petition state that the proceedings will be tendered later, . . . The application was supported on 31.5.85 and notice issued. Objections were filed on 19.8.85 and the 3rd Respondent specifically pleaded non-compliance with Rule 46 of the SC Rules 1978 ... Despite objections the Petitioner did not tender the proceedings but filed a motion dated 13.01.86 moving that the record be called for ... On 4.7.88 when objections were taken that Rule 46 had not been complied with, Counsel for the Petitioners Stated "documents mentioned to the case have been filed and they would stand or fail by their own exhibits." In view of this statement, by my judgement dated 27.09.88, I left this issue open ... No other documents or proceedings have been filed since ... **Learned Counsel for the Petitioners is now seeking not only to refer to the proceedings but also to other documents as well.** It is now claimed that certain proceedings and documents have been tendered. There is no record whatsoever of such proceedings or documents being either tendered to Court to served on the 3rd Respondent. The Petitioner is unable to state as to when these (additional) documents were tendered. In any event proceedings or documents could have been tendered only upon a motion and with permission of Court after notice to the 3rd respondent in terms of Rule 50 of the SC Rules. This has not been done. Further, the material said to have been tendered are uncorrected uncertified copies ... In

the instant case the Petitioner having stated that he was relying only on the original exhibits filed and prevented the application from being dismissed (on 27.09.89) cannot now resile from that position. By seeking to rely on documents and proceedings which have not been duly tendered the Petitioners impliedly admit that the petition as presently constituted cannot be sustained ... The Appellants has not adduced any reason as to why there has been non-compliance with Rule 46. The application . . . is dismissed with costs."

Whilst vigorously contending that the Court of Appeal should have allowed him to support his application on the 10 documents tendered, learned president's Counsel for the Appellant also submitted that:

(i) In the Court of Appeal the Appellants moved the Court to call for the record fromt he Industrial Court. Court of Appeal made order calling for such record on 13.1.86. The record was received by the appellate Court on 16.1.86. it was submitted the relief invoked involved the appellate tribunal having to inspect and examine such record – vide Article 140 of the Constitution. Certiorari proceedings begin with such examination. Therefore, irrespective of the Petitioner filing certified copies of proceedings, they are to be found in the record which Court inspects. No prejudice can therefore be caused to the Respondent in the circumstances.

(ii) The rule-making power of the Supreme Court was governed by Article 136 (1) (b) of the Constitution, which provides for Parliamentary surpervision. Rule 46 does not provide for dismissal of an application for non-compliance. Parliament has not been made aware that the appellate Courts prescribe dismissal as a penalty for non-compliance with rule 46 by the process of interpretation of the Rules. Parliament may well consider such a penalty as excessively harsh or unfair. It was submitted the supreme Court has no inherent power to interpret rules as its powers are here circumscribed by the Constitution which prescribed for parliamentary supervision of the rule-making power of the Court. There is also no room for the application of precedents. In a written Constitution when power is prescribed there is no room for arrogation of inherent powers. If the Supreme Court thought that Rule 46 should be imperative it would

have prescribed for same. It has not. The Rules may be amended but only with the approval of Parliament. That has not been done regarding Rules 46. Therefore the power of dismissal for non-compliance is not available to a Court. In previous decision of the Courts which held that the rule is mandatory, to wit:

*Nicholas v. Macan Markar* (CA)[1]
*Rasheed Ali v. Mohamed Ali*[2] and [3]
*Koralage v. Mohamed* (CA)[4]
*Mary Nona v. Francina* (CA)[5]

the Courts have not counsidered the impact of Article 136 (1) (a) and (b) and (3) and (4) of the Constitution. Counsel also compared the rule-making powers of Section 39 of the former Courts ordinance and Section 15 of the former Administration of Justice law which required the concurrence of the Minister to the rules framed.

(iii) Appellants Counsel dealing with the factual position regardings the application submitted that the 10 documents tendered provided sufficient information to establish a *prima facie* case. But the Court did not get to the stage of examining those documents. The Court dismissed the application prematurely for alleged non-compliance with Rule 46.

Appellants Counsel in the course of oral submissions before us said that the told the Court of Appeal that the 10 documents tendered were material and sufficient for his case and that it was not necessary to also have the proceeding held before the arbitrator. The Record was also available. In the result Petitioners Counsel contended there had been sufficient compliance with Rule 46 and that his application should be decided on its merits.

Learned Counsel for the 3rd Respondent on the other hand submitted that all documents relevant to the case have not been tendered. Material documents such as the proceedings before the Arbitrator which are essential for a proper grasp of the dispute have been deliberately left out. There was a lack of *uberrimae fides* on the part of the Petitioner. The arbitration proceedings itself were deliberately prolonged on frivolous grounds and vexations applications. The 10 documents tendered to the Court of Appeal

along with the petition were not enough. Counsel submitted that the Appellants merely joined issue as to whether Rule 46 was mandatory or not ... (ie) that they only canvassed matters of law in the Court of Appeal. Their position was that the Rule was merely directory and that the Court had no power of dismissal complaining that such would amount to judicial legislation; but the Petitioners did not contend that all material documents have been tendered to Court. Respondents Counsel explained the contents of the Petitioners 10 documents tendered to wit:

A – an earlier decision of the Court of Appeal as to who should commence leading evidence before the Arbitrator – on whom was the burden of proof;

B – an earlier order of the arbitrator as to whether his inquiry should proceed *ex parte*;

C – an earlier order of the Court of Appeal that the inquiry before the arbitrator should commence afresh;

D – the arbitrator's Award;

E – I – 5 letters which included a memorandum and annual leave entitlement.

3rd Respondents Counsel also submitted that the material that has not been filed by the Petitioners comprised.

(i) Written statements of parties tendered to the arbitrator setting out their full positions.

(ii) 475 pages of oral evidence including the evidence of the 3rd Respondent and 2 witnesses called on his behalf who were all subjected to cross-examination.

(iii) Written submissions made to that Arbitrator.

It was contended for the 3rd Respondent that of 20 documents produced at the inquiry, only 5 were tendered to the Appeal Court. This would present a distorted picture and mislead the Court.

Consequently the 3rd Respondent strenuously objected to the Petitioner's claim that the 10 documents tendered to Court by the Petitioner were sufficient. The Petitioners were content to canvass only matters of law before the Appeal Court but did not contend that all relevant documents material for a proper adjudication were tendered to Court.

When the inquiry was taken up the second time in October 1989 before the Court of Appeal, Petitioner's Counsel kept referring to documents other than those 10 which had been tendered and also to oral evidence given before the Arbitrator which proceedings also were not tendered. Even after objection was taken the Petitioners did not seek to tender the other material and essential documents for a just decision, although such a step is permissible under Rule 50 – vide *Paramanathan v. Kodithuwakkuaratchi* (CA).[6] Thus Counsel prayed for a dismissal of this appeal with costs and interest.

I now turn to the submissions of Appellant's Counsel that as Rule 46 does not specifically provide for dismissal for non-observance the Court below acted without jurisdiction and that as the record was indeed available there was no prejudice caused to the Respondents.

Article 136 (1) provides for Rules to be made regulating generally the practice and procedure of the Courts including rules as to the proceedings in the Court of Appeal as to the exercise of the several jurisdictions of that Court. Writ jurisdiction is a special jurisdiction of the Court. This appeal deals with a procedural matter regarding the exercise of this special jurisdiction.

What is the procedure to be adopted at the threshold stage of a writ application seeking the invocation of the Court's discretionary powers under Article 140? Sometimes a Rule makes it plain what the effect of non-observance of the Rule is to be. More often it does not. It is a question of construction by looking at the scheme and purpose of the relevant rules and deciding whether dismissal is in the scheme of things or whether dismissal would amount to an amendment,

alteration or revocation of the Rule as envisaged by Article 136 of the Constitution. Rule 46 requires the petition to be supported by affidavit and to be accompanied by original or duly certified copies of documents material to the case in the form of exhibits. Clearly then, the burden of presenting a proper application is on the party that seeks the intervention of the Court. The procedure is specified for this threshold stage. The Rule regulates the mode of enforcing a legal right. The Petitioner has to tender all relevant material to the Court in order to invoke its jurisdiction. If he fails to do this there is a failure to comply with a substantial aspect of the Rule. The fact that the Court is empowered by Article 140 to inspect and examine the record does not absolve the Petitioner of his duty to invoke jurisdiction properly.

The Appellant's responsibilities are not over by simply filing a petition and affidavit in the Court. A Court is not compelled to inspect and examine the record. As a matter of fact, there is nothing on record to show that the Court did inspect or examine the record in the instant case although it did call for the record upon the motion of Appellant's Counsel. So the fact that the record was subsequently made available to Court is not an excuse for failure to comply with basic requirements of the Rule. To hold otherwise would lead to unfairness. The Rule itself is a commonsense response to litigants wanting the disturbance of an Order or Award. It is no more than a normal procedural step deemed necessary to inform both Court and Respondents of the matters of complaint and the matters relied upon to support the complaint. It is consistent with ordinary practice. One cannot claim a right to proceed to the next step without compliance with a valid invocation of jurisdiction in the first place. Such would lead to uncertainty, unreasonableness and oppressive results. In this sense the rule is mandatory. In this view of the matter dismissal for want of compliance with necessary basics is an order that may be made within the Rule, a necessary corollary to it and does not amount to an amendment, alteration or revocation of the Rule approved by Parliament. The Court here is only articulating the real scope of the Rule to give effect and expression to it. This interpretation does not widen the ambit of the Rule.

Thus the question of obtaining the approval of Parliament to make an order of dismissal does not arise.

I have enumerated salient facts both from the Petition filed before the Court of Appeal and the order of the Court of Appeal which are important for the disposal of this appeal. The contents of paragraph 15 of the aforesaid Petition clearly state that the Award was bad in law and disclosed errors of law in that –

(a) conclusions drawn from the primary evidence are perverse, and;

(b) the Arbitrator took into account irrelevant evidence to wit: the poor performance of the 3rd Respondent in cross-examination and his admissions.

Upon the aforesaid averments clearly the proceedings wherein the 3rd Respondent gave evidence and called two witnesses on his behalf and other relevant documents should have been tendered to the Appeal Court as they are highly relevant for its consideration. This has not been done.

There is a passage in the Award that the Arbitrator took into account both the oral and documentary evidence laid before him. This suggests that there was important relevant material that ought to be considered by a Court exercising writ jurisdiction but not laid before it. The order of the Court of Appeal shows that that tribunal has pointed to this very circumstance as militating against the Appellant's application for writ. There is no inconsistency between the orders made by the Court of Appeal (*supra*). The preliminary objection taken by Respondents was overruled on the first occasion as Petitioner had insisted that his 10 documents were sufficient to enable the Court to decide on issuance of a writ. On the second occasion according to the Court, the Petitioner had sought to refer to contents of proceedings and documents not tendered and strenuously opposed by Respondents. This fact is confirmed by Counsel for Respondents before us. We see no reason not to accept the record of events as contained in the Orders of the Court of

Appeal (*supra*). No effort had been made by the Petitioners to seek permission of the Court of Appeal to tender additional documents as they may have done under Rule 50 – vide 1988. 1 SLR. 315 at 333[6] and no explanation for such omission has been offered. Under rule 50 the Court of Appeal has discretionary powers where appropriate to admit material not tendered with the petition. In these circumstances the Court below was entitled to refuse to proceed further with the application. Appellant's present submission that he could proceed upon the 10 documents tendered is contradicted by the facts and circumstances placed before us. The order of dismissal was a proper order that the Court could fairly have made. The order of the Court of Appeal dated 25.10.89 is affirmed. The appeal is dismissed. The 3rd Respondent is entitled to his costs both here and in the Court of Appeal.

This appeal arises from a dispute between employer and employee. The Arbitrator's award was as far back as 1985. In the circumstances I think it fair that the employee 3rd Respondent be paid interest on the aggregate sum of Rs. 470,105/- awarded to him. The Appellants will therefore pay legal interest on the said total sum awarded from date of Award to date of payment.

**KULATUNGA, J.** – I agree

**WADUGODAPITIYA, J.** – I agree

*Appeal dismissed.*
*Interest awarded.*