

BROWN AND CO. LTD. AND OTHERS
v.
RATNAYAKE AND OTHERS

COURT OF APPEAL
S. ANANDA COOMARASWAMY, J.
C.A. APPLICATION 566/85.
OCTOBER 10 AND 11, 1989.

Writ of Certiorari - Industrial dispute - Award of arbitrator - Rules 46 and 50 of the Supreme Court Rules of 1978 - Effect of non-compliance with Rule 46.

The Petitioner when confronted with the objection that Rule 46 had not been complied with stated that documents material to the case have been filed and they would stand on fall by their own exhibits. Subsequently the petitioner sought to refer to the proceedings and certain documents which they tendered to the record without a court order.

Held:

(1) Rule 46 is applicable to writ application also. An application (for writ) under Article 140 and 141 of the Constitution has to be accompanied by a duly certified copy of the

proceedings of the Court of first instance, tribunal or other institution if this copy is material to the case but not otherwise.

(2) The petitioner adduced no reason for non-compliance with Rule 46.

(3) Compliance with Rule 46 is mandatory.

Cases referred to :

- (1) *Ceylon Insurance Co. Ltd. v. Dharmasena and Others* - C.A. No. 1685/79 Minutes of 30.9.81.
- (2) *S.C. Fernando v. N.A. Navaratne and others* - C.A. No. 1401/79 C.A. Minutes of 14.10.84.
- (3) *State Graphite Corporation v. Fernando* - (1981)2 Sri L.R. 401,415.
- (4) *Navaratnasingham v. Arumugam* - (1980)2 Sri L.R. 1
- (5) *Rasheed Ali v. Mohamed Ali* - (1981)2 Sri L.R. 29

APPLICATION for Writ of Certiorari to quash award of arbitrator.

S.J. Kadiragamar, Q.C. with H.L. de Silva, P.C., Desmond Fernando and N.T.S. Kularatne for Petitioners.

Faiz Musthapa, P.C., with Miss. G. Arulpragasam and M. Withanachchi for Respondents.

Cur. adv. vult

October 25, 1989.

ANANDA COOMARASWAMY, J.

This is an application for a Mandate in the nature of a writ of Certiorari to quash the Award made by the 1st Respondent dated 31.1.1985.

A preliminary objection had been taken by the 3rd Respondent that Rule 46 of the Supreme Court Rules 1978 published in Government Gazette No. 09/10 of 08.11.1978 had not been complied with by the petitioners in that the certified copy of the proceedings had not been filed.

By paragraph 15 of the petition the petitioners state that the Award is bad in Law and/or discloses errors of law on the face of the record in that the conclusions drawn from the primary evidence are perverse.

The facts relevant to this application are briefly as follows:-

The Award was made on 13.1.1985 and Gazetted on 15.03.1985. This application to this Court was made on 16.5.1985. The pleadings show that the Petitioner relied only on the exhibits annexed to the petition and

not on the proceedings. (Vide paragraph 15 and 17 of the Petition). This is also evidenced by the fact that no reason is pleaded in the petition as to why the proceedings are not annexed nor does the petition state that the proceedings will be tendered later.

The application was supported on 31.5.1985 and notice issued. Objections were filed on 19.8.1985 and the 3rd Respondent specifically pleaded non-compliance with Rule 46 of the Supreme Court Rules, 1978. The matter was fixed for argument on 20.1.1986.

Despite objections being taken, the Petitioner did not tender the proceedings but fixed a motion dated 13.1.1986 moving that the record of the proceedings be called for.

The matter was not taken up on several dates although fixed for argument.

When the matter came up before this Court on 4.7.1988, objections were taken that Rule 46 had not been complied with. Counsel for the Petitioner stated, "documents material to the case have been filed and they would stand or fail by their own exhibits". In view of this statement, by my judgment dated 27.9.1988 I left this issue open. This would show that from 31.5.1985 to 4.7.1988 no other documents or proceedings have been filed.

The learned Counsel for petitioner is now seeking not only to refer to the proceedings but also to other documents as well. It is now claimed that certain proceedings and documents have been tendered. There is no record whatsoever of such proceedings or documents being either tendered to Court or served on the 3rd Respondent. The petitioner is unable to state as to when these documents were tendered. In any event, proceedings or documents could have been tendered only upon a motion and with permission of Court after notice to the 3rd Respondent in terms of Rule 50 of the Rules of the Supreme Court. This has not been done. Further the material said to have been tendered are uncorrected, uncertified copies.

In the instant case the Petitioner having stated that it was relying only on the original exhibits, and prevented the application being dismissed, cannot resile from that position. By seeking to rely on documents and

proceedings which have not been duly tendered, the Petitioner impliedly admits that the petition as presently constituted cannot be maintained.

The Petitioner however contended that the requirements in Rule 46 for an application for relief to be accompanied by two sets of copies of proceedings in the Court of First Instance, tribunal or other institution, related only to an application by way of revision or restitutio-in-integrum under Article 138 of the Constitution and not to an application under Article 140 where a writ of certiorari was sought as in this case.

According to Rule 46 of the Rules of the Supreme Court, every application to the Court of Appeal under Articles 138, 140 and 141 of the Constitution shall be accompanied by originals of documents material to the case or duly certified copies thereof, in the form of exhibits. Two sets of copies of proceedings in the Court of First Instance, tribunal or other institution had to be annexed to an application under Article 138 of the Constitution. It is therefore clear that an application under Articles 140 and 141 of the Constitution shall be accompanied by a duly certified copy of the proceedings in the Court of First Instance, tribunal or other institution if only this copy is material to the case and not otherwise, but in the case of an application under Article 138 of the Constitution the application shall be accompanied by two sets of copies of proceedings in the Court of First Instance, tribunal or other institution and that too "so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context.

In the case of *Ceylon Insurance Co, Ltd., v. Dharmadasa and Others* (1), the case of *S. C. Fernando v. N. A. Navararne and others* (2) and the case of *State Graphite Corporation v. Fernando* (3) Rule 46 of the Rules of the Supreme Court has been construed as being applicable to writ applications.

In the case of *Navaratnasingam v. Arumugam* (4) *Rasheed Ali v. Mohamed Ali* (5) affirmed by the Supreme Court, Rule 46 has always been construed as mandatory and non-compliance is fatal.

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

For the foregoing reasons the preliminary objection is upheld and the Petitioner's application for a Mandate in the nature of a Writ of Certiorari dated 16.05.1985 is dismissed with costs.

Application dismissed.
