CEYLON ELECTRICITY BOARD AND OTHERS
v
RANJITH FONSEKA

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
MARSOOF, J. AND
EKANAYAKE, J.
S.C. (SPL.) L.A. NO. 113/2008
C.A. WRIT APPLICATION NO. 51/2007
DECEMBER 01, 2008

Supreme Court Rules 1990 – Rule 2 – Rules 8(2) – Constitution – Article 136 – Special Leave to Appeal should be by way of petition together with affidavit and other supporting documents – Non-compliance of Supreme Court Rules – Substantial Compliance?

The Respondents-Petitioners (Petitioners) had preferred an application for Special Leave to Appeal to the Supreme Court against an order of the Court of Appeal, which stayed the decision of the petitioner to withhold the respondents pension until the next date of the case.

The Counsel for the petitioner-respondent, took up the following preliminary objections:

(1) The petition and affidavit for Special Leave to Appeal is titled:
   - (a) *"in the Court of Appeal of the Democratic Socialists Republic of Sri Lanka".*
   - (b) *the caption of the petition is titled:*
     "In the matter of an application under and in terms of Article 154(3)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka."

(2) The written submissions of the petitioners have not been annexed, whereas in paragraph 4 of the petition and in paragraph 5 of the affidavit it is stated that written submissions have been annexed marked as 'P4'.

(3) The petitioners are described as 1st to 10th respondents-appellants whereas,
   - (a) The 10th respondent-appellant so described is the Hon. Attorney-General.
   - (b) Proxy has only been filed for the 1st respondent-appellant.

Held:

(1) A petition with an incorrect title would not be acceptable for the purpose of making an application for Special Leave to Appeal in terms of Rule 2 of the Supreme Court Rules 1990. A defective petition would amount to non-compliance with the said rule.

(2) Where there had been objections based on non-compliance with the Supreme Court rules, whilst due consideration should be given to remove any technical objections in order to meet out justice, it is also necessary to ensure that the approach of Court in interpreting the applicability of Supreme Court Rules, should not lead to serious erosion of well established Court procedures, applied and maintained throughout several decades.

(3) If there is no proper petition filed for the purpose of a Special Leave to Appeal application, then such application would amount to non-compliance with Rule 2 of the Supreme Court Rules 1990.

(4) It is apparent that the default in question, including the non-compliance with Rule 2 of the Supreme Court Rules 1990, had not been satisfactorily explained by the petitioners nor have they cured it to the satisfaction of the Supreme Court, thus giving no opportunity to use the judicial discretion.

per Dr. Shirani Bandaranayake, J.

"An application such as the present application which is teeming with irregularities and mistakes cannot, not cnly be tolerated, but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application".

Cases referred to:

(1) *Velupillai v Chairman, Urban District Council* (1926) 29 NLR 464.
(2) *Kiriwanthe and Another* v *Navaratne and Another* (1990) 2 SLR 393.
(3) *Priyani E. Soyza* v *Rienzie Arsecularatne* (1999) 2 SLR 179.
(4) *S.C. (Spl.) L.A. No. 49/2007.*
(5) *Samantha Niroshana and Another* v *Gunasekera* (S.C. (Spl.) L.A.145/2006 S.C. Minutes of 2.8.2007.
(6) *Jones* v *Chennell* (8 ch. D. 506).
(7) *Read* v *Samsudin* (1895) 1 NLR 292.
(8) *Annamalai Chettiar Muthappan Chettiar* v *Karunanayake and Another* (S.C. Appeal 69/2003 S.C. Minutes of 06.06.2005.
(9) *Reaindran* v *K. Velusomasunderam* (S.C. (Spl.) L.A. 298/99 S.C. Minutes of 07.02.2000.
(10) *N.A. Premadasa* v *the Peoples Bank* S.C. (Spl.)L.A. 212/99 S.C. Minutes of 24.02.2000.
(11) *Hamed* v *Majbdeen and Others* S.C. (Spl.) L.A. 38/2001 S.C. Minutes of 23.07.2001.

(12) *K.M. Samarasinghe* v *R.M.D. Ratnayake and Others* SC (Spl.) L.A. 51/2001 S.C.Minutes of 27.07.2001.
(13) *Soong Che Foo* v *Harosha K. de Silva and Others* S.C. (Spl.) 184/2003 S.C. Minutes of 25.11.2003.
(14) *C.A. Haroon* v *S.K. Muzoor and Others* S.C. (Spl.) L.A. 158/2006 S.C. Minutes of 24.11.2006.

APPLICATION for Special Leave to Appeal from the judgment of the Court of Appeal.

Mohan Peiris, P.C. with *Nuwanthi Dias* for respondents-petitioners.
Romesh de Silva, P.C. with *Sugath Caldera, S, Cooray and G.G. Arulpragasam* for petitioner-respondent.

Cur.adv. vult.

December 16, 2008
DR. SHIRANI BANDARANAYAKE, J.

This is an application for Special Leave to Appeal filed by the respondents-petitioners (hereinafter referred to as the petitioners) from the judgment of the Court of Appeal dated 28.04.2008. By that judgment the Court of Appeal had confined itself to consider the sole issue of the grant of interim relief prayed for by the petitioner-respondent (hereinafter referred to as the respondent) directing the payment of his pension, which was withheld by the petitioners and the Court of Appeal had made order staying the decision of the petitioners to withhold the respondent's pension, until the next date of that case.

The petitioners had preferred an application for Special Leave to appeal to this Court against the said order of the Court of Appeal and when it came up for support, learned President's Counsel for the respondent took up the following as preliminary objections:

(1) The petition and affidavit for Special Leave to Appeal filed before this Court is titled *in the Court of Appeal of the Democratic Socialist Republic of Sri Lanka*;

The caption is titled as follows:

"In the matter in the application under and in terms of Article 154P(3)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka".

(2) The written submissions of the petitioners have not been annexed whereas in paragraph 4 of the petition as well as in paragraph 5 of the affidavit it is stated that the written submissions have been annexed marked as P4.

(3) The petitioners are described as 1st to the 10th respondents-appellants whereas;

(a) The 10th respondent-appellant so described is the Hon. The Attorney-General; and

(b) proxy has only been filed for the 1st respondent-appellant.

Learned President's Counsel for the respondent, accordingly submitted that the preliminary objections so raised are fatal to the acceptability and maintainability of this application and the objections be upheld and the application for Special Leave to Appeal be dismissed *in limine*.

Learned President's Counsel for the petitioners contended that on the day this application was first taken up for support, the President's Counsel for the petitioner had sought for permission to amend the caption, if necessary, and had apparently filed amended caption. Learned President's Counsel for the petitioners referred to the oft quoted words of Abrahams C.J. in *Velupillai* v *Chairman, Urban District Council*[1], where it was stated that,

"this is a Court of justice, it is not an academy of law."

Learned President's Counsel further submitted that he is relying on the decisions of *Kiriwanthe and another* v *Navaratne and another*[2] and *Priyani E. Soysa* v *Rienzie Arsecularatne*[3].

Having stated the contention of both learned President's Counsel for the petitioners and respondent, let me now turn to refer to the relevant facts of this matter and to examine whether the objections taken by the learned President's Counsel for the respondent would amount to a dismissal *in limine* of the Special Leave to Appeal application filed by the learned President's Counsel for the petitioners.

The judgment of the Court of Appeal, as stated earlier, was delivered on 28.04.2008 and the Special Leave to Appeal application had been filed in the Supreme Court on 15.05.2008. In that

application the petition and the affidavit were titled as correctly submitted by the learned President's Counsel for the respondent, referring to the Court of Appeal and not to the Supreme Court. Further, as submitted by the learned President's Counsel for the respondent, the caption referred to Article 154P(3)(b) of the Constitution. There is no dispute regarding the contention of the learned President's Counsel for the respondent on the 2nd and 3rd preliminary objections that the written submissions were not filed along with the petition and affidavit and that the proxy filed was only of the 1st petitioner. However, the contention of the learned President's Counsel for the Petitioners was that notwithstanding the above, there was substantial compliance with the Supreme Court Rules of 1990.

In such circumstances, let me examine the said preliminary objections raised by the learned President's Counsel for the respondent to ascertain whether there had been compliance with the Supreme Court Rules of 1990.

Referring to the 1st preliminary objection raised by the learned President's Counsel for the respondent, learned President's Counsel for the petitioners contended that although the captions in the petition and affidavit had been defective, such defects are not fatal to the maintainability of this application. The contention was that in terms of Rule 2 of the Supreme Court Rules of 1990 an affidavit is merely used as a supplementary source of evidence and therefore a defective caption in the affidavit will not reduce the evidentiary value of the relevant application.

It is common ground that the application for Special Leave to Appeal preferred by the petitioners contained incorrect titles. Rule 2 of the Supreme Court Rules, 1990, which is contained in Part I and deals with applications for Special Leave to Appeal, clearly stipulates that,

> *"Every application for Special Leave to Appeal to the Supreme Court shall be made by a petition in that behalf* lodged at the Registry, together with affidavits and documents in support thereof as prescribed by Rule 6 ......" (emphasis added).

Rule 2 of the Supreme Court Rules, 1990 thus states quite clearly that an application for Special Leave to Appeal should be made by way of a petition. A petition for the said purpose therefore is a mandatory requirement and to fulfill such requirement, it is necessary

for the petition to be a valid petition. A petition with an incorrect title therefore would not be acceptable for the purpose of making an application for Special Leave to Appeal in terms of Rule 2 of the Supreme Court Rules 1990, and thereby it is apparent that there had been non-compliance with the said Rule.

The question, which arises at this point is that in a situation, where there has been non-compliance with Rule 2 of Supreme Court Rules 1990, whether it is possible for the petitioners to cure that defect by an amendment to the petition.

Learned President's Counsel for the petitioners, after filing the application for Special Leave to Appeal on 15.05.2008, had filed a motion on the same date, moving this Court to permit the learned Counsel to support the application for interim relief. Accordingly, this matter was fixed for support on 28.05.2008 and on that date, it was re-fixed for support, since the respondents had not received the necessary documents. In fact it is recorded that the learned Counsel for the petitioners had undertaken to handover a 'fresh set of papers' to the learned Counsel for the respondent. A careful perusal of the record does not however reveal any other application made by the learned President's Counsel for the petitioners as the Journal Entry reads thus:

> *"Court is informed that Mr. Romesh de Silva, PC, appears for the respondent. Mr. Arulpragasam submits that the Counsel for the respondent has not received papers filed in this application. Counsel for the petitioners undertakes to handover a fresh set of papers.*
>
> *Support on 04.06.2008."*

On 04.06.2008, the matter had been re-fixed for support as the petitioners were exploring the possibility of a settlement. Only at that time, learned President's Counsel for the petitioners had moved for time to file papers to amend the caption, if it becomes necessary, and it had been recorded that,

> *"Learned President's Counsel for the petitioners informs Court that this matter be re-fixed for support since the petitioners are exploring the possibility of a settlement.*

Learned President's Counsel for the petitioners' also moves for time to amend the caption, if necessary.

Of consent, support on 19.06.08" (emphasis added).

On 11.06.2008, petitioners had filed the amended caption, along with the written submissions, which was the annexure marked X4 in the Court of Appeal and had moved this Court to accept same. When this matter was taken up for support on 19.06.2008, learned President's Counsel for the respondent took up the preliminary objections, stated earlier. It is therefore quite apparent that the motion for the amendment had not been supported at the time the preliminary objections were taken and in the event, if the said motion was fixed for support, the learned President's Counsel for the respondent, as has been stated in his oral as well as in his written submissions, would have objected to such an amendment.

Therefore it is apparent that at the time the objections were taken, although motions were filed to amend the petition, the said motions were not supported; permission of Court was not sought to amend and therefore admittedly no amendment was permitted by this Court, Accordingly, in those circumstances, it cannot be disputed that the defect in question was not cured by the petitioners within a reasonable time.

Learned President's Counsel for the respondent, in support of his contention that this application must be dismissed *in limine* due to the defects in the petition, referred to the decision in S.C. (Spl.) L.A. No. 49.2007[4], where the petition, which was filed in the Supreme Court titled '*In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka*', had to be withdrawn on the basis of the objections taken by the respondent.

As stated earlier, learned President's Counsel for the petitioners, relied on the decision in *Kiriwanthe and Another* v *Navaratne and Another (supra)* and *Priyani Soysa* v *Rienzie Arsecularatne (supra)* stating that in those decisions the Court had held that the non-compliance with the Supreme Court Rules is not fatal and does not necessitate a dismissal of the case.

The rationale of the decision in *Kiriwanthe and Another* v *Navaratne and Another (supra)* as clearly stated in *Samantha*

Niroshana and Another v *Gunasekera*(5) was that in certain instances, taking into consideration the surrounding circumstances, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction. The majority decision in *Priyani Soysa* v *Rienzie Arsecularatne (supra)* had followed that *dictum* and had used its discretion in coming to its conclusion.

A careful examination of the decision in *Kiriwanthe (supra)*, clearly indicates that it does not suggest that there ought to be an automatic exercise of Courts discretion to excuse the non-compliance with regard to Supreme Court Rules. It is not disputed that in *Kiriwanthe (supra)* Mark Fernando, J. had stated that although the requirements of Rule 46, (as was the case in that application) must be complied with, strict or absolute compliance is not essential. In Mark Fernando, J.'s words,

> *".... 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."*

However, *Kiriwanthe (supra)* cannot be considered as a decision, which had expressed the view that the Court would always exercise its discretion to excuse non-compliance with the Rules. A close scrutiny of the said decision in *Kiriwanthe and another* v *Navaratne and Another (supra)* clearly emphasizes the fact that, what the Court had stated was that it would be necessary for the Court to first determine whether such non-compliance could be excused or impose a sanction on the basis of the circumstances of each instance. As has been stated by Mark Fernando, J., in the said decision,

> *"It is not to be mechanically applied, as in the case now before us; the Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction ..."*

The Rules of the Supreme Court, it is to be noted, is for the sole purpose of regulating generally the practice and procedure of the Court. Article 136, which deals with the Rules of the Supreme Court states that the Rules made to so regulate the practice and procedure would include,

"a) *rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non-compliance with such rules;*

b) *rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules;*

...."

The said Articles of the Constitution therefore clearly specifies the fact that subject to the terms stipulated in the specific Rules, there are instances, where an application could be dismissed for non-compliance with relevant Rules.

I am certainly mindful of the observations of Sir George Jessel, Master of the Rolls, made in the case of *Jones* v *Chennell*[6] cited with approval by Bonser, C.J. over a century ago in *Read* v *Samsudin*[7] and has been referred to in *Annamalai Chettiar Muthappan Chettiar* v *Karunanayake and another*[8], where it was stated that,

"*It is not the duty of a Judge to throw technical 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.*"

This position was carefully considered in *Annamalai Chettiar Muthappan Chettiar (supra)*, where it was held that objections raised on the basis of non-compliance with a mandatory Rule cannot be taken as a mere technical objection and where there has been non-compliance with such mandatory Rules at the time the matter was taken for hearing, serious consideration should be given to the effects of such non-compliance.

It is therefore quite apparent that, this Court had given careful consideration to matters, where there had been objections based on non-compliance with Supreme Court Rules. Whilst due consideration should be given to remove any technical objections in order to meet out justice, it is also necessary to ensure that the approach of Court in interpreting the applicability of Supreme Court Rules, should not lead to serious erosion of well established Court procedures, applied and maintained throughout several decades.

In *Samantha Niroshana* v *Gunasekera (supra)* this Court had noted that a long line of cases had decided that non-compliance with Rule 8(3) of the Supreme Court Rules of 1990 would result in the dismissal of the application (*Reaindran* v *K. Velusomasunderam*(9), *N.A. Premadasa* v *The People's Bank*(10), *Hamed* v *Majbdeen and Others*(11), *K.M. Samarasinghe* v *R.M.D. Ratnayake and Others*(12), *Soong Che Foo* v *Harosha K. De Silva and Others*(13), *C.A. Haroon* v *S.K. Muzoor and Others*(14).

The preliminary objection taken in this matter does not deal with Rule 8(3) of the Rules, but relates to Rule 2 of the Supreme Court Rules 2 and 8 are contained in Part I of the Supreme Court Rules 1990 and deal with Special Leave to Appeal applications. Rule 2 clearly states that it is a mandatory requirement that any application for Special Leave to Appeal to the Supreme Court be made by a petition in that behalf. Accordingly, if there is no proper petition filed for the purpose of a Special Leave to Appeal application, then such would amount to non-compliance with Rule 2 of the Supreme Court Rules 1990.

In such circumstances, the question, which arises at this point is to see whether the said non-compliance with Rule 2 of the Supreme Court Rules of 1990 would result in the dismissal of this application

or whether the discretion of this Court could be used to over rule the preliminary objection.

It is pertinent to note at this juncture that the aforesaid non-compliance with Rule 2 was not the only objection raised by the learned President's Counsel for the respondent.

Along with the objection of not having a proper petition in terms of the Supreme Court Rules 1990 before this Court, learned President's Counsel for the respondent had contended that the affidavit is not in order as the affidavit is titled 'in the Court of Appeal of the Democratic Socialist Republic of Sri Lanka' and that the written submissions filed in the Court of Appeal although had been referred to in the paragraph 4 of the petition that it has been attached to the petition as P4, has not been annexed. Learned President's Counsel for the respondent, also referred to the fact that although this is an application filed apparently for the purpose of obtaining Special Leave to Appeal from the judgment of the Court of Appeal, in the application, the petitioners are referred to as appellants. It is an obvious fact that aggrieved persons would become appellants before this Court, only if and when Special Leave to Appeal is granted for the application made by the petitioners, by this Court.

The caption of the application was also erroneous as it was titled as follows:

> *"In the matter in the application under and in terms of Article 154P(3)b of the Constitution of the Democratic Socialist Republic of Sri Lanka."*

As correctly submitted by learned President's Counsel for the respondent that the said Article 154P(3)(b) does not in any way refer to an application for Special Leave to Appeal to the Supreme Court, and clearly refers to an application to High Court. It is also to be borne in mind that even in the amended petition the petitioners had referred to Article 154P(3)(b) in its title. Considering the aforementioned circumstances, along with the defective title to the petition and affidavit; the petitioners being referred to as appellants, which include the Hon. the Attorney-General; the proxy being filed only for the 1st petitioner, it is quite evident that the petition filed before this Court is teeming with mistakes and irregularities.

As correctly submitted by the learned President's Counsel for the respondent the application for Special Leave to Appeal filed by the petitioners before the apex Court of the Republic, should have been drafted with 'care and due diligence' in order to maintain the stature and dignity of this Court. An application such as the present application, which is teeming with irregularities and mistakes cannot, not only be tolerated, but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application. Even if the objection may be technical in nature, such irregularities clearly demonstrate the fact that the application made by the petitioners has not complied with the Supreme Court Rules of 1990.

As has been stated earlier, if I am to apply the test stated by Mark Fernando, J., in *Kiriwanthe's case (supra)*, it is apparent that the default in question, including the non-compliance with Rule 2 of the Supreme Court Rules 1990, had not been satisfactorily explained by the petitioners nor have they cured it to the satisfaction of this Court, without undue delay, thus giving no opportunity to use the judicial discretion.

In the circumstances, on a consideration of all the material placed before this Court and for the reasons aforementioned, I hold that the preliminary objections raised by the learned President's Counsel for the respondent must be sustained. The petitioners' application for Special Leave to Appeal is accordingly dismissed.

I make no order as to costs.

MARSOOF, J. - I agree.
EKANAYAKE, J. - I agree.

Application dismissed.