PRIYANI E. SOYSA
v.
RIENZIE ARSECULARATNE

SUPREME COURT
AMERASINGHE, J.,
WIJETUNGA, J. AND
BANDARANAYAKE, J.
S.C. SPL LA APPLICATION NO. 141/98
C.A. APPEAL NO. 173/94 (F)
D.C. *COLOMBO NO. 13035/MR*
MARCH 25, 1999.

Appeal – Non-compliance with Supreme Court Rules, 1990 – Rules 2, 6 and 8 (6) – Discretion of the Court to excuse non-compliance – Criteria relevant to the exercise of discretion.

The Court of Appeal affirmed the judgment of the District Court against the petitioner who had been sued for damages on the ground of medical negligence subject, however, to a difference of opinion between the two Judges in appeal as regards the quantum of damages. On 28. 07. 1998 the petitioner made an application to the Supreme Court for special leave to appeal. The petitioner tendered with the application the requisite notice for service on the plaintiff-respondent. The notice set out the respondent's address as appearing in the caption to the proceedings in the Court of Appeal. He annexed to his application copies of, *inter alia*, judgments of the District Court and of the Court of Appeal; but no copies of the brief in the Court of Appeal or the original Court necessary to verify the allegations of fact in the petition as required by Rule 2 read with Rule 6 were annexed. Nor did the petitioner obtain the leave of Court in terms of the proviso to Rule 2 to tender those documents later. But on 16. 9. 1998 the petitioner filed a motion iin the Supreme Court tendering three copies of the Court of Appeal brief and moved that the same be kept by the Registrar in safe custody and be submitted to the Court when the special leave to appeal application would be supported on 28. 09. 1998.

The notice of the application to the respondent was despatched by the Registrar on 19. 08. 1998 by registered post in terms of Rule 8 (1); the notice had been delivered to the address given therein, namely 51/4, Halpe Road, Kandana. It was not returned and hence deemed to have been received by the respondent. However, by the time the application was filed, the respondent had changed his residence from Kandana to Colombo. Nevertheless, he used to periodically visit

the Kandana address and collect his mail. The respondent collected his mail inclusive of the notice on 13. 09. 1998 and lodged his caveat under Rule 8 (6) on 23. 09. 1998.

When the application came up for hearing the petitioner raised a preliminary objection that the respondent had failed in breach of Rule 8 (6) to file a caveat within fourteen days of the receipt of the notice, hence the objection, of the respondent to the grant of special leave to appeal should not be entertained. The respondent raised a preliminary objection that the petitioner had, in breach of Rule 2 read with Rule 6 failed to annex to the petition the documents which were necessary to verify the allegations of fact in the application which could not be verified with reference to the judgment of the Court of Appeal; hence the special leave application should be disimissed *in limine.*

Held:

1. In the absence of the intimation by the respondent of a change of address the petitioner had no option but to treat the address given in the caption of proceedings last had in connection with the matter as the "present address" of the respondent within the ambit of Rule 4. For the purpose of Rule 8 (6) the date of receipt of the notice is ordinarily the date on which the notice is delivered at such address; and the respondent is deemed to have received such notice on that date.

2. If the respondent has failed to file the caveat within the time specified by Rule 8 (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 with in time.

3. Held further, Amerasinghe, J. dissenting : 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.

Cases referred to:

1. *Rasheed Ali v. Khan Mohamed Ali* (1981) 2 Sri LR 29, 32 (C.A).
2. *Chelliah v. Ponnambalam* (1986) Sriskantha's Law Reports vol. IV 61, 64.
3. *Caldera v. John Keells Holdings Ltd.* (1986) Colombo Appellate Law Reports vol. I 575, 585.
4. *Gangodagedera v. Mercantile Credit Ltd.* (1988) 2 Sri LR 253, 257-258 (CA).
5. *Leelananda v. Mercantile Credit Ltd.* (1988) 2 Sri LR 417, 419 (CA).
6. *Paramanathan v. Kodituwakkuarachchi* (1988) 1 Sri LR 315, 337 (CA).
7. *Brown & Co., Ltd. v. Ratnayake* (1990) 1 Sri LR 92, 95-96 (CA).
8. *Ibrahim v. Nadaraja,* (1991) 1 Sri LR 131 (SC).
9. *Kiriwanthe and Another v. Navaratne and Another* (1990) 2 Sri LR 393.
10. *Rasheed Ali v. Khan Mohamed Ali* (1981) 1 Sri LR 262 (SC).
11. *Collins v. Blantern* 2 Wils KB 341.
12. *Master v. Miller* 4 TR 320, 344.
13. *R. v. Wilks 4 Burr* 2527, 2539.
14. *Duport Steels Ltd. v. Sirs* (1980) ICR 161, 189.
15. *Alice Kotelawala v. W. H. Perera and Another* (1937) 1 CLJ 58; VII CLW 61.
16. *Rasiah v. Sittamparapillai* (1920) VII CWR 116.
17. *Mary Nona v. Fransina* (1988) 2 Sri LR 250.
18. *Karunawathi v. Kusumaseeli* (1990) 1 Sri LR 127.
19. *Fernando v. Sybil Fernando* (1997) 3 Sri LR 1.
20. *Read v. Samusudin* (1895) 1 NLR 292, 294.
21. *Velupillai v. Chairman UDC* (1936) 29 NLR 464, 465.
22. *Dulfa Umma et al v. UDC Matale* (1939) 40 NLR 474, 478.
23. *All Ceylon Match Workers' Union v. Jauffer Hassan and Others* (1990) 2 Sri LR 420.
24. *Jayasuriya v. Sri Lanka State Plantations Corporation* (1995) 2 Sri LR 379.
25. *Piyadasa and Others v. Land Reform Commission* SC Appeal No. 30/97 SC Minutes 8 July, 1998.

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

H. L. de Silva, PC with *R. K. W. Goonesekera,* E. D. *Wickremanayake, S. C. Crossette Tambiah, Hugo Anthony* and *Aravinda Athurupana* for the petitioner.

Romesh de Silva, PC with *Palitha Kumarasinghe, Harsha Amarasekera* and *Hiran de Alwis* for the respondent.

Cur. adv. vult.

May 4, 1999.

AMERASINGHE, J.

The Background

Two Judges of the Court of Appeal delivered their separate judgments affirming the judgment of the District Court on the questions of the appellant's alleged professional negligence and liability to pay damages. One of the Judges of the Court of Appeal upheld the award of Rs. 5,000,000 made by the District Court on the 17th of January, 1994. The other judge held that the respondent was only entitled to a sum of Rs. 250,000. I am not in the matter before me concerned with of the correctness or otherwise of the views of the learned Judges of the Court of Appeal on the questions of liability or quantum. When the learned Judges of the Court of Appeal delivered their judgments on the 24th of June, 1998, learned counsel for the respondent stated that his client would accept the sum of Rs. 250,000 but reserved his right to claim the sum of Rs. 5,000,000 in the event of his case being reviewed by the Supreme Court. The two Judges of the Court of Appeal made order for judgment in the sum of Rs. 250,000.

Being aggrieved by the judgments of the learned Judges of the Court of Appeal, the respondent in the Court of Appeal, sought, and was granted, permission to formulate the questions of law for an appeal to the Supreme Court. The questions were tendered to the Court of Appeal with a Motion, but on the date fixed for support, the two Judges who had delivered the judgments sought to be set aside in appeal, were not available. The learned Judge before whom the matter came up referred the matter to a Bench comprising the President of the Court of Appeal and another Judge of that Court for consideration on a day that happened to be the last date permitted by the Rules for obtaining leave from the Court of Appeal. On that day, learned counsel for the plaintiff-respondent stated that he was opposing the application for leave to appeal. Learned counsel for the defendant-appellant informed Court that, as one of the two Judges of the Court of Appeal who had delivered judgment had since been elevated to the Supreme Court and the other was out of the country,

he was withdrawing his application to the Court of Appeal for leave to appeal and that he would, instead, make an application to the Supreme Court for Special Leave to Appeal. In the circumstances, the Court of Appeal made no order on the matter of an appeal to the Supreme Court.

On the 28th of July, 1998, a petition of appeal was filed in the Supreme Court, stating that the petitioner was aggrieved with the finding of professional negligence by the Court of Appeal. The grounds for that averment were set out in paragraph 12 (*a*) – (*h*) – (1) – (25) of the petition of appeal.

The application came up before this Court on various dates without a consideration of the issues before us. However, on the 12th of February, 1999, learned counsel for the respondent stated that he wished to take a preliminary objection on the basis of which, he submitted, the petition of appeal should be rejected *in limine*. Learned counsel for the petitioner submitted that the respondent had failed to comply with the provisions of rule 8 (6) of the Supreme Court Rules and that therefore he could not be heard. In any event, learned counsel for the petitioner further submitted, the objections of the respondent should be made available to him so that he might have an opportunity of considering them and responding to them.

On the 19th of February, 1999, learned counsel for the respondent, on the directions of the Court, lodged (1) a document setting out the preliminary objection of the respondent; and (2) an affidavit and other documents in answer to the petitioner's objection that the respondent had failed to comply with Rule 8 (6) of the Rules of the Supreme Court.

On the 25th of March, 1999, the Court had the benefit of a very full argument on the matters that had been raised by learned counsel.

The objection of the petitioner

Mr. H. L. De Silva, PC., submitted that in terms of Rule 8 of the Supreme Court Rules, 1990 (published in the *Gazette* of Sri Lanka,

No. 665/32 of June 07, 1991) upon an application for special leave to appeal being lodged in the Registry of the Supreme Court, the Registrar shall forthwith give notice, by registered post, of such application to each of the respondents : Rule 8 (1). Such notice shall be despatched within five working days after the application has been lodged, and shall specify, the date of the hearing of the application; and state "that the respondent, if he intends to oppose the grant of special leave to appeal shall lodge, within fourteen days of the receipt of such notice a Caveat indicating such intention:" Rule 8 (2). Rule 8 (6) states : *"The respondent shall, within fourteen days of the receipt of such notice, enter an appearance in the Registry of the Supreme Court, and if he intends to oppose the grant of special leave to appeal shall lodge a Caveat indicating such intention."* (The emphasis is mine).

The petition of appeal applying, *inter alia,* for special leave to appeal, was lodged in the Registry of the Supreme Court on the 28th of July, 1998. The notice to the respondent was despatched on the 19th of August, 1998, by Registered Post; and the notice had been delivered to the place to which the notice was addressed, namely 51/4, Halpe Road, Kandana, on the 21st of August, 1998. The notice was not returned, and it must, Mr. H. L. de Silva said, be "deemed" to have been received by the respondent. The respondent's Caveat was lodged on the 23rd of September, 1998. Learned counsel for the petitioner submitted that the respondent ought, in terms of Rule 8 (6), to have, within fourteen days of the receipt of the notice, entered an appearance in the Registry of the Supreme Court, and if he intended to oppose the grant of special leave he was required to lodge a Caveat indicating such intention : That was a mandatory requirement. It was obligatory in consequence of Rule 8 (6).

In the circumstances, Mr. H. L. De Silva, PC learned counsel for the petitioner, submitted, the objections of the respondent to the grant of special leave to appeal ought not to be entertained by this Court.

Mr. Romesh De Silva, PC learned counsel for the respondent, submitted that the objection of the respondent to the grant of special leave ought to be heard by the Court, for the respondent had in fact complied with the requirements of Rule 8. That rule, he said, requires

that a respondent who intends to oppose the grant of special leave to appeal shall lodge a Caveat indicating such intention within fourteen days of the *receipt* of such notice. The respondent received notice on the 13th of September, 1998, and filed his Caveat on the 23rd of September, 1998, and therefore, within the period of fourteen days within which he was required to lodge his Caveat.

The fact of "receipt" referred to in Rule 8 (6) in my view ought to be ascertained by reference to the circumstances of each case.

I find myself in agreement with Mr. H. L. De Silva's submission that the proved delivery of a Registered document at the address of a party should ordinarily result in such party being deemed to have received such document. However, such an assumption is, in my view permissible only if the address was the address of that person. The address to which the notice was sent in this case was the *former* address of respondent. At the time of the filing of the action in the District Court of Colombo and at the time of the institution of the appeal in the Court of Appeal, the address of the respondent was 51/4, Halpe Road, Kandana. By the time of the filing of the petition of appeal in the Supreme Court, however, the respondent had changed his residence to 87, St. Joseph's Street, Grandpass, Colombo 14. The respondent, together with his affidavit, filed ten documents supporting his assertion that it was a well-known fact that his address was 87, St. Joseph's Street, Grandpass, Colombo 14. However, even today the caption has not been amended to reflect the fact that the respondent's address is not 51/4, Halpe Road, Kandana, but 87, St. Joseph's Street, Grandpass, Colombo 14. Rule 4 requires that in every application for special leave to appeal to the Supreme Court there shall be set out in full "the names and *present* addresses" of all the respondents. (The emphasis is mine). An application for special leave to appeal to the Supreme Court marks the commencement of an entirely new stage in a proceeding when the mechanical repetition of vital information, such as the address of the respondent, relating to an earlier stage of the proceeding will not suffice. It was, in my view, incumbent on the petitioner to have furnished the address of the respondent as at the date of the filing of the application for

special leave. It is not without significance that the earlier Rules of 1978 in Rule 20 merely required "the full address" of respondents.

In the matter before me, although the address furnished was not the *present* address of the respondent, it was an address at which he happened to collect mail, albeit not immediately on a daily basis.

The notice in this matter had been sent to the respondent's earlier place of residence, which was at the time the notice was despatched occupied by his mother-in-law and her brother, whom the respondent visited from time to time. Hence, his mail was received and kept for him. The respondent in an affidavit satisfactorily explains why he came to visit his former place of residence only on the 13th of September and not earlier, and then collected mail lying at that address. I have no hesitation in accepting the averment in the respondent's affidavit dated the 17th of February, 1999, that he "collected all correspondence addressed to [him] inclusive of the notice" on the 13th of September. He filed his Caveat on the 23rd of September. The date of receipt of the notice was the 13th of September.

I, therefore, hold that the respondent filed his Caveat within 14 days of the receipt thereof, and therefore within the time specified by Rule 8 (6) and should, therefore, be heard.

Learned counsel's submissions for the respondent were, therefore, heard.

The Objection of the Respondent

Mr. Romesh De Silva, PC., submitted that in terms of Rule 2 read with Rule 6 of the Rules of the Supreme Court, the application for special leave should be dismissed *in limine*, for the petitioner had failed to annex documents to the application for special leave to appeal to the Supreme Court, especially the record of the original Court and/ or the Brief in the Court of Appeal, which were necessary to verify the allegations of fact in the application which could not be verified by reference to the judgments of the learned Judges of the Court of Appeal in respect of which special leave was sought.

Mr. H. L. De Silva, PC., did not deny that the allegations of fact contained in the application for special leave to appeal could not be verified by reference to the judgments of the Court of Appeal in respect of which special leave to appeal was sought but, he submitted, that if a petitioner, as the petitioner in this case had done, annexed an affidavit in support of allegations of fact which could not be verified by reference to the judgment of the Court of Appeal, then other documents need not have been annexed, for Rule 6 provides as follows : "Where any [application for special leave to appeal to the Supreme Court] contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or [emphasis added] other relevant document (including any relevant portion of the record of the Court of Appeal or of the original Court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to; provided that statements of such declarant's belief may also be admitted, if reasonable grounds be set forth in such affidavit." Mr. De Silva stressed the word "or" which he submitted should be read disjunctively.

The documents submitted with the petition were the following: (1) A copy of the Plaint; (2) A copy of the Answer; (3) a copy of the judgment of the District Court; (4) A copy of the defendant's petition of appeal to the Court of Appeal; (5) A copy of the judgment of the Hon. Mr. Justice Weerasekera of the Court of Appeal; (6) A copy of the judgment of the Hon. Mr. Justice Wigneswaran of the Court of Appeal; (7) A copy of the order made on 24 June, 1998 by Justices Weerasekera and Wigneswaran; (8) A copy of the motion and questions of law submitted to the Court of Appeal; and (9) A copy of the order made by Mr. Justice Ismail and Mr. Justice Weerasooriya on the 13th of July, 1998. Those documents, in my view, do not enable the Supreme Court to verify the questions of fact canvassed in the application for special leave to appeal to the Supreme Court. Nor is the affidavit of the petitioner helpful in that regard. The affidavit merely states as follows:

"1. I am the deponent abovenamed and the defendant-appellant-petitioner in the above captioned application to the Supreme Court.

2. I have perused the petition for Special Leave to Appeal to the Supreme Court from the two judgments of the Court of Appeal delivered on 24th June, 1998, in CA Appeal No. 173/94 (F).

3. The said petition was prepared by my counsel on my instructions and I declare and swear to the truth of the facts contained therein."

The Court cannot accept the matters stated in the petition to be true merely because the petitioner believes them to be the truth; the allegations in paragraph 12 of the petition are to be verified by reference to the facts established by the evidence.

Admittedly, in terms of the proviso to Rule 2, if the petitioner was unable to obtain any documents at the time of tendering her petition, she would have been excused so doing, for the law does not expect petitioners to do what is not possible. Cf. *Rasheed Ali v. Mohammed*[1] *per* Soza, J. She might have been "deemed" to have complied with the rule *if* the petitioner had set out the circumstances in the petition and prayed for permission to tender the document together with the requisite number of copies, as soon as she obtained the same, *and* if the Court was satisfied (*a*) that the petitioner had exercised due diligence attempting to obtain such documents; *and* (*b*) that the failure to tender the same was due to circumstances beyond her control. However, in this case the petitioner did not in her application for special leave set out circumstances why she was unable to tender the relevant documents with such application; nor was the permission of the Court sought and obtained to file the documents subsequently.

What the petitioner did instead was this : on the 16th of September, 1998, through her registered attorneys-at-law, she filed what purported to be a Motion in the Supreme Court tendering three copies of the Brief (vols. 1 – III) in CA Appeal No. 173/94 (F) and moving "that

the same be kept by the Registrar of Your Lordships Court in safe custody and

(*a*) submitted to Their Lordships who will hear the above Special Leave to Appeal Application which is to be supported on the 28th September, 1998, by Mr. H. L. De Silva, PC., on behalf of the defendant-appellant-petitioner;

(*b*) thereafter, submitted to Their Lordships who will hear the appeal in the event of Special Leave to Appeal being granted."

As pointed out earlier, no explanation for the failure to tender the documents in time was ever made and no permission of the Court was ever sought or obtained to tender the documents after the application for special leave had been made. In fact, the document is not addressed to His Lordship the Chief Justice and the other Honourable Judges of the Supreme Court. It is in my view, no more than a memorandum addressed presumably to the Registry with regard to the safe custody of the documents and a request that such documents be submitted to the Judges when the matter of special leave was taken up, and if leave was granted, at the hearing. The Court may in its discretion in an appropriate case permit the tender of documents after the making of an application for special leave (rule 2 proviso) but this may be done upon an application to Court with notice to the other party and with an order of Court granting permission to do so. (Cf. *Chelliah v. Ponnambalam*[2] per Bandaranayake, J. with Wijetunga, J. agreeing). Where a petitioner fails to tender a necessary document either with the application or with the leave of Court subsequently the application is liable to be rejected. Cf. *Rasheed Ali v. Khan Mohamed Ali* (*supra*) followed in *Caldera v. John Keells Holdings Ltd.*[3], (1986) per Jameel, J., Siva Selliah, J. agreeing. Moreover, documents annexed to a petition, or tendered later with the permission of the Court, must according to Rule 2 be four in number and not three as tendered by the petitioner. Where there has been a non-compliance with rules and there is no acceptable explanation for non-compliance and the default has not been cured, in general the application would be rejected. Cf. per Wijetunga, J. citing Maxwell on the Interpretation of Statutes, 11th ed. (1962)

p. 367 in *Gangodagedara v. Mercantile Credit Ltd*[4] *Leelanada v. Mercantile Credit Ltd.* [5] (per Anandacoomaraswamy, J. with Wijetunga, J. agreeing); *Paramanathan v. Kodituwakkuarachchi*[6] (1988) (per Bandaranayake J. with S. N. Silva, J. agreeing); *Brown & Co., Ltd. v. Ratnayake*[7] (per Anandacoomaraswamy, J.); Cf. also *Ibrahim v. Nadaraja*[8] per Amerasinghe, J., (Dheeraratne and Gunawardana, JJ. agreeing).

Mr. H. L. de Silva, PC., referred to the judgment of Fernando, J. (Dheeraratne, J. agreeing) in *Kiriwanthe and another v. Navaratne and another*[9]. After comprehensively reviewing the decisions on the subject of the failure to comply with the Rules of the Court, Fernando, J. at p. 401 said: "I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute compliance is not essential; it is sufficient if there is compliance which is "substantial" – this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied, as in the case now before us; the *Court should first have determined whether the default had been satisfactorily explained, or cured subsequently* without unreasonable delay, *and then* have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction; dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the rules and not as a means of punishing the defaulter." (The emphasis is mine). Later, at p. 404, Fernando, J. said : "The weight of authority thus favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility *or for any other reason*) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, *as well as the excuse or explanation therefor,* in the context of the object of the particular rule." (The emphasis is mine).

In *Kiriwanthe* the relevant document, after it had been obtained, was (1) tendered with the leave of Court, (2) with an acceptable explanation, and (3) within a time the Court regarded as not justifying the dismissal of the application. In the matter before me, however,

no explanation for non-compliance has been offered. Nor has the default been cured in terms of the proviso to Rule 2, for the documents were not tendered with an explanation for the failure to tender them with the petition and with a prayer for permission to tender them. Nor was there a favourable decision of the Court obtained with regard to that matter. If the non-compliance is to be excused, what is the "sanction" to be imposed?

It was not the petitioner's case that the documents should be "deemed" to have been tendered in time. Indeed the petitioner's submission was that the briefs containing the evidence were unnecessary and that her affidavit was a sufficient compliance with Rule 2 read with Rule 6. That was an erroneous view, having regard to the words of Rule 2 read with Rule 6. No discretion can be allowed to a petitioner to decide what are the necessary documents to be tendered with an application for special leave to appeal: *Rasheed Ali v. Khan Mohamed Ali,*[10] followed in *Caldera v. John Keells Holdings* (*supra*). The Court has a discretion as to what it may do if rules are not complied with, as Fernando, J. observed in *Kiriwanthe* (*supra*).

Aristotle (Rhetoric, 1.1) said: "It is best, as we may observe, where the laws are enacted upon right principles, that everything should, as far as possible, be determined absolutely by the laws, and as little as possible left to the discretion of judges." However, necessarily many things, especially in the domain of procedure are left to the discretion of judges; but the maxim is also observed in our jurisprudence, *optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi* – that system of law is the best which leaves least to the discretion of the judge; that judge the best who relies least on his or her own opinion: See per Wilmot, CJ. in *Collins v. Blantern,*[11]; per Buller, J. in *Master* v. *Miller,*[12]. And although where discretion is left to a judge, he or she is to a great extent left unfettered in its exercise, Coke's definition (4 *Institutes* 41) – *discretio est discernere per legem quit sit justum* – still holds good. Lord Mansfield in *R. v. Wilkes,*[13] said: " . . . discretion, when applied to a Court

of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular". Lord Scarman in *Duport Steels Ltd.* v. *Sirs*,[14] said: "When one is considering the law in the hands of judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of discretionary power granted to judges; but in developed societies limits are invariably set beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree." "Justice must be done according to law": *Per* Maartensz, J. (Abrahams, CJ. agreeing) in *Alice Kotelawala v. W. H. Perera and another*[15]. The law must be followed "punctiliously": per Bertram, CJ. in *Rasiah v. Sittamparapillai*[16]. The observance of the law minimizes arbitrariness and the appearance of arbitrariness, and also makes the law certain and predictable. These are essential features of a good legal system.

The law regulating the way in which the Court could exercise its discretion in favour of a petitioner who is unable to lodge a required document is set out in the proviso to Rule 2. Ordinarily a petitioner must tender the necessary documents with his petition. He is nevertheless "deemed" to have complied with the rules, "If the court is satisfied that the petitioner had exercised due diligence in attempting to obtain such . . . document . . . and that the failure to tender the same was due to circumstances beyond his control, *but not otherwise* . . ." (The emphasis is mine). In order to enable the Court to be satisfied that a petitioner was "unable to obtain any . . . document . . . as is required by the rule to be tendered with his petition the petitioner "shall set out the circumstances in his petition, and *shall* pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same." (The emphasis is mine).

In the matter before us, there is nothing either in the petition or any other document stating that the petitioner was unable to tender the document with the petition; nor is there a statement of cirumstances why the document could not be duly tendered: There was not a word

of explanation for the inability to tender the documents with the petition offered by learned counsel for the petitioner nor has permission been sought to tender them. In the cirumstances, how could the Court satisfy itself that the petitioner had exercised due diligence to obtain the document and that her failure to tender the document with the petition was due to circumstances beyond her control – the only grounds upon which the Court being, satisfied, the late tender of a document could in law be "deemed" to have been submitted with the petition in accordance with Rule 2?

The petitioner was obliged by Rule 2 read with Rule 6 to submit material to enable the Court to review the alleged erroneous conclusions of the Court of Appeal based on the misinterpretation or misunderstanding or inadequate consideration of the facts by the learned Judges of the Court of Appeal. In order to be able to do so, it was necessary to verify the facts established by the evidence. Where the Court is unable to review a judgment in respect of which an appeal is made because of the absence of relevant material for that purpose, the discretion of the Court should in my view be exercised by rejecting the application for special leave to appeal: *Mary Nona v. Fransina*[17] and *Karunawathi v. Kusumaseeli*[18] . The rejection of the application is not by way of a punishment but is the necessary consequence of the failure of the petitioner to place the Court in a position, by the submission of relevant documents, to be able to decide whether, having regard to the evidence, the case is fit for review. Admittedly, some copies of the relevant documents had been sent to the Registrar and were placed before the Court but, for the reasons explained, they cannot be documents deemed to have been admitted in compliance with the rules and, therefore they are not documents which I can take in judicial cognizance of having regard to the provisions of Rule 2 read with Rule 6.

The objection, in my view, is based on the breach of a rule, which, having regard to its purpose, is of a substantial nature and not a mere technicality. Having regard to the words of the proviso to rule 2, I am permitted by law to deem the document to have been tendered with the petition, and therefore hold that there was compliance with the rule in the circumstances set out in the proviso "but not otherwise". Accordingly, other considerations, such as the fact that the question

to be decided is of public or general importance, are not relevant to the threshold question whether there is a properly constituted petition which may be entertained. In terms of Article 128 (2), the Court would be bound to grant leave to appeal if it is satisfied that the question to be decided is of public or general importance. But that is a matter to be determined at the stage when, after a petition has been accepted, the application made in it for leave to appeal comes up for consideration. To consider the question of public or general importance at the stage when it has to be decided whether there is a properly constituted petition before this court slides two stages into each other, driving us to lose sight of the issue before the Court at this time. In my view, to avoid an inaccurate decision from a confusion of matters for decision, I ought to proceed step by step and not telescope the various stages of the proceedings in the case. In any event, the rules do not say that where a matter is of general or public importance the rules need not be observed nor that the Court may, notwithstanding the provisions of Rule 2, have recourse to necessary documents that have not been filed with a petition that was, understandably, not the petitioner's case.

There remains the question of "justice" and the need to avoid technicalities. In *Fernando v. Sybil Fernando*[19] I had, at some length, endeavoured to explain the importance of complying with procedural laws and in doing so considered the observations of Bonser, CJ. in *Read v. Samsudin*[20] and of Abrahams, CJ. in the cases of *Velupillai v. Chairman UDC*[21]; and *Dulfa Umma et al. v. UDC Matale*[22]. I confirm my earlier observations, for there was nothing learned counsel said in the matter before me to the contrary. However, in order to dispel any lingering apprehension in that regard, I do wish to reiterate the assurance that judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities; although litigants on the road to justice may act recklessly, or negligently or inadvertently and do themselves harm.

Having regard to the allusive reference to civil procedure as an indispensable vehicle for the attainment of justice, perhaps we ought to remind ourselves that procedural law has a protective character and represents the orderly, regular and public functioning of the legal

machinery and the operation of the process of the law. Procedural law is important, for, among other reasons, it has the salutary effect of safeguarding the rights, privileges and legitimate interests of both plaintiffs and defendants, appellants or petitioners and respondents even-handedly : The protective character of rules of procedure helps ensure that one person's justice is not another's injustice. Notions of abstract justice are alluring, but, in my view they tend to obscure the way to an accurate decision according to law.

For the reasons stated in my judgment, I hold that the preliminary objection of the respondent is entitled to succeed and I, therefore, reject the application for special leave to appeal with costs.

WIJETUNGA, J.

I have had the advantage of reading in draft the judgment of my brother Amerasinghe, J. in respect of preliminary objections taken by the defendant-appellant-petitioner ('petitioner') and the plaintiff-respondent-respondent ('respondent') respectively. I regret very much that I am unable to agree with him that the preliminary objection of the respondent is entitled to succeed and that the application for special leave to appeal should therefore be rejected.

I shall first deal with the objection of the petitioner. Learned counsel for the petitioner submitted that in terms of Rule 8 (6), the respondent should have entered an appearance at the registry of this Court within 14 days of the receipt of notice and if he intended to oppose the grant of special leave to appeal, he should have lodged a Caveat indicating such intention. As the notice had been delivered at the address mentioned therein on 21.8.98, and as the respondent's Caveat had been lodged only on 23.9.98, it was submitted that there was non-compliance with Rule 8 (6), which is mandatory; and that the objections of the respondent to the grant of special leave to appeal should not therefore be entertained by this Court.

Learned counsel for the respondent, on the other hand, submitted that the respondent had in fact complied with the requirements of Rule 8, as he had received the notice only on 13.9.98 and had filed his Caveat on 23.9.98, within the specified period of 14 days.

I agree with learned counsel for the petitioner that on proof of delivery of a registered document at the address of a party, such party is 'deemed' to have received such document. However, if there is material which shows that a respondent was in fact not resident at that address on the date of receipt of such document and submits an explanation to Court which it is prepared to accept, then the Court may exercise its discretion and regard such date of 'actual' receipt of notice as the relevant date for the purpose of compliance with the Rule.

It is correct that Rule 4 of the present Rules requires the *present addresses* of the respondents to be set out in full, whereas Rule 20 of the former Rules of 1978 required the *addresses* of the respondents to be set out in full. I do not think, however, that the present Rule meant to impose an undue burden on a petitioner to ascertain such *present address.* It is inconceivable that a party has to speculate on what the present address of an adverse party is or that he has to 'go on a voyage of discovery' to ascertain such present address. To my mind, the *present address* contemplated by Rule 4 is an address of which due notice had been given by a respondent to the petitioner, upon changing his former address. If it were otherwise, the petitioner would be placed in peril, as a notice which is directed to an address other than the address in the caption could be challenged by a respondent, on the ground that his present address is the same as the address in the caption.

In the matter before us, the respondent had ample notice of the fact that the petitioner intended to make an application to this Court for special leave to appeal – vide the proceedings before the Court of Appeal on 13.7.98 (A9). In those circumstances, it was at the least *prudent* for the respondent to have notified any change of address to the petitioner. But, I think the matter goes even further. Rule 8 (3) requires a petitioner to forthwith notify the Registrar of any change in the particulars relating, *inter alia,* to the names and addresses of parties, for the purpose of issuing notice. To enable the petitioner to comply with this requirement, he should in turn have due notice of any change of address on the part of the respondents.

While I agree with my brother that "an application for special leave to appeal to the Supreme Court marks the commencement of an entirely new stage in a proceeding when the mechanical repetition of vital information, such as the address of the respondent, relating to an earlier stage of the proceeding will not suffice", I am equally of the view that, in the absence of due intimation by the respondent of a change of address, the petitioner has no option but to treat the address given in the caption in the proceedings last had in connection with the matter (viz. in the Court of Appeal in the instant case) as the *present address* of the respondent.

Though the respondent has filed ten documents together with his affidavit, in answer to the preliminary objection, seeking to support his assertion that his present address was "well-known", it does not follow that it was even *known* to the petitioner. The respondent's change of address may have been "well-known" in the circles to which he belongs, but one cannot presume it to be so where the adverse party is concerned.

Rule 8 (5) indicates the duty cast on a petitioner in this regard. It provides that "the petitioner shall, not less than two weeks and not more than three weeks after the application has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered. the petitioner shall furnish the correct address for the service of notice on such respondent. The Registrar shall thereupon despatch a fresh notice by registered post . . .". The notice in this case had admittedly not been returned undelivered. I see no further duty imposed on the petitioner by the rules.

Therefore, I do not think that the petitioner can be faulted for not having despatched the notices to an address which is now stated to be the "present address" of the respondent.

On the other hand, the respondent had, on his own admission, not totally severed connections with his earlier place of resisdence,

which at the relevant time was occupied by his mother-in-law and her brother, whom he visited from time to time. He collected his mail on such occasions. But, that arrangement has been proved to be quite inadequate.

By his affidavit dated 17.2.99, the respondent has sought to set out the circumstances in which he came to lodge his Caveat on 23.9.98. He states that he "collected all correspondence addressed to [him], inclusive of the notice" on 13.9.98. Solely on the basis of the averments in the respondent's affidavit aforementioned, I am prepared to accept his position that the notice was *in fact* received by him only on 13.9.98. I would, however, reiterate that for the purpose of Rule 8 (6), the date of receipt of such notice is ordinarily the date on which the notice is delivered at the address of the respondent and he is deemed to have received such notice on that date. But, in all the circumstances of this case, I would agree with the liberal view taken by my brother. Amerasinghe, J. in regard to the Caveat being filed "within time".

That brings me to the preliminary objection raised by the respondent. That objection relates to non-compliance by the petitioner with Rule 2 read with Rule 6 of the present Rules. Learned counsel for the respondent submitted that the application for special leave should be dismissed *in limine* as the petitioner had failed to annex the documents which were necessary to verify the allegations of fact in the application, which could not be verified by reference to the judgment of the Court of Appeal.

Learned counsel for the petitioner, on the other hand, submitted that as the petitioner has annexed an affidavit in support of the allegations of fact which could not be verified by reference to the judgment of the Court of Appeal, other documents need not be annexed. As Rule 6 provides that the petitioner shall annex in support of such allegations an affidavit or other relevant document, he submitted that the word "or" should be read disjunctively.

Admittedly, the petitioner has filed an affidavit, the contents of which have been reproduced in the judgment of my brother Amerasinghe, J. The other documents submitted with the petition too have been referred to in his judgment. He, however, comments that "those documents, in [his] view, do not enable the Supreme Court to verify the questions of fact canvassed in the application for special leave to appeal to the Supreme Court. Nor is the affidavit of the petitioner helpful in that regard". He further observes that "the Court cannot accept the matters stated in the petition to be true merely because the petitioner believes them to be the truth . . .".

While I agree that the truth of the matters stated in the petition cannot be accepted by the Court merely on the basis of the petitioner's belief, I wish to point out that the Rules provide a further safeguard in Rule 8 (7), which is as follows :

> "Not less than twenty-one days before the date specified in the aforesaid notice as the date of hearing of the application, any respondent may lodge (with notice to the petitioner and other respondents) a statement, together with three additional copies thereof, setting out his objections to the grant of special leave to appeal or controverting the allegations of fact set out in the petition; where such statement contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, affidavits and other relevant documents shall be annexed in support, and the provisions of Rule 6 shall apply *mutatis mutandis.*"

Thus, a respondent who seeks to controvert the allegations of fact set out in the petition can do so before the hearing, and even submit other relevant documents in support, where necessary. Read with section 6, 'other relevant documents' include any relevant portion of the record of the Court of Appeal or of the original court.

The Court, at the stage of hearing the application for special leave to appeal, would therefore be in possession not only of the petitioner's

version in regard to the facts, but also of such other material as would have been furnished by the respondent.

In regard to the purpose of the affidavit contemplated by Rule 6 of the present Rules, it is useful to look at the corresponding Rule 6 of the Rules of 1978, pertaining to applications for special leave to appeal, as such comparison makes the purpose clear.

That Rule states that "an application for special leave to appeal containing allegations of fact which cannot be verified by reference to any certificate or duly authenticated statement of the Court from the judgment of which the application for leave to appeal is preferred shall be supported by affidavit. Where the applicant prosecutes his application in person, the said affidavit shall be sworn by the applicant himself and shall state that, to the best of the deponent's knowledge, information and belief, the allegations contained in the application are true. Where the applicant is represented by an agent the said affidavit is sworn by such agent, it shall, besides stating that, to the best of the deponent's knowledge, information and belief, the allegations contained in the application are true, show how the deponent obtained his instructions and the information enabling him to present the application".

The purpose of the affidavit required by Rule 6, in my view, is to ensure that the petitioner deposes to the truth of the facts contained in the petition for special leave. That objective could be achieved either by repeating every averment in the petition for special leave to appeal as an averment in the affidavit, or, as in this case, by making a blanket declaration of the truth of the facts set out in the petition.

As rightly observed by Amerasinghe, J. the petitioner has not set out in her application for special leave "circumstances why she was unable to tender the relevant documents with such application; nor was the permission of the Court sought and obtained to file the documents subsequently". Instead, the petitioner has tendered to Court on 16.9.98 three certified copies of the Brief (volumes I to III)

in the Court of Appeal for submission to the Judges who would hear the special leave to appeal application and in the event of special leave to appeal being granted, to the Judges who would hear the appeal. This procedure is not in compliance with the proviso to Rule 2.

The anxiety of the petitioner that the Registrar of this Court would keep these documents in safe custody is, however, understandable, as the Cash Receipts marked Y1 and Y2 show that the said documents cost the petitioner over Rs. 77,000.

The authorities referred to by Amerasinghe, J. for the proposition that "where there has been a non-compliance with rules and there is no acceptable explanation for non-compliance and the default has not been cured, in general, the application would be rejected" indicate the attitude of the Court of Appeal at that time to the question of non-compliance. Much water has flowed under the bridges since then.

The decision of Amerasinghe, J. in *Ibrahim v. Nadarajah* (*supra*), referred to by him, was in respect of a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court Rules, 1978, where he held that "it has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected". That decision cannot be of much assistance in regard to the matter before us.

The case of *Kiriwanthe and another v. Navaratne and another,* (*supra*) dealt comprehensively with the decisions pertaining to failure to comply with the Rules of this Court. My brother has quoted certain passages from that judgment which indicate that, though the Rules must be complied with, the Court does not favour an automatic dismissal of an application or appeal of a party in default, but should exercise its discretion, *inter alia,* in the light of the object and purpose of the particular Rule. Said Fernando, J. in the penultimate paragraph

of that judgment : "Even if non-compliance had not been explained, the discretion of the Court to make an order of dismissal should have been exercised only after considering the gravity of default in relation to the issue arising in the case".

In the same case, Kulatunga, J. said in a separate judgment, *inter alia* that "in exercising its discretion the Court will bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. At the same time the Court will not permit mere technicalities to stand in the way of the Court doing justice."

Kiriwanthe's case, to my mind, is a watershed in judicial thinking in regard to the question of non-compliance with the Rules of the Supreme Court.

This trend is evident even in certain other decisions of the Court. In *All Ceylon Match Workers' Union v. Jauffer Hassan and others*[23] where a preliminary objection was taken that as the petitioner had not filed any written submissions, thereby failing to comply with Rule 35 (*b*) of the Supreme Court Rules, 1978, Amerasinghe, J. upheld that objection and dismissed the appeal with costs. Again, in *Jayasuriya v. Sri Lanka State Plantations Corporation*[24] (decided on 30.5.91), Amerasinghe, J. once again held that the respondent's delay to file the written submissions in compliance with Rule 35 of the Rules of the Supreme Court was inexcusable and that he could not be heard.

But, in *Piyadasa and others v. Land Reform Commission*[25] where a preliminary objection was taken by learned counsel for the petitioners that the respondents had filed their written submissions 197 days after the date on which they were required by Rule 30 (7) to be filed, and it was contended that the respondents' belated submissions should not be accepted and that the respondents should not be heard; *even though there was no explanation offered regarding the delay,* Amerasinghe, J. overruled the preliminary objection stating that "in my view Rule 30 is meant to assist the Court in its work and not to obstruct

the discovery of the truth. There were numerous documents that had to be considered; and, in our view, we needed the assistance of learned counsel for the petitioner as well as the respondents, including their written submissions, to properly evaluate the information that we had before us. It was, therefore, decided that the preliminary objection should be overruled".

In dealing with the procedure applicable to applications for special leave to appeal to the Supreme Court, we are here concerned particularly with the requirements of the Rules at the stage when the Court decides whether or not such leave should be granted.

In this context, one must not lose sight of the salutary provisions of Rule 13 (2) of the present Rules which state that "the Supreme Court may at any time after an application for special leave to appeal is lodged in the Registry, or after special leave to appeal is granted, direct the Registrar of the Court of Appeal to transmit to the Supreme Court the entire record of the proceedings (including the journal entries, pleadings, evidence, submissions, judgments and orders, and the documents produced in the Court of Appeal and in the original court or tribunal) and the Judges briefs, and may give such other directions as to the Court may seem expedient, and the Registrar shall forthwith comply with all such directions".

This Court has, on numerous occasions, both before and after special leave to appeal was granted, given directions in terms of this Rule to the Registrar of the Court of Appeal, with a view to making a just and fair determination of the application before it.

Let us now pause to consider the position in regard to the present application at the stage when it was listed for support: The Court had before it the following documents which were annexed to the petition for special leave to appeal:

1. A true copy of the plaint marked A1.

2. A true copy of the answer marked A2.

3. A true copy of the District Court judgment marked A3.

4. A true copy of the defendant's petition of appeal to the Court of Appeal marked A4.

5. A certified copy of the judgment or Justice Weerasekera marked A5.

6. A certified copy of the judgment of Justice Wigneswaran marked A6.

7. A certified copy of the order made by Justices Weerasekera and Wigneswaran on 24.6.98 marked A7.

8. A true copy of the motion and substantial questions of law submitted to the Court of Appeal marked A8, and

9. A certified copy of the order made by Justices Ismail and Weerasuriya on 13.7.98 marked A9.

In addition, on 16.9.98 the petitioner had tendered to this Court three certified copies of the entire brief in the Court of Appeal, in three volumes containing 3,030 pages.

Thus, at the stage when the matter came up for support, the Court had all the necessary material for the due consideration of the application for special leave to appeal.

The case was mentioned before a Bench of two Judges on 28.9.98, counsel for the petitioner being present. Order was then made that the matter be supported on 4.12.98. It could not be supported on

4.12.98 as one of the Judges of that Bench had written one of the two judgments in the Court of Appeal. It was thereafter fixed for support on 12.2.99 when, on an objection being taken regarding non-compliance, the Court directed counsel for the respondent to formulate the objection in writing and make such objection available to the petitioner within one week from that date.

As an objection had already been taken by the petitioner on 25.9.98 that the proxy and Caveat of the respondent had been filed only on 23.3.98 and was therefore out of time, the Court fixed 25.3.99 as the date for consideration of the objections of the petitioner as well as of the respondent.

Even assuming, though not agreeing, that the affidavit filed by the petitioner under Rule 6 was inadequate and that certified copies of the record of the Court of Appeal should have been submitted with the original application, the only lapse then on the part of the petitioner would be that she did not obtain the permission of the Court to tender the same, under the proviso to Rule 2, and that she tendered only 3 copies to Court. Having regard to the purpose of the Rules pertaining to special leave to appeal, it appears that non-compliance 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. As Fernando, J. said in *Kiriwanthe's* case (*supra*), "even if non-compliance had not been explained, the discretion of Court to make an order of dismissal should be exercised only after considering the gravity of default in relation to the issues arising in the case".

In the instant case, by the document A, 8 tendered to the Court of Appeal on 6.7.98, eight substantial questions of law were submitted to Court for its consideration. The eighth question, in subparagraphs (*a*) to (*z*), dealt with alleged "errors of fact which are unsupported by evidence and/or are inconsistent with the evidence and/or are unreasonable".

There was a difference of opinion between the two Judges who heard the appeal in the Court of Appeal in regard to the quantum of damages. While one Judge affirmed the order of the District Court awarding a sum of Rs. 5 million, the other Judge awarded only Rs. 250,000 as damages, on the basis of the medical expenses incurred by the respondent in respect of his child, whose death was the subject matter of this action.

Furthermore, this is the first case of its kind in our Courts where a professional of standing was sued for damages on the ground of medical negligence.

Viewed in the light of the seriousness of the issues arising in the case, I think that even if there was a lapse on the part of the petitioner, it should not stand in the way of the application for special leave to appeal being considered by this Court.

Over a century ago, Bonser, CJ. in *Read v. Samsudin* (*supra*) quoted with approval the words of Sir George Jessel, Master of the Rolls, (whom he referred to as "one of the greatest Judges that ever adorned the bench") 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".

"Those observations of the late Master of the Rolls", said the Chief Justice, "ought to be borne in mind by every Judge in this Colony".

Abrahams, CJ. in *Dulfa Umma et al v. Urban District Council, Matale,* (*supra*) expressed himself even more emphatically thus:

> "It happens, perhaps too frequently in this Court, that the language which the Legislature has chosen to employ in enacting certain rules of procedure compels the Court in applying the principles of construction to hold that non-compliance with a rule

is fatal to an action. But, I see no such compulsion on me in this case. Civil Procedure should be a vehicle which conveys a litigant safely, expeditiously and cheaply along the road which leads to justice, and not a juggernaut car which throws him out and then runs over him leaving him maimed and broken on the road."

Reminding myself of the oft quoted words of Abrahams, CJ. in *Velupillai v. The Chairman, Urban District Council* (*supra*) that "this is a Court of Justice, it is not an academy of Law", suffice it to say that in the application of Rules which regulate the procedure before the Court, every endeavour should be made to ensure that 'justice' is not sacrificed at the altar of procedure, but is administered generally in harmony with such Rules.

For the reasons aforesaid, I am of the view that this is an appropriate case for both preliminary objections to be overruled and for the application for special leave to appeal to be set down for hearing in due course.

I, therefore, make order accordingly. There will be no costs.

SHIRANI A. BANDARANAYAKE, J.

I have had the advantage of reading the judgments, in draft, of Amerasinghe, J. and Wijetunga, J., in respect of the preliminary objections taken by the defendant-appellant-petitioner and the plaintiff-respondent-respondent, respectively. I am unable to agree with the reasoning and conclusion of Amerasinghe, J., but am in entire agreement with the reasoning, findings, conclusion and order of Wijetunga, J.

Preliminary objections overruled; Application for Special Leave set down for hearing.

21st May, 1999

We have, on reading the judgment of Amerasinghe, J. on the preliminary objections, delivered on 4.5.99, observed several paragraphs, (which are reproduced below), which did not form part of his judgment in draft, sent to us for our consideration. It was on the basis of his original draft that Wijetunga, J. responded by way of a dissent, with which Bandaranayake, J. agreed. The judgment of Wijetunga, J. as well as the decision of Bandaranayake, J. were delivered by Amerasinghe, J., together with his judgment in the present form.

We find it necessary to have this material on record, in order that the judgment of Wijetunga, J. may be read in its proper context.

The Registrar is, therefore, directed to have the same annexed to the judgment of Wijetunga, J. as an addendum.

He is further directed to submit a copy to Hon. Amerasinghe, J. for his information.

A. S. WIJETUNGA, J.

SHIRANI A. BANDARANAYAKE, J.

The paragraphs are as follows :

> "Nor has the default been cured in terms of the proviso to Rule 2, for the documents were not tendered with an explanation for the failure to tender them with the petition and with a prayer for permission to tender them. Nor was there a favourable decision of the Court obtained with regard to that matter. If the non-compliance is to be excused, what is the 'sanction' to be imposed?
>
> It was not the petitioner's case that the documents should be "deemed" to have been tendered in time. (at page 8).

"Aristotle (Rhetoric 1.1) said: "it is best, as we may observe, where the laws are enacted upon right principles, that everything should, as far as possible, be determined absolutely by the laws, and as little as possible left to the discretion of Judges." However, necessarily many things, especially in the domain of procedure are left to the discretion of Judges; but the maxim is also observed in our jurisprudence, *optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi* – that system of law is the best which leaves least to the discretion of the Judge; that Judge the best who relies least on his or her own opinion: . See per Wilmot, CJ. in *Collins v. Blantern,* 2 Wils. K.B. 341; per Buller, J. in *Master v. Miller,* 4 TR 320 at 344. And although where discretion is left to a Judge, he or she is to a great extent left unfettered in its exercise, Coke's definition (*4 Institutes 41*) – *discretio est discernere per legem quid sit justum* – still holds good. Lord Mansfield in *R v. Wilkes,* 4 Burr. 2527 at 2539 said' . . .discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular." Lord Scarman in *Duport Steels Ltd. v. Sirs,* 1980 ICR 161 at 189 said : "When one is considering the law in the hands of Judges, law means the body of rules and guidelines within which society requires its Judges to administer justice. Legal systems differ in the width of discretionary power granted to judges; but in developed societies limits are invariably set beyond which the Judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree." Justice must be done according to law" : *Per* Maartensz, J. (Abrahams CJ. agreeing) in *Alice Kotelawala v. W. H. Perera and another,* (1937) 1 CLJ 58; VIII CLW 61. The law must be followed "punctiliously' : per Bertram, CJ. in *Rasiah v. Sittamparapillai,* (1920) VIII CWR 116. The observance of the law minimizes arbitrariness and the appearance of arbitrariness, and also makes the law certain and predictable. These are essential features of a good legal system.

Ordinarily a petitioner must tender the necessary documents with his petition. He is nevertheless "deemed" to have complied with the rules, "if the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such . . . document . . . and that the failure to tender the same was due to circumstances beyond his control, *but not otherwise* . . ." (at page 9). (The emphasis is mine).

In order to enable the Court to be satisfied that a petitioner was "unable to obtain any . . . document . . . as is required by the rule to be tendered with his petition "the petitioner shall set out the circumstances in his petition, and *shall* pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same." (The emphasis is mine).

In the matter before us, there is nothing either in the petition or any other document stating that the petitioner was unable to tender the document with the petition; nor is there a statement of circumstances why the document could not be duly tendered: There was not a word of explanation for the inability to tender the documents with the petition offered by learned counsel for the petitioner nor has permission been sought to tender them. In the circumstances, how could the Court satisfy itself that the petitioner had exercised due diligence to obtain the document and that her failure to tender the document with the petition was due to circumstances beyond her control – the only grounds upon which the Court being 'satisfied', the late tender of a document could in law be "deemed" to have been submitted with the petition in accordance with Rule 2?

Admittedly, some copies of the relevant documents had been sent to the Registrar and were placed before the Court but, for the reasons explained, they cannot be documents deemed to have been admitted in compliance with the rules and, therefore they are not documents which I can take in judicial

cognizance of having regard to the provisions of Rule 2 read with Rule 6.

The objection, in my view, is based on the breach of a rule, which, having regard to its purpose, is of a substantial nature and not a mere technicality. Having regard to the words of the proviso to Rule 2, I am permitted by law to deem the document to have been tendered with the petition, and therefore hold that there was compliance with the rule in the circumstances set out in the proviso "but not otherwise". Accordingly, other considerations, such as the fact that the question to (at page 10) be decided is of public or general importance, are not relevant to the threshold question whether there is a properly constituted petition which may be entertained. In terms of Article 128 (2), the Court would be bound to grant leave to appeal if it is satisfied that the question to be decided is of public or general importance. But, that is a matter to be determined at the stage when, after a petition has been accepted, the application made in it for leave to appeal comes up for consideration. To consider the question of public or general importance at the stage when it has to be decided whether there is a properly constituted petition before this Court slides two stages into each other, driving us to lose sight of the issues before the Court at this time. In my view, to avoid an inaccurate decision resulting from a confusion of matters for decision, I ought to proceed step by step and not telescope the various stages of the proceedings in the case. In any event, the rules do not say that where a matter is of general or public importance the rules need not be observed nor that the Court may, notwithstanding the provisions of Rule 2, have recourse to necessary documents that have not been filed with a petition that was, understandably, not the petitioner's case.

There remains the question of "justice" and the need to avoid technicalities. in *Fernando v. Sybil Fernando,* (1997) 3 SLR 1,

I had, at some length, endeavoured to explain the importance of complyng with procedural laws and in doing so considered the observations of Bonser, CJ. in *Read v. Samsudin,* (1895) 1 NLR 292 at 294; and of Abrahams, CJ. in the cases of *Velupillai v. Chairman UDC* (1936) 39 NLR 464 at 465; and *Dulfa Umma et al. v. DDC Matale.* (1939) 40 NLR 474 at 478. I confirm my earlier observations, for there was nothing learned counsel said in the matter before me to the contrary. However, in order to dispel any lingering apprehension in that regard, I do wish to reiterate the assurance that Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities; although litigants on the road to justice may act recklessly, or neligently or inadvertently and do themselves harm.

Having regard to the allusive reference to civil procedure as an indispensable vehicle for the attainment of justice, perhaps we ought to remind ourselves that procedural law has a protective character and represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of the law. Procedural law is important, for, among other reasons, it has the salutary effect of safeguarding the rights, privileges and legitimate interests of both plaintiffs and defendants, appellants or petitioners and respondents even-handedly: The protective character of rules of procedure helps to ensure that one person's justice is not another's injustice. Notions of abstract justice are alluring, but, in my view they tend to obscure the way to an accurate decision according to law." (at page 11).