

EBERT SILVA AND ANOTHER
v.
SILVA

COURT OF APPEAL.
D. P. S. GUNASEKERA (P/C.A.) J. AND
AMEER ISMAIL, J.
C.A. 469/96.
D.C. MT. LAVINIA 1051/ZL.
APRIL 9, 1997.

Court of Appeal (Appellate Procedure) – Rules 2(1), 3(4) (a), and 14 of the Court of Appeal Appellate Procedure Rules – Applicability mandatory or not.

Held:

(i) Compliance with Rule 3(4) (a) is mandatory. However non compliance does not itself result in an automatic dismissal of the application, in view of Rule 14.

In the instant case although the petitioners had failed to comply with Rule 3(4) (a) by tendering Notices within two weeks after Notice was issued, the Registrar had failed to comply with Rule 14 and list the Application for an Order of Court. Had that been done the court would have made an order either directing the petitioner to comply with the Rule on a date to be specified by the Court or to have dismissed the Application after hearing the parties.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Gangodagedera v. Mercantile Company Ltd.*, [1988] 2 Sri. L.R. 253.
2. *Marinona v. Francina* [1988] 2 Sri. L.R. 250.
3. *Mohamed Haniffa Rashad Ali v. Khan Mohamed Ali* – S.C. 6/81 – SCM 20.11.81.
4. *Keerthiratna v. Udana Jayasekera* – [1990] 2 Sri. L.R. 346.
5. *Nicholas v. Macan Markar Ltd., and Others* S.C. 30/81 – CA 97/80 – 1986 BALJ Vol. I Part 6-245.

P. A. D. Samarasekera, P.C. with *G. L. Geethananda* for 1st defendant-petitioner.

E. D. Wickremanayake, for 2nd defendant-petitioner.

Wijedasa Rajapakse with *B. Waduressa* and *Ali Shabby* for the respondent.

June 13, 1997.

GUNASEKERA, J.

This application in Revision to set aside the Order of the Learned District Judge of Mount Lavinia dated 22.7.1996 marked X14 was supported on 31.7.1996 and 1.8.1996 before us by learned President's Counsel for the petitioner in the presence of learned Counsel for the respondents who appeared on behalf of the respondent on receipt of notice tendered by the petitioner in accordance with Rule 2(1) of the Court of Appeal Appellate Procedure Rules. After hearing Counsel for both parties by our Order dated 02.8.1996 we directed that notice be issued on the respondents and stayed the execution of the Writ issued by the learned District Judge by his Order dated 22.7.1996 until 23.8.1996. Further we directed that objections if any of the plaintiff-respondent be filed on or before that day.

When the matter came up on 23.8.1996 learned Counsel for the plaintiff-respondent without having filed objections as directed raised a preliminary objection that there had been a non compliance of Rule 3(4) (a) of the Court of Appeal (Appellate Procedure) Rules of 1990 by the petitioner and moved that the application be dismissed.

Inquiry into the preliminary objection raised by Counsel for the respondents was fixed for 27.9.1996 and the stay Order issued was extended till 30.9.1996. The inquiry into the preliminary objections could not be taken up as scheduled due to reasons beyond the control of Court since there was a reconstitution of the Benches without any notice. Inquiry was thereupon refixed for 1.11.1996 and the Stay Order was extended till 4.11.1996. On 1.11.1996 since, Hon. Ismail J. went on medical leave inquiry was refixed for 14.2.1997 and on that day the application was refixed for inquiry for 26.2.1997. Since the matter came up only before Hon. Ismail, J. the same Bench which originally issued notice was reconstituted for 27.3.1997 and on that day Counsel appearing for the parties submitted that the matter could be disposed of upon a consideration of written submissions which were to be tendered and accordingly written submissions were tendered on behalf of the parties.

It was submitted by the Learned Counsel for the plaintiff-respondent that since the Court when directing notice to be issued on the respondents on 2.8.1996 had not fixed a particular date that the petitioners were obliged to tender notices within two weeks from 2.8.1996 which lapsed on 16.8.1996. Learned Counsel drew the attention of Court to Rule 3(4) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 which reads as follows:

“(4) where upon such application being supported, the Court orders the issue of notice—

(a) the Court shall fix the date for tendering by the petitioner of the requisite notices together with such number of copies as there are respondents and stamped addressed envelopes for despatch of such notices by registered post to the respondents, it being the duty of the petitioner to ensure the accuracy of such notices, copies and addresses; if no date is fixed by the Court, the petitioner shall tender such notices, copies and envelopes within two weeks”.

It was contended further that the petitioner had failed to comply with the said Rule even at the time when it was taken up as a preliminary objection when the case was mentioned on 23.8.1996 the date fixed by the Court for the tendering of objections by the plaintiff respondent. Thus it was sought to be argued by Learned Counsel for the respondent that compliance with Rule 3(4) (a) was mandatory and that as the petitioner had failed to comply with the said Rule that the application should be dismissed.

Learned counsel for the respondent relied on the judgments of the Supreme Court in *Gangodagedera v. Mercantile Company Ltd.*⁽¹⁾, *Marinona v. Francina*⁽²⁾, *Mohamed Haniffa Rashid Ali v. Khan Mohamed Ali*⁽³⁾, *Keerthiratna v. Udana Jayasekera*⁽⁴⁾ amongst several other cases which have held that compliance with the Rules was mandatory and that non compliance was fatal.

Whilst we are in agreement with the said decisions and are of the view that compliance with the Rules is mandatory we take the view that non compliance does not by itself result in an automatic

dismissal of the application. In view of the provisions of Rules 14 which reads as follows:

“where the parties fail to comply with the requirements set out in the preceding rules, the Registrar shall without any delay, list such application for an Order of Court”.

In the instant case although the petitioners had failed to comply with Rule 3(4) (a) by tendering notices within two weeks after notice was issued on 2.8.1996 the Registrar had failed to comply with Rule 14 and list the application for an Order of Court and had that been done the Court would have made an Order either directing the petitioner to comply with the Rule on a date to be specified by the Court or to have dismissed the application after hearing the parties.

In the case of *Nicholas v. Macan Markar Ltd. and Others*⁽⁵⁾ Wimalaratne J. with Soza J. agreeing held that where parties failed to comply with requirements in Rules 46 to 58 of the Supreme Court Rules that it was the duty of the Registrar to list such application for an Order of Court without any delay under Rule 59 and it was then open to the Court after hearing the parties either to direct compliance with the Rules or to dismiss it. It was further held that dismissal was not the only consequence of the breach because the object of ensuring that no second Order could be made on a second application regarding the identical matters could be achieved without resorting to the drastic step of dismissal.

In the instant case the petitioners had filed this application in revision on 25.7.1996 and had given notice of the application to the respondents in terms of Rule 2(1) of the Court of Appeal (Appellate Procedure) Rules 1990 since there was a prayer for interim relief to stay the Order of the Learned District Judge dated 22.7.1996 marked 'X14' and in fact when the application was supported the respondent was represented by Counsel and the Order dated 2.8.1996 was made after hearing counsel for the respondent as well. This being so we are of the view that no prejudice has been caused to the respondent as a result on the petitioners failing to comply with Rules 3(4) (a) to tender notice as required. For the reasons stated we overrule the preliminary objection raised on behalf of the respondents.

The second matter that arises for consideration is whether the Learned District Judge was right in issuing the Writ pending appeal in this case or whether the petitioners are entitled to have the Order of the Learned District Judge dated 22.7.1996 marked 'X' set aside as having been wrongly made.

On this question the Court having heard the submissions of Counsel for the parties and after a consideration of the documents tendered by its Order dated 2.8.1996 directed that notice be issued on the respondent and made Order that objections for the plaintiff respondent be filed on or before 23.8.1996. It also made order staying the execution of the Writ issued by the Learned District Judge till that date. In its Order it was specifically stated that "this Order is a temporary Order pending the consideration of the objections of the plaintiff respondent upon which a final Order would be made". The plaintiff respondent having filed a statement of objections on 23.8.1996 after the matter came up in open Court when a preliminary objection was raised that the application be dismissed for non compliance of rule 3(4) (a) has since taken possession of the premises in dispute by execution of the writ due to the Stay Order not been extended on account of a lapse. The defendant-petitioners in their written submissions have prayed that the Order of the Learned District Judge marked 'X14' be set aside and the petitioners be restored to possession. We have anxiously given our mind to this question and are mindful that the plaintiff respondent has taken undue advantage of a lapse in not extending the Stay Order. Since the matter regarding the interim relief is now over we are of the view that the final appeal should be disposed of very early so that appeal would finally conclude the matter in dispute.

Accordingly, we make Order to the Registrar to accelerate the hearing of the final appeal No. CA 446/94 and for this purpose he should call upon the parties to deposit the brief fees if it has not already been done, to prepare the briefs and list the appeal for hearing early next term before the Bench hearing D.C. Final appeals (1) on a date convenient to Counsel. In view of the above Order this application is dismissed. There will be no costs.

AMEER ISMAIL, J. – I agree.