

**GANGODAGEDERA**  
**V.**  
**MERCANTILE CREDIT LTD.**

COURT OF APPEAL  
WIJETUNGA, J. AND S N SILVA, J.  
CA NO. 1304/87.  
DC COLOMBO NO. 93714/M.  
MARCH 24, 1988

*Civil Procedure — Order for stay of execution — Supreme Court Rules, 1978. Rule 49*

The provisions of Rule 49 of the Supreme Court Rules 1978 are imperative. On 11.12.87, the Court ordered issue of notice on the respondents. The Attorney-at-Law for the petitioner tendered the notice only on 25.01.88 in breach of the provision that notice be tendered within two weeks. Failure to comply with the mandatory Rule 49 is fatal to the application.

**Cases referred to**

1. *Samarawickrema v Attorney-General* 1 Sri Skantha's Law Reports 47
2. *Navaratnasingham v Arumugam* (1980) 2 Sri LR 1
3. *Rasheed Ali v. Mohamed Ali* (1981) 2 Sri LR 29
4. *Nicholas v Macan Markar* (1981) 2 Sri LR 1
5. *Perera v. Perera* (1981) 2 Sri LR 41
6. *Vithana v Weerasinghe* (1981) 1 Sri LR 52 (S.C.)

**APPLICATION** for revision of the order of the District Court of Colombo

S. Sinnathamby for 2nd defendant — petitioner  
Chula de Silva with N. Casie Chetty for plaintiff-respondent

*Cur. adv. vult.*

May 20, 1988  
**WIJETUNGA, J.**

This is an application by the 2nd defendant-petitioner for revision under Section 753 of the Civil Procedure Code. He seeks to revise the order of the learned District Judge dated 3.11.87 refusing to stay the execution of writ until the

conclusion of the inquiry. When this application was supported on 11.12.87, this court has made order that notice be issued on the respondent for 28.1.88 and that the writ already issued be stayed and/or recalled in terms of paragraph (ii) of the prayer to the petition, until the conclusion of the inquiry in the District Court.

Mr. de Silva for the plaintiff-respondent submits inter alia that this application should be dismissed for non-compliance with Rule 49 of the Supreme Court Rules, 1978. That Rule is as follows:— "Where the Court orders the issue of notice, it shall be the duty of the petitioner within two weeks of the date of the order of Court unless the Court otherwise directs to tender the requisite notices along with such number of copies of his application as there may be respondents". The order for issue of notice has been made on 11.12.87. The Attorney-at-Law for the petitioner has tendered the notices to be served on the respondents only on 25.1.88, which is clearly not within two weeks of the date of the order of the Court. Nor has the Court directed otherwise. There is, therefore, no question that there has been non-compliance on the part of the petitioner with Rule 49. What has then to be decided is whether the provisions of this Rule are mandatory in nature and non-compliance renders the application liable to be dismissed.

In regard to Rule 35(e) of the Supreme Court Rules which requires the written submissions to be lodged within 14 days of the grant of special leave to appeal, it has been held in *Samarawickrema v. Attorney-General*, (1) that the provisions are of a mandatory nature. Wanasundera, J. there stated that "these provisions have been consistently held by this Court as being imperative" and dismissed the appeal.

In *Navaratnasingham v. Arumugam* (2) where there was non-compliance with Rule 46 in that the petitioner had come into Court only with a certified copy of the proceedings of a certain date and of the order thereon and the orders canvassed by him could not be reviewed in the absence of the earlier proceedings etc., Soza, J. held that the petition should have been rejected for non-compliance with that Rule.

Again, in *Rasheed Ali v. Mohamed Ali* (3) Soza, J. held that the provisions of Rule 46 were imperative and where there was non-compliance, the preliminary objection was entitled to succeed.

In *Nicholas v. Macan Markar Ltd.* (4) Ratwatte, J. considered the requirement of Rule 47 that the petition and affidavit should contain an averment that the jurisdiction of the court has not previously been invoked in respect of the same matter and held that the provision is mandatory and non-compliance would render the application liable to be rejected.

But, the Supreme Court in S.C. Appeal No. 30/81, reported in (1986) B. L. R., Vol. 1, part VI at 245, reviewed this decision and held by a majority decision (Wimalaratne, J. with Soza, J. agreeing) that

- (i) the Court of Appeal ought to have called upon the petitioner to perfect his application by complying with Rule 47,
- (ii) where the parties fail to comply with the requirements in Rules 46 to 58, it is open to the Court, under Rule 59, after hearing the parties, either to direct compliance with the Rules or to dismiss it, and
- (iii) dismissal is not the only consequence of the breach, at least of Rule 47.

Wanasundera, J., however, took the view that the Court of Appeal had the authority to make an order which, in a fit case, could extend to the making of an order of rejection.

In *Perera v. Perera* (5) where the petitioner had filed both his notice of appeal and the petition of appeal out of time, Soza, J. held that the provisions of Sections 754 (2) and 755 (3) of the Civil Procedure Code are mandatory and accordingly the District Judge had correctly rejected the petition of appeal. He quoted Bindra on Interpretation of Statutes, 6th Edition (1975) at page 559 where it is stated that "statutes conferring private rights are in general construed as being imperative in character and those creating public duties are construed as directory."

In *Vithana v. Weerasinghe*, (6) where the petition of appeal had been filed out of time and there was an affidavit by the Attorney-at-Law to the effect that the omission was due to his illness, the Court of Appeal upheld the objection and abated the appeal. But, the Supreme Court held that Section 759(2) of the Civil Procedure Code which enables relief to be granted by this Court in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the sections pertaining to appeals was wide enough to apply to such a case. (per Wanasundera, J.)

Learned counsel for the plaintiff-respondent contends that Rule 49 affects private rights in that the respondents are entitled to receive notice in time and its provisions are mandatory in nature. He further submits that even if a Rule is only directory, the petitioner must explain his non-compliance in order that the court may exercise its discretion in the matter. In this instance, even after the plaintiff-respondent had in its objections taken up the question of non-compliance with Rules, no explanation has been submitted by the petitioner in his counter affidavit regarding his failure to comply with the Rule.

Mr. Sinnathamby for the petitioner, however, submits that no prejudice has been caused to the plaintiff-respondent by the petitioner's failure to comply with this Rule, as the plaintiff-respondent had notice of this application and the order made thereon within a week of the application being supported on 11.12.87. A certified copy of the order dated 11.12.87, he states, had been served when the Fiscal Officer, accompanied by an officer of the plaintiff-respondent, had come to seize the property of the petitioner on or about 14.12.87. He further submits that where the parties fail to comply with the requirements set out in the preceding Rules, Rule 59 requires the Registrar to list such application for an order of court without any delay. But in the instant case the Registrar has not done so. Rule 49, he submits, is only directory in nature and the petitioner should not be penalized for his failure to comply with the same, particularly as no prejudice has thereby been caused to the plaintiff-respondent.

The authorities cited above deal with the Supreme Court Rules as well as the provisions of the Civil Procedure Code. The latter can be distinguished from the Rules, as the Code itself makes provision in Section 759(2) for the Court to grant relief to an appellant in appropriate circumstances. But a similar provision does not exist under the Rules. The Court would have a discretion in the matter only if a Rule is taken to be directory and the Court is further satisfied on the material before it that circumstances exist which justify the exercise of such discretion in the defaulting party's favour.

· Unlike in respect of Rule 47 where the Court could direct compliance with the Rule when such an application is listed by the Registrar for an order of Court under Rule 59, due to non-compliance, Rule 49 does not admit of similar remedial action as the time limit imposed by the Rule would by then have already lapsed.

In that instant case, the notice returnable date was 28.1.88 and notices have been tendered only on 25.1.88, although the Court had made its order on 11.12.87. The purpose of Rule 49 in requiring the notices and the copies of the application to be tendered within two weeks of the date of the order is to ensure that the respondents receive notice within the time schedules. The delay that has ensued in the present case illustrates by itself the need to adhere to the Rules, as notices have been despatched barely three days before the notice returnable date. As Rule 52 permits a respondent to file objections, if any, within two weeks of the service of such notice, unless the Court otherwise directs, the scheme of the Rules requires that the parties take necessary steps within the period prescribed. It is only then that the purpose and object of the Rules can be achieved.

Maxwell on Interpretation of Statutes, 11th Edition (1962) states at page 367 that "enactments regulating the procedure in courts seem usually to be imperative and not merely directory. If, for instance, a right of appeal from a decision be given with provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognisances or

transmitting documents within a certain time, a strict compliance would be imperative and non-compliance would be fatal to the appeal".

In the present case, there had no doubt been a failure on the part of the Registrar to list the application for an order of Court, on the petitioner failing to comply with the Rule. But, that does not absolve the petitioner from his obligation to adhere to the Rules. Even if the application had been so listed, the Court could not have procured compliance with the Rule. So also, the fact that the respondent may have become aware incidentally of the order made by Court does not detract from the necessity to follow the procedure laid down in the Rules.

For the above reasons, I am of the view that the provisions of Rule 49 are imperative in nature and call for strict compliance. Failure to comply with such a mandatory requirement is fatal to the application.

In any event, the petitioner has not submitted any explanation as regards his failure to comply with the Rule.

As the plaintiff-respondent is entitled to succeed on this ground alone, I do not find it necessary to consider the other submissions of counsel.

Accordingly, I would dismiss this application with costs.

**S. N. SILVA, J.** — I agree

*Application dismissed*