SHANMUGAVADIVU
v
KULATHILAKE

SUPREME COURT
BANDARANAYAKE, J.
EDUSSURIYA, J. AND
DE SILVA , J.
SC.APPEAL NO. 50/2002
C.A. NO. 1545/2000
DC BANDARAWELA NO. 676/L
25th OCTOBER, 2002

Revision - Supreme Court Rules, 1990, Rule 3 – Requirement to produce material documents or to seek leave of court to produce the same latter – Consequence of default of Rule 3.

The appellant ("the plaintiff") instituted action against the respondent ("the defendant") and another person for a declaration that the plaintiff is the tenant of the premises in suit and for an injunction against the 1st defendant from demolishing the said premises. The 1st defendant pleaded that the plaintiff was in illegal occupation of the premises as the same were burnt during the 1983 riots and were currently vested in the REPIA. The District Judge gave judgment for the 1st defendant. The plaintiff filed a revision application in the Court of Appeal on 12.12.2000; supported it on 15.12.2000 and obtained a stay order and notice on the 1st defendant for 15.01.2001.

The plaintiff filed with his application 4 documents including the judgment of the District Judge but failed to file all the material documents or to explain the reason for the failure and seek leave of court to furnish the necessary documents later, as required by Rule 3 (1)(b) read with Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules, 1990. Instead the plaintiff amended her petition without notice to the 1st defendant and without leave of court. She filed one additional document with the amended petition and the balance documents with her counter objections.

Held:

The requirements of Rules 3 (1)(a) and 3 (1) (b) are imperative. In the circumstances of the case the Court of Appeal had no discretion to excuse the failure of the plaintiff to comply with the Rules.

APPEAL from the judgment of the Court Appeal.

Case referred to:

(1) *Kiriwanthe and Another v Navaratne and Another* (1990) 2 Sri LR 393 distinguished.

K.M.P. Rajaratne with *B. Wickremasinghe* for appellant.

Navin Marapana with *Nishanthi Mendis* for 1st defendant-respondent.

March 12, 2003

BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 20.02.2002. By that judgment, the Court of Appeal upheld the preliminary objections taken by the 1st defendant-respondent-respondent (hereinafter referred to as the respondent) that the plainfiff-appellant-appellant (hereinafter referred to as the appellant) failed to file all the necessary documents along with the petition dated 12.02.2000, as required by Rule 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules of 1990 and that the appellant had amended her petition dated 12.02.2002, without notice to the respondent and without seeking the permission of Court, and dismissed the case.

Special leave to appeal was granted by this Court on the following questions:

a. Did the Court of Appeal err in law in holding that Rule 3(1)a and 3(1)b of the Court of Appeal (Appellate Procedure) Rules were applicable?

b. Did the Court of Appeal err in law by failing to consider whether it should exercise its discretion under Rule 3(1)a and 3(1)b of the Court of Appeal (Appellate Procedure) Rules?

The facts of this case, albeit brief, are as follows:

The appellant instituted action against the respondent and another person for a declaration that the appellant is the tenant of

the premises referred to in the plaint and for an injunction against the respondent from demolishing the said premises.The respondent took up the position that the appellant was in illegal occupation as the premises in suit were burnt during the July 1983 riots and that it was currently vested with the REPIA. The District Court delivered its judgment in favour of the respondent and the appellant came before the Court of Appeal with an application for revision filed on 12.12.2000. This was supported on 15.12.2000. On that day, the respondent was noticed to appear on 15.01.2001 and a stay order was granted.

Learned counsel for the respondent submitted that the appellant obtained her stay order from the court of Appeal after supporting her application *ex parte* on 15.12.2000. His position was that the appellant had not filed all the relevant documents along with her petition, dated 12.12.2000 and for this reason, the appellant's application should be dismissed *in limine*.

The Court of Appeal brief indicated that the appellant had filed only the documents marked P1 to P4 along with her petition and affidavit dated 14.12.2001. These 4 documents included the judgment of the District Court of Bandarawela (P1), order of the learned District Judge dated 04.12.2002 (P2), answer of the respondent (P3) and the evidence of the appellant (P4).

The appellant in her petition to the Supreme Court stated that after filing the application for revision in the Court of Appeal on 12.12.2000 and supporting on 15.12.2000 for a stay order she had filed an amended petition dated 10.01.2001 with 5 documents marked P1 to P5. The documents marked P1 to P4 were the documents filed along with the initial application for revision, dated 12.12.2000 and the document marked P5 was the order of the Rent Board dated 07.04.1984. Thereafter she had filed counter objections on 26.02.2001 along with the documents marked P6.to P6(d). These included the documents in the case and inquiry (P6), amended plaint (P6(a)), answer of the respondents (P6(b)), replication (P6(c)), the judgment (P6(d)) and several other documents.

According to Rule 3(1) (a) it is necessary for an application to be made by way of petition together with an affidavit in support of the averments and these should be accompanied by the originals

of documents material to such application. Rule 3(1)(b) specifically refers to the application made by way of revision or *restitutio in integrum* and states that those too should be made in like manner referred to in Rule 3(1)a 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.

Admittedly, in the instant case, the original application made by the appellant to the Court of Appeal on 14.12.2001, did not accompany the originals or certified copies of documents material to that application. Moreover, the appellant had not stated the reasons for such inability and sought leave of the Court to furnish such documents later. What the appellant in effect did was to amend the petition without obtaining the approval of the Court and file the rest of the documents along with his counter objections on 26.02.2001.

The appellant came before the Court of Appeal on a revision application to set aside and vacate the order of the learned District Judge made on 04.12.2000 and to obtain a stay order to prevent the respondent from executing writ to remove the appellant from the premises in question. Rules 3(1)(a) and 3(1)(b) are in Part II of the Rules of the Court of Appeal (Appellate Procedure) which deals with applications made under Articles 140,141 and 138 of the Constitution. Rule 3(1)(b) specifically refers to applications by way of revision or *restitutio in integrum* under Article 138 of the Constitution and reads 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."

In such circumstances, it is my view that both the Rules 3(1)(a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules were applicable in the instant case.

Learned counsel for the appellant strenuously argued that the Court of Appeal erred as they did not consider the decision in *Kiriwanthe and another* v.*Navaratne and another*[1]. His position

was that in *Kiriwanthe's* case, it was clearly held that, although requirements of Rule 46 must be complied with normally at the time of filing the application, strict or absolute compliance is not essential. Learned counsel for the appellant drew our attention to the following paragraph in the judgment of *Kiriwanthe's* case (*supra*, at pg. 401):

> "....I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute compliance is not essential; it is sufficient if there is compliance which is "substantial" - this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied, as in the case now before us; the Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction...."

Rule 46 of the Supreme Court Rules of 1978, which was in Part IV and dealt with "Writs and Examination of Records," was in the following terms:

> "Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 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 be accompanied by two sets of copies of proceedings in the Court of First Instance, tribunal or other institution."

It will be seen that Rule 46 laid down the procedure in the strictest sense without giving a right or an opportunity for an applicant to purge his default. The decision in *Kiriwanthe's* case nullified the severity in Rule 46 by bringing in the judicial discretion either to exercise the non-compliance or to impose a sanction. *Kiriwanthe's* case was decided on 18.07.1990 and it was only a few months later on 13.11.1990, the new Rule 3 of the Court of Appeal (Appellate

Procedure) Rules 1990 came into effect. The contents of Rules 3(1)(a) and 3(1) (b), referred to above, clearly show that they are different to Rule 46. The new Rules indicate that the objectivity of exercising judicial discretion, as intended in *Kiriwanthe's* case has been incorporated as it enables an applicant to submit to Court the relevant documents at a later stage.

According to Rule 3(1)(a),

> ".... where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later."

Kiriwanthe's case was decided on the basis of Rule 46 of the Supreme Court Rules 1978 and therefore admittedly has no application to the instant case. As referred to earlier, in the instant case, the question in issue is with regard to Rules 3(1)(a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules 1990. Rules 3(1)(a) and 3(1)(b) unlike Rule 46 make provision for an applicant to purge his default and cure the defect. As pointed out clearly in *Kiriwanthe's* case, in terms of Rule 46, there was no provision for purging an applicant's default and the Court was of the view that it should 'first determine whether the default has been satisfactorily explained or cured subsequently without unreasonable delay.' The new Rules permit an applicant to file documents later, if he has stated his inability in filing the relevant documents along with his application, and had taken steps to seek the leave of the Court to furnish such documents. In such circumstances, the only kind of discretion that could be exercised by Court is to see whether and how much time could be permitted for the filing of papers in due course.

The appellant had made no such statements in her petition and the Court of Appeal had rightly decided that in the absence of the relevant documents, the Court is "unable to exercise its revisionary powers in respect of the order sought to be revised" by the appellant.

On numerous occasions the Supreme Court as well as the Court of Appeal have held that the compliance of the Supreme Court Rules and the Court of Appeal Rules is imperative. In a situation where an application was made to the Court of Appeal without the relevant documents being annexed to the petition and the

affidavit, but has stated the reason for such inability and sought the leave of the Court to furnish such documents on a later date, the Court could have exercisd its discretion and allowed the petitioner to file the relevant documents on a later date. However on this occasion, as pointed out earlier, no such leave was sought by the appellant and in the circumstances, the Court of Appeal could not have exercised its discretion in terms of Rules 3(1) (a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules.

For the foregoing reasons, the questions on which special leave to appeal was granted by this Court, are answered in the following terms:

a. the Court of Appeal did not err in law in holding that Rule 3(1)(a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules were applicable; and

b. the Court of Appeal did not err in law by failing to consider whether it should exercise its discretion under Rules 3(1)(a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules.

I accordingly dismiss the appeal and affirm the judgment of the Court of Appeal. In all the circumstances of this case there will be no costs.

EDUSSURIYA, J. - I agree.

DE SILVA, J. - I agree.

Appeal dismissed.