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DIGEST

CIVIL PROCEDURE CODE -

(1) Section 214,416-Plaintiff abroad-Security for costs- Judicial discretion - Can such an order be made exparte?

(2) **CIVIL PROCEDURE CODE** - amended by Act,section 9 of 1991-section 18,section 21,section 93 (2)-Addition of a party - Opting to file replication - No steps taken to comply with S21-Application to amend plaint - Laches.

SUPREME COURT RULES 1990 – Rule 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?

NIMALRAJ
VS.
THARMARAJAH AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J. (P/CA)
WIMALACHANDRA, J.
CA LA 23 1200/2004.
DC MT. LAVINIA 1061/98/L.
JUNE 29th, 2005.

Civil Procedure Code - amended by Act,section 9 of 1991-section 18,section 21,section 93 (2)-Addition of a party - Opting to file replication - No steps taken to comply with section 21-Application to amend plaint - Laches.

The Plaintiff-respondents instituted action against the 1st respondent and 2nd defendant-respondents seeking a declaration of title to the property in question. The 3rd defendant was added as a party subsequently. No steps were taken by the plaintiffs under section 21, and without filing an amended plaint proceeded to file a replication. After 3 days of trial, the plaintiffs-respondents moved to amend the plaint, the trial Judge permitted the amendment. The defendant-petitioner contended that the order was erroneous in the face of the mandatory provisions contained in section 93 (2) and section 21.

HELD:

(1) The application to amend the plaint was clearly a belated application made after three trial dates - section 93 (2) would become operative and applicable.

(2) There are two limbs in section 93 (2) and the two ingredients are separate and distinct requirements and a party seeking to amend the pleadings after the first date of trial should establish the existence of both ingredients.

(3) In the instant action the plaintiff-respondents are clearly guilty of laches. The proposed amended plaint was filed nearly 2 years after the 3rd defendant-petitioner was added as a party.

Per Somawansa. J. (P/CA) :

"Where a defendant is added in terms of section 18, depending on the facts and circumstances of each case the provisions of section 21 only or provisions of section 21 read with section 93 of the Code would apply-in the instant case, certainly in view of the facts and circumstances the provisions of section 93 (2) could also apply".

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia.

Cases referred to :

(1) *Atalugamage Herath Prasanna Silva vs John Arul Rajah* - CALA 41/2001 -DC Colombo 17771/L-CA M.27.06.2002.

(2) *Arudiappam vs The Indian Overseas Bank* - 1995 2 SRI LR 131

(3) *Paramalingam vs Sirisena and Another* - 2001 2 SRI LR 239

(4) *Ceylon Insurance Co. Ltd vs Nanayakkara* - 1993 3 SRI LR 50

Ranjan Suwandaratne with *Ranjan Perera* for 3rd defendant - petitioner
J. D. Kahawithana for plaintiff-respondent.

Cur. adv. vult.

November 25, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking leave to appeal from an order made by the Additional District Judge of Mt. Lavinia dated 14.01.2004 over-ruling the objection taken by the 3rd defendant-petitioner to the acceptance of an amended plaint and accepting the same and if leave is granted to set aside the aforesaid order impugned by the 3rd defendant-petitioner and to refuse the plaintiffs-respondents' belated application to amend the plaint.

As per minute dated 31.08.2004 leave to appeal has been granted on the following question of law :

> "When a defendant is added in terms of section 18 of the Civil Procedure Code what is the provision of the Code which is applicable to the amendment of the plaint? In such a situation is the plaintiff required to satisfy Court of the existence of the conditions laid down in section 93(2) of the Code before he is allowed to amend the plaint or can the plaintiff, without satisfying the conditions laid down in section 93(2), amend the plaint by virtue of the right conferred on him by section 21 of the Code ?

When the appeal was taken up for argument both parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submission. However prior to the consideration of the aforesaid questions of law it would be pertinent to ascertain the relevant facts which culminated in the learned Additional District Judge making the impugned order.

The plaintiffs-respondents instituted the instant action against the 1st defendant-respondent and the deceased 2nd defendant seeking a declaration of title to the subject matter of this action and ejectment of the defendants and those holding under them and for recovery of damages. The defendants in their answer pleaded that their son-in-law Nimalarajah who was subsequently added as the 3rd defendant-petitioner is the lawful tenant of the premises in suit since 1991 and that the 1st defendant-respondent and the deceased 2nd defendant who is the wife of the 1st defendant-respondent are holding under the tenant the 3rd defendant-petitioner as his agent or licensees in the said premises, that in the year 1994 the son-in-law and the daughter left to the United Kingdom

and are resident there and that the 1st defendant-respondent has been duly appointed as the power of Attorney holder of the aforesaid Nimalraj. They further pleaded that the 1st Plaintiff-respondent has agreed with the said Nimalraj to sell the premises in suit as per agreement marked X and the said Agreement and the 1st plaintiff-respondent in violation of the said agreement failed and neglected to transfer the premises in suit and in the premise prayed for a dismissal of the action and also moved to add the aforesaid Nimalraj as a party defendant to the instant action on the basis that he is a necessary party for the full and final adjudication of the dispute.

However Nimalraj was not added as a party and after the commencement of the trial and the recording of issues on an application of the aforesaid Nimalraj he was added as the 3rd defendant to the instant action as per order dated 15.06.2001. It appears that although Nimalraj was added as 3rd defendant the plaintiffs-respondents totally failed to take steps in terms of mandatory provisions contained in section 21 of the Civil Procedure Code. Be that as it may, after the 3rd defendant-petitioner was added as a party he filed answer disclosing matters pertaining to his tenancy and the agreement to sell the property in suit and moved for a dismissal of the plaintiffs-respondents' action and also claimed in reconvention for a declaration that the 3rd defendant-petitioner is the lawful tenant of the premises in suit and is entitled to remain in occupation of the premises in suit and for an order directing the plaintiffs-respondents to pay a sum of Rs. 3.5 million together with legal interests from the year 1995 to the 3rd defendant-petitioner and also claimed the right to retain possession until the payment of the aforesaid amount. Thereafter the plaintiffs-respondents without filing an amended plaint in terms of Section 21 of the Civil Procedure Code proceeded to file a replication on 1st February 2002 and the case was fixed for trial for the first time

thereafter for 4th June, 2002. After three postponements of trial when the case was taken up for trial on the March 2003 certain objections were raised by the counsel for the 3rd defendant-petitioner and counsel for the plaintiffs-respondents obtained a date to consider whether the plaint should be amended. Thereafter on or about 02.04.2004 plaintiffs-respondents sought to amend the plaint. The 3rd defendant-petitioner objected to the application made on behalf of the plaintiffs-respondents to amend the plaint and after the conclusion of the inquiry into these objections taken by the 3rd defendant-petitioner the learned Additional District Judge permitted the amendment of the plaint and it is from this order that the 3rd defendant-petitioner has prefarred this appeal.

It is contended by counsel for the 3rd defendant-petitioner that the order dated 14.01.2004 made by the learned Additional District Judge of Mt. Lavinia is completely erroneous on the face of the mandatory provisions contained in Section 93(2) and Section 21 of the Civil Procedure Code and the order should necessarily be set aside. Further it is argued by counsel for the 3rd defendant-petitioner that the plaintiffs-respondents are guilty of laches and should suffer the consequences of their laches and negligence in prosecuting the instant action and there is no basis to condone such a blatant and apparent laches and to permit the aforesaid extremely belated amended plaint. I would say I am impressed with these matters raised by counsel for the 3rd defendant-petitioner for there is blatant and apparent laches on the part of the plaintiff-respondent in applying to amend the plaint.

At this point, it would be useful to refer to the sections of the Civil Procedure Code which are relevant to the issue at hand.

Section 18(1) "The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name or any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.

(2) Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added the added party or parties shall be named, with the designation "added party" in all pleadings or processes or papers entitled in the action and made after the date of the order".

Section 21 "Where a defendant is added, the plaint shall, unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants".

93(2) "On or after the day first fixed for the trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches".

It is contended by counsel for the plaintiffs-respondents that Sections 18 and 21 are time tested provisions of the Civil Procedure Code on which there is a plentitude of judgments and judicial dicta which have become an important part of our law. What is more important is that Section 21 is a special provision of law, dealing with a particular situation, that is an amendment consequent upon an order for addition under section 18. In every sense, it is a special and particular legislative provision.

Section 93(2) of the Civil Procedure Code, covers amendment to pleadings in general and is clearly a general enactment. The amending Act No. 9 of 1991 which brought in Section 93(2) does not expressly amend either Section 21, which stands as it stood all these years. It cannot be contended that Section 21 has been by implication varied or restricted by the general enactment of 93(2). Thus, he submits that the special provision in Section 21 read with Section 18 cannot be affected or varied or restricted by a general enactment as authoritative statements of the rule *generalia specialibus non derogant.*

In this respect counsel has made reference to quotations from Halsbury 4th Edition Vol. 44 paragraph 875. Caries on Statute Law 7th Edition page 222 also 5th Edition page 349. Maxwell on the Interpretation of Statutes 12th Edition page 196. However in view of the facts and circumstances of this case, I am unable to agree that the aforesaid rules of interpretation would be applicable to the issue at hand for the simple reason that after the 3rd defendant-petitioner was added as a party the plaintiffs-respondents for reasons best known to them without complying with the mandatory requirements in section 21 has opted to file a replication and thereafter proceed to trial.

Counsel for the plaintiffs-respondents further submits that the 3rd defendant-petitioner having secured his addition as a party, ostensibly to enable Court to effectually and completely adjudicate upon and settle all the questions involved in the action, and having made a very substantial counter claim, the 3rd defendant-petitioner is now seeking to undermine the letter and the spirit of Section 18 of the Civil Procedure Code by opposing the amendment of the plaint.

He further submits that if the plaint is not amended the plaintiffs-respondents will not be able to get a binding judgment against the 3rd defendant-petitioner or seek the ejectment of the 3rd defendant-petitioner and recover damages from him. This is exactly what the amendment in the plaint of the plaintiffs-respondents marked "G1" accepted by the original Court has sought to achieve. This relief was particularly important because the other defendants in their answer claim to occupy under the 3rd defendant-petitioner.

However if the amended plaint is not accepted and in the event of the plaintiffs-respondents being successful in the District Court action, they will have to file another action to seek the said relief from the 3rd defendant-petitioner, thereby leading to multiplicity of actions and defeating the very objective of Section 18.

In this respect he refers to the decision of an unreported case of *Atalugamge Herath Prasanna Silva vs. John Arul Rajah*[1] wherein Nanayakkara J. held :

> "Having granted permission to the plaintiff to add the new owner of the property in suit, as a party, can the court prevent the plaintiff from taking the next logical

step of amending the plaint? Once a party is added next inevitable and logical step would be an amended plaint.

Therefore all the argument advanced on the basis of section 93(2) of the Civil Procedure Code would be rendered futile in the circumstances when the facts and circumstances of the case are also examined it becomes evident that the addition of a new owner of the property in suit as a party and also an amendment to the plaint resulting from such addition would be vital to the proper and complete effectual determination of the issue involved in this case."

However the Judge according to the photo copy of that judgment annexed to the written submissions of the plaintiffs-respondents the order for the adding a new party had been made on 18.02.2001 while the order for rejecting the amended plaint is dated 23.01.2001. Facts in that case appears to be misleading.

Be that as it may, in the instant action the facts and circumstances does not warrant the application of any of the rules of interpretations or decisions referred to by counsel for the plaintiffs-respondents for the simple reason that the plaintiffs-respondents had purposely not complied with the mandatory provisions of Section 21 of the Civil Procedure Code but had opted instead to file a replication and proceed to trial. I might also say that the facts and circumstances in the instant action clearly warrants the application of provisions contained in section 93(2) for as already stated by order dated 15.06.2001 the 3rd defendant-petitioner was added as a party defendant. However the plaintiffs-respondents for reasons best known to them did not take steps to comply with the mandatory provisions of Section 21 of the Civil Procedure Code. In November

2001 the 3rd defendant-petitioner filed his answer with a counter claim and on or about 1st February 2002 the plaintiffs-respondents filed replication but did not seek to comply with the provisions of Section 21 of the Civil Procedure Code. Thereafter the trial was fixed for 10.07.2002 and was postponed for 06.11.2002 and again postponed to 05.03.2003. On 05.03.2003 the 3rd defendant-petitioner objected to any issue being raised against him claiming any relief from him. Thereafter counsel for the plaintiffs-respondents had obtained a date to consider whether the plaint should be amended and on 02.04.2003 a proposed amended plaint was filed nearly 2 years after the 3rd defendant-petitioner was added as a party.

On a consideration of facts and circumstances of this case the aforesaid application to amend the plaint was clearly a belated application made after three trial dates and thus provisions of Section 93(2) would become operative and applicable. Undoubtedly the plaintiffs-respondents are guilty of laches in prosecuting this action and the said laches cannot be condoned or excused by any means.

It is to be seen that there are two limbs in Section 93(2) that needs consideration.

(I) The party seeking the amendment should satisfy Court for the reason to be recorded by the Court that a grave and irremediable injustice will be caused if such amendment is not permitted.

(II) The party seeking to amend the pleadings should not be guilty of laches.

These two ingredients are separate and distinct requirements and a party seeking to amend the pleadings after the day first fixed for trial should establish the existence of both these ingredients. Thus in the instant action the plaintiffs-respondents are clearly guilty of laches in prosecuting this action and the plaintiffs-respondents have not up to date given any explanation for the belatedness of this application and there is nothing to indicate that they occurred beyond the control of the plaintiffs-respondents.

For the foregoing reasons, I would hold that the order of the learned Additional District Judge is erroneous and should necessarily be set aside. The plaintiffs-respondents who apparently are guilty of laches should suffer the consequences of these laches and negligence in prosecuting the instant action and there is no basis to condone such blatant and apparent laches and permit the extremely belated amended plaint.

In the case of *Arudiappan vs. Indian Overseas Bank*[2]

> "The amendments contemplated by Section 93(2) are those that are necessitated due to unforeseen circumstances. Laches does not mean deliberate delay, it means delay which cannot be reasonably explained. The plaint was filed in July 1988, the amendment was sought in September 1994. No explanation was forthcoming from the respondent for the delay. Such a delay in seeking amendment of pleadings of the 5th day of trial cannot be countenanced".

In the case of *Paramalingam vs. Sirisena and Another*[3]

Per Wigneswaran, J.(P/CA)

"Indeed in this case injustice may be caused to the plaintiff respondent by the non-allowing of the new amended plaint in that a plea of *res* judicata might be raised in a subsequent action since the added defendant had been named in this case though relief not claimed - but to allow amendments which are necessitated by the carelessness and negligence of the plaintiff-respondent himself or his lawyers would be to perpetrate and perpetuate such careless and negligent behaviour by litigants and their lawyers despite the amendment brought to section 93.

Laches means negligence of unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent.

P was known to claim title to the subject matter, when this case was first filed-not against P but against another-original defendant, despite an amendment no reliefs were claimed against P. Thereafter there had been undue delay in applying for amendment which was done only after issues were framed, and on the second date of trial'"

Ceylon Insurance Co. Ltd., vs. Nanayakkara [4]

"The plaintiff-respondent instituted action against the defendant-petitioner claiming a certain sum due on a contract of insurance. The defendant disclaimed liability.

Trial commenced on 28.07.1995 after recording issues, it was postponed for 16.10.1995. On this date certain objections were taken and when the trial resumed again on 9.1.97 a trial *de novo* was ordered on 13.05.97. On 7.5.97 the plaintiff sought to amend his pleadings, which was allowed by Court.

Weerasuriya, J held that,

1. Section 93(2) prohibits Court from allowing an application for amendment, unless it is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying has not been guilty of laches.

The Court required to record reasons for concluding that both conditions referred to have been satisfied.

2. The application to amend by pleading mistake or inadvertence can in no sense be regarded as necessitated by unforeseen circumstances. The plaintiffs' conduct point to one conclusion, *viz* that they have acted without due diligence, this error could have been discovered with reasonable diligence; the need for the amendment did not arise unexpectedly.

3. The plaintiffs had failed to adduce reasons for the delay of over 3 years for making an application to amend the plaint on the basis of a purported mistake by the defendant.

4. Section 80 of the Civil Procedure Code provides for fixing the date of trial, and such date constitutes the day first fixed for trial. The discretion vested in the Judge either to

continue with t he trial or to commence proceedings afresh does not affect the nature of the order made under section 80 of the Civil Procedure Code relating to the fixing of the first trial date. The order made fixing the date of trial in terms of section 80 becomes the day first fixed for trial within the meaning of section 93(2) of the Civil Procedure Code."

For the foregoing reasons, I would answer the questions of law formulated for determination in the following manner :

"Q. When a defendant is added in terms of Section 18 of the Civil Procedure Code what is the provision of the Civil Procedure Code which is applicable to the amendment of the plaint? Depending on the facts and circumstances of each case provisions of Section 21 only or provisions of Section 21 read with Section 93 of the Civil Procedure Code would apply."

In the instant action certainly in view of the aforesaid facts and circumstances provisions of Section 93(2) would also apply. In the circumstances in considering the aforesaid mandatory provisions of law and the authorities cited above the impugned order of the learned Additional District Judge is per se erroneous in law.

For the foregoing reasons, I would allow the appeal and set aside the order of the learned additional District Judge canvassed in these proceedings and direct the Additional District Judge to proceed to trial on the original plaint filed by the plaintiffs-respondents. The 3rd defendant-petitioner will be entitled to costs of these proceedings fixed at Rs. 10,000/-

WIMALACHANDRA, J. - I agree.

Appeal allowed.

BARR KUMARAKULASINGHE AND OTHERS
VS
OLLEGASEGARAM

AMARATUNGA J.
WIMALACHANDRA J.
CALA NO. 396/2001.
D.C. MT. LAVINIA NO.762/03/RE.
NOVEMBER 2, 2004.

Civil Procedure Code-Sections 214,416-Plaintiff abroad-Security for costs-Judicial discretion - Can such an order be made exparte?

The Plaintiff Petitioner sought to recover a sum of Rs.680,000 as damages and to recover further damages at Rs.20,000 per mensem until the Plaintiffs are restored to possession. The Plaintiffs action was filed through their attorney. After the Defendant's answer and the Plaintiffs replication were filed the Defendant Respondent moved court for an order under Section 416 directing the Plaintiffs to deposit a sum of Rs.10,10,000 as security for costs *exparte*. The Court ordered the Plaintiff to deposit the said sum.

HELD:

(i) Section 46 provides that at any stage of the action, if it appears to court that the Plaintiffs are residing out of Sri Lanka, the Court may in its discretion either of its own motion or on the application of any defendant order the Plaintiff to give security-for the payment of all costs incurred and likely to be incurred ;

(ii) An order calling upon a Plaintiff under sections 416, 417, should be made as a matter of course, and should not be made exparte ;

(iii) The Court in the exercise of its discretion should be satisfied that the aid of either section 416 and 417 is not being oppressively used by the party moving for security ;

(iv) Court has also failed to address its mind to the reasonableness of the amount of security moved by the Defendants.

APPLICATION for leave to Appeal from an Order of the the District Court of Mt. Lavinia.

Cases referred to :-

1. *Alahakoon vs Tampoe* - 2002 3 Sri LR 299
2. *Scott vs Mohamadu* - 19 NLR 219
3. *Samarasinghe v. Atchy*

C. E. De Silva with *Mrs Pushpa Narendran* for Petitioner.

A. R. Surendran with *Arul Selvaratnam* for the Respondent.

Cur.adv. vult.

January 18, 2005.

GAMINI AMARATUNGA, J.

This is an appeal with leave granted by this Court against the order of the learned Additional District Judge of Mt. Lavinia dated 07.10.2004, directing the plaintiff, in terms of section 416 of the Civil Procedure Code, to deposit a sum of Rs.One million and ten thousand as security for costs. The facts relevant to this appeal are as follows :–

The plaintiffs, through their attorney filed action against the defendant to eject the defendant from premises No. 203, Sri Saranankara Road, Kalubowila, to recover a sum of Rs.680,000 as damages and to recover further damages at Rs.20,000 per mensum from 1.11.2003 until the plaintiffs are restored to possession. After the defendant's answer and the plaintiffs replication, the trial was fixed for 15.12.2004. On 13.09.2004, the defendant filed a motion and affidavit seeking an order from court under section 416 of the Civil Procedure Code directing the plaintiffs to deposit a sum of Rupees one million and ten thousand as security for costs. The defendant moves to support his motion on 23.09.2004 and on that date the matter was postponed to 07.10.2004.

On 07.10.2004 an attorney at law made an application on behalf of the plaintiffs registered attorney for a postponement on the registered attorney's personal grounds. The power of attorney holder of the plaintiffs was also not present in court on that day. No order was made

by court with regard to the postponement sought on behalf of the registered attorney for the plainfiffs. Instead the court proceeded to hear the submission of the learned President's Counsel for the defendant in support of the application for an order directing the plaintiffs to furnish security for costs.

The learned President's Counsel submitted that since all of the plaintiffs lived abroad, the defendant had a right to make an application for an order directing the plaintiffs to furnish security for costs. The learned counsel submitted that there was no provision for filing objections to such an application. The learned judge thereupon made order directing the plaintiffs to deposit a sum or Rs. One Million and ten thousand (Rs.10,10,000) in Court one month before the trial date *i.e.* 15.12.2004. This appeal is againt that order.

Section 416 provides that at any stage of the action, if it appears to Court that the plaintiffs are residing outside Sri Lanka, the Court may in its discretion and either of its own motion or on the application of any defendant order the plaintiff to give security for the payment of all costs incurred and likely to be incurred by the defendant.

According to the section itself the Court has a discretion in the matter. The Court has to exercise its discretion judicially. In exercising the discretion vested in Court under section 416, the Court has to take into account several matters. The Court has to consider the validity of the cause of action in the sense whether there is a case to be tried on the pleadings. The Court has also to see whether the proceedings were being protracted by the plaintiff, either wilfully or due to lack of diligence, incurred costs under this section means costs which the court may finally award, regardless of what the party may actually spend. *Alahakone vs Tampoe* [1]. In deciding the amount of security to be deposited the court must have regard to the total costs that can be ordered in an action of that category at the rates prescribed for the purpose of Section 214. The Court also has to bear in mind that if the security ordered by Court is not furnished the Court has the power to dismiss the action. Therefore the Court has to ensure that the provisions of section 416 are not used oppressively to keep the plaintiff out of Court.

An order calling upon a plaintiff under sections 416 and 417 of the Code should not be made as a matter of course. The Court in the exercise of its discretion should be satisfied that the aid of either section is not being oppressively used by the party moving for security. *Scott vs Mohamadu* [2] *Samarasinghe vs. Atchy* [3] and Order to a plaintiff living outside the jurisdiction of Court to give security for costs should not be made ex-parte. *Samarasinghe vs Atchy* (Supra)

In this case the defendant has failed to explain to Court why the defendant wanted the plaintiffs to deposit such an enormous sum when the plaintiffs' action was valued at Rs.700,000 and the defendants counter claim at Rs.400,000.

The learned judge has also failed to address her mind to the reasonableness of the amount of security moved by the defendants. The order of the learned judge does not contain the reasons why the Court ordered the plaintiffs to deposit Rs.10,10,000 as security and the basis upon which the said amount was computed. The learned judge's order does not contain the reasons for the order. There is a total failure to judicially exercise the discretion vested in court under section 416. The learned judge has also failed to consider whether the plaintiffs demand for such an unusually large amount as security is an attempt to use section 416 oppressively. Further the order has been made ex-parte without making any order with regard to the application for postponement made on behalf of the registered attorney for the plaintiffs.

For the foregoing reasons this appeal must be allowed. Accordingly I set aside the order dated 07.10.2004 and direct the learned judge to hear both sides on the defendant's application for security for costs and make an appropriate order upon a proper exercise of the discretion available to Court. The parties shall bear their own costs.

WIMALACHANDRA, J. – I agree.

Appeal allowed.

District Court directed to hear both sides and make an appropriate order.

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 ejectment 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* [1] and *Union Apparel (pvt) Ltd. vs. Director General of Customs* [2] 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."

"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 ealier, 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 submisions, was considered by this Court in *Balasingham and another vs. Puranthiran (A Minor) by his next friend Sivapackiam*[3]. 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.*[4] 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[5] 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*[6] 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. *Jaufer Hassan and others*[7] 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 respondant 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*[9] *Secretary of State for Defence vs. Warn* and this position, as pointed out earlier, has been up held 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.