KIRIWANTHE AND ANOTHER
v.
NAVARATNE AND ANOTHER

SUPREME COURT,
FERNANDO, J
KULATUNGA, J. AND DHEERARATNE, J ,
S.C. APPEAL No. 16/90,
C.A. APPLICATION No.626/88,
AGRARIAN SERVICES INQUIRY No BD/E/34/375,
JULY 18, 1990

Supreme Court Rules – Compliance with Rule 46 – Uberrima fides – Lex non cogit ad impossibilia

The requirements of Rule 46 must be complied with normally at the time of filing the application ; but 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. 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. Dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter. The discretion should be exercised judicially

A failure to comply with the rule is curable by subsequent compliance where the court holds that initial compliance was impossible by reason of circumstances which are beyond the control of the applicant. The court may also permit the amendment of papers filed or the filing of additional papers in terms of Rule 50

Per Kulatunga, J. –

"In exercising its descretion the Court will bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law At the same time the court will not permit mere technicalities to stand in the way of the Court doing Justice"

Per Fernando, J. –

"The weight of authority thus favours the view that while all these Rules (Rules 46, 47, 49, 35) 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 object of the particular Rule"

The petitioners being unaware of the existence of the determination there was no want of *uberrima fides* and they were not guilty of wilful non-disclosure or deception

Cases referred to :

(1) *Appuhamy v. Hettiaratchi (1973) 77 NLR 131*
(2) *Navaratnasingham v. Arumugam (1980) 2 Sri LR 01*
(3) *Collettes v Weerakoon C A Application No 77/88, C A Minutes of 08.09.1989*
(4) *Rasheed Ali v. Mohamed Ali (1981) 2 Sri LR 29 (C A.)*
(5) *Rasheed Ali v Mohamed Ali (1981) 1 Sri LR 262 (S C)*
(6) *Nicholas v. Macan Markar (1981) 2 Sri LR 1 (C A)*
(7) *Koralage v. Mohamed (1988) 2 Sri LR 299*
(8) *Caldera v. John Keells Holdings (1986) 1 C A L R 575*
(9) *Brown and Co v. Ratnayake (1990) 1 Sri LR 92 95*
(10) *Mary Nona v Fransina (1988) 2 Sri LR 250*
(11) *Karunawathie v Kusumaseeli (1990) 1 Sri LR 127, 128*
(12) *Paramanathan v Kodituwakuarachchi (1988) 1 Sri LR 315*
(13) *Samarasekera v. Mudiyanse (1990) 1 Sri LR 137*
(14) *Woodward v. Sarsons (1875) LR 10 CP 733*
(15) *Liverpool Borought Bank v Turner (1860) 2 De G F J. 502*
(16) *Howard v. Bodington (1877) 2 P D 203*
(17) *B v B (1961) 2 All ER 396*
(18) *Gangodagedera v Mercantile Credit (1988) 2 Sri LR 253*
(19) *Leelananda v. Mercantile Credit (1988) 2 Sri LR 417*
(20) Samarawickrema v Attorney-General (1983) Sriskantha's LR 47
(21) Mylvaganam v Reckitt & Colman S.C 154/87 – S C Minutes of 08 07.1987
(22) Mendis v Rajapaksa S C 49/88 – S C Minutes of 03 11 89
(23) *Coomasaru v. Leechman and Co S C 27/73 – SC Minutes of 26 05 76*
(24) *Folkestone Cpn v Brockman (1914) A C 338, 367*
(25) *Anisminic Ltd. v Foreig Compensation Commission (1969) 2 A C 147, 195*
(26) *Udeshi et al v Mather C A Application No 622/86 – C A Minutes 24 10 86*

APPEAL from order of Court of Appeal

K M P. Rajaratne for the appellants
1st respondent absent and unrepresented
J.C.T. Kotalawala with *D Guruge* for the 2nd respondent

Cur. adv vult

October 16, 1990

FERNANDO, J.

This is an appeal against a judgment of the Court of Appeal dismissing an application in revision upon certain preliminary objections. It raises important questions as to the tenability of those objections, as well as the proper approach to the exercise of the discretion of the Court in regard to such preliminary objections

The tenant-cultivator of a paddy field died in February 1986. It was the position of the 2nd Respondent (the owner) that he became aware in July, 1987 that the field was being cultivated by the 1st Petitioner-Appellant (whose wife, the 2nd Petitioner-Appellant, was the youngest daughter of the deceased tenant-cultivator), contrary to Section 14 of the Agrarian Services Act, No. 58 of 1979 , he complained to the 1st Respondent, the Assistant Commissioner of Agrarian Services, who inquired into that complaint. The 1st Petitioner claimed that he had been recognised as tenant-cultivator by the 2nd Respondent during the lifetime of the deceased ; the 2nd Petitioner, though not a party to the proceedings, gave evidence to support her husband. Soon after the conclusion of that inquiry, the 2nd Petitioner received a letter dated 15.6.88, conveying the 1st Respondent's decision that after the death of the tenant-cultivator, the 1st Petitioner had been in possession of the field without any legal right, and ordering him to vacate the field without delay. That letter was copied to the 2nd Respondent, for the purpose of enabling him to take possession of the field ; it was also copied to two officials for the purpose of a report by them to enable future legal action if the first Petitioner failed to vacate without delay. It did not state or suggest that any further order or communication would follow. In these circumstances, the Petitioners naturally anticipated imminent eviction, from a field, the income from which was their only source of income, and feared irreparable loss unless that order was stayed On 22.6.88 they applied to the Court of Appeal for *Certiorari* to quash the 1st Respondent's order dated 15.6.88, and *Mandamus* to compel him to declare that the 1st Petitioner and/or the 2nd Petitioner were entitled to the rights of the deceased tenant-cultivator, in terms of section 14(1) of the Act. They averred that two sisters of the 2nd Petitioner had, in the course of their evidence at the inquiry, claimed that if the 1st Petitioner was held not to be the tenant-cultivator of the field, they would be

entitled to those rights, and consented to those rights being vested in or transferred to the 2nd Petitioner. Among the grounds relied on by the Petitioners were that "the 1st Respondent has not given any reasons for his order [dated 15.6.88]", that "the 1st Respondent has not given a specified date as mentioned in Section 14 (2)", and that "the 1st Respondent has erred in not holding that the 2nd Petitioner is entitled to the right of her father". On 24.6.88, notice was issued, and an *ex parte* stay order was issued. The Court of Appeal judgment sets out the preliminary objections which were upheld :

"1. That the Petitioners have not disclosed material facts in that they have not adverted to the determination made by the 1st Respondent at the conclusion of the inquiry upon which this said order dated 15.6.88 was based and have thereby failed to show *uberrima fides* in placing the full facts before this Court.

2. That the Petitioners are relying on the failure to state the reasons for the said order, in the said letter dated 15.6.88 as an error on the face of the record to obtain a Writ of *Certiorari*, whereas the petitioners should have disclosed that in fact the said order is based upon the reasons given in the determination marked P10, made by the 1st Respondent after the said inquiry.

3. That the Petitioners have failed to comply with Rule 46 of the Supreme Court Rules of 1978, in that the Petitioners have failed to file along with the petition and affidavit, the reasons and determination made by the 1st Respondent, upon the conclusion of the said inquiry, which is a part of the proceedings as contemplated under Rule 46. that would be necessary to understand the said order sought to be quashed and place it in its proper context.".

It is common ground that the only communication which the 2nd Petitioner had received by 24.6.88, when the application was supported, was the **letter** dated 15.6.88. The **"determinations** marked P10" referred to in the preliminary objections is an undated document appearing at the end of the certified copy of the proceedings (P10) ; this was certified on 11.7.88, and issued to the Petitioners sometime later that month. While no reasons are set out in the letter, reasons are stated in the determination. Counsel for the Petitioners stated from the Bar that he was not informed immediately of the existence of this determination because of the conditions prevailing at that time, but I will assume that it

is his clients' knowledge which is relevant. Counsel for the 2nd Respondent did not inform the Court on the notice returnable date, or on subsequent calling dates, that this material document had not been produced and that the stay order should be vacated , nor did the 2nd Respondent refer specifically to the non-production of this document in his objections dated 17.8.88, although he averred that documents annexed to the petition had not been served on him, that documents produced and evidence given by him had been concealed, and that relevant and material copies of the inquiry proceedings had not been made available to the Court. The document P10 was produced with the Petitioners' counter-affidavit dated 6 10 88.

Referring to the Petitioners' failure to produce this "determination" with their petition or to make reference to it when the petition was supported, the Court of Appeal held :

> "The said objections arose mainly from the fact that the Petitioners have failed to file the determination and the reasons given by the 1st Respondent, at the conclusion of the said inquiry, **along with the original petition and affidavit in this Court.** However the Petitioners have filed the said determination and the reasons along with their counter-affidavit later. Counsel for the Petitioners stated that the Petitioners were unaware, that there was a determination and that the reasons have been given for such determination, **at the time this application was filed.** In my view this explanation is unsatisfactory. The Petitioners have been represented by Counsel even at the stage of the said inquiry. In any event, with the production of the said document, the legal consequences that have flown has given a different complexion to the whole case." (emphasis added)
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> ". . . . .In the circumstances, this Court is of the view that the Petitioners should have disclosed that the order dated 15.6.88 is based upon the reasons and the determination made by the 1st Respondent after the said inquiry. In my view, the failure to do so justifies the denial of the remedy."

The application was thus dismissed solely on account of the failure (*a*) to produce the determination with the petition, and (*b*) to disclose its contents in the petition.

This decision was strongly criticized by Counsel for the Petitioners, who submitted that the Petitioners ought not to have been penalised for the failure to produce this "determination" with their petition or to make

reference to it when the petition was supported, since they were unaware of its existence at that time ; even now it is not known whether the undated determination was in existence on 24.6.88. It is the Petitioners' case that the 2nd Respondent failed to discharge the burden of satisfying the Court that the document was in existence, and could have been produced by the Petitioners ; that Rule 46 must be applied subject to the principle that *lex non cogit ad impossibilia* ; and finally that the element of wilful non-disclosure or deception is of the essence of the *uberrima fides* principle, and was manifestly lacking here.

Uberrima Fides : The Court of Appeal relied on *Appuhamy v. Hettiaratchi* [1] certain English decisions cited in that case, *Navaratnasingham v. Arumugam,* [2] and *Collettes v. Weerakoon*[3]. However, these have no application for the reason that the Petitioners were unaware of the existence of the determination, and hence were not guilty of wilful non-disclosure or deception.

Rule 46 : The Court of Appeal purported to follow *Rasheed Ali v. Mohamed Ali,* [4] [5] as well as *Nicholas v. Macan Markar,* [6] which dealt with Rule 47. It is thus relevant to refer to decisions dealing with Rules 35 and 46 to 49, which are similar in many respects.

In *Navaratnasingham v. Arumugam,* Soza, J. considered Rules 46 to be mandatory or imperative, observing –

> ". . . . .the order canvassed before us cannot be reviewed in the absence of the earlier proceedings, evidence and the original complaint. These were procured only subsequently. This petition therefore should have been rejected for noncompliance with Rule 46."

Later, in *Rasheed Ali v. Mohamed Ali,* Soza, J., modified this view :

> ". . . . . that judgment should be read subject to the principle that the law does not expect a person to do the impossible. There may be occasions when matters of great urgency arise where a party has to seek the revisionary powers of this Court but is left with no time to obtain the documents as required by Rule 46. On such an occasion the Court no doubt will take a reasonable view of the matter and extend such indulgence as is necessary to enable a petitioner to comply with the requirements, subsequent to the filing of the

petition. . . . . [He] is not exempted from complying with Rule 46. If circumstances beyond his control prevent his complying with the rule at the moment of filing the application he should yet comply with it as soon as possible."

In that case the Petitioner's initial failure to comply was excused because of the urgency of the application. However, he did not attempt to comply later, but the Respondent filed "a number of documents so as to present an adequate picture of the dispute between the parties". It was held that this did not absolve the Petitioner from himself complying with Rule 46 by tendering the necessary documents. On appeal to this Court, it was held that Rule 46 was mandatory, even if non-compliance causes no prejudice to the opposite party ; that the Petitioner could not be excused from complying with the rule, because that would be virtually to invest the Petitioner with a discretion whether or not to comply with the rule (Wanasundera, J., Weeraratne, J., agreeing). Sharvananda, J., (as he then was) took a more liberal view :

"A party should ordinarily comply with the requirements of Rule 46, and if he fails to do so, his petition is liable to be rejected, unless he had good reason for such non-compliance. It is a matter falling within the discretion of the Court whether, in the circumstances, the petitioner should be excused or not for such non-compliance. In the instant case,. . . . . the respondent, by furnishing. . . . . *all the* necessary exhibits, relieved the petitioner of the requirement to file the material documents. The Court was in possession of the necessary material and hence it was not obligatory on the part of the petitioner to duplicate the exhibits. . . . . **the purpose of the requirement of the petitioner filing those documents is satisfied.**"

Pertinently, he added :

"The Rules are designed to facilitate justice and further its ends ; they are not designed to trip the petitioner for justice."

In *Koralage v. Mohamed,* [7] a revision application was dismissed both on the merits, and for non-compliance with Rule 46 ; there was neither subsequent compliance nor an explanation for non-compliance (cf. *Caldera v. John Keells Holdings*[8] In *Brown & Co. v. Ratnayake*[9] the objection was upheld as the non-compliance did not fall "within the limited exceptions judicially recognised".

The discretion to dismiss was exercised in the light of the object of the Rule in *Mary Nona v. Fransina,*[10] where there was continuing non-compliance, and Ramanathan, J., found it "not possible to review the order complained of without these documents" ; so also in *Karunawathi* v. Kusumaseeli[11] where it was found impossible to review the order without the missing documents.

In *Paramanathan v. Kodituwakuarachchi* [12] Bandaranayake, J., observed that a deficiency can be made good later "by tendering additional papers with permission of Court as provided for in Rule 50".

I refrain from commenting on *Samarasekera v. Mudiyanse*[13] where the objection was upheld, as an appeal is pending to this Court.

Maxwell (Interpretation of Statutes, 12th ed. pp. 314-5), discusses the principle governing statutory requirements of this kind :

> "When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive) ? In some cases, the conditions or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. "An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially" [*Woodward* v Sarsons[14]]"

> "'No universal rule' said Lord Campbell L C. 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience 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.' [*Liverpool Borough Bank v. Turner*[15]].And Lord Penzance said : 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must 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 by the Act ; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.' "[*Howard v. Bodington*[16]; see also *B. v. B.*[17] – " to look at. . . . . the purposes that it was intended to serve] ".

While "mandatory" is generally used in the sense of "imperative" or "absolute" or "obligatory", as opposed to "directory" or "permissive", it is used by Lord Campbell as embracing both categories. Without becoming enmeshed in semantics, 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 execuse the non-compliance, or to impose a sanction ; dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter.

Rule 47 : The Court of Appeal held in *Nicholas v. Macan Markar* that Rule 47 was mandatory, and that a petition which does not contain the averment required by that Rule must be rejected. The petition had been accepted by the Registrar, with a minute that the papers were in order, and the Court issued notice. One averment in the Respondent's statement of objections was that the petition and affidavit "do not conform to the Rules of the Supreme Court, 1978, which are imperative" but no particular rule was specified. The Court of Appeal observed that the Respondent "has specifically taken up this objection, but the Petitioner has not thought it fit to seek to amend his petition or to explain the non-compliance by filing a counter affidavit". It would thus appear that although the Court of Appeal seemed to favour an automatic rejection of the application, it did not completely exclude the discretion of the Court to excuse non-compliance in appropriate circumstances. This decision was reversed on the facts by this Court (S.C. 30/81, S.C.M. 22.3.82 ; (1986) B. A. L. J. Reports Vol. 1 Part VI page 245). Wimalaratne, J., (with whom Soza, J., agreed) took the more liberal view (Wanasundera, J., dissenting) as to the discretion of the Court :

". . . . . it is open to the Court, after hearing the parties, either to direct compliance with the Rules or to dismiss it. Dismissal is not the only consequence of the breach, at least of Rule 47, **because the object of ensuring that no second order would be made on a second application** regarding the identical matter could be achieved without resorting to the drastic step of dismissal.

As a result of his application having been accepted and registered, notice on the Respondents being issued thereafter, and the absence of the listing of the matter for an order of Court soon after the general objection was taken by the Respondent, the Petitioner may well have been led to believe that his application was in order. Under these circumstances. . . . . .the Court ought to have called upon the Petitioner to perfect his application by complying with Rule 47."

My view of Rule 46 is fortified by this decision.

Rule 49 : Two decisions of the Court of Appeal must be mentioned. In *Gangodagedera v. Mercantile Credit*[18] and *Leelananda v. Mercantile Credit*,[19] it was held that the failure to tender the requisite notices within two weeks is fatal to the application. However, both judgments make passing references to the Petitioner's failure to submit an explanation, and thus seem to recognise that there is no automatic dismissal, without the prior exercise of a judicial discretion.

Rule 35 : This Rule requires the filing of written submissions. In *Samarawickrema v. Attorney-General*[20] Wanasundera, J., observed that "these provisions have been consistently held by this Court to be imperative" in dismissing a criminal appeal in which written submissions had been filed, but without a copy having been served on the Attorney-General in terms of *Rule 35 (e)*. In *Mylvaganam v. Reckitt & Colman*,[21] the appeal was dismissed since the submissions had been filed out of time, without any excuse having been tendered for the delay. Both these decisions did not consider the effect of Rule 35 (*b*) which prescribes the consequence of non-compliance. After a full argument, a different view was taken in *Mendis v. Rajapakse* [22] having regard to the object of the Rule, non-compliance does not automatically result in the dismissal of an appeal, and the Court has a real discretion ; that Rule 40 would permit dismissal only upon a failure to show due diligence. In *Coomasaru v Leechman & Co.*[23] the Supreme Court (in an appeal

transferred from the former Court of Appeal after the abolition of that Court) interpreted the Court of Appeal, Appeal Procedure Rules, 1972. It was submitted that :

> "while the effect of these Rules is to deprive the appellant of a right of being heard, there is nothing to prevent the Court from granting permission to the appellant or his Counsel, who had made default in filing written submissions, to make oral submissions at the hearing. As against this it was submitted by Counsel for Leechmans that while he does not deny a right in the Court to grant such permission in appropriate circumstances, the appellant must place some material before Court sufficient to excuse his default, which the appellant in his case has signally failed to do."

The appeal came up for hearing two years after it had been filed, and the appellant had neither filed written submissions nor explained his default. Tennekoon, C.J., (Vythialingam, J., Sharvananda, J., and Colin Thome, J., agreeing, Rajaratnam, J., dissenting), referred to Rule 26 –

> "At the hearing of the appeal only such authorities or legislation as are referred to in the submissions may be relied on at the argument before the Court of Appeal, save and except those which were not in existence at the time the submissions were lodged" –

and held that :

> "the effect of this Rule would be to deprive the Court itself of the benefit of a full argument. This can only result in the Court having to carry out a study of the appellant's case unaided by adversary argument by Counsel at the grave risk of misdirecting itself in regard to authorities and legislation which the parties had no opportunity of discussing before the Court. In the result, I am of opinion that this is a case in which the appellant who, though enjoying a right of appeal to the Court of Appeal, has not. . . . . 'properly asserted that right'. He has further submitted no excuse for his failure to comply with the Rule. In such a situation I think it is the duty of any Court to exercise that power common to all Courts, which is usually referred to as its 'inherent power', and to strike out or dismiss the appeal."

With respect, that line of reasoning does not appeal to me. Even in a case where submissions are filed, Rule 26 would deprive the Court of the benefit of Counsel's assistance in regard to authorities not cited in

the Appellant's written submissions, but the Court would nevertheless have to study that aspect of the Appellant's case to which the omitted authorities relate, despite the same risk of misdirecting itself in regard to those authorities ; Rule 26 would not permit a dismissal of the appeal for non-compliance. It is also difficult to see how this principle could be applied to cases where it was the respondent who failed to file submissions, and thus deprived the Court of the benefit of assistance in regard to authorities in support of his case. In any event, Tennekoon, C.J., does not indicate what the position would have been had an excuse been submitted ; would relief have been granted despite Rule 26 ? That decision is distinguishable for two reasons : Rule 26 finds no counterpart in the present Rules, and it dealt with a case of continuing non-compliance for over two years without excuse or explanation.

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 object of the particular Rule. In the case before us, the Court of Appeal was clearly wrong in upholding the preliminary objection based on Rule 46.

Counsel for the 2nd Respondent then sought to support the judgment on a different basis. Seizing upon a sentence in the judgment – that "the Petitioners have been represented by Counsel even at the stage of the said inquiry" – he submitted that the usual practice in these inquiries, with which Petitioners' Counsel would have been familiar, was for an order to be communicated by letter, and for the reasons to be set out in another document which is retained in the inquiry file ; this, he submitted, is not sent to the parties, but could be discovered by any interested party upon making inquiries at the office of the 1st Respondent. Such an extraordinary procedure would place an intolerable burden on an aggrieved party, and I cannot accept this submission in the absence of any rules prescribing such a procedure or clear evidence of such a practice. Section 14 (2) authorises a written order. It does not contemplate more than one order ; while such an order may possibly consist of more than one document, some suitable cross-reference is necessary. Further, that section authorises an order requiring a person to vacate immovable property on a specified date,

and such an order must necessarily be served on the person affected. It can well be contended that where the order consists of two documents, both must be served ; be that as it may, I cannot regard an order under Section 14 (2) as including a document which is neither served, nor referred to in the document which is actually served on the party concerned. The failure to search for the determination does not establish a lack of *uberrima fides* or a breach of Rule 46

Counsel for the 2nd Respondent next contended that the Petitioners were under an obligation to tender the determination no sooner they obtained a copy thereof, explaining why they failed to do so earlier. This is not the basis on which the Court of Appeal upheld the preliminary objections. In this case, the Petitioners have tendered the document about ten weeks after they obtained it, and long before the first date of hearing ; no prejudice was occasioned by this delay. Rule 50 contemplates that additional papers may be filed only upon a motion with leave of Court ; on 20.9.88, the Petitioners obtained permission to file their counter-affidavit, and tendered the determination with that affidavit. In these circumstances, no violation of Rule 46 is involved. While I agree that a Petitioner must cure his default as soon as possible, and with an explanation, I am not prepared to regard a period of ten weeks delay, without any prejudice having been proved, as justifying the dismissal of the petition. Since the objection was not specifically taken in the 2nd Respondent's statement of objections, I do not regard the absence of a specific explanation in the counter-affidavit as fatal ; when the matter was first raised at the hearing, an explanation was tendered which appears, from the documents, to be true and reasonable.

The Petitioners' application to the Court of Appeal involved substantial questions of law. Even if the 1st Petitioner's claim to be recognised as the tenant-cultivator was rejected, the further question arose as to the persons entitled to be so recognised (under Section 8) , whether possession by potential successors under Section 8 was "unlawful" within the meaning of Section 14 (1) ; whether the 1st Respondent was obliged to determine the lawful successor under Section 8, or to stay further proceedings pending the determination of that question under Section 9 ; even if an order for the ejectment of the 1st Petitioner was properly made, whether the 2nd Respondent could be placed in possession by the ejectment of all others including potential successors (under Section 8) the 2nd Petitioner and her sisters. 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 issues arising in the case.

For these reasons, I allow the appeal, and set aside the judgment and order of the Court of Appeal, with costs in a sum of Rs. 2,500 payable by the 2nd Respondent to the Petitioners-Appellants. The Court of Appeal is directed to hear and determine the Petitioners' application on the merits.

DHEERARATNE, J. – I agree

KULATUNGA, J.

I have had the advantage of reading in draft, the judgment of my brother Fernando, J., allowing this appeal I am in agreement with that order but my approach and reasons therefor are in some respects different ; hence this judgment.

The petitioners-appellants (hereinafter referred to as the petitioners) sought writs of *certiorari* and *mandamus* challenging an order dated 15.06.88 made by the 1st respondent (Asst. Commissioner of Agrarian Services) under S.14 (2) of the Agrarian Services Act, No. 58 of 1979 ordering the 1st petitioner to vacate a paddy land called Galpattiyaarawa owned by the 2nd respondent on the ground that the 1st petitioner was in occupation of the said paddy land in breach of S. 14 (1) of the Act after the death of one Suduhamy who was the tenant cultivator thereof. The Court of Appeal by its judgment dated 19.01.90 dismissed the application in limine upholding certain preliminary objections taken by the 2nd respondent namely –

(*a*) that the petitioners have not disclosed material particulars, in that they have not adverted to the determination made by the 1st respondent at the conclusion of the inquiry upon which the said order dated 15.06.88 was based and have thereby failed to show *uberrima fides* in placing the full facts before the Court ; and

(*b*) that the petitioners have failed to comply with Rule 46 of the Supreme Court Rules of 1978, in that the petitioners have failed to file along with the petition and affidavit, the reasons and

determination made by the 1st respondent, upon the conclusion of the inquiry, which is a part of the proceedings as contemplated under Rule 46, that would be necessary to understand the said order sought to be quashed and place it in its proper context.

As it appears from the objections filed on behalf of the 2nd respondent, the above stated preliminary objections are based on the following premise, namely : "that the petitioners are relying on the failure to state the reasons for the (impugned) order, in the letter dated 15.06.88, **as an error on the face of the record** to obtain a writ of *certiorari*, whereas the petitioners should have disclosed that in fact the said order is based upon reasons given in the determination marked P 10, made by the 1st respondent after the said inquiry". (emphasis added) ; and it seems to me that the Court of Appeal has itself proceeded to determine the objections on an acceptance of the correctness of the premise so set out. Thus, despite the subsequent production of the said determination and reasons marked P 10 with the counter affidavit of the petitioners and their Counsel's submission that they were unaware of the existence of such determination the Court of Appeal upheld the preliminary objections, having rejected the explanation for the delay in supplying the said document. In so holding the Court accepted the submission of the Counsel for the 2nd respondent that as a result of the failure to disclose the document, the Court had been led to issue notice ; that if a true disclosure was made **the error on the face of the record** complained of, upon which the writ of *certiorari* is asked for would be non-existent ; and that the other ground urged in the petition do not warrant the issue of a writ of *certiorari*. The Court concluded that "if the petitioner had made a true disclosure, then the Court may not have acted in this case".

In view of the fact that the writ application is still to be argued on its merits in the Court below, I do not wish to express any firm views as to the grounds upon which relief has been sought. That must be left to the parties and to that Court. However, the question whether the decision of that Court in allowing the preliminary objections has been influenced by any misunderstanding as regards the grounds or the scope of the grounds on which the relief sought in the application is based is relevant to this appeal. I therefore propose to briefly examine that question but without prejudice to the rights of the parties to pursue the matter at the hearing of the application. I shall first summarise the relevant facts and circumstances.

It is common ground that Suduhamy who died in 1986 was the tenant cultivator of the paddy land in dispute and the 1st petitioner is his son-in-law married to his youngest daughter, the 2nd respondent. In the absence of a nomination of a member of Suduhamy's family as tenant cultivator under S. 7 (1) of the Agrarian Services Act, his rights would have devolved on Angonona being his oldest child (as his wife has predeceased him), in terms of S.8 of the Act. However, Angonona does not appear to have exercised her right but allowed the 1st petitioner her brother-in-law to cultivate the land. Both at the inquiry before the 1st respondent and in the Court below, the petitioners claimed that with the concurrence of the 2nd respondent, Suduhamy permitted the petitioners to cultivate the land especially after he became seriously ill , and consequently the 1st petitioner became the tenant cultivator in proof of which the petitioners produced an extract from the Paddy Lands Register marked P 1, acreage fees receipts marked P2, P3, P4, P8 and Agro Identity Card marked P5. It is the 2nd respondent's position that he never consented to the 1st petitioner becoming the tenant cultivator and that the alteration in the Paddy Lands Register had been made without informing him.

Under S. 11 of the Act, Suduhamy could have transferred his rights only to his wife or failing her to his oldest child Angonona. He could have ceded his rights to the 2nd respondent, his landlord only with the written sanction of the Commissioner. In view of these strict provisions, it seems difficult for the 1st petitioner to have become the tenant cultivator of the land in dispute except perhaps on proof of an abandonment of his rights by Suduhamy. It is in the background of these provisions of the Act and the relevant facts that the 1st respondent's order against the 1st petitioner has to be viewed. However, these are matters for decision by the Court of Appeal.

In their application, the petitioners averred to the facts and documents in their favour ; they produced the order made against the 1st petitioner, marked P6 and the day-to-day record of proceedings of the inquiry held by the 2nd respondent, marked P 7 and alleged that the order P 6 is *ex facie* **wrong and invalid in the light of evidence led at the inquiry** and that the 1st respondent has not given reasons for the said order ; and that the 1st respondent had failed to consider relevant evidence. The petition makes no reference to error on the face of the record but states that in the premises the petitioners are entitled to a writ of *certiorari* to quash the said order as it **is contrary to law and made in excess or abuse of jurisdiction.**

It seems to me that the petitioners have based their application on the ground of want or excess of jurisdiction in the narrow sense of there being no acceptable evidence to support the impugned order. Such an order would be arbitrary and in the absense of reasons, would also be irrational. The averment that the 1st respondent has given no reasons for the order can be understood in that context. **Wade Administrative Law 5th Ed.** p.293 discussing the "no evidence" rule as a basis of review concludes –

> "No evidence" seems destined to take its place as yet a further branch of the principal of *ultra vires*, so that Acts giving powers of determination will be taken to imply that the determination must be based upon some acceptable evidence. If it is not, it will be treated as 'arbitrary, capricious and obviously unauthorised'".

At p. 289 Wade refers to many judicial decisions which held that lack of evidence raises no question of jurisdiction and adds –

> "But there is current opinion to the contrary which has recently been gathering force. Lord Atkinson said in one case that 'an order made without any evidence to support it is in truth, in my view, made without jurisdiction".

Folkestone Cpn v. Brockman[24]. See also *Anisminic Ltd., v. Foreign Compensation Commission*[25].

If as it seems, the wirt was not sought on the ground of error on the face of the record but on the ground of want or excess of jurisdiction in the narrow sense supported by the record of evidence P 7 and exhibits P1, P2, P3, P4, P5 and P8, the failure to produce the determination and the reasons of the 1st respondent would not necessarily raise the issue of *uberrima fides* or compliance with Rule 46 ; but it would be open to the 2nd respondent to produce such determination in rebuttal. In this view of the matter, I hold that the Court of Appeal has misdirected itself in upholding the preliminary objections of the assumption that the writ had been asked on the ground of error on the face of the record and that the other grounds urged in the petition do not warrant the issue of a writ.

In any event, I am in agreement with the view expressed by my brother Fernando, J., that on the facts of this case the allegation of lack of *uberrima fides* on the part of the petitioners cannot be made out and the judicial decisions relied upon by the Court of Appeal have no application to this case as the petitioners are not guilty of wilful non-disclosure or

deception. The petitioners filed with their application the record of inquiry upto 26.04.88 on which date the inquiry was concluded and the parties were permitted to file written submissions on 26.05.88. The next intimation was the vacation order dated 15.06.88 (P6). The determination which contained reasons for that order is undated and was not made with notice to the petitioners ; nor were they furnished with a copy thereof. As such, they could not have become aware of it on 22.06.88 when they filed their application. They became aware of it when they obtained a fresh copy of the proceedings on 11.07.88. Thereafter, they tendered it to Court with their counter affidavit which was filed with the leave of Court obtained on 20.09 88. The Court of Appeal has rejected the explanation that the petitioners were not aware of the existence of the determination because they were represented by Counsel even at the stage of the inquiry. This in my view is not a valid ground for rejecting the explanation submitted on behalf of the petitioners.

As regards the alleged non-compliance with Rule 46, I am of the view that even assuming that the petitioners were obliged to supply the determination as an exhibit accompanying the petition, the failure to do so is excusable in the light of the available facts and authorities ; and hence the application cannot be thrown out for non-compliance with Rule 46. The defect, if any, is curable by the application of the maxim *lex non cogit ad impossibilia* or by recourse to Rule 50 which permits the tendering of additional papers. In upholding the preliminary objection based on Rule 46 the Court of Appeal has failed to apply the well settled principles of law and to judicially evaluate the facts before it. In the result, the Court has applied Rule 46 most rigorously and almost mechanically as though that rule carries with it a penalty to be imposed on a litigent who fails to establish literal compliance with its terms. This is evident from certain statements in the judgment. Thus, after rejecting the explanation offered for the delay in tendering the document under reference the learned Judge said –

> "In any event, with the production of the said document, the legal consequences that have flown has given a different complexion to the whole case."

In another part of the judgment he says –

> "If the petitioners followed the required procedure at the appropriate time the situation that has arisen in this case would not have come to pass. Thus in my view the observance of Rule 46 is

mandatory, and the failure on the part of the petitioners to comply the said rule is a fatal irregularity which would disable the petitioners from maintaining this application".

There is no support for this approach in law or judicial decisions.

Rule 46 requires, *inter alia,* that evey application to the Court of Appeal for the exercise of powers vested in the Court by Article 140 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" **Maxwell** Interpretation of Statues 12th Ed. p.320 states –

"Enactments regulating the procedure in Courts are usually construed as imperative".

Besides, the language of this rule is plainly imperative (or mandatory) and it has been so construed in the decisions of the Court of Appeal and this Court during this decade. Therefore, as stated by my brother Fernando, J., Rule 46 "must be complied with". However, it is either implict or conceded in every one of the previous decisions that non-compliance is curable, on the ground of impossibility or by recourse of Rule 50. The denial of the remedy is not automatic. In the previous decisions, the remedy has been denied for good reasons upon a judicial evaluation of the case.

In *Navaratnasingham v. Arumugam*[2] an application to the Court of Appeal to revise an order made by a Magistrate under S. 62 of the Administration of Justice Law 1973 was not accompanied by a complete copy of the relevant proceedings in the absence of which the Court was unable to review the order canvassed before it. These were procured subsequently. Soza, J. (Atukorale,J. agreeing) observed that the petition should have been rejected for non-compliance with Rule 46. The Court also found that the petitioner had made averments which do not accurately reflect the state of true facts and hence failed to show *uberrima fides*. The application was dismissed. Such dismissal can be justified on the basis of the second ground alone. As regards the first ground, the judgment does not indicate whether the petitioner gave any explanation for his delay in supplying the relevant proceedings. Presumably, he gave no explanation, if so the dismissal can be justified on that ground also.

Rasheed Ali v. Mohammed Ali [4] – An application was made to the Court of Appeal to revise an order of a District Judge against the petitioner rejecting his claim to remain in possession of certain premises in opposition to the claim of the judgement-creditor in whose favour the Court had ordered writ to issue. Soza, J. (L. H. de Alwis, J. agreeing) confirmed that Rule 46 is imperative but added that any default resulting by reason of circumstances beyond the petitioner's control and great urgency in seeking the revisionary powers of the Court may be excused. However, the petitioner should comply with the Rule as soon as possible. He had made no effort to so comply. The 1st respondent filed a statement annexing a number of document so as to present an adequate picture of the dispute. Yet this did not absolve the petitioner from his duty to comply with the rule by moving for amendment of the petition or tender of additional documents. The Court upheld the preliminary objections. It was also held that the petitioner had failed to make a full disclosure of all material facts and as such was not entitled to relief by way of revision ; and the Court affirmed the judgment of the District Judge that the petitioner's claim was vexatious and frivolous and not made bona fide. An appeal to this Court was dismissed (see (1981) 1 Sri L.R. 262)[5] Sharvananda, J. (as he then was) dissenting. Wanasundera, J. said (p.267-268).

"While I am against mere technicalities standing in the way of this Court doing justice, it must be admitted that there are rules and rules. Sometimes Courts are expressly vested with powers to mitigate hardships, but more often we are called upon to decide which rules are merely directory and which mandatory carrying certain adverse consequences, for non-compliance. Many procedural rules have been enacted in the interest of the due administration of justice, irrespective of whether or not a non-compliance causes prejudice to the opposite party. It is in this context that Judges have stressed the mandatory nature of some rules and the need to keep the channels of procedure open for justice to flow freely and smoothly. The position of course would be worse if such non-compliance also causes prejudice to the opposite party.

If we are to accede to the appellant's plea that he should be excused from complying with the rule, because the respondent has filed some of these documents, we should be virtually investing an appellant with a discretion whether or nor to comply with the rule,

because the required material has already been filed by the opposite party or it is anticipated that they would be filed by that party. Such I think is not the law. The material filed by a respondent is in support of his own case and is in no way intended to supplement the appellant's case or to make good any ommission on the part of the appellant. I am having in mind here not mere formal documents, but material that have a direct bearing on the issues in a case.

Even assuming that the appellant's excuse is acceptable, it would still cover only these documents which have been produced by the respondent. Mr. Jayawardena pointed out that there are yet other documents which are material to the case and are not before the Court. These are the two documents referred to in judgment of the Court of Appeal. It may be mentioned that an attempt was made at the last moment when the matter was before us to have these documents filed in this Court. This has not been allowed".

This Court also upheld the conclusion of the Court below that the appellant had no valid and *bona fide* claim to remain in possession of the premises. In so holding the Court took the view that the appellant was a person who had entered into a sham transaction and found himself in a precarious position where he can neither achieve the desired result nor fall back on the purported transaction.

In *Caldera v. John Keel Holdings Ltd.*,[8] the Court of Appeal refused an application to revise an order of a District Judge for non-compliance with Rule 46. Jameel J., said (p. 585) –

"In *M. H. Rasheed Ali v. Khan Mohamed Ali et al* CA 997/80, DC Colombo 3290/ZL SC 6/81, the Supreme Court has held that compliance with Rule 46 is mandatory and any omission must be made good even at a later stage. Total non-compliance will render the application liable to dismissal. Their Lordships have gone on to state that no discretion can be allowed to either party to decide what and what are the necessary documents that should be tendered with the petition. If a material document is not furnished even at a later stage, than at the time of filing the application, the application for revision could be refused".

In *Paramanathan v. Kodituwakkuarachchi*[12] an application was made to the Court of Appeal to revise an order of a District Judge issuing a writ of execution in an ejectment action pending appeal, alleging *inter alia* that the District Judge has not delivered his reasons for the said

order. With his objections the plaintiff-respondent annexed a copy of the Judge's order dated 24.03.87 to show that the defendant-petitioners were not correct in the statements made in their petition, and showing that written reasons have in fact been delivered by the District Judge. Petitioners' Counsel in the course of submissions accepted that there were reasons and sought to attack it.

Bandaranayake J. said (p. 333) -

"Rule 46 has been held to be a mandatory provision in *Rasheed Ali's* case and *Caldera v. John Keels*. Nor has the petitioner moved to make good the deficiency later by tendering additional papers with permission of Court as provided for in Rule 50. No attempt to obtain permission has been made. This provision too has been construed as an imperative provision – Vide *Udeshi et al v. Mather*[26]. Thus a breach of mandatory rules is observed as regards the revision application. In the circumstances, this application too should be rejected in limine and the stage of going into the merits cannot arise. The argument of the petitioners that the Court should consider the order as it is among the papers is a strained submission which is unacceptable. Likewise the argument that *Rasheed Ali's* case can be distinguished in that case the required document was never available to the Court of Appeal but in this case it is among the papers is also unacceptable ; strained as it is against the discipline of the law".

Mary Nona v. Fransina[10] – This was an application to revise an order of a Magistrate made under S.66 of the Primary Courts Procedure Act, No. 44 of 1979. The petitioner had failed to file some of the documents which were material to his case. Ramanathan, J., dismissed the application for non-compliance with Rule 46, following the majority view of the Supreme Court in *Rasheed Ali's* case that Rule 46 is mandatory.

Koralage v. Marikkar Mohamed[7] – An application for revision of the judgment of the District Judge of Colombo in a partition action was refused on merits and non-compliance with Rule 46. At p. 313 Viknarajah, J., citing *Navaratnesingham v. Arumugam* and *Rasheed Ali's* cases observed that "compliance with this rule is a mandatory requirement.

Brown & Co. Ltd. v. Ratnayake[9] – This was an application for a writ of *certiorari* to quash an award of an arbitrator of an industrial dispute. The petitioner failed to file the relevant proceedings with the petition,

pleaded no reason for such failure nor undertook to tender them later. They were not tendered even after objection was taken specifically pleading non-compliance with Rule 46. The preliminary objection was upheld by the Court of Appeal following the ruling in *Rasheed Ali's* case that Rule 46 is mandatory. Ananda Coomaraswamy, J. said (p. 95) –

"The petitioner has not adduced any reason as to why there has been non-compliance with Rule 46 which would fall within the limited exceptions judicially recognized."

Karunawathie v. Kusumaseeli[11] – A Magistrate refused a postponement of the trial, acquitted the accused and ordered costs against the petitioner, the complainant in the case. The petitioner sought to revise the said orders.

Ananda Coomaraswamy, J., said (p.128) –

"To revise the order of the learned Magistrate, the material before this Court is insufficient as the petitioner has only filed the order of the learned Magistrate and not the proceedings in that case. . . . . "

"There is also non-compliance of Rule 46 of the Rules of the Supreme Court. I therefore, dismiss the petitioner's application".

The principles deducible from the foregoing decisions may be summarised as follows :

1. Rule 46 is mandatory and must be complied with normally at the time of filing of an application.
2. A failure to so comply with the rule is curable by subsequent compliance where the Court holds that initial compliance was impossible by reason of circumstances which are beyond the control of the applicant. The Court may also permit the amendment of papers filed or the filing of additional papers in terms of Rule 50.
3. The question whether prompt compliance was impossible would depend on the facts and circumstances of each case and will be determined by the Court exercising its discretion. Such discretion should be exercised judicially and not mechanically. Whether the petitioner may be permitted to have recourse to Rule 50 is also a matter of discretion to be exercised on similar considerations.

4 The Court will not condone non-compliance with the Rule or a failure to show *uberrima fides* referable to such non-compliance. In exercising its discretion the Court will bear in mind the need to keep the channels of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. At the same time the Court will not permit mere technicalities to stand in the way of the Court doing justice.

5. No discretion can be allowed to either party to decide what and what are the necessary documents that should be tendered with the petition or even later, where an objection is taken on the ground of non-compliance.

6. A total non-compliance will render the application liable to dismissal. Such dismissal is not a punishment but a consequence of non-compliance with the mandatory requirements of the rule.

In the light of these principles and the reasons set out earlier in this judgment, I am of the view that the Court of Appeal was wrong in upholding preliminary objections based on the alleged failure on the part of the petitioner to show *uberrima fides* and non-compliance with Rule 46. Accordingly, I allow the appeal and set aside the judgment of the Court of Appeal. I also concur with the order for costs made by my brother Fernando J., and, the direction to the Court of Appeal to hear and determine the petitioner's application on the merits.

Appeal allowed.