BALASINGHAM AND ANOTHER

v.

PURANTHIRAN (A MINOR) BY HIS NEXT FRIEND SIVAPACKIAM

SUPREME COURT
PERERA, J.,
WIJETUNGA, J. AND
ISMAIL, J.
SC APPEAL 41/98
CA (REV) APPLICATION NO.545/97
WITH CA LA NO 12/97
D.C. JAFFNA L/16/A2
20th SEPTEMBER, 1999

Appeal - Supreme Court Rules, 1990 - Failure to file written submissions of appellant - Rule 30 of the Supreme Court Rules - Inordinate delay in filing written submissions without reasonable excuse - Order declaring the appeal to stand dismissed for non-prosecution - Rule 34 of the Supreme Court Rules.

The appellants failed to file their written submissions in terms of Rule 30 of the Supreme Court Rules 1990, within 6 weeks of the date on which special leave to appeal was granted. The written submissions were filed approximately one year from that date. The respondent in his counter-submissions took an objection on the ground of such default and moved that the appeal be declared dismissed for non-proseuction, in terms of Rule 34. The appellants also failed to give an acceptable excuse for the default on their part.

Held :

On the facts of the case, the preliminary objections raised on behalf of the respondent that the appeal be declared dismissed for non-compliance, must be sustained.

Cases referred to :

1. *Coomasaru v. Leechman Ltd* SC Applications Nos. 217/72 and 307 /72 SC minutes 26th May 1976
2. *Samarawickrama v. Attorney-General* Sriskantha's Law Reports Vol 1 P 47
3. *Mendis v. Abeysinghe* (1989) 2 Sri LR 262
4. *Kiriwanthe and another v. Navaratne and another* (1990) 2 Sri LR 393 at 0. 404

APPEAL from the judgement of the Court of Appeal.

P. Nagendran, P.C. with P. Silvaloganthan for appellants.

S. Mahenthran for substituted - respondent.

Cur. adv. vult

February 16, 2000
PERERA, J.

This is an appeal by the 2nd Defendant-Petitioner against the Order of the Court of Appeal in Revision Application No CA 545/97 with CA LA 12/97.

The original action was filed by the next friend of a minor seeking ejectment of the defendants and recovery of peaceful possession of the premises in suit.

The Plaintiff in that action claimed the following reliefs against the Defendants :

(a) that the defendants, their agents, servants, dependants and others claiming from the defendants be ejected from the land and premises described in the schedule to the plaint;

(b) that the plaintiff be kept in peaceful possession thereof;

(c) that an injunction be issued restraining the defendants from keeping open the doors of the shop forcibly opened by them; and

(d) for damages and costs.

Along with the plaint, the Plaintiffs in this action filed a petition and an affidavit and prayed for an interim injunction restraining the Defendants from keeping open the doors of the premises described in the schedule to the petition and for costs and such other relief as to the Court may deem necessary.

The District Court upon this application of the Plaintiff issued an enjoining order on 26. 5. 1997.

Thereafter, on 26. 5. 1997 the Defendants filed answer and objections together with an affidavit and prayed for:

(a) dissolution of the enjoining order purported to be issued in the case;

(b) rejection of the application for interim injunction; and

(c) dismissal of the plaintiff's action.

The learned District Judge having heard Counsel for the Petitioners and Counsel for the Defendants reserved his order on this application of the Defendants, and delivered the order on 6. 6. 1997 dismissing the Defendant's application and made a further order extending the enjoining order for a further period of 14 days. The Defendant-Petitioners then filed papers in revision in the Court of Appeal (CA 545/97) and sought leave to appeal (CA LA 126/97) against this order of the learned District Judge dated 6. 6. 1997 dismissing the Defendant's application.

The Court of Appeal having heard Counsel on behalf of the Defendant-Petitioners and the Plaintiff-Respondents made the following order "that at the end of the period of the existing enjoining order already granted by the learned District Judge before he extends such enjoining order, if that be the case, that he makes further inquiry to ascertain whether in fact the enjoining order should be extended or not, and then make an appropriate order." The Court of Appeal also directed that the inquiry into the issue of an injunction be concluded early, if necessary, even by advancing the date already fixed after giving notice to parties and re-fixed the application for leave to appeal.

The Defendants then sought Special Leave to Appeal to the Supreme Court against this order and on the 7th day of May, 1998 this Court granted Special Leave to Appeal against the judgement of the Court of Appeal and further directed the District Judge that no further extensions of the enjoining order be granted until the final determination of this appeal. Of consent, hearing of this appeal was fixed for the 20th of August,

1998. On this day, this matter was not taken up for hearing and the Court listed this matter for hearing on the 10th of December, 1998. On the 10th of December, 1998, the hearing of this appeal was once again postponed for the 12th of May, 1999. On the 12th of May, 1999, this appeal was once again listed for hearing on the 20th of September, 1999.

When this matter was taken up for hearing on the 20th of September, 1999, Mr. Mahenthiran, Counsel for the Plaintiff-Respondent raised a preliminary objection to the hearing of the appeal. It was Mr. Mahanthiran's contention that Rule 30 of the Supreme Court Rules mandated the appellant to tender written submissions within 6 weeks of the date on which Special Leave to Appeal was granted. However, the appellant has failed to comply with this Rule. Counsel submitted that the appellant has filed his written submissions only on the 4th of May, 1999 which was almost one year after the date on which Special Leave was granted.

It was Counsel's contention that this matter had been listed for hearing on two previous occasions, namely, **20th of August, 1998 and 10th of December, 1998** and it was only thereafter that written submissions were filed by the Appellant. Counsel further submitted that having regard to the fact that an essential step in the prosecution of the present appeal had not been taken by the Appellants, this appeal stood dismissed for non-prosecution in terms of Rule 34 of the Supreme Court Rules 1990.

Counsel also invited the attention of the Court to the fact that the District Court and the Court of Appeal had undoubtedly appreciated the necessity to retain the status quo and upheld the continuation of the enjoining order.

We have heard Counsel for the Appellants and Counsel for the Plaintiff-Respondent who made both oral and written submissions on this preliminary objection. The main submission of Counsel for the Plaintiff-Respondent Mr. Mahenthiran was that the present appeal must stand dismissed in terms of Rule 34 of the Supreme Court Rules as written submissions of the Appellants though filed on the 4th of May, 1999 were not filed in terms of the said Rule.

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 on their 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 the application to stand dismissed, for non-prosecution, and 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."**

In *Coomasaru vs Leechman Ltd.*,[1], the former Supreme Court dismissed an appeal for failure to file written submissions in terms of certain Rules of the Appeal Procedure Rules in the absence of any excuse for such failure. In *Samarawickrema vs Attorney General*[2], this Court dismissed an appeal for failure to serve a copy of the written submissions on the Respondent as required by Rule 35(e). In that case, the Court observed that no valid excuse for such non-compliance had been shown. However, in *Mendis vs Abeysinghe*[3], it was held that the failure to comply with Rule 35(e) can be excused at the discretion of the Court.

Under the present Rules, the specific Rule which is applicable to this case is Rule 30, and in particular Rule 30(1) which provides thus :

> **"No Party to an appeal shall be entitled to be heard unless he has previously lodged 5 copies of his written submissions . . . . complying with the provisions of this Rule."**

It is further provided in Rule 30(6) that the Appellants shall within 6 weeks of the grant of Special Leave to Appeal or Leave to Appeal, as the case may be, lodge their submissions in the Registry and shall forthwith give notice thereof to each Respondent by serving on him a copy of such submissions.

It is, therefore, clear that in respect of all appeals to the Supreme Court, the appellant is required to tender written submissions within 6 weeks of the grant of Special Leave or Leave to Appeal.

In *Kiriwanthe and another vs Navaratne and another*[4], the question of failure to comply with the Rules of the Supreme Court was considered and this Court in that case observed thus :

> **"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 objection of the particular ruling."**

The Court further observed that "even if non-compliance had not been explained, the discretion of the Court to make an order of dismissal should have been exercised only after considering the gravity of default in relation to the issue arising in the case." (Vide ps. 405 & 406)

I am, therefore, of the view that the tendering of written submissions is a mandatory requirement in respect of appeals in terms of Rule 30 of the Supreme Court Rules and it would be open for this Court where an appellant or a petitioner who has obtained leave to appeal fails to show due diligence in taking all steps for the purpose of prosecuting the appeal, declare the appeal to stand dismissed for non-prosecution under the provisions of Rule 34.

The Rules of the Supreme Court set out above require the Petitioner:

(a) to file his written submissions within 6 weeks of the grant of leave to proceed; and

(b) the petitioner is directed to give the Respondent notice of it by serving a copy on the Respondent to enable him to file his submissions in reply before the hearing commences.

Having regard to the cases decided by this Court relating to this matter, it would be safe to act on the basis that while all these Rules (30 & 34) must be complied with, the law does not require or permit an automatic dismissal of the appeal of the party in default. The consequence of non-compliance is a matter falling within the discretion of the Court to be exercised after considering the nature of the default and the excuse or explanation tendered by the defaulting party; and even where the non-compliance has not been explained, only after considering the gravity of default in relation to the issue arising in the case.

In the aforesaid circumstances, I propose to consider the reason given by the appellants to justify the non-compliance with Rule 30. Admittedly, the appellants had failed to file written submissions within 6 weeks stipulated in Rule 30(6). Counsel for the appellants in his endeavour to explain the inability on the part of the appellants to comply with this Rule submitted that when Special Leave to Appeal was granted by this Court on the 7th of May, 1998, this Court made inter alia the following order :

> **"Of consent, hearing on 20th August 1998. Counsel agreed to use Court of Appeal briefs. Mr. Mahenthiran requests that he be allowed to file additional material from the District Court records with translations and with a copy to the petitioner."**

It was Counsel's submission that having regard to this passage in the order, the appellants had formed the impression, (mistaken though it may be) that this Court had acted in terms of Rule 16(1) and "had dispensed with compliance with the provisions of the rules in regard to the steps preparatory

to the hearing of such appeal" and that such dispensation included the requirement set out in Rule 30(6). Counsel strenuously urged that although the Rules of the Supreme Court must be complied with, the law does not require or permit an automatic dismissal of the appeal of the party in default.

I am in entire agreement with the submission of Counsel that the weight of authority favours the view that while all rules must be complied with, the law does not require or permit an automatic dismissal of the appeal of the defaulting party.

However, in this case there are certain matters which this Court must necessarily take cognizance of :

, Firstly, the appellants were granted Special Leave to Appeal by this Court on the 7th of May, 1998 and this matter was fixed for hearing on the 20th of August 1998.

Secondly, on that date fixed for the hearing, this matter was postponed for the 10th of December, 1998. This appeal was not taken up for augument on that date as well and it was re-fixed for hearing on 12. 5. 1999.

It would, therefore, be clear that the appellants had failed to comply with Rule 30 for a period of approximately one year from the date on which Special Leave to Appeal was granted.

While this matter stood fixed for hearing on the 12th of May, *1999* the appellants proceeded to file their written submissions on the 4th of May, 1999.

The Respondent filed counter-submissions on the 11th of May 1999, and Counsel for the Respondent in his written submissions filed shortly thereafter had taken the objection that the appellants had failed to comply with the provisions of Rule 30 in that the written submissions of the Appellants have been tendered approximately one year of the date on which Special Leave to Appeal was granted and that too after this appeal had been listed for argument on two occasions. The Respondent has in the aforesaid circumstances moved that this appeal be declared dismissed for non-prosecution.

I have very carefully considered the explanation given by the Respondent for non-compliance with Rule 30. But I regret to state that it is most unreasonable for the Appellants to have presumed that the Court on the date Special Leave to Appeal was granted, had acted in terms of Rule 16(1) and "had dispensed with compliance with the provisions of the rules in regard to the steps preparatory to the hearing of such Appeal" and that this dispensation included the requirement set out in Rule 30(6). The excuse furnished by the Appellants in this case for failing to comply with Rule 30 of the Supreme Court Rules is both unacceptable and unconvincing and is conduct that cannot be condoned by this Court.

In my view, failure to comply with Rule 30 is indeed a failure to show due diligence. It is to my mind quite clear from the facts that I have set out in this judgement that the Appellants had ample opportunity of becoming aware of the failure to file written submissions. The Appellants have also failed to give an acceptable excuse for this default on their part.

For the reasons aforesaid, I am of the view that the preliminary objection raised by Counsel for the Respondent, must be sustained. This appeal is accordingly dismissed. There will be no costs. The learned District Judge is, however, directed to conclude the inquiry into the issue of an injunction in this case as expeditiously as possible.

WIJETUNGA, J. - I agree.

ISMAIL, J. - I agree.

Appeal dismissed.