

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

1. H. C. Wickremasinghe of  
No. 52, Thenna, Matale.

2. M.S. Ratnayake

3. C. P. Nawimana

4. J. M. Nawimana

5. H. N. Nawimana

All of No. 52, Oville Thenna,  
Matale.

**PETITIONERS**

C.A 248/2007 (Writ)

Vs.

1. H. Don Cyril Dissanayake of  
No. 97, Tenna, Matale.

2. People's Bank  
Sir Chittampalam A. Gardiner  
Mawatha, Colombo 2.

3. Inquiring Officer,  
Land Redemption Department,  
People's Bank  
No. 18, 1<sup>st</sup> Floor, Welikada Plaza,  
Rajagiriya.

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J. &  
Deepali Wijesundera J.

**COUNSEL:** H. Withanachchi with Shantha Karunadhara for the Petitioners  
  
Athula Perera for the 1<sup>st</sup> Respondent  
  
Kushani D Alwis P.C. with K. Navaratne and D. Abeyasena  
for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

**ARGUED ON:** 17.09.2013

**DECIDED ON:** 20.01.2014

**GOONERATNE J.**

This is an application for a Writ of Certiorari and Mandamus. However the prayer to the petition of 27.02.2007 (sub paragraph (i)) has been incorrectly stated to read as “a mandamus in the nature of writ of certiorari”. At the hearing of this application on 17.9.2013 the Respondents raised a preliminary objection as regards the maintainability of this application and moved court to dismiss the application. The basis of the objections is that the Petitioners have failed to comply with the mandatory provisions of Rule 3(1)(a) & (b) of the Court of Appeal (Appellate Procedure) Rules 1990 (Petitioner’s failure to file material

documents along with the application). A mere glance at the petition of the Petitioner indicate the following list of documents are in fact not annexed to the petition.

P1 – plan 2971

P3 – plaint of mortgage suit

P3 – copy of fiscal conveyance

P4 – deed of 2891

P6 – deed of 2099

P12 – recommendation of 3<sup>rd</sup> Respondent

P11 – proceedings of 29.06.2005

P9 – proceedings tendered but not the entirety

This application should have been rejected. The journal entry of 04.05.2007 indicates that the Petitioners were granted time to produce same but it had not been done and as such time was granted till 17.05.2009. However on 18.05.2007 this application was supported for notice and court had issued formal notice. Perusal of the docket I find that by motions of 30.03.2007 & 14.05.2007 documents P11 & P12 had been produced. The motion of 08.03.2007 it is stated that documents P2, P5, P7 P8 & P9 are produced without the documents mentioned in the list of documents mentioned above. Document P11 the purported proceedings of 29.06.2005 seems to be submitted to supply an

omissions, but it is certainly not the function of court to inquire as to whether the entirety of the proceedings are made available. Does documents P11 & P9 constitute all the proceedings held before the 3<sup>rd</sup> Respondent? It appears to this court that Petitioner has in a very haphazard manner attempted to smuggle documents into the record. This court need to comment on the Petitioners role and conduct, which does not seem to favour the stance taken by him in this application, due to absence of due diligence.

However before I consider the preliminary objection, it would be necessary to briefly state the facts relevant to this application. The 1<sup>st</sup> Respondent (Dissanayake) was the owner of the property in dispute. By bond 1830 dated 12.05.66 the Respondent mortgaged the property to one Heen Amma for Rs. 3750/-. Owner Dissanayake failed to discharge the mortgage and it was put in issue in D.C. Matale Case No. 1002. Judgment was entered of consent against the 1<sup>st</sup> Respondent. In execution of decree property sold at a fiscal sale to Heen Amma. Sale confirmed by the District Court on 11.09.80. Fiscal conveyance in favour of Heen Amma executed on 22.09.80 (P3 fiscal conveyance not included in the record). On or about 29.11.1984 the 1<sup>st</sup> Respondent made an application to the Land Redemption Department of the People's Bank under Section 71 of the Finance Act No. 11 of 1963 to get the property redeemed. However after inquiry,

by P7 application of 1<sup>st</sup> Respondent was rejected and the Bank decided not to redeem the property due to delay. The 1<sup>st</sup> Respondent filed a Writ Application earlier (P8) and in that application court held in favour of the 1<sup>st</sup> Respondent on 21.08.1995.

Inquiry was held in the Land Redemption Department of the 2<sup>nd</sup> Respondent (vide proceedings at P9 – incomplete document). Para 12 of the petition it is pleaded that on 30.06.2004 the 1<sup>st</sup> Respondent commenced his evidence and while the 1<sup>st</sup> Respondent was under examination in chief, on 31.08.2004 further inquiry was postponed for 18.10.2004. Court notes that proceeding P10 not produced at any stage of this case. In paragraph 13 of the petition it is pleaded as follows:

On 29.06.2005, when the inquiry was to be resumed the inquiring officer observed inter alia: -

- (i) That the respondent and the said Sirimanna were absent and unrepresented.
- (ii) That the 1<sup>st</sup> petitioner was absent but his son was present
- (iii) That since the application had been pending from 1984 and since the parties had shown lack of interest in the case she decided to conclude the inquiry by calling the parties to file written submissions.

The basis of contesting this application is contained in paragraph 18 of the petition. This court has taken note of the matters pleaded therein. What has been stressed is that the 3<sup>rd</sup> Respondent acted without jurisdiction by allowing the application without holding a proper inquiry and that there had been a breach of the principles of natural justice, by the acceptance of untested evidence, in the manner pleaded by the Petitioner.

The Petitioner in this Writ Application seems to rely only on documents P11 & p12. Both documents P11 & P12 were in fact tendered to court at a very late stage and not annexed to the petition. P 12 is the recommendation of the 3<sup>rd</sup> Respondent. P11 seems to be the journal entry or proceedings of 29.06.2005. Perusal of same indicates that except for a person called Rohana Pathirana, all others inclusive of lawyers were absent and parties unrepresented. It is stated in P11 that the application was tendered as far back as 18.10.1984 but parties had been absent from time to time and that it shows a lack of diligence to proceed with the inquiry and such proceedings to be terminated. It is recorded in P11 inter alia as follows:

“නිතර නිතර පාර්ශවයන් නොපැමිණීම නිසා මෙය නව දුරටත් ගෙන යෑම ඔවුන්ට ද අවශ්‍යතාවයක් නැති බව පෙනී යන හෙයින් ද, පරීක්ෂණය අද දින අවසන් කරමි. දෙපාර්ශවයේම ප්‍රශ්න නිසා කල් ගොස් ඇතත් ඔවුන්ම නිතර කල් යන බවට විරෝධය

පළ කරන නිසා ද මෙය අවසන් කිරීමට තවත් හේතුවකි. The 2<sup>nd</sup> paragraph of P11 express the reasons to terminate proceedings, and state very clearly that it is difficult to proceed with the inquiry in the circumstances that prevailed at that time. However parties had been given the opportunity, to file written submissions.

The proceedings or journal entry referred to as P10 had never been produced by the Petitioner. It is very apparent that the entirety of the inquiry notes or proceedings are not tendered to court. In the light of the observations made in P11 by the 3<sup>rd</sup> Respondent it is important to have the full set of proceedings. I am unable to accept the views of the Petitioner that based on P11 and P12 alone this application could be decided. On the other hand it is a bad practice to decide cases in the absence of proper documentation, being made available to court. Petitioner having not acted with due diligence as recorded in P11, cannot be heard to complain of jurisdictional issue or a breach of natural justice as the Petitioner had himself failed to act diligently before the inquiring officer. Further this court cannot decide on an important issue as jurisdiction or natural justice in the absence of the entire proceedings being made available to court. P11 which is made available to court is a photocopy and the seal affixed therein is hardly legible with the hand written words 'true copy'. Failure of the Petitioner to make available the entire set of proceedings gives rise to certain doubts as regards the position taken up by the Petitioner. In a case of this nature it is equally important and relevant to

consider an issue from all perspectives. Cases should not be decided only on isolated bear facts. Petitioner has also failed to provide an acceptable reason or explanation not to produce the entirety of the proceedings. This court need to interpret the Appellate Courts Procedure Rules very strictly, and certainly not leniently. The position of the Respondents should not be dismissed by merely pointing the finger to be highly technical. It is not technical in the manner submitted by the Petitioner. Non compliance of the Appellate Procedure Rules would be fatal and I uphold the preliminary objections of the Respondents and dismiss this application.

However before I conclude I would also incorporate the following authorities in this judgment some of which were in fact cited by the Petitioners, and the Respondents.

**Kiriwanthe v. Navaratne (1990-2 SLR 393 per M.D.H. Fernando J.**

The weight of authority thus favours the view that while all these Rules must be complied with the law does not regulate 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. In the case before us, the Court of Appeal was clearly wrong in upholding the preliminary objection based on Rule 46.

His Lordship, Kulatunga, J. while delivering a separate Judgment observed “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”.

### **Imperative Nature of Rules**

#### **Shanmugavadivu Vs. Kulathilaka 2003 (1) SLR 215(SC)**

The requirements of rules 3 (1)(a) and 3 (1) (b) are imperative. In the circumstances of the case the Court of Appeal has not discretion to excuse the failure of the Plaintiff to comply with the rules.

#### **Karunasekara Vs. Rev Chandananda (2004) 2 SLR 82 and 83**

In the statement of Objections of the Plaintiff judgment creditor Respondent, the Petitioner’s failure to file the necessary documents has been specifically raised but even thereafter the Petitioner has not taken steps to file those documents. Thus there is a clear failure to comply with the mandatory provisions of rule 3(1)(b) of the Appeal Rules 1990.

#### **Perera Vs. Perera (2001) 3 SLR 30**

The absence of the originals of the documents material to the order or duty certified copies or in the event of inability to obtain such documents and the absence of satisfactory explanation of such non-compliance, is fatal.

#### **Urban Development Authority Vs. Ceylon Entertainments Limited & Others (2004) 1 SLR 95**

The appellant failed to file the Court of Appeal duly certified copies of the material documents as required by rules 3(b) read together with 3(a) of the Supreme Court Rules. It is settled law that Rule 3 of the Supreme Court rules must be adhered to.

In all the above circumstances it is apparent that the Petitioner's failure to comply with the Court of Appeal (appellate Procedure) Rules 1990 is fatal since same is imperative and mandatory. Further we find that sub paragraph (i) of the prayer to the petition, vague and meaningless. As regards sub paragraph (iii) of the prayer to the petition a Writ of Mandamus cannot in any event issue against the 3<sup>rd</sup> Respondent who has not been named. Nor can court direct to issue a mandamus in a particular way i.e to dismiss the application, in the absence of explaining the public statutory duty. The grounds urged in any event cannot be the basis for issue of the prerogative writs prayed, writs being issued in the discretion of court. As such we uphold the preliminary objections and dismiss this application without costs.

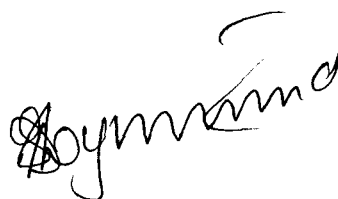
Preliminary objection upheld. Application dismissed,



JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.



JUDGE OF THE COURT OF APPEAL