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DIGEST

CIVIL PROCEDURE – Civil Procedure Code, sections 438/754(2), 757 and 759(2) — Leave to appeal — Not supported by a valid affidavit — Consequences — Affidavit not signed by the party — Bona fide mistake in signing the petition and not the affidavit — Acceptance of same ? — Could a corrected affidavit be submitted later ?–Should an affidavit accompany the petition ?

KANDYAN LAW – Daughter married in deega – Forfeiture of rights to paternal (mulgedera) inheritance – Re-acquisition of binna rights in mulgedera – Rights of daughter's son to succeed to maternal grandfather's property.

(Continued from Part 9)

LAST WILL – Revocation by second marriage – Prevention of Frauds Ordinance, section 6 – Whether "subsequent marriage" in section 6 includes a marriage of the testator – Interpretation of statutes.

CM 6580– 2,500 (2006/09)

In this case notwithstanding the fact that the *diga* marriages of the two daughters, their brothers had executed a series of deeds clearly based upon the supposition that their sisters retained rights in the paternal inheritance. It was held that the execution of a series of deeds for a number of years by other members of the family on the footing that a *diga* married lady still possessed rights would be sufficient evidence of such waiver. In deciding so, Bertram C. J., further stated that—

> The point at issue is the forfeiture of certain rights of inheritance. Any forfeiture may be waived by those in whose benefit it takes place. It has been customary in considering whether a forfeiture of *binna* rights has been waived to look at the matter from the point of view of the connection of the daughter in question with the *mulgedera*. But in my opinion there is nothing to show that this is the only test. To use a favourite phrase of the late Lord Bowen, 'there is nothing magic about the *mulgedera*. When a forfeiture has taken place it is not the connection with the *mulgedera* which restores the *binna* rights, it is the waiver of the forfeiture of which the connection with the *mulgedera* is the evidence. As was said by Wood Renton C. J., in Fernando vs. Bandi Silva (1917) 4 C. W. R. 12), 'The instances given in the text books on Kandyan Law of the cases in which *binna* rights can be regained are illustrations of a principle and not categories exhaustive in themselves. **The underlying principle is that the forfeiture by a marriage in *diga* of the rights of the *diga* married daughter to a share of the inheritance may be set aside by her readmission into the family** (emphasis added.)"

Several years later, another aspect was taken into consideration by the then Supreme Court and the decision in *Appu Naide* vs. *Heen Menika* [10] brought in a new concept to the question of the rights of a woman married in *diga* to acquire property of her family. The question in this case was whether the two sisters who were married in *diga* and had no re-acquisition of *binna* rights be entitled to their father's property on his death. There was evidence that on the death of their father, who was the original owner of the land, the two sisters with their brother in pursuance of an arrangement among themselves, possessed and enjoyed their father's lands in equal shares. It was held that where a brother permits his sisters,

in spite of their marriages in *diga* to possess their share of the land for a long period of time, he has acquiesced in their right and cannot be permitted to deny it.

On an examination of the afore-mentioned decisions as well as the early authorities, it is apparent that a Kandyan woman who had married in *diga,* could establish the re-acquisition of *binna* rights by proof of several instances, which would include —

(a) having a close link with the *mulgedera* even after the marriage ;
(b) by a subsequent marriage in *binna ;*
(c) by leaving a child with the grand parents at the *mulgedera* ;
(d) by possessing their shares of property in spite of the marriage in *diga* ;
and most importantly
(e) any evidence to indicate waiver of the forfeiture of her rights.

Having said that, let me now turn to examine the circumstances in which the plaintiff had made a claim to the property in question.

Admittedly, the plaintiff's mother, the said Podimahathmayo married one Dingiri Banda, on 30.05.1906. The certificate of marriage (P1) states that the marriage was in *diga.* The said marriage had been dissolved on 30.11.1908 (P2). According to the Register of Dissolution, there had been no children from that marriage. The plaintiff was born on 06.06.1915 at Halpandeniya and the Certificate of Birth (P3) discloses that Menawa Ralalage Mudiyanse and Podimahathmayo are the parents and that they were not married at the time of the birth of the plaintiff. Podimahathmayo had died in 1918 and the plaintiff's maternal grandfather, Mohotti Appuhamy, had died in 1929.

Learned Counsel for the plaintiff, referred to the judgment of the District Court and submitted that the learned District Judge had held that from the fact that the plaintiff was born and bred in the mother's village, that it could be concluded that the plaintiff's mother had close connection with the *mulgedera* and therefore she does not forfeit her paternal inheritance. I reproduce below the relevant portion from the judgment of the learned District Judge where he had stated that —

"පැමිණිලිකරු ඉපදී හැදී වැඩී ඇත්තේ මවගේ ගමේ බව පෙනී යාමෙන් මව වන පොඩිමහත්මයා මහගෙදර සමග සබඳකම් පවත්වා තිබුණ බවට නිගමනය කළ හැකිය."

Except for the afore-mentioned statement, learned District Judge has not referred to any instances which had indicated that plaintiff's mother had maintained a close and constant affiliation with the *mulgedera* at Halpandeniya. The Court of Appeal was of the view that the judgment of the District Court would not warrant interference and had stated that —

> "In the instant case the plaintiff's paternal grandfather (sic) having brought up the child from tender years and admittedly in the '*mulgedera*' by the maternal grandfather whose rights the plaintiff claims in the instant action, had not obviously disapproved of the daughter's cohabitation with the plaintiff's father."

On a careful examination of the evidence of the plaintiff and the 1st defendant and on a perusal of the documents that were produced in the District Court, it appears that except for the Certificate of Birth of the plaintiff, there is no other material which reveals detailed information regarding the residence of the plaintiff's parents. The Certificate of Birth clearly indicates that the plaintiff was born at Halpandeniya and that being the village of the plaintiff's mother, Podimahathmayo, it would appear that she had been at the *mulgedera* for the confinement. However, with reference to the name and residence of informant and in what capacity he had given information, it had been stated that—

> *" මේනව රාලලාගේ මුදියන්සේ ගමආරච්චිල සහ රාජපක්ෂ මුදියන්සේලාගේ පොඩිමහත්මයෝ 'පදිංචිය මේනව' - උපන් ළමයාගේ දෙමව්පියෝ (emphasis added)."*

The inference that could be clearly drawn from this statement is that Podimahathmayo, who had been living with ther husband at Menawa had returned to her *mulgedera* at Halpandeniya for her confinement, in keeping with the customary traditions. Except for the fact that Podimahathmayo had given birth to the plaintiff at Halpandeniya, there is no other material that indicate that Podimahathmayo had maintained a close relationship with her *mulgedera*. Although the plaintiff in his evidence in the District

Court had stated that his mother had a *binna* marriage with his father and that they had lived at Halpandeniya there is no material to substantiate this position. Furthermore, it is to be borne in mind that when the plaintiff was questioned about his mothers previous marriage as to whether it was *diga,* he had vehemently denied that position. However, as stated earlier, Podimahathmayo's first marriage was clearly in *diga* and therefore the question arises as to the credibility of the plaintiff's evidence.

Be that as it may, the issue that has to be considered would be whether the return of Podimahathmayo to the *mulgedera* for her confinement could be regarded as an instance where there was a re-admission into the family and thereby whether there had been a waiver of the forfeiture of inheritance. The question as to the return of a Kandyan woman to her parental home for her confinement would re-establish the connection with the *mulgedera* was considered in *Emi Nona* vs. *Sumanapala* [11], where Jayatilake, S. P. J., held that, although there is evidence that after her marriage in *diga* she had visited her parents from time to time and stayed for some time with them, that she went to her parents house for her confinement and attended on her father during his last illness is insufficient to establish a re-acquisition of *binna* rights.

In the instant case, there is no evidence to establish that Podimahathmayo was living with the plaintiff's father in the *mulgedera.* Also there is no material to show that, the plaintiff had been living with his maternal grandparents prior to his mother's demise. He was brought up by the maternal grandfather only after the death of his mother Podimahathmayo in 1908. On the other hand, the Certificate of Birth clearly states that the plaintiff, although was born at Halpandeniya, his parents were living at Menawa in the Kegalle district. In such circumstances it is evident that Podimahathmayo had not been living with Menawa Ralalage Mudiyanse at her *mulgedera.*

The legal position in regard to the property rights of a married daughter therefore is quite clear and even if one were to consider the rights of a daughter who had returned from her *diga*-husband's house, according to Hayley (Supra at pg. 384), such a woman does not ordinarily recover any right to inherit whether she returns before or after her father's death. The only exception to this position where she would be able to inherit, is that if she marries again in *binna,* with the consent of her parents.

In such circumstances, it is apparent that the plaintiff's mother Podimahathmayo does not come within the said exception and therefore she would not be entitled to inherit from her father.

There is one other matter that has to be considered in this appeal. Inheritance is claimed by the plaintiff from the Estate of his maternal grandfather. Plaintiff's mother, Podimahathmayo pre-deceased her father and therefore the consideration should be regarding the rights of an illegitimate child to succeed to his maternal grandfather's property. Hayley (Supra at pg. 391) referring to the said rights of illegitimate children states that, an illegitimate child does not succeed to his grandfather.

The Court of Appeal, however, relying on the decision of *Appuhamy* vs *Lapaya* [12] was of the view that irrespective of the fact that the plaintiff was illegitimate that he is entitled to acquired property of his maternal grandfather.

In *Appuhamy* vs. *Lapaya* (*Supra*) the Court had to deal with the rights of an illegitimate child of the deceased person, namely one Rattarana, who had pre-deceased his father. Wendt, J., sitting alone, was of the view that—

> "he succeeds directly to his grandfather ; the property does not come 'through' his father Rattarana in the sense that the father ever had any interest in it, and there is therefore no reason for the argument that when it reached Wattuwa it was Rattarana's *paraveni* property."

It has to be observed that this view is not in accordance with the laws applicable to intestate succession in Kandyan Law. Referring to the decision in *Appuhamy* vs. *Lapaya* (Supra), Hayley in his treatise on the Laws and Customs of the Sinhalese (*Supra*) stated that in deciding the matter in hand, Wendt, J., has disregarded the general principles of representation on which the rights of grandchildren are based. In his observation Hayley stated that—

> "in allowing the appeal, Wendt, J., relies mainly on the proposition that the property descended to the grandchild directly in its character of acquired property. Such a view, however,

> disregards the general principle of representation on which the rights of grandchildren are based and also fails to take account of the fact that illegitimacy itself usually arose from the refusal of the grandparents to recognize the marriage, for which very reason the issue of such marriage was debarred from inheriting any property descending from them."

The decision in *Appuhamy* vs *Lapaya* (*Supra*) was considered by Wanasundera, J., in *Kiri Puncha* vs. *Kiri Ukku and others*[13]. In that case, the question arose as to the rights of illegitimate children to *paraveni* property and it was held that although illegitimate children are entitled to succeed to their father's acquired property, that in the general Kandyan Law an illegitimate child cannot inherit the property of his grandfather. Further it was held that if his father had predeceased the grandfather, he would not be in a better position than if his father had survived and the property would still descend as *paraveni.*

In Kiri Puncha's (Supra) case, Wanasundera, J. closely examined the decision of Wendt, J. in *Appuhamy* vs. *Lapaya* (*Supra*) and was of the view that Wendt, J.,'s position was clearly not in accordance with the Kandyan Law. Referring to Wendt J.,'s judgment in *Appuhamy* vs. *Lapaya* (*Supra*), Wanasundera, J. stated that,

> "This view is clearly not in accordance with the principles of Kandyan Law. Hayley at page 392 of his book shows by reference to the passage from Armour and other institutional writers on Kandyan Law that Wendt, J., had overlooked certain basic features of the Kandyan Law in coming to this conclusion."

On an examination of the decision in *Appuhamy* vs. *Lapaya* (*Supra*) and *Kiri Puncha* vs. *Kiri Ukku* and the principles of Kandyan Law referred to by Armour and Hayley, it is apparent that in *Appuhamy* vs. *Lapaya Wendt, J.,* had overlooked certain basic features applicable to Kandyan Law in coming to his conclusion. It is also to be born in mind that in *Kiri Puncha* vs. *Kiri Ukku* (*Supra*) decided in 1981, Wanasundera, J. disapproved the decision in *Appuhamy* vs. *Lapaya* (*Supra*) and did not follow that judgment.

The Court of Appeal in considering the present appeal however has relied on the decision in *Appuhamy* vs. *Lapaya* (*Supra*) where it was stated that—

"Even in the case of acquired property of a deceased who dies intestate under the Kandyan Law both legitimate and illegitimate children are entitled to such property in equal shares, *vide Appuhamy* vs *Lapaya* 8 *(Supra).*

On a consideration of the above, I am inclined to the view that the impugned judgment would not warrant interference."

Thus it is evident that the Court of Appeal in deciding that there should not be any interference with the decision of the District Court, had relied on a decision, which was disapproved by the Supreme Court and has been regarded by Hayley, as a decision which had overlooked certain basic features in succession to property by illegitimate children under the Kandyan Law.

The judgment of the Court of Appeal thus creates the impression that *Appuhamy* vs. *Lapaya* (*Supra*) is decided correctly and has to be followed in deciding property rights of illegitimate children.

The position with regard to the intestate succession of illegitimate children in Kandyan Law is quite clear. Under the general Kandyan Law an illegitimate child could not succeed to *paraveni* property if there are any other relations however remote (*Rankiri* vs. *Ukku* [14]). Considering this position Hayley (The Laws and customs of the Sinhalese (Supra) pg 3) has clearly stated that the illegitimate child does not succeed to the grandfather. In Hayleys words :

"Illegitimate children are, however not entitled, to succeed to the *paraveni* if there are any other relations however, remote. It follows therefore that an illegitimate child can never inherit the property of his grandfather, for, even if his father has predeceased the grandfather, he cannot be in a better position than if his father had survived in which case the property would descend as *paraveni."*

As referred to earlier, the decision in *Appuhamy* vs. *Lapaya* (*Supra*), clearly constitutes a departure from the general principles applicable in Kandyan Law dealing with property issues pertaining to an illegitimate child. The Court of Appeal decision is based on the decision in *Appuhamy* vs. *Lapaya*

which was disapproved in *Kiri Puncha* vs. *Kiri Ukku* (*Supra*) and for the reasons aforementioned, I hold that that the Court of Appeal has decided this matter erroneously.

For the reasons afreosaid, I answer the issue in the appeal in the negative. This appeal is accordingly allowed and the judgment of the Court of Appeal dated 27.08.2003 and the judgment of the District Court dated 30.07.1993 are set aside. In all the circumstances of this case there will be no costs.

AMARATUNGA, J. - I agree.

MARSOOF, J. - I agree.

Appeal allowed

SANJI PARARAJASINGHAM AND ANOTHER
VS.
DEVI PARARAJASINGHAM

SUPREME COURT
BANDARANAYAKE, J.
UDALAGAMA, J AND
FERNANDO, J.
SC(APPEAL)No. 74/2002
CA No. 353/1999
DC MT. LAVINIA No. 738/98T
WITH
SC(APPEAL) No. 75/2002
CA No. 352/1999
DC MT. LAVINIA No. 707/97/T
15TH JUNE, 2005 AND 19TH AND 20TH JULY, 2005

Last will - Revocation by second marriage - Prevention of Frauds Ordinance, section 6 - Whether "subsequent marriage" in section 6 includes a second marriage of the testator - Interpretation of statutes.

Muthiah Pararajasingham died on 02.11.1997, his first marriage to one Asoka having been dissolved in July 1993. There were two children by the first marriage Sanji and Vinoji (appellants). On 24.08.1990 Muthiah made his last

will making Sanji the sole heir and one Devi Pararajasingham (respondent) the executor.

The appellant Sanji complained to the District Court (Case No. 738/98/T) that the executor(the respondent) failed to take steps to administer the estate and sought an order that the appellant (Sanji) was the sole heir to the estate. The respondent whom the deceased had married after making his will applied to the District Court (Case No. 707/97/T) for letters of administration on a claim of 1/2 share of the estate to herself and 1/2 share to Sanji and Vinoji on the basis that the deceased had died without leaving a last will.

The District Judge appointed the respondent as the administrator of the estate of the deceased. The Court of Appeal affirmed it by dismissing an appeal by Sanji relying on section 6 of the Prevention of Frauds Ordinance and the judgment in *Mary Nona* vs. *Edward de Silva* (50 NLR 73) which held that a will is revoked, *inter alia*, by a subsequent or second marriage of the testator, in terms of section 6 of the Prevention of Frauds Ordinance.

HELD:

1. The decision of the Court of Appeal was correct and the contrary view expressed in *Johannes Muppu* (SCC Vol. II No. 4, 14) was obiter.

2. The plain and grammatical meaning of "subsequent marriage" in section 6 of the Prevention of Frauds Ordinance will include a second marriage of the testator for revoking a last will.

Per **BANDARANAYAKE, J.**

"The words of a statute must *prima facie* be given their ordinary meaning"

3. Court cannot alter the plain and clear meaning of the statute. The court must administer it leaving it to the Legislature to give effect to its intention or supposed intention.

Cases referred to :

1. *Ludwig* v *Ludwig* 2M 449
2. *Shearer* v. *Shearer's Executors* (1911) CPD 813
3. *Johannes Muppu* SCC Vol II No 4, 14
4. *Mary Nona* v. *Edward de Silva* (1948) 50 NLR 73
5. *Re Estate Koshen* (1940) 2SR 174
6. *Mudanayake* v *Sivanagasunderam* (1931) 53 NLR 25

7. *Fernando* v *Perera* (1932) 25 NLR 197
8. *Sallis and another* v. *Jones* 1936 Probate Division 43
9. *Re Mainland Lloyds Bank Ltd.* v. *Mainland* (1939) All ER 148
10. *Miller* v *Solomons* (1852) Exch 560
11. *Nolon* v *Clifford* 1 CLR 453

APPEAL from the judgment of the Court of Appeal

Rohan Sahabandu for appellants in SC No. 74/2002 and SC No. 75/2002

A. R. Surendran, P. C. with *K. V. S. Ganesharajan and Nadarajan Kandeepan* for respondent in SC No. 74/2002 and for respondent in SC No. 75/2002

Cur. adv.vult.

October 14, 2005
SHIRANI BANDARANAYAKE, J.

These are appeals from the judgment of the Court of Appeal dated 31.05.2002. By that judgment the Court of Appeal affirmed the decision of the District Court dated 31.12.1998 and dismissed the appeal. The petitioner-appellant-appellant in S. C (Appeal) No. 74/2002 and respondents-appellants-appellants in S. C. (Appeal) No. 75/2002 (hereinafter referred to as the appellant)appealed to this Court where special leave to appeal was granted.

The facts of this appeal, *albeit* brief are as follows :

The appellant is a dauther of one Muthiah Pararajasingham, who had passed away on 02.10.1997. The appellant has a sister, Vinoji who is the 2nd respondent-appellant-appellant in S. C. (Appeal) No. 75/2002 (hereinafter referred to as Vinoji). The late Pararajasingham was earlier married to one Asoka Wickramasinghe and they were divorced in July 1993. During that marriage the appellant and Vinoji were born. The said Pararajasingham had executed his last will on 24.08.1990 appointing the appellant as his sole heir and appointing one Nithyalakshmi Devi Pararajasingham, the respondent-respondent-respondent in S.C.(Appeal) **74/2002 and petitioner-respondent-respondent in S. C. (Apeal)** No. 75/2002 (hereinafter referred to as the respondent), as the Executor. Later the said deceased had married the respondent. According to the appellant, the said Executor had not taken steps to have the estate adminstered. The appellant had therefore petitioned the District Court and sought an

order of court that the appellant is the sole heir to the Estate of the deceased (Case No. 738/98/T-S. C. (Appeal) No. 74/2002). Thereafter the respondent Nithyalakshmi Devi Pararajasingham, the second wife of the late Muthiah Pararajasingham and the step mother of the appellant had filed papers in the District Court of Mr. Lavinia (Case No. 707/97/T-S.C.(Appeal) No. 75/ 2002) seeking an order to administer the property, claiming 1/2 share of the Estate of the deceased and the other 1/2 share to be given to the appellant and Vinoji, the two daughers of the deceased, on the basis that the deceased died without leaving a last will.

The appellant had objected to the said application of the respondent on the basis that the deceased in terms of his last will had bequeathed his Estate to the appellant as his sole heir.

The District Court considered both cases (Case No. 707/97/T and Case No. 738/98/T) together with one judgment binding the other and on 31.12.1998 dismissed Case No. 738/98/T and appointed the respondent Nithyalakshmi Devi Pararajasingham as the administrator of the Estate of the deceased on the basis that the last will was revoked by the subsequent marriage of the Testator, which position was confirmed by the Court of Appeal.

Both Counsel agree that the only question involved in this appeal is to consider the meaning that should be given to section 6 of the Prevention of Frauds Ordinance in order to decide whether the last will of the Testator was revoked by his subsequent marriage. They also agreed that both cases could be considered together with one judgment binding the other.

Learned Counsel for the appellant strenuously argued that in terms of Section 6 of the Prevention of Frauds Ordinance, there was no revocation of the impugned will by the marriage of the Testator to the respondent. His position was that although ordinarily a last will could be revoked by a subsequent marriage of the Testator by virtue of section 6 of the Prevention of Frauds Ordinance, this rule would be applicable only where an unmarried person contracts a marriage for the first time. Accordingly learned Counsel for the appellant submitted that the said provision would not be applicable in a situation where a person had married for the second time.

Section 6 of the Prevention of Frauds Ordinance is in the following terms:

> "No will, testament or codicil or any part thereof shall be revoked otherwise than by the marriage of the testator or testatrix or by another will, testament or codicil executed in manner herein before required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will, testament or codicil is herein before required to be executed or by the burning, tearing or otherwise destroying the same by the testator of testatrix or by some person in his or her presence and by his or her direction with the intention of revoking the same."

The contention of the learned Counsel for the appellant is that under the Roman Dutch Law, the Testator's second marriage will not have the effect of revoking his will and therefore section 6 of the Prevention of Frauds Ordinance should be construed in the light of the principles laid down in Roman Dutch Law. In support of his contention learned Counsel for the appellant relied on the decisions in *Ludwig v Ludwig* [1] *and Shearer v Shearer's Executor* [2] where it was held that a will was not revoked or invalidated by a subsequent change in the Testator's circmustances.

He also referred to the writings of Wille in Principles of South African Law, where he had stated that 'a will cannot be revoked by the subsequent marriage of the Testator' and the opinion expressed by R. W. Lee in his Treatise on Roman Dutch Law, where he had stated that 'a will cannot be revoked by the subsequent marriage of the testator'.

The contention of the learned Counse' for the appellant is that, the words in section 6 of the Prevention of Frauds Ordinance is clear and if the law before the said Ordinance came into effect, was the Roman Dutch Law, it is quite evident that it is only an unmarried person's will could be revoked by a marriage subsequent to the execution of a will. Therefore he submitted that there is no ambiguity relating to the meaning of the words in the relevant section and that the specific words in the Ordinance which is 'the marriage' is diferent from the word 'subsequent marriage'.

Learned Counsel for the appellant drew our attention to the observations of Stewart, J. in *Johannes Muppu* [3] and the decision in *Mary Nona* v. *Edward de silva* [4] and submitted that the Court of Appeal had relied on the decision in *Mary Nona* (Supra). His posi'ion was that, the observations made by Stewart, J., that the subsequent marriage of a surviving spouse would not revoked a will, is the better view out of the two different positions taken in the aforementioned decisions.

Having said that let me now turn to consider the first limb of the submission of the learned Counsel for the appellant that under the Roman Dutch Law, the Testator's second marriage subsequent to the execution of a will, shall not have the effect of revoking it. In other words learned Counsel for the appellant's position is that the word 'marriage' in section 6 of the Prevention of Frauds Ordinance should be construed to refer only to first marriage and not to any other valid marriage the testator would have entered thereafter.

R. W. Lee considering the methods of revocation of wills and legacies (An Introduction to Roman Dutch Law, 5th Edition, Clarendon Press, Oxford, at pg. 342) had stated that, in the modern law, **in the absence of statutory provisions,** ' the revocation of a will based on a marriage cannot be assessed as pointed out by Van der Linden, as it could vary. In his words:

> "Van der Linden says that a will is revoked by subsequent marriage forllowed by birth of issue. But the statement wants authority, and it does not appear that in the modern law, in the absence of statutory provision, a will is revoked either by marriage alone or by marriage followed by birth of issue. In Natal a will is generally revoked by marriage, unless expressed to be made in view of a contemplated marriage, or made in exercise of a power of appointment which does not affect the interest of the heirs *ab intestato*; but no joint will is revoked by the marriage of the surviving spouse."

It is thus clear that Van der Linden's observations had not reached any finality and more importantly that Lee had not accepted Van de Linden's version on a will been revoked by a subsequent marriage followed by the birth of a child. Moreover, none of these statements are authorities, which proclaimed that only the first marriage of the Testator would revoke a previous will and that there is no such revocation when there is a subsequent marriage.

Learned President's Counsel for the respondent, referring to the decision in *Johannes Muppu's case* (Supra) rightly submitted that even assuming without in any manner conceding that section 6 of the Prevention of Frauds Ordinance, should be read in the light of the Roman Dutch Law principles, there is no warrant for the appellants contention that section 6 should be

construed as being applicable only to the first marriage of the Testator, in as much as the Roman Dutch Law only refers to revocation of wills by a subsequent marriage producing issues and not to any principle whereby revocation of a prior will is postulated only by the first marriage of the Testator. In support of his contention learned President's Counsel for the respondent referred to the observations made by Stewart, J. in *Johannes Muppu's case* (Supra). Referring to the words in section 5 of Ordinance, No. 7 of 1840, that 'no will ..... shall be revoked otherwise than by the marriage of the 'testator or testatrix or by another will', Stewart, J., observed that,

> "probably the grammatical and logical equivalent of the words" no will shall be revoked otherwise than by the marriage of the 'testaror or testatrix" may be taken, rendered into affirmative language, as enacting' that every will shall be revoked by the marriage of the testaror or testatrix'."

Having said that, Stewart, J. further proceeded to observe that there was no occasion for the purposes of *Johannes Muppu's case* (Supra) to determine definitively whether the terms of section 5 of Ordinance No. 7 of 1840 are sufficiently adequate to abrogate the Roman Dutch Law. In Stewart, J.'s words,

> " But as will be seen hereafter, there is no occasion for the purposes of the present case to determine definitively whether the terms of the 5th section are sufficiently express to abrogate the Roman Dutch Law, according to which the person should not only be married when the will was made, but the subsequent marraige should be followed by issue to render the prior will void."

In the light of the aforementioned, it is evident that although Stewart, J., referred to the principles of Roman Dutch Law, which are applicble mainly to joint wills and with regard to the application when there is a subsequent marriage, he did not proceed to make any determination regarding the applicability and the effect of any such principle on section 6 of the Prevention of Frauds Ordinance. On the contrary,Stewart, J., has made reference to the English Common Law in *Johannes Muppu's case* (Supra and his reasoning had been solely on that basis. Consequently, the decision by Stewart, J., in *Johannes Muppu* (Supra) cannot be taken as a binding authority in construing the provision in section 6 of the Prevention of Frauds

Ordinance, which deals with the revocation of a will by a subsequent marriage.

Learned President's Counsel for the respondent, drew our attention to the decision in *Re Estate Koshen* [5]. This decision in my view, suggests an interesting point. In that matter the Testator was a Muslim who contracted two marriages by Islamic Rites; both of which were in terms of Islamic Law potentially polygamous. His first wife died in 1930 and in 1932 he had made a will which contained three (3) beneficiaries, namely his two sons and a nephew. In 1933 the testator married his second wife and had a large family by her. He died in 1954. The question arose as to the validity of his will made in 1932. Hathorn, j., considering that the case relates only to the succesion of property and that it also falls within the principles of *Mehta's* case, held that the Testator's marriage in 1933 was a marriage within the meaning of section 7 of the Deceased Estates Succession Act and in the absence of an endorsement as is described in that section that marriage renders null and void the will made by the testator in 1932.

This decision, thus clearly emphasises the fact that, priority had been placed for the governing provisions laid down in statutes and due consideration had been given to such provisions in interpreting the question of the revocation of a will based on a subsequent marriage.

It is also pertinent to note, both Hathorn, J., and R. W. Lee have been specific that consideration should be given to relevant statutary provisions in deciding the validity of a will executed prior to a second marriage of the Testator.

In such circumstances, the question arises as to whether there is any necessity to consider the position which prevailed under the Roman Dutch Law, despite that being our common law, where there are specific statutory provisions which govern the question under consideration.

It is common ground that express provision has been made under the Prevention of Frauds Ordinance on revocation of a will. Accordingly, any such principle of Roman Dutch Law concerned with revocation of a will has been superseded by the express provisions contained in the Prevention of Frauds Ordinance. In the absence of any doubt or ambiguity, there are no means for the appellant to rely on principles governed by Roman Dutch Law, to be applied in their favour.

Referring to principles of interpretation, Sutherland (Statutory Construction, 3rd Edition, Vol. II, pg. 310) stated quite clearly that,

> "where the words of an Act of Parliament are clear, there is no room for applying any of these principles of interpretation, which are merely presumptions, in cases of ambiguity in the statute."

Maxwell has confirmed this position by stating that it is not allowable to interpret what has no need of interpretation (Interpretation of Statutes, 10th Edition, pg. 4.). Stating that the ordinary and natural meaning to be adhered to in the first instance, Bindra had categorically stated that,

> "The words of a statute must *prima facie* be given their ordinary meaning. Where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there be some strong and obvious reason to the contrary.
>
> When there is no ambiguity in the words, there is no room for construction ..... No single argument has more weight in statutory interpretation than the plain meaning of the word. 'If the meaning of the language be plain and clear, we have nothing to do, but to obey it - to administer it as we find it,observed Pollock CB in *Miller* v *Salomons.* If the language of statute is clear and unambiguous, the court must give effect to it and it has no right to extend its operation in order to carry out the real or supposed intention of the legislature (Interpretation of Statutes, 9th Edition, Bullerworths, pp 394-395)"

This position has been accepted by our Courts in several decisions. For instance in *Mudanayake v Sivagnanasunderam* [6] it was held that 'when the language of a statute speaks clearly for itself it is not permitted to rely on extraneous evidence in support of an interpretation, which the words of the statute do not warrant'.

It is thus evident that, when the language of a statute is clear and has no ambiguities, there is no provision for this Court to refer to any other material in view of giving a different interpretation. The only role for the

Court, when there is no ambiguity in the language and when it is plain and clear, is to do nothing, but to simply give effect to the statutory provision. It is thereby clear that the Court has no power to add any words to statutory provision which is clear, plain and unambiguous. The contention of the learned Counsel for the appellant is that, the words, **'the marriage'** in section 6 of the Prevention of Frauds Ordinance lays emphasis on 'marriage'. Learned Counsel submitted that 'THE' is a functional word to indicate that following a noun or a noun equivalent is **definite** or has been previously specified by context or by circumstances. The resulting position of the submission of the learned Counsel for the appellant in other terms would be to interpolate the word 'first' between the words 'the' and 'marriage' in section 6 of the Prevention of Frauds Ordinance to read as by the **'first'** marraige.

It has been stated time and again as referred to earlier, that when there is no ambiguity in the words in a statute there is no room for construction. if the language of a statute is clear and unambiguous, Courts must give effect to the words so stated in the statute, without attempting to obtain the intention of the legislature. Moreover when the language is clear and meaningful there is no authority for the Court to add to the language of a statute. This position was cosidered by Jayawardene, A. J. in *Fernando v Perera*[7] where it was held that,

> "Courts have no power to add to the language of a statute unless the language as it stands is meaningless or leads to an absurdity."

It is thus evident that in view of the unambiguous language of section 6 of the Prevention of Frauds Ordinance there is no necessity for interpreting that section in terms of the Roman Dutch Law.

Having said that let me now turn to examine the meaning given in section 6 of the Prevention of Frauds Ordinance in a situation where there is a second marriage after Testator had executed his last will.

The second limb of the contention of the learned Counsel for the appellant was that the court of Appeal should have followed the observations of Stewart, J., in *Johannes Muppu*'s case *(Supra)* and not the decision in *Mary Nona* v *Edward de Silva (Supra).* Learned Counsel's

position was that the better view was of Stewart, J. in *Johannes Muppu* (supra) and not what was expressed by then Supreme Court in *Mary Nona* v. *Edward de Silva* (Supra).

In *Johannes Muppu* (supra) a husband and wife executed a joint will disposing of their common property. The wife died and the husband married for the second time. It was in evidence that after the first wife's death the husband executed conveyances of portions of the property dealt with by the joint will to legatees under the will. The husband afterwards died leaving heirs surviving his second wife. An executor of the joint will having applied for probate after the husband's death,the application was opposed by the second wife, who contended that the joint will was revoked by the second marriage.

The Court held that the husband had adiated the inheritance under the joint will and that, that being so, the joint will was not revoked by the husband's subsequent marriage. It was further held that the provisions of clause 5 of Ordinance No. 7 of 1840, with respect to the revocation of wills by subsequent marriage of the Testator's not to apply to the case of the joint wills made by spouses married before the passing of the Ordinance.

It is to be borne in mind that in *Johannes Muppu's* case *(Supra)* the question was based on the validity of a joint will and Stewart, J., took the view that the said will is irrevocable in view of the husband adiating the inheritance. In such circumstances there was no necessity for Stewart, J. to consider the application and scope of section 6 of the Prevention of Frauds Ordinance and thereby his position became *obiter dictum* and could not have been taken as authority on the applicability of section 6.

In *Johannes Muppu's* case(Supra), Stewart, J., had considered the issue in hand on the basis of the corresponding statutory provisions in the English Statute, namely section 18 of the Wills Act and came to the conclusion that the will of the Testator is revoked only when a testator marries for the first time. Section 18 of the Wills Act states that,

> "Every will made by a man or woman shall be revoked by his or her marriage....."

Section 18 of the Wills Act had been considered by several English decisions where it has been stated that the Testator's second marriage

would revoke a will executed prior to the marriage. Considering this position learned President's Counsel for the respondent cited *Sallis and Another* v. *Jones* [8] where the Testator who was a widower, by his will executed in June 1927 appointed his two daughters his executrices. He married his second wife in Novemebr 1927. In the final sentence of his will the Testator had declared that 'this will is made in contemplation of marriage.' After his death in 1936, testamentary proceedings for the grant of probate were instituted by his daughters on the basis of his will executed inJune 1927; the second wife resisted the application contending that in terms of section 18 of the Wills Act, the said will was revoked by the testator's marriage to her and that thereafter the testator died intestate.

Section 177 of the Law of Property Act of 1925, excluded the operation of section 18 of the Wills Act, if the will was made before a marriage is expressed to be made in contemplation of a particular marriage and is followed by the solemnization of that marriage. However, in *Sallis's* case Bennett, J., was of the view that, for the operation of section 177 of the Law of Property Act, the will should contain 'something more than a declaration containing a reference to marriage generally'. Therefore Bennett, J., was of the view that the case had to be decided in terms of section 18 of the Wills Act and it was held that the will in question was revoked by the subsequent marriage of the deceased.

In *Re Gilligan* (deceased) the court had to consider the scope of section18 of the Wills Act of 1837. The court while considering the purpose and effect of section 18 stated that the section provided that wills shall be revoked by subsequent marriage and more importantly was of the view that 'the event which the section contemplates is the re-marriage of a person who has made a will and the circumstances in which a will so made shall be revoked by such subsequent marriage.'

In *Re Mainland, Lloyds Bank Ltd.*, v *Mainland* [9] the Testaror had executed a will prior to entering into his second marriage. After his second marriage he had executed another will. Considering the validity of the will Lord Greene, M. R. was of the view that,

> "Section 18 provides that a will shall be revoked by marriage. Here revocation takes place, not by virtue of some action of the testator directed to the revocation of the will, but as

> a collateral consequence, imposed by law, of an action performed *alio intuitu* .....under section 18, where revocation follows as a matter of law, whether or not the testator wishes it".

The English Wills Act has no direct relevance to the matter in issue. However, the purpose of citing English authorities was for the reason that as correctly pointed out by learned President's Counsel for the respondent, Stewart,J., in his judgment in *Johannes Muppu* (Supra) had referred to section 18 of the Wills Act in the process of determining whether the subsequent marriage of *Johannes Muppu* had revoked the will executed prior to his second marriage.

All these decisions therefore clearly indicate that section 18 of the Wills Act provides without any doubt that a will which had been executed prior to a second marriage would be revoked as a result of that marriage. In such circumstances, the view taken by Stewart, J., in *Johannes Muppu's* case *(Supra)* that in terms of section 18 of the Wills Act, the will of the testator is revoked only when a testator married for the first time cannot be accepted. Having given consideration to that decision I am not in agreement with the view taken by the learned Counsel for the appellant that the Court of Appeal should have followed the observations of Stewart, J., in *Johannes Muppu's* case (Supra).

Learned President's Counsel for the respondent on the other hand relied on the decision of *Mary Nona* v *Edward de silva* (Supra) decided by the Supreme Court in 1948, which had clearly disagreed with the view expressed by Stewart, J. in *Johannes Muppu* (Supra).

In *Mary Nona's* case, the question arose in relation to a joint will made by one Charles de Silva and his wife Elizabeth in 1921.By clause A, both movable and immovable property belonging to both of them were given to one Margaret, a daugher of Charles by a previous marriage. Clause B went on to state that if Charles was the survivor he would be entitled absolutely to all the property belonging to the joint estate, and that if Elizabeth was the survior she would be entitled to the control of all the property and to enjoy the rest and profits thereof, but that Elizabeth would not be at liberty to sell or dispose of that property. Charles died in 1922 and after Charles's death Elizabeth contracted a marriage with one Warakaulle who died in 1938 leaving Elizabeth considerable property. Elizabeth died in 1943. Considering the question whether the second marriage contracted by Elizabeth had revoked her will, Wijeyewardene, A.

C. J., clearly stated that the second marriage she had entered into had resulted in revoking her last will. Expressing his view,Wijeyewardene, A. C. J. further stated that,

> "It was contended by Mr. H. V. Perera that section 6 of the Prevention of Frauds Ordinance, did not have the effect of invalidating a will of a married person by reason of a second marriage subsequent to the execution of the will, and he relied on the opinion expressed by Stewart, J., in *Re the estate of K. D. Johannes Muppu* (1879) 2 Supreme Court Circular 14. That opinion was *an obiter dictum,* as it was not necessary for Stewart, J., to consider section 6 in view of the definite decision reached by him that the last will in that case had become irrevocable , since the testator and testatrix there had massed their estates and the surviving testator had adiated the inheritance. **With due respect to the learned Judge, I find myself compelled to disagree with the view expressed by him as to the scope of section 6** (empahsis added)".

Learned Counsel for the appellant submitted quite strenuously that, in *Mary Nona* v *Edward de Silva* (Supra), although the Supreme Court decided that the opinion of Stewart,J.,in *Johannes Muppu* (Supra)was *obiter* and cannot be agreed upon, that there was no analysis of section 6 of the Prevention of Frauds Ordinance and that there was no comparison with other authorities like in Stewart, J.'s judgment.

It would not be correct to state that in *Mary Nona's* case, (*Supra*) the Court had not given due consideration to the applicability of section 6 of the Prevention of Frauds Ordinance or to applicable case law. The Court had examined the issue in question and had referred to *Johannes Muppu's* Case (Supra) as a decision relied on by the Counsel. After considering the submissions of the Counsel and the said decision, Court had held that the opinion of Stewart, J. was an *obiter dictum.* It appears that Johannes Muppu was the only authority available on the subject and therefore it would not have been possible for the Court to have considered any other judgment, decided by our Courts.

Also if I may reiterate, when there is no ambiguity in a specific provision there will not be any necessity for any sort of construction. Pollock C. B. , in *Miller* v *Solomons* [10] quite clearly stated that,

> "If the language used by the legislature be clear and plain, we have nothing to do with its policy or impolicy its justice or injustice, or even its, 'absurdity', its being framed according to our views of right or the contrary, we have nothing to do but to obey it, and administer it as we find it; and I think to take a different course is to abandon the office of judge and assume that of a legislator (emphasis added)".

A similar view was expressed by Connor, J. in *Nolon* v *Cliford*[11] when it was specifically stated that,

> "The first and most important rule in the construction of statutes is to give effect to words according to their grammatical meaning. If that meaning is clear, then, whether an alteration is made in the common law or the statute law or not, and whether of a serious character or not, is of no moment, effect must be given to the words the legislature has used."

Considering the aforementioned position it is abundantly clear that the words given in section 6 of the Prevention of frauds Ordinance with reference to the phrase **'by the marriage of the testator or testatrix'** conveys the meaning of more than one marriage of the Testator or the Testatrix and has not restricted itself only to the first marriage of the Testator or the Testatrix. In such circumstances, out of the two decisions, which considered the effect of the said provision, I am of the view that the observation of Wijeyewardene A.C. J., in *Mary Nona* v *Edward de Silva* (supra) represents the correct position of the scope and applicability of section 6 of the Prevention of Frauds Ordinance that a will could be revoked by the second marriage of the Testator subsequent to the execution of the will.

For the aforementioned reasons, I answer the issue in the affirmative and state that the last will made by the Testator, namely the deceased Muthiah Pararajasingham, was revoked on his subsequent marriage.

I accordingly dismiss the appeal and affirm the judgment of the Court of Apeal dated 31.05.2002.

There will be no costs.

UDALAGAMA, J., — I agree.

FERANDO, J., — I agree.

Appeal dismissed.

NAVARATNE
vs
WADUGODAPITIYA AND OTHERS

COURT OF APPEAL
SOMAWANSA, J. (P/CA)
CALA 452/2004
DC KANDY 21172/1
MARCH 17, 2005

Civil Procedure Code, sections 438/754(2)/757 and 759(2) — Leave to appeal — Not supported by a valid affidavit — Consequences ? — Affidavit not signed by the party — Bona fide mistake in signing the petition and not the affidavit ? — Acceptance of same ? — Could a corrected affidavit be submitted later ? Should an affidavit accompany the petition ?

The defendants respondents contended that the application for leave to appeal is not properly constituted in that the plaintiff petitioner's amended petition is not supported by a valid affidavit – not being signed by the plaintiff-petitioner – and in the circumstances should be dismissed *in limine.*

The position of the plaintiff petitioner was that after reading the affidavit, thinking he signed the affidavit placed his signature on the petition instead of placing same on the affidavit, and that it is a *bona fide* mistake.

HELD:

(i) The purported affidavit does not comply with the provisions contained in section 438.

(ii) It is seen that in the instant application for leave, the averments contained in the petition are not supported by a valid affidavit. The application for leave to appeal is not properly constituted and has to be rejected.

Per **SOMAWANSA,** J. (P/CA)

"In the instant application in making the purported affidavit, I would say not only the attorney-at-law on record, but the plaintiff petitioner as well as the Justice of Peace had been negligent and careless. Such acts should not be condoned or considered as technicalities that should be overlooked."

Per **SOMAWANSA, J.** (P/CA)

"Though in section 757 the words used are "such petition shall be supported by affidavit" which indicate that the affidavit need not be accompanied with the petition and the supporting affidavit could be tendered after any mistake has been corrected with permission of court, I am not inclined to hold such a view – my considered view is that a valid affidavit in compliance with section 438 should be tendered supporting the averments in the petition, and section 759(2) cannot be made use of to bring about legal validity or sanctity to a purported affidavit invalid and unacceptable in law."

APPLICATION for leave to appeal from an order of the District Court of Kandy, on a preliminary objection raised.

Cases referred to :

1. *Clifford Ratwatte* vs *Thilanga Sumathipala (2001) 2 Sri LR 56*
2. *Keerthiratne* vs *Udena Jayasekera* (1990) 2 Sri LR 346
3. *Meeruppe Sumanatissa Therunnanse* vs *Warakapitiya Sangananda Therunanse* 66 NLR 333

A. Anees for petitioner.

D. Jayasuriya with *Jeffry Zainudeen* for respondents.

June 03, 2005
ANDREW SOMAWANSA, J. (P/CA)

When this application for leave to appeal was taken up for inquiry, counsel for the defendants-respondents took up a preliminary objection that the application for leave to appeal is not properly constituted in that the plaintiff-petitioner's amended petition filed in this Court is not supported by a valid affidavit. Since the purported affidavit tendered with the amended petition has not been signed by the plaintiff-petitioner, the plaintiff-petitioner's purported application ought to be dismissed *in limine.* On the aforesaid preliminary objection both parties agreed to tender written submissions and have tendered their submissions.

The relevant facts are the plaintiff-petitioner filed the instant application for leave to appeal initially by a petition and affidavit dated 01.12.2004. Thereafter the plaintiff-petitioner obtained leave of this Court and filed an amended petition and an affidavit purported to be that of the plaintiff-petitioner but not signed by the plaintiff-petitioner.

This fact is conceded by the counsel for the plaintiff-petitioner in his written submissions wherein he says the plaintiff-petitioner has filed an affidavit but apparently not placed the signature at the end of the affidavit against the jurat clause. He submits that this is a bona fide mistake on the part of the petitioner who obviously placed the signature after reading the affidavit thinking that he signed the affidavit in the presence of the Justice of Peace who attested his signature, but that the affirmant by mistake has placed the signature on the petition instead of placing the same on the affidavit. He further submits that a *bona fide* mistake in not placing the signature on to the right paper should not jeopardize the genuine application for leave to appeal for the plaintiff-petitioner in the belief that he signed an affidavit has by mistake placed his signature on to the petition.

Be that as it may, the aforesaid mistake on the part of the plaintiff-petitioner clearly indicates that the purported affidavit has not been read over and explained to the plaintiff-petitioner nor has the plaintiff-petitioner himself read the affidavit which is fatal to the validity of the said affidavit. If as the plaintiff-petitioner tries to make out that he placed his signature on the petition instead of on the affidavit then the purported affidavit has been signed by the Justice of Peace prior to the plaintiff-petitioner placing his signature on the petition, for it is obvious that the Justice of Peace should have observed that the affirmant's signature was not on the affidavit when he entered the jurat clause. In effect it is obvious that the purported affidavit does not comply with the provisions contained in section 438 of the Civil Procedure Code which reads as follows :

> "Every affidavit made in accordance with the proceeding provisions shall be signed by the declarant in the presence of

the court, Justice of the Peace, or Commissioner for Oaths or person qualified before whom it is sworn or affirmed".

Provision relating to application for leave to appeal are laid down in Section 754(2) read together with section 757 of the Civil Procedure Code. The relevant provisions of section 757 of the Civil Procedure Code reads as follows :

"Every application for leave to appeal against an order of court made in the course of any civil action, proceeding or matter shall be made by petition duly stamped, addressed to the Court of Appeal and signed by the party aggrieved or his registered attorney. Such petition shall be supported by affidavit".

Thus it is to be seen that in the instant application for leave, the averments contained in the petition are not supported by a valid affidavit. Therefore one has to concede that the plaintiff-petitioner's application for leave to appeal is not properly constituted and has to be rejected.

In the case of *Clifford Ratwatte* vs *Thilanga Sumathipala*[1]

it was held :

"The deponent states that he is a Christian and makes oath, the jurat clause at the end of the affidavit states that the deponant has affirmed. The affidavit is defective."

It was further held :

"Subsequent explanation cannot be used to correct in any way what is obvious on the face of the affidavit in question and therefore it is not an affidavit which has any legal validity or sanctity and therefore there was no affidavit as required by law filed with the Petition within 14 days, as contemplated in section 757(1) – C.P.C. "It is not a mistake as to formality that can be cured under s. 759(2)."

Counsel for the plaintiff-petitioner also refers to section 759 of the Civil Procedure Code which reads as follows :

759(1) "If the petition of appeal is not drawn up in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court ; or be amended then and there. When the court rejects under this section any petition of appeal, it shall record the reasons for such rejection. And when any petition of appeal is amended under this section, the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature."

(2) "In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just".

In this respect, I would refer to the decision in *Keerthiratne* vs *Udena Jayasekera*[2]

wherein it was held :

> "The provisions of section 759(2) of the Civil Procedure Code cannot be invoked to condone the negligence and carelessness of the attorney-at-law on record".

In the instant application in making the purported affidavit, I would say not only the Attorney-at-Law on record but the plaintiff-petitioner as well as the Justice of Peace had been negligent and careless. Such acts should not be condoned or considered as technicalities that should be over-looked.

Counsel for the plaintiff-petitioner also invites us to compare provisions contained in section 757 of the Civil Procedure Code with section 766 of

the Civil Procedure Code and submits that in section 757 of the Civil Procedure Code words used are "such petition shall be supported by affidavit" which indicate that the affidavit need not be accompanied with the petition and the supporting affidavit could be tendered after any mistake has been corrected with permission of Court. However I am not inclined to hold such a view. My considered view is that a valid affidavit in compliance with section 438 of the Civil Procedure Code should be tendered supporting the averments in the petition and section 759(2) cannot be made use of to bring about legal validity or sanctity to a purported affidavit invalid and unacceptable in law.

Counsel for the plaintiff-petitioner also has cited the decision in *Meeruppe Sumanatissa Therunnanse* vs *Warakapitiya Sangananda Terunnanse*[3]

where it was held :

> "In an application for conditional leave to appeal to the Privy Council in terms of Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance, the absence of an affidavit is not fatal to a grant of leave."

However the aforesaid dicision has no relevance to the facts of the instant application for that decision dealt with appeals (Privy Council) Ordinance Schedule Rules 1(a) 2 and 3 which are repealed and no longer operative.

For the foregoing reasons, I would hold that the purported affidavit accompanying the petition tendered by the plaintiff-petitioner is not a valid affidavit. In the circumstances, I would uphold the preliminary objection taken on behalf of the defendants-respondents and dismiss the plaintiff-petitioner's application for leave to appeal with costs fixed at Rs. 5000.

Preliminary objection upheld ; application dismissed.