

**MUTHAPPAN CHETTIAR  
VS  
KARUNANAYAKE AND ANOTHER**

SUPREME COURT.  
BANDARANAYAKE.J.  
FERNANDO.J.  
AMARATUNGA.J.  
SC 69/2003.  
FEBRUARY 17, 2005.  
MARCH 4, 2005.  
MAY 10, 2005.

*Supreme Court Rules 1990 - Rules 2, 6, 8 (6), 30, 30 (1), 30(6), 30(7), 34, 35(c)*  
*- Filing of written submissions within six weeks from date special leave is granted - Is It mandatory? - Could the party be heard?*

**HELD:**

*Per Shirani Bandaranayake, J.*

" Objection raised on a non compliance of a mandatory Rule, in my view cannot be taken as a mere technical objection and where there has been no compliance at all of such mandatory Rules at the time the matter was taken up for hearing serious consideration should be given for such non compliance as that kind of behaviour could lead to serious erosion of well established Court procedures maintained throughout several decades".

- (1) Rules 30 (1) and 30 (6) specify that it is mandatory that within 6 weeks of the grant of special leave to appeal the appellant has to file his written submissions, although the appeal shall not be dismissed for the non compliance of Rule 30 (c) and the effect of such non compliance would be the non entitlement to be heard, such non compliance would attract Rule 34 which states that, an appellant who fails to exercise due diligence in taking all necessary steps for the purpose for prosecuting the appeal, the Court could declare the appeal to stand dismissed for non prosecution.
- (2) A party in default could move Court stating valid and acceptable reasons and seek the leave of Court of further time to furnish written submissions.

- (3) Non compliance of Rules 30(1) - 30 (6) combined with the non compliance would certainly amount to failure to show due diligence.

**Cases referred to :-**

1. *Priyani Soysa vs. Rienzie Arasakularatne* - 1999 1 Sri LR 179
2. *Union Approach (Pvt.) Ltd vs. Director General of Customs* - 2000 1 Sri LR 27
3. *Balasingham and another vs. Puranthiran (minor) by the next friend* - 2000 1 Sri LR 163
4. *Coomasaru vs. Leechman Ltd* - SC 217/72 - 307, 72-SCM 26.6. 1976
5. *Samarawickrema vs. Attorney General* - 1983 - 2 Sri LR 162
6. *Mylvaganam vs. Reckit and Colman* - SC 154/87 - SCM 8.7. 1987
7. *All Ceylon Metal Workers Union vs. Jaufer Hassan and Another* - 1990 2 Sri LR 420
8. *Read vs. Samsudeen* - 1895 1 NLR 292
9. *Aspinall vs. Sutton* - 1894 2QB 349
10. *Secretary of State for Defence vs. Warn* - 1968 3 NLR 609

*Romesh de Silva PC* with *V. C. Choksy* for defendant - appellant - appellant  
*Gamini Marapana PC* with *Keerthi Sri Gunawardena* for plaintiff - respondents  
- respondents

June 6, 2005.

**SHIRANI BANDARANAYAKE, J.**

This is an appeal filed by the defendant- appellant- appellant (hereinafter referred to as the appellant) from the judgment of the Court of Appeal dated 13.05.2003. By that judgment the Court of Appeal affirmed the decision of the learned District judge dated 18.09.1995 given in favour of the plaintiffs - respondents respondents (hereinafter referred to as the respondents) and dismissed the appellant's appeal. The respondents had instituted action in the District Court of Galle against the appellant for a declaration of title to the premises in suit, for his ejection and for recovery of damages. The appellant came before this Court and special leave to appeal was granted on 24.09.2003.

When this matter was taken up for hearing on 17.02.2005, learned President's Counsel for the respondents, took up a preliminary objection, in terms of Rule 30 of the Supreme Court Rules of 1990, that the appellant

had not complied with the mandatory requirement of filing written submissions within six weeks from the date on which special leave to appeal was granted and therefore the appellant had failed to comply with the said Rule. Learned President's Counsel for the respondents therefore contended that having regard to the fact that an essential step of the prosecution of the present appeal had not been taken by the appellants and therefore the appeal should be dismissed for non compliance. Both parties thereafter agreed to file written submissions on the preliminary objection and judgment was reserved on the said preliminary issue.

Learned President's Counsel for the appellant submitted that there are no provisions in the Supreme Court Rules of 1990, to indicate that an appeal must be dismissed for the non filing of written submissions. In support of his contention learned President's Counsel drew our attention to Rule 30(1) of the Supreme Court Rules of 1990 and the decisions of this Court in *Priyani Soysa v Rienzie Arsecularatne*<sup>(1)</sup> and *Union Apparel (pvt) Ltd. vs. Director General of Customs*<sup>(2)</sup> Referring to the said decisions, learned President's Counsel contended that, it is clear law that non compliance with the Rules, particularly in regard to non filling of written submissions, will not disentitle the appellant to be heard. It was also submitted that the Court can order the appellant to furnish written submissions at any time determined by Court.

Having said that, let me now turn to examine the provisions of the relevant Rules and the *ratio decidendi* of the aforementioned cases and their applicability to the appeal in question.

Rule 30 of the Supreme Court Rules of 1990 deals with the written submissions that has to be filed prior to the date of the hearing. Both Rules 30(1) and 30(6) refer to the filing of the written submissions regarding an appeal. Whilst Rule 30(1) refers to the need for filing of such submissions, Rule 30(6) clearly specifies the time period given for the filing of the said written submissions. A careful reading of both Rules indicates that the provisions stated in them are mandatory. Rules 30(1) and 30(6) of the Supreme Court Rules, 1990 are in the following terms :

Rule 30(1)

No party to an appeal shall be entitled to be heard, unless he has previously lodged five copies of his written submissions (hereinafter referred to as 'submissions') complying with the provisions of this rule."

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“Rule 30(6)

The appellant shall within six weeks of the grant of special leave to appeal, or leave to appeal, as the case may be lodge his submissions at the Registry and shall forthwith give notice thereof to each respondent by serving on him a copy of such submissions.”

In terms of these two Rules, it is necessary for the appellant to file five copies of his written submissions in the Registry and this has to be carried out within six weeks of the grant of special leave to appeal or leave to appeal by this Court. Also it is necessary that the appellant must take steps to give notice to each respondent of the lodging at the Registry of such submissions by serving on them a copy of his written submissions. Therefore the cumulative effect of Rules 30(1) and 30(6) would be that the appellant should file five copies of his written submission within six weeks of the grant of special leave to appeal or leave to appeal as the case may be, and a copy of such submissions has to be served to the respondents' notifying of the said submissions.

In the event of non-compliance of the said provisions of the Rules, Rule 30(1) specifically states that, such party shall not be entitled to be heard.

Learned President's Counsel for the appellant's first submission was that the Rules do not indicate that an appeal should be dismissed for non filing of written submissions. As referred to earlier, Rules 30(1) and 30(6) clearly specify that it is mandatory that within Six weeks of the grant of special leave to appeal, the appellant has to file his written submissions. Although the appeal shall not be dismissed for the non-compliance of Rule 30(1) and the effect of such non compliance would be the non entitlement to be heard, such non-compliance would attract Rule 34 which clearly states that, an appellant who fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal, the Court would declare the appeal to stand dismissed for non prosecution.

The applicability of Rule 34, when the appellants had failed to file their written submissions, was considered by this Court in *Balasingham and another vs. Puranthiran (A Minor) by his next friend Sivapackiam*<sup>(3)</sup>. In that case, the appellants had failed to file their written submissions in terms of Rule 30 of the Supreme Court Rules, 1990 within six weeks from the date on which special leave to appeal was granted. The written submissions

were filed approximately one year from that date. The respondent in his submissions took an objection on the ground of such default and moved that the appeal be declared dismissed for non-prosecution, in terms of Rule 34. It is to be noted that the appellants in that case had also failed to give an acceptable excuse for the default on their part. Considering the material placed before this Court, it was decided that the preliminary objection raised on behalf of the respondent that the appeal be declared dismissed for non-compliance must be sustained. In *Balasingham's case* reference was made to *Coomasaru vs. Leechman Ltd.*<sup>(4)</sup> where the former Supreme Court dismissed an appeal for failure to file written submissions in terms of Rules of the Appeal Procedure Rules in the absence of any excuse for such failure.

*Samarawickrama vs. Attorney- General*<sup>(5)</sup> is also a decision that is worthy of note in this regard. In that case, a preliminary objection was taken by the Senior State Counsel that the appellant had not complied with the provisions of Rule 35(c) of the Supreme Court Rules of 1978. Rule 35(c) requires the appellant, within 14 days of the grant of special leave to appeal, to lodge his written submissions and forthwith give notice thereof to each respondent by serving on him a copy of the submission. Learned Counsel for the appellant had taken up the position that a copy of the written submission was handed over to the office of the Hon. Attorney General. However, the Senior State Counsel had informed Court that there was no record of such receipt and the learned Counsel for the appellant conceded that he had no proof of such service. The Court noted that apart from the aforementioned submission that no other excuse for the non-compliance with the Rule 35(c) of the Supreme Court Rules, 1978 was given by the appellant. The Supreme Court took the view that the relevant provisions have been consistently held by the Court as being imperative' and the preliminary objections were so upheld. A similar approach was taken in *Mylvagnam vs. Reckitt and Colman*<sup>(6)</sup> and the appeal was dismissed for failure to comply with Rule 35 of the Supreme Court Rules of 1978. This Court had also considered the necessity to comply with Rule 35 of the Supreme Court Rules of 1978, in *All Ceylon Match Workers Union vs. Jauffer Hassan and others*<sup>(7)</sup> where Amerasinghe, J. held that, when the appellant had not filed any written submissions there is a failure on the part of the appellant to comply with Rule 35.

In view of the aforementioned decisions of this Court, it is apparent that objections taken in terms of Rule 30 of the Supreme Court Rules of 1990

have not only been upheld, but Rule 30 also have been considered in terms of Rule 34 of such Rules.

Having considered the first submission of the learned President's Counsel for the appellant let me now turn to examine his second submission.

Learned President's Counsel drew our attention to the decision in *Priyani Soysa vs. Rienzie Arsecularatne* (supra) and *Union Apparel (Pvt.) Ltd. vs. Director General of Customs* (supra). His contention was that in these two decisions this Court had held that the non-compliance with the said Rules is not fatal and does not necessitate a dismissal of the case. However, it is to be noted that both the aforementioned cases could be distinguished from the instant case for several reasons, which are discussed in the following paragraphs.

In ***Priyani Soysa's case***, the question arose with regard to the non-compliance with Rules 2, 6 and 8(6) of the Supreme Court Rules of 1990. This Court in its majority view had decided that there was compliance with the aforementioned Rules for the reason that,

- (a) if the respondent had failed to file the caveat within the time specified by Rule 3(6), but submits an explanation, which the Court is prepared to accept, eg. that he was in fact not resident at the address on the date of receipt of the notice, the Court may in its discretion regard the date of 'Actual' receipt of the notice as the relevant date for the purpose of compliance with the Rule. On a liberal view of the matter, the respondent had filed the caveat within time ;
- (b) the only lapse of the petitioner relied upon by the respondent was that the petitioner had failed to obtain the Court's permission in terms of the proviso to Rule 2 to tender the copies of the Court of Appeal briefs and the fact that the petitioner filed three instead of four copies. However, Rule 8(7) enables the respondent also to submit the same documents by way of objection whilst Rule 13(2) empowers the Court to direct the Registrar to call for the same, and having regard to the purpose of the Rules, non-compliances of this nature would not necessarily deprive a party of the opportunity of being heard on the merits at the threshold stage unless there is some compelling reason to do so.

The decision in *Union Apparels (Pvt.) Ltd. vs. Director General of Customs and others* (Supra) also could be clearly distinguished from the instant case. In that case, the question arose as to whether the petitioner had filed his written submissions in compliance with the Rule 34 of Supreme Court Rule of 1990. The petitioner company had filed its application on 03.06.1999. Hearing was fixed for 20.08.1999 and the written submissions were filed by the petitioner on 19.08.1999. The respondents' objection was that the petitioner thereby had failed to comply with Rule 45(7), which requires the written submissions to be filed at least 'One week before the date fixed for hearing'. The 2nd respondent took up the position that the application must stand dismissed in terms of the Supreme Court Rules of 1990 as the written submissions of the petitioner were not filed in terms of the Rules. This Court having regard to the purpose of Rule 45(7) in comparison with Rule 30 and considering the purpose of Rule 34 and especially the circumstances of the case decided that it cannot be said that the petitioner had failed to show due diligence in taking all necessary steps for the purpose of prosecuting the application. Accordingly the Court held that the preliminary objection must be overruled.

It is to be borne in mind that in *Union Apparels (Pvt.) Ltd. (Supra)*, although there was a delay in filing the written submissions, it was however filed one day before the date of the hearing. Therefore it is to be noted that, when that matter was taken up for hearing, the written submissions were available.

The purpose of the Rules of the Supreme Court is to ensure that the necessary submissions and authorities are available to Court when the appeal or the application is taken up for argument. It is also necessary to be borne in mind that the right to be heard by a party is one of the most elementary, but significantly important rights of any party before Court. Nevertheless, when a party is before this Court in connection with an appeal or an application, this right has to be exercised in terms of the Supreme Court Rules, as the failure to comply with the rules cannot be simply ignored. I am in complete agreement with the view expressed over a century ago by Bonser, C. J. in *Read vs. Samsudin* where his Lordship quoted the words of Sir George Jessel, Master of the Rolls with approval that, it is not the duty of a judge to throw technical objection, difficulties in the way of the administration of Justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

However, objection raised on a non-compliance of a mandatory Rule, in my view cannot be taken as a mere technical objection and where there has been no compliance at all of such mandatory Rules at the time the matter was taken up for hearing, serious consideration should be given for such non-compliance as that kind of behaviour by parties could lead to serious erosion of well established Court procedures, maintained throughout several decades.

In the instant case, it is quite clear that the appellant had not taken steps to comply with Rule 30 of the Supreme Court Rules of 1990. The case record reveals that this Court granted special leave to appeal in this matter on 24.09.2003. On that day, the Court had made order that written submissions be filed according to Rules. Supreme Court Rules of 1990 clearly states that the appellant should, within six weeks of the grant of special leave to appeal, lodge his submissions at the Registry and should give notice to each respondent by serving on him a copy of such submission (Rule 30(6). Rule 30(7) of the Rules of the Supreme Court, 1990 refers to the time given to the respondent in submitting his written submissions in case of an appeal and states that,

“ the respondent shall within six weeks of the receipt of notice of the lodging of the appellants submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions.”

It further provides that,

“Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of special leave to appeal, or leave to appeal as the case may be giving notice in like manner.”

According to the aforementioned Rules, the appellant should have filed his written submissions on or before 05.11.2003. Although the matter was fixed for argument on 29.01.2004, on a motion filed by the learned President's Counsel for the respondents dated 10.10.2003, this matter was re-fixed for hearing on 03.03.2004. On 03.03.2004, on an application made on behalf of the learned President's Counsel for the appellant, the hearing



was again re-fixed for 01.07.2004. On 01.07.2004, it was not possible for the appeal to be taken up for hearing as the Bench comprised of a judge who had heard this matter in the Court of Appeal and this was re-fixed for hearing on 01.11.2004. On that day it was once again re-fixed for hearing for 17.02.2005. By that time one year and four months had lapsed from the date special leave to appeal was granted. It is not disputed that even on the day this appeal was finally taken up for hearing, viz. on 17.02.2005, the appellant had neither filed his written submissions nor had he given an explanation as to why it was not possible to file such written submissions in accordance with the Rules.

Notwithstanding the aforementioned non-compliance, it appears that even thereafter, the appellant had not taken any interest to comply with the rules relating to the filing of written submissions. On 17.02.2005, when this matter was taken up for hearing and when the learned President's Counsel for the respondents took up the preliminary objection, appellant moved to file written submissions on the question of the preliminary objection. This Court granted time for both parties to tender such written submissions and reserved the judgment on the question of the preliminary objection. The Court directed the respondents to file their written submissions on or before 07.03.2005 and the appellant to file their written submissions on or before 01.04.2005.

The respondent filed their written submissions on 04.03.2005 and the appellant's written submissions were not filed on 01.04.2005, as directed by this Court. Later the appellant had filed their written submissions on 10.05.2005. The written submissions filed belatedly refer to the aforementioned submissions pertaining to Rule 30 and the decision in *Priyani Soysa (Supra) and Union Apparels (Pvt.) Ltd. (Supra)*, but does not give any reason as to why there was no compliance with the rules after special leave to appeal was granted and also an explanation for the delay in filing written submissions after hearing the objection on the preliminary issue, as directed by this Court.

Enactments legislating the procedure in Courts are usually construed as imperative *Aspinall vs. Sutton*<sup>(9)</sup> *Secretary of State for Defence vs. Warn* and this position, as pointed out earlier, has been upheld on numerous occasions by the Supreme Court in this country.

The appellant could have moved this Court stating valid and acceptable reasons and sought the leave of the Court for further time to furnish written submissions, so that this Court could have exercised its discretion in permitting the appellant to file his written submissions. However, it is to be borne in mind that the appellant had not sought to exercise the discretion of this Court, but also had not given any valid reason even belatedly for this Court to consider using its discretion.

It is therefore absolutely clear that the appellant has not complied with Rules 30(1) and 30(6) of the Rules. The contention of the learned President's Counsel for the appellant is that non-compliance with such Rules will not disentitle the petitioner being given a hearing. I am in agreement with the learned President's Counsel that Rule 30(1) does not refer to an appeal being dismissed for non compliance with that Rule. However, it is necessary to consider the circumstances of this case, which makes it necessary for this Court to take cognizance of them.

As referred to earlier, in *Balasingham's case* (*Supra*) appellants had filed their written submissions approximately one year after special leave to appeal was granted and this Court held not only that there was non-compliance, but also that such non-compliance was the appellant's failure to show due diligence.

It is quite clear from the aforementioned that there was not only non-compliance of Rules 30(1) and 30(6) of the Supreme Court Rules of 1990, but also that such non-compliance combined with the non -availability of a valid explanation for such non-compliance would certainly amount to failure to show due diligence. In such circumstances, in terms of Rule 34, the appeal stands to be dismissed for non prosecution.

For the aforementioned reasons, I hold that the preliminary objection raised by learned President's Counsel for the respondents must be sustained. This appeal is accordingly dismissed. There will be no costs.

**FERNANDO J.**— I agree.

**AMARATUNGA J.**— I agree.

Preliminary objection upheld Appeal dismissed.