

JAYAWICKREMA, SOMESWARAM &
MANTHRI & COMPANY
v.
JINADASA

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 74/91
H.C. CASE NO. 53/91
L.T. CASE NO. 23/1716
OCTOBER 23 1993.

Supreme Court Rules 1978 - Rule 35 (same as Rule 30 of the Supreme Court Rules 1990) - Non-compliance - Order of dismissal for failure to show due diligence in prosecution of appeal under Rule 40 of the Supreme Court Rules 1978 (same as Rule 34 of the Supreme Court Rules 1990) - Failure to file written submissions within 14 days as required by the Rules and to forthwith give notice thereof by service of copy on respondents.

Held:

The appellant failed to file written submissions within 14 days as required by Rule 35 of the Supreme Court Rules 1978 and was unable to tender an excuse for not so tendering the written submissions. The appeal has therefore to be dismissed for failure to show due diligence for the purpose of prosecuting the appeal. The corresponding provision relating to written submissions is found in Rule 30 and the provision for dismissal of the appeal for non-prosecution is found in Rule 34 of the Supreme Court Rules 1990 which are now in force. There is no change in the

requirement for filing written submissions and in the provision for dismissal for non-prosecution. As this appeal was pending on the date of the promulgation of the new Rules, the 1978 Rules would apply to this case.

Cases referred to:

1. *Coomasaru v. Leechman Ltd.*, S.C. Application Nos. 217/72 and 307/72 SCM of 26.05.1976.
2. *Samarawickrema v. The Attorney-General Sri Kantha* LR Vol. 1 p. 47.
3. *Mendis v. Abeysinghe* (1989) 2 Sri LR 262.

APPEAL from order of the High Court.

Nihal K. M. Perera with Ms. Lakshmi Abeysekera and Indunil Silva for appellant.
K. Balapatabendi with S. J. Gunawardena for respondent.

Cur adv vult.

November 05, 1993.

KULATUNGA, J.

When this appeal was taken up for hearing the Court called upon the learned Counsel for the appellant to explain why the appellant had failed to file written submissions as required by Rule 35 of the Supreme Court Rules 1978. He informed us that he was unable to tender any excuse for such non-compliance but moved for permission to file submissions. This was refused and we reserved judgment on the question whether this appeal should be dismissed under Rule 40 on the ground of failure to show due diligence for the purpose of prosecuting the appeal.

In this case, special leave to appeal was granted on 03.12.91 when this Court directed that the appeal be listed for hearing together with appeals Nos. 48/87 and 49/87 where similar questions arose and further directed that written submissions be filed in accordance with the Rules. Rule 35(e) read with Rule 35(c) of the Supreme Court Rules 1978 which were then in force required the appellant to lodge his submissions within fourteen days of the grant of special leave to appeal and to forthwith give notice thereof to the respondent serving on him a copy of such submissions.

The three appeals came up for hearing on 19.03.92 and 26.05.92. However, the hearing was postponed. The appellants in appeals Nos. 48/97 and 49/87 had filed written submissions but some of the respondents had failed to file submissions and they were informed that they had lost their right to be heard. The appeals were then called on 03.07.92 and 04.03.93 to enable the parties to explore the possibility of a settlement. As there was no settlement, the appeals were fixed for hearing. On 25.05.93 which was the 5th date of hearing appeals Nos. 48/87 and 49/87 were argued (and judgment was delivered on 15.07.93) but this appeal was moved out on the ground that the respondent's Counsel was ill. It was called on 30.07.95 and refixed for hearing on 23.09.93. On that day it was moved out on the ground that the appellant's Counsel was ill and the hearing was refixed for 29.10.93. Parties were throughout represented by the same Counsel.

In appeals Nos. 48/87 and 49/87 the workmen had applied to the Labour Tribunal against the termination of their services by the National Textile Corporation. While the inquiry was pending, the business undertaking of the N.T.C. was vested in the government under the Business Undertakings (Acquisition) Act No. 35 of 1971. Thereafter, the N.T.C. was dissolved and the appellant was appointed as its liquidator, under S. 19 of the Finance Act No. 39 of 1971; whereupon the Labour Tribunal ordered the addition of the appellant as a respondent. The Court of Appeal granted a writ of certiorari quashing the said order holding that a liquidator appointed under the Finance Act had no power to bring or defend legal proceedings in the name of the dissolved corporation. However, the Court refused to issue a writ of prohibition directing the Tribunal not to proceed with the inquiry, being of the opinion that the Tribunal was competent to conclude the inquiry and to forward to the liquidator for payment any order for back wages which it may make, in favour of the workmen. The liquidator appealed to this Court for a writ of prohibition.

Counsel cited several authorities in support of the judgment of the Court of Appeal. Even though there was no cross appeal against the order of the Court below quashing the addition of the liquidator, Counsel argued that such addition is lawful. However, as the

business undertaking (together with its potential liabilities) had been vested in the government, this Court held that no order can be made against the N.T.C. Accordingly, the appeals were allowed and writs of prohibition were issued in both the appeals directing the Labour Tribunal not to proceed with the hearing of the applications pending before it. In the circumstances, this Court did not consider the question as to whether or not a liquidator appointed under S.19 of the Finance Act, No.38 of 1971 has the power to bring or defend legal proceedings.

In the instant case, the River Valleys Development Board was dissolved and the appellant was appointed as its liquidator under S.19 of the Finance Act, No. 38 of 1971 whilst the application made to the Labour Tribunal by the respondent against the termination of his services by the said Board was pending. The Labour Tribunal refused to add the appellant as a respondent but in appeal the High Court directed the addition of the appellant. The decision of the Court of Appeal application No. 472/82 C.A.M. 02.04.87 (to the contrary) does not appear to have been brought to the notice of the High Court. (Vide Nigel Hatch "Commentary on the Industrial Disputes Act of Sri Lanka" p. 545 for a reference to that decision).

Learned Counsel for the appellant informed us that there are numerous cases before the Labour Tribunal awaiting a ruling on the correctness of the decision of the High Court. However, in the circumstances of this case, we are unable to hear this case and decide that question as the appeal has to be dismissed in terms of Rule 40.

In *Coomasaru v. 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 v. The Attorney-General Sri Kantha*⁽²⁾, this Court dismissed an appeal for failure to serve a copy of written submissions on the respondent as required by Rule 35(e). The Court observed that no valid excuse for such non-compliance had been shown. In *Mendis v. Abeysinghe*⁽³⁾ it was held that the failure to comply with Rule 35(e) can be excused in the discretion of the Court. The Court also observed that even in the case

of a failure to file written submissions in terms of Rule 35(b), the sanction is that the party is deprived of the right to be heard, but the Court must proceed to hear the appeal and may, in its discretion, give such party a hearing; however, where the failure to comply with Rule 35(b) or Rule 35(e) shows a failure to show due diligence when he has become aware that he is in default, the Court may dismiss the appeal for non-prosecution.

The corresponding provision relating to written submissions is found in Rule 30 and the provision for dismissal of the appeal for non-prosecution is found in Rule 34 of the Supreme Court Rules 1990 which are now in force. There is no change in the requirement for filing written submissions and in the provision for dismissal of the appeal for non-prosecution. As this appeal was pending on the date of the promulgation of the new Rules, the 1978 Rules would apply to this case. It is clear from the facts which I have narrated in an earlier part of this judgment that the appellant had ample opportunity of becoming aware of the failure to file written submissions. Counsel himself is unable to adduce any excuse for the default. Accordingly, I dismiss this appeal with costs.

G. P. S. DE SILVA. C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.