MENDIS
v.
ABEYSINGHE AND ANOTHER

SUPREME COURT
H. A. G. DE SILVA, J.
BANDARANAYAKE, J. AND FERNANDO, J.
S.C. APPEAL NO. 49/88 – CA (LA)
S.C. 24/88 – CA NO. 329/79 (F)
D.C. COLOMBO A/33/M.
4 AND 5 SEPTEMBER 1989.

Appeal – Leave to appeal – Grant of leave ex mero motu – Rules 35, 36(b) and 40 of the Supreme Court Rules – Failure to comply with Rules 35(b) and 35(d) – Failure to show due diligence.

A reading of Article 128 of the Constitution shows that leave to appeal can be granted by the Court of Appeal ex mero motu. Sometimes in the judgment itself, in an appropriate case, the Court of Appeal gives leave to appeal ex mero motu and it is for the parties, if they so desire to avail themselves of such leave. In such a case the parties are not heard before leave ex mero motu is granted. An interpretation of Article 128 taken with the Supreme Court Rules do not compel one to the view that one should read into them a procedure not provided for in them and make it obligatory, in all cases, whatever the circumstances, that the respondent should be heard before leave to appeal is granted by the Court of Appeal. There is not at this stage a final determination affecting the rights of parties and the respondent would at a later stage be heard and could then put forward all the material and arguments which he could have preferred at the hearing of the leave to appeal application. No injustice has been suffered by him in not being heard at this stage. No doubt in an appropriate case the Court would give such an opportunity to the respondent if the circumstances warranted such a step.

2. In Rule 35(b) there is no provision for automatic dismissal of an appeal where there was a failure on the part of the respondent to serve the written submissions on the respondent. The Rule provides only that no party to an appeal shall be entitled to be heard if he has not previously lodged written submissions. Thus the penalty, and the only penalty, for default has been prescribed. The Rule contemplates that this court will proceed to hear the appeal. All that it does is to disentitle the party in default from claiming a *right* to be heard, but preserves the undoubted *discretion* of the Court to give such party such hearing as it thinks appropriate. If that be the only consequence of the failure *to lodge* written submissions, it is impossible to interpret the Rules as requiring a more severe penalty for a far less default, namely the failure *to give notice* of the lodging of written submissions to the respondent together with a copy thereof in terms of Rule 35(e). That Rule omits even the penalty set out in Rule 35(b).

3. Further as the Rules are not silent as to the consequences of default, and therefore it cannot be implied that non-compliance must result in dismissal. Secondly the real intention or the general object of the Rules is to restrict the right of a party in default to be heard, but not to deny him a just determination of the appeal.

4. Though the penalty for default prescribed by Rule 35 is not dismissal, the appeal may be dismissed where an appellant fails to comply with Rule 35(b) or Rule 35(e) provided the conditions prescribed by Rule 40 are satisfied: however mere non-compliance is not sufficient and there must be a failure to show due diligence. Failure to show due diligence must refer, not to the initial default, but to a subsequent default after he has become aware he is in default. A mistake of fact or law as to the correct procedure for lodging written submissions will not always be a failure to show due diligence.

Cases referred to:

1. *State Graphite Corporation* v. *Fernando* [1982] 2 Sri L.R. 590.
2. *Pearlberg* v. *Varty* (Inspector of Taxes) [1972] 2 All E.R. 06, [1972] 1 W.L.R. 524.
3. *Cooper* v. *Wandsworth Board of Works* (1863) 14 CB (NS) 180, 190, 194.
4. *Wiseman* v. *Borneman* et al [1969] 3 All E.R. 275, 277.
5. *Edward* v. *de Silva* 46 NLR 342.
6. *Wimalasekera* v. *Parakrama Samudra Co-operative APSS Society* 58 NLR 298.
7. *Mylvaganam* v. *Reckitt & Colman S.C.* Appeal No. 154/87 with S.C. Appeal No. 16A/87 – S.C. Minutes of 8.7.1987.
8. *Samarawickrama* v. *Attorney General* 1 Srikantha L.R. 27

PRELIMINARY OBJECTIONS re grant of leave to appeal.

P. A. D. Samarasekera, P.C. with *Jayampathy A. Gunaratne* and *I.P. Wickremasinghe* for 1st plaintiff-respondent-appellant.
Dr. H.W. Jayewardene, Q.C. with *Jacolyn Seneviratne, Harsha Amerasekera* and *Harsha Cabraal* for defendant-respondent.

Cur. adv. vult.

November 03, 1989

H. A. G. DE SILVA, J.

The Plaintiff-Appellant instituted this action in the District Court of Colombo in which he claimed that the Defendant-Respondent was in breach of an agreement to sell and transfer to the Appellant and to one G. Speldwinde (deceased) a portion of a land called Galla Estate at Ekala. The Appellant had made the 2nd Respondent, who was the executrix of the Estate of the said G. Speldwinde a party defendant, but subsequently upon an application made by the 2nd Respondent she was added as a Plaintiff in the said action. After trial, judgment was entered in favour of the Appellant in a sum of Rs. 163,296/-, and in favour of the 2nd Respondent in a sum of Rs. 107,500/-. The 1st Respondent appealed from the said judgment of the District Court to the Court of Appeal. That Court set aside the judgment of the District Court but entered judgment in favour of the Appellant in a reduced sum viz: Rs. 28,296/-. The Appellant sought from the Court of Appeal leave to appeal to this Court against the judgment of the Court of Appeal, and it was allowed on the ground that there were substantial questions of law involved in the appeal.

By a motion dated 30.6.89, the Respondent moved that the appeal be dismissed as no copy of the Appellant's written submissions had been served on the Respondent. This objection was amplified by a further motion dated 25.8.89, which was the subject-matter of the hearing before us. These objections were as follows:-

(1) that the leave to appeal purported to have been granted by the Court of Appeal ex parte without the Respondent being noticed or informed of the grounds of appeal is void and is of no effect in law.

(2) that there has been non-compliance with Rule 35 of the Supreme Court Rules in as much as the Appellant has failed to serve on the Respondent a copy of his written submissions.

The judgment in this case was delivered by the Court of Appeal on 5.8.1988 by Dheeraratne, J. with Palakidnar, J. agreeing. The application for leave to appeal to the Supreme Court was taken before the same two judges on 7.10.88, on which date learned President's Counsel appeared for the Petitioner and the Court made order granting leave to appeal to the Supreme Court on the grounds

set out in paragraph 17 of the petition. It is conceded that notice of that application had not been given to the Respondent either by the Appellant or by the Court, and on 7.10.88 the Respondent was unrepresented. The fact that the leave to appeal to the Supreme Court was granted by the same two Judges who heard the appeal is of some importance as they were fully conversant with the facts and it cannot be said that the exercise of the jurisdiction of the Court was arbitrary. In *State Graphite Corporation v. Fernando*(1) it was held that:

"the Court of Appeal can dispense with a hearing in granting leave ex mero motu. In other cases where a party wishes to be heard or the issues involved are such that the Court ought not to make an order without hearing a party affected, a proper hearing and determination would generally require a hearing however summary or brief that hearing may be...."

It was further observed that the Bench which gave leave was the same Bench which gave judgment and was fully conversant with the case.

It was the contention of learned Queen's Counsel that the fact that Rule 20 of the Supreme Court Rules dealing with all applications for leave to appeal to the Supreme Court made in the Court of Appeal requires that –

"Every application for leave to appeal shall name as respondent ..... in the case of a civil cause or matter, the party or parties in whose favour the judgment complained against has been delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal and shall set out in full the address of such respondents.",

inferentially meant that the Respondents must be given notice of such application so that they may oppose it or make submission to Court to assist the Court in coming to a correct decision as to whether such application should be allowed or not. He submitted that natural justice which is really "fairplay in action" requires such notice to be given and a decision made behind the back of a Respondent is a denial of natural justice.

A reading of Article 128 of the Constitution which gives a right of appeal to the Supreme Court –

"From any final order, judgment, decree or sentence of the Court of

Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings,"

shows that the Court of Appeal can in the appropriate case grant leave ex mero motu. In fact, sometimes the Court of Appeal judges in their judgment itself, in an appropriate case, give leave to appeal ex mero motu and it is for the parties, if they so desire, to avail themselves of such leave. In such a case, the parties are not heard before leave ex mero motu is granted. (*State Graphite Corporation vs. Fernando, supra*) In *Pearlberg vs. Varty (Inspector of Taxes)*(2) where,

"in 1957 the Revenue, on finding that the tax payer had made no return at all on his income between 1937 and 1957, made an assessment on him for the year 1951-52 ('the normal year' within the meaning of Section 51(1) of the Finance Act 1960). In 1967 the Revenue decided to make an assessment under Section 51(1)(3) of the 1960 Act for each of the five years preceding the normal year' to recover tax allegedly lost due to the 'wilful default or neglect' of the tax payer. Prior to 1965 such late assessments were made by the Commissioner but where the assessment was for a year ending earlier than six years before the end of the normal year, Section 51(4) provided that it could only be made with the leave of the Special or General Commissioner, and under Section 51(7), the person to be assessed was entitled to appear and be heard when the application for leave was made. The Income Tax Management Act 1964 however relieved the Commissioner of the function of making assessments .... but Section 6(1) provided that such assessments could only be made with the leave of a Commissioner 'given on being satisfied by an Inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person'. In accordance with Section 6(1) the Revenue applied to a Commissioner for leave to make assessments on the taxpayer for the years in question and the Commissioner granted leave without giving the taxpayer an opportunity to be heard .... The taxpayer claimed that those assessments were invalid on the ground that the Commissioner had acted ultra vires in granting leave without giving him an opportunity to appear and be heard. It was held (i) that Section 6(1) to Section 51(7) which specifically gave the tax payer a right to

appear and be heard....the wording of Section 6(1) describing the procedure whereby the Commissioner must be satisfied by an Inspector or other officer of the Board was more naturally to be understood as meaning that the application was to be ex parte and that the tax payer therefore had no right to be heard: (ii) the function of the Commissioner in granting leave under Section 6(1) was administrative and not judicial .... (iii) the decision of the Commissioner to give leave did not make any final determination of the right of the taxpayer; where the person affected by the decision could be heard and could then put forward all the objection which he could have preferred on making of the application, it by no means followed that he suffered an injustice in not being heard on that application".

Learned Queen's Counsel contended that though Article 128 did not state specifically, the procedure to be followed and whether it would involve giving the Respondent an opportunity of being heard before leave to appeal was granted, the dictum of Byles J. in *Cooper vs. Wandsworth Board of Works*(3) that –

"although there are no positive words in a statute requiring that the parties shall be heard, the justice of the common law will supply the omission of the legislature"

would apply; but in *Wiseman vs. Borneman et al* (4) Lord Reid at page 277 says that –

"Natural justice requires that the procedure before any Tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the Courts have without objection from Parliament supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation".

An interpretation of Article 128 taken with the Supreme Court Rules do not compel one to the view that one should read into them a procedure not provided for in them and make it obligatory, in all cases, whatever the circumstances, that the Respondent should be heard before leave to appeal is granted by the Court of Appeal. As

was stated in *Pearlberge vs. Varty* (2) there is not at this stage a final determination affecting the rights of parties and the Respondent would at a later stage be heard and could then put forward all the material and arguments which he could have preferred at the hearing of the leave to appeal application. No injustice has been suffered by him in not being heard at this stage. No doubt in the appropriate case the Court would give such an opportunity to the Respondent, if the circumstances of the case warranted such a step.

Learned Queen's Counsel cited *Edward vs. de Silva*(5) and *Wimalasekera vs. Parakrama Samudra Co-operative A.P.S.S. Society*(6) in support of his contention that the Respondent should have been noticed before leave to appeal was granted. The principle involved in those decisions was that, upon an appeal being filed in a higher Court, the inferior Court ceases to have jurisdiction over the action, and can take no further proceedings in the action, save as expressly permitted by law. That principle has no application here, because the jurisdiction of this Court had not yet been invoked at the time the Court of Appeal granted leave, and that Court undoubtedly continued to have jurisdiction: a jurisdiction expressly granted by Article 128. Further, in those cases writs of execution were issued *ex parte,* after appeals had been filed: orders for the issue of writs of execution directly and immediately affect the proprietory rights of parties with a degree of finality which the grant of leave to appeal does not have. The fact that the Respondent was not noticed does not affect the jurisdiction of the Court of Appeal to grant leave to appeal. I am of the view that no prejudice has resulted to the Respondent and I accordingly over-rule this objection.

The second matter raised by the learned Counsel for the Respondent is that the written submissions have not been served on the Respondent by the Appellant as required by Rule 35(e) of the Supreme Court Rules which states that –

"The appellant shall, as soon as may be, and in any case within fourteen days of the grant of special leave to appeal or the filing of an appeal lodge his submissions, and forthwith give notice thereof to each Respondent serving on him a copy of submissions".

The Appellant filed his petition of appeal in the Supreme Court on 3rd November 1988 and on 17th November 1988 his written submissions were filed in the Supreme Court Registry with a copy thereof to be served on the Respondent. This copy was withdrawn by

the Appellant on a date prior to the 8th August 1989 after the Respondent had filed a motion on 30th June 1989 stating that the Appellant's written submissions had not been served on the Respondents in terms of Rule 35. These written submissions had been subsequently sent to the Respondent by registered post on 7.8.1989.

Learned Queen's Counsel for the Appellant submitted that there was a failure on the part of the Respondent to serve the written submissions on the Respondent in compliance with Rule 35 which is mandatory and hence he could not be heard in terms of Rule 36(b). He cited in support the unreported judgment of this Court in *V. Mylvaganam vs. Reckitt & Colman*(7) where admittedly written submissions were filed well out of time and in contravention of Rule 35 of the S.C. rules. Apart from that, no excuse had been tendered for the delay. It was held that this Court has consistently taken the view that in circumstances such as this, the appeal should be dismissed for non-compliance with the rule which is imperative.

Learned Queen's Counsel also relied on *Samarawickreme vs. Attorney-General*(8) in support of his contention that Rule 35(e) was imperative, and that upon the Appellant's failure to prove that due notice had been given to the Respondent of the lodging of the Appellant's submissions, the appeal has to be dismissed. In that case, the order of dismissal was made after "considering all the circumstances of (the) case"; the circumstances, however, are not set out in the judgment. In regard to this decision, as well as *Mylvaganam vs. Reckitt & Colman,* it would appear that the express provisions of Rule 35(b) have not been sufficiently considered. Article 136(1)(a) of the Constitution authorised the making of Rules providing for the dismissal of appeals for non-compliance with such Rules. However, in making Rule 35(b), no provision was made for automatic dismissal of an appeal upon such non-compliance; instead that Rule provided only that "no party to an appeal *shall be entitled* to be heard" if he had not previously lodged his written submissions. Thus the penalty, and the only penalty, for default has been prescribed. This must be regarded as deliberate, and one can well understand the reason: where either the Court of Appeal (upon an application to that Court for leave to appeal) or this Court (upon an application for special leave) has considered that a question fit for adjudication by this Court does arise, the failure to take a subsequent step will not inevitably or automatically, prevent this Court from determining a

serious question of that nature. The Rule contemplates that this Court will proceed to hear the appeal: all that it does is to disentitle the party in default from claiming a *right* to be heard, but preserves the undoubted *discretion* of this Court to give such party such hearing as it thinks appropriate. If that be the only consequence of the failure *to lodge* written submissions, it is impossible to interpret the Rules as requiring a more severe penalty for a far less serious default, namely the failure *to give notice* of the lodging of written submissions to the Respondent together with a copy thereof in terms of Rule 35(e). That Rule omits even the penalty provided in Rule 35(b), and it is not open by a process of interpretation to read into Rule 35(e) an implied penalty, either that the right to be heard is to be denied or that the appeal is to be dismissed. In coming to this conclusion, it is necessary to bear in mind that Rules 36(b), (e) and (f) apply to the Respondent as well: it would be a discriminatory interpretation to hold that where the Appellant is in default, the appeal must be dismissed, but where the Respondent is in default, there is no corresponding requirement that the appeal be allowed. On the other hand, to hold that upon the Respondent's default, the appeal must be allowed would be both arbitrary and absurd, for the questions of law involved must be answered by this Court correctly, on the merits, and not by reference to the failure of one party or the other to comply with the Rules. While it is an established rule of construction that enactments regulating the procedure in courts are usually construed as imperative, this is a principle based upon the assumed intention of Parliament on questions necessarily arising out of an enactment *on which Parliament has remained silent:* and even then "it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed" "to look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured....and (then) decide whether the matter is what is called imperative or only directory". Maxwell, Interpretation of Statutes, 12th edition, pages 314, 315 and 320. The object of Rule 35(e) appears from Rule 35(f) namely to identify the date of receipt of notice of the lodging of the Appellant's written submissions as the date from which the time for lodging the Respondent's submissions is to be reckoned. Thus, applying these principles of interpretation of statutes to the Rules, it is seen, firstly, that the Rules are not silent as to the consequence of default, and therefore it cannot be implied that non-compliance must

result in dismissal, and secondly, that the real intention or the general object of the Rules is to restrict the right of a party in default to be heard, but not to deny him a just determination of the appeal.

Learned Queen's Counsel also relied on Rule 40, contending that the Appellant had failed "to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal and that this Court should "declare the appeal to stand dismissed for non-prosecution" in terms of that Rule. Though the penalty for default prescribed by Rule 35 is not dismissal, I agree that an appeal may be dismissed, where an Appellant fails to comply with Rule 35(b) or Rule 35(e), provided the conditions prescribed by Rule 40 are satisfied: however, mere non-compliance is not sufficient, and there must be a failure to show due diligence. In the context of Rule 35(b) and (e) and in relation to a default thereunder, "failure to show due diligence" must refer, not to the initial default, but to a subsequent default after he has become aware that he is in default. Clearly, a mistake of fact or law, as to the correct procedure in lodging written submissions, will not always be a "failure to show due diligence". In the present case, the Appellant intended to give notice, but by an error tendered to the Registrar the notice intended for the Respondent; within about one month of his becoming aware of this mistake, he took steps to rectify his error. I doubt whether, in the context of the Law's delays today, such a delay can be regarded as a "failure to show due diligence"; even otherwise, this Court has a discretion under Rule 40, and I am of the view that this is not an appropriate case for the dismissal of the appeal as no prejudice whatsoever has been caused to the Respondent.

I would therefore hold that the default on the part of the Respondent is not of such a nature as to disentitle him from being heard. I accordingly over-rule this objection too. The main appeal should now be listed for argument before any Bench. Costs of this hearing would be costs in the cause.

BANDARANAYAKE, J. – I agree

FERNANDO, J. – I agree

Preliminary objections overruled.