THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2010] 1 SRI L.R. - PART 11

PAGES 281 - 308

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

February 9th, 2010

J.A.N. DE SILVA, C.J.

The learned counsel for the petitioner heard in support of this application. We formerly granted leave to proceed on the questions set out in paragraph 7 (a) (b) and (c) of the petition. Thereafter the court decided to proceed with the appeal with the consent of both parties.

Dr. Ranjith Fernando senior counsel for the appellant submitted that in the Court of Appeal judgment too the court has recognized the fact that there are certain infirmities with regard to the identity of the appellant.

The appellant together with two others were indicted before the Chilaw High Court on a charge of attempted murder of one Herathge Don Nandasena on the 11th of November 1991. After trial the 2nd and 3rd accused were acquitted. The appellant was found guilty and sentenced to 3 years R.I. together with a fine of Rs. 25,000/=

After the conviction and sentence the appellant lodged an appeal to the Court of Appeal. This appeal was heard and by its order dated 8 September 2009 dismissed the appeal.

The following two grounds were urged by the appellant before us (a) Non consideration of material infirmities in the prosecution case (b) The High Court Judge misdirected herself by acting on the premise that the alibi defence must be proved by the accused.

The evidence of the victim Nandasena was that he was watching a television program with his family members on 11th November 1991 around 8.30 P.M. and when he heard the noise of dogs barking, through the door he saw the

accused with gun in hand. Soon thereafter he fired the gun at him injuring him on his thigh and genital area. He testified that he did not know the name of the appellant but knew him as "Hamuda Karaya" (army man or soldier). He further stated that the 2 and 3 accused too were there armed with clubs. According to Nandasena's testimony when the incident happened he shouted "Hamuda Karaya" fired at him as he did not know his name. When he was taken to the hospital doctor has recorded the short history given by the patient. It reads as "Kerthi or Keerthi B-in law". MLR had been recorded the very next day i.e. on 12.11.1991. Keerthi was the 2nd accused and he was acquitted at the High Court. 1st information to the police had been provided by one Wimalasiri, brother of the victim at 7 AM on 12.11.1991. According to Wimalasiri victim told him Jayatissa fired and he mentioned that name in the police complaint.

Udulawathie the sister of the victim who is also an eye witness relates the same story but says that she saw only the appellant and also states that her brother soon after the incident shouted that Jayatissa (appellant) fired and also said that appellant was known to her family and they knew his name. The above evidence creates a problem with regard to the credibility of Nandasena's evidence regarding the identity of the appellant. However Udalawathie's evidence had not been shaken by the defence at the trial. Therefore the conviction of the appellant could be sustained solely on her evidence if properly considered by the High Court Judge.

The learned counsel for the appellant contended that the approach taken by the High Court Judge relating to the defence of alibi and the burden of proof is totally erroneous. In the judgement High Court Judge has noted that the burden of proof of the defence of alibi is on the accused.

The defence in a criminal case is entitled to plead alibi as a defence. Section 11 of the Evidence Ordinance provide for such a plea. The word "inconsistence" referred to therein denotes the physical impossibility of the co existence of two facts-see also illustration in section 11 (a).

Plea of alibi is not an exception to penal liability. Hence there is no burden of proof on the accused. Section 105 of the Evidence Ordinance has no application. Evidence of alibi has merely to be weighted in the balance with the prosecution evidence. When the defence set up an alibi the prosecution is entitled to lead evidence in rebuttal. When the accused take up an alibi defence, three positions could arise.

(i) If the evidence is not believed the alibi fails

(ii) If the evidence is believed the alibi succeeds

(iii) If the alibi evidence is neither believed nor disbelieved but would create a reasonable doubt the accused should get the benefit of the doubt. These principles have been discussed in the following cases:

- *King vs Marshall* [1]
- *Yahonis Singh vs. Queen* [2]
- *Punchi Banda vs. State* [3]

It is to be noted that these are certain fundamentals to be observed when an alibi is set up as a defence.

1. If an alibi is established by unsuspected testimony that will be satisfactory and conclusive
2. It should cover the time of the alleged offence so as to exclude accused presence at the crime scene at the relevant time.

3. If the alibi was set up at the time the accusation was first made and was constantly maintained, credibility of alibi will be enhanced. If it is taken up belatedly the effect will be less.
4. Evidence of alibi can be falsified by mistaken identity and the difference of the times in the clocks. A few minutes will make all the difference.

It is also to be noted that false alibi will weaken the defence case and strengthen the prosecution case.

In this case of course the trial judge has gone on the wrong assumption that burden of proof of alibi is on the defence. Having considered the evidence relating to alibi we are of the view that if proper evaluation was carried out by the trial judge she could have rejected this defence and still convict the appellant. We have also given due consideration to the fact that the offence had taken place 19 years ago and the appellant had been in custody for considerable length of time before the trial. We are of the view that interest of justice would be met if a non custodial sentence is imposed and by increasing the fine. We affirm the conviction. However, considering the circumstances of this case we reduce the 3 R. I. imposed on the accused to 2 years and suspend it for 7 years. The fine imposed is increased to Rs. 50,000/= and that should be given to the victim as compensation. Subject to the above variation of the sentence this appeal is dismissed. The High Court judge is directed to act in terms of Section 303 of the Criminal Procedure Code.

SRIPAVAN J. – I agree

IMAM, J. – I agree.

Sentence Varied.

Appeal dismissed.

SILVA AND OTHERS VS. DIRECTOR OF HEALTH SERVICES AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 97/2007
MAY 11, 2005

Human Rights Commission of Sri Lanka Act 21 of 1996 Section 14, Section 15 (3) – Recommendations – Report of the Commission – Proprio vigour – Enforcement of Order of the Commission – Altering or amending list of duties – Scope of prerogative writs – against whom?

The Human Rights Commission recommended that the post of Public Health Inspectors (PHIs) and Public Health Field Officers (PHFOs) are in equal capacity and that in the circumstances it was appropriate to take out the supervisory duties of the PHIs over the PHFOs. After this recommendation the respondent directed the relevant Heads of Departments to suspend the duty of the supervision of PHFOs by PHIs. The petitioners – PHIs sought to quash the said recommendation of the Human Rights Commission.

Held

(1) A report of the Commission does not take effect *proprio vigour* accordingly certiorari will not issue to quash the report of the Commission.

(2) There is no provision in the Act to enforce the recommendation of the Commission. If the Commissioner's recommendations are not complied with, the Commission can only report to the President and in turn it can be placed in Parliament.

(3) The effect of the Circular is that PHFOs should not be supervised by PHIs. The removal of supervision is an alteration in the list of duties which was given to the PHIs, the authorities are entitled to alter or amend the list of duties at all times.

(4) The petitioners have no claim that their duties should not be changed or altered. The authorities are entitled to decide or

arrange the list of duties of the officers. The PHIs have no right whatsoever to supervise PHFOs. This supervisory arrangement is only an administrative step to facilitate the smooth functioning of the institution.

(5) Certiorari does not lie against a person unless he has legal authority to determine a question affecting the rights of a subject and at the same time, has the duty to act judicially when he determines such question. The 1st respondent has no duty to act judicially when he decides to remove the supervision of PHIs over the PHFOs.

APPLICATION for a writ of certiorari/mandamus.

Cases referred to:

(1) *G. P. A. Silva and others vs. Sadique and others* (1978-79-80) 1 Sri LR 166 at 172, 177.

(2) *R. vs. Electricity Commissioner exp. London Electricity Joint Commission Co. Ltd* – 1920 – 1 KB 171

(3) *Jayawardane vs. Silva* – 72 NLR 25

Upul Kumarapperuma with *Suranga Munasinghe* for petitioner.

Nirmalan Wigneswaran SC for 1st and 2nd respondents.

S. N. Vijitsingh for 6th respondent.

Rohan Sahabandu for added respondents.

September 23rd 2009

SRISKANDARAJAH J.

The Petitioners are Public Health Inspectors (PHIs) attached to the Ministry of Health and belongs to the Paramedical Service of Sri Lanka. The added Respondents are Public Health Field Assistants and in the year 2003 their designation was changed to Public Health Field Officers (PHFOs) and these officers are in Middle Level Technical Service after 1994 the said service was renamed as Sri Lanka Technical Service.

The Petitioners submitted that all the Public Health Inspectors (PHIs) performed their duties under supervision of the Regional Medical Officers (RMO) and Medical Officers (MO). Public Health Inspectors (PHIs) supervised their staff. The said staff comprised Public Health Field Officers (PHFOs), and Spray Machine Operators. The Public Health Field Officers (PHFOs) performed their duties under the supervision of the Public Health Inspectors (PHIs) according to the circular dated 23.11.1982.

The Respondents submitted that in the organizational structure of the Health Service under Provincial Councils, Field staff attached to the Anti Malaria and Anti Filariasis Campaigns are placed directly under the Assistant Medical Officers of Health, who in turn report to the Medical Officers of Health and/or the Divisional Directors of Health Services. In this structure Public Health Inspectors (PHIs) are separate and distinct category of officers who are also directly placed under the supervision of the Assistant Medical Officers of Health. According to the Respondents, Public Health Inspectors (PHIs) and Public Health Field Officers (PHFOs) are in parallel services and perform parallel functions [in the field] of the Public Health Sector. Consequent upon the adoption into the Sri Lanka Technical Service, Public Health Field Officers (PHFOs) have their own hierarchical structure within the service.

I.e:- Public Health Field Officers (PHFOs) – Supervisory Grade

Public Health Field Officers (PHFOs) – attached Grade I

Public Health Field Officers (PHFOs) – attached Grade II

The Respondents contended that at the initial point, when Public Health Field Officers (PHFOs) were mere casual employees recruited in the capacity of 'Casual Overseers', the supervision of the work of the said 'Casual Overseers' had been entrusted to Public Health Inspectors (PHIs). However an anomaly had been created by the failure to make the formal adjustment to this position by a direct circular removing the supervisory function of Public Health Inspectors (PHIs) over the Public Health Field Officers (PHFOs), after the Public Health Field Officers (PHFOs) were clearly and distinctly given independent status coming under the purview of Assistant Medical Officers of Health.

The aforesaid issue was brought to the Human Rights Commission by the 6th Respondent and after deliberation the Human Rights Commission recommended that the post of Public Health Inspectors (PHIs) and Public Health Field Officers (PHFOs) are in equal capacity and it was further recommended that in the said circumstances it was appropriate to take out the supervision duties of the Public Health Inspectors (PHIs) over the Public Health Field Officers (PHFOs). The said recommendation is marked as P11a and the direction to implement the said recommendation marked as P12. After this recommendation by a circular bearing No. 02-175/2006 dated 30.09.2006 the 1st Respondent directed the relevant Heads of Departments to suspend the duty of the supervision of Public Health Field Officers (PHFOs) by Public Health Inspectors (PHIs). This circular is marked as P10.

The Petitioners in this application is seeking a writ of certiorari to quash the recommendation of the Human Rights Commission marked P11a and P12 and the direction of the 1st Respondent embodied in circular P10.

Section 14 of the Human Rights Commission of Sri Lanka Act No 21 of 1996 provides that; *the Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons caused – (a) by executive or administrative action, or (b) as a result of an act which constitutes an offence under the Prevention of terrorism Act. No. 48 of 1979, committed by any person.*

Section 15(3) of the said Act provides "*Where an investigation conducted by the Commission under section 14 discloses the infringement or imminent infringement of a fundamental right by executive or administrative action, or by any person referred to in paragraph (b) of section 14, the Commission may make such recommendations as it may think fit, to the appropriate authority or person or persons concerned, with a view to preventing or remedying such infringement or the continuation of such infringement."* The recommendation marked P11a and P12 are made under the above provisions.

In *G.P.A. Silva and Others v. Sadique and Others* [(1)] at 172, 177 the full bench of the Supreme Court comprising Justice Samarawickrame J., Thamotheram J. Ismail J. Weeraratne J. and Sharvananda J came to the conclusion that the report of a commission does not take effect *proprio vigour,* accordingly, Certiorari will not issue to quash the report of the commission. The Court held:

> "It appears to be clear that certiorari will also lie where there is some decision, as opposed to a recommendation, which is a prescribed step in a statutory process and leads to an ultimate decision affecting rights even though that decision itself does not immediately affect rights. From the citations which I have set out, it would appear

that a Writ of Certiorari would lie in respect of an order or decision where such order or decision is binding on a person and it either imposes an obligation or involves civil consequences to him or in some way alters his legal position to his disadvantage or where such order or decision is a step in a statutory process which would have such effect."

The recommendation of the Human Rights Commission contained in P11a and P12 does not take effect *proprio vigour.* There is no provision in the said Act to enforce the recommendation of the said Commission. If the Commission's recommendations are not complied with, the Commission can only report to the President and in turn it can be placed in Parliament. In view of this the recommendation of the Human Rights Commission cannot be quashed by a writ of Certiorari.

The Petitioners in this application has also sought a writ of certiorari to quash the decision of the Director General of the Health Services; the 1st Respondent to implement the recommendation of the Human Rights Commission by his Circular P10. The effect of the said circular is that the Public Health Field Officers (PHFOs) should not be supervised by Public Health Inspectors (PHIs). The removal of supervision is an alteration in the list of duties which was given to the Public Health Inspectors (PHIs), the authorities are entitled to alter or amend the list of duties at any time. The Petitioners have no right to claim that their duties should not be changed or altered. The authorities are entitled to decide or arrange the list of duties of its officers. If this is not permitted the administration of an institution cannot be run smoothly. The removal of the supervision of the Public Health Inspectors (PHIs) over Public Health Field Officers (PHFOs) cannot be claimed as affecting rights of the Public Health Inspectors (PHIs). The Public Health Inspectors (PHIs) have no right what

so ever to supervise the Public Health Field Officers (PHFOs). This supervisory arrangement is only an administrative step to facilitate the smooth functioning of the institution.

Atkin L.J in R v. Electricity Commissioners exp. London Electricity Joint Commission Co. Ltd (2) held that the writ of certiorari will be issued;

"wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority."

Following the above legal principle the Supreme Court held in *Jayawardene v. Silva* (3) that a writ of certiorari does not lie to quash an detection made by the collector under Section 130 of the Customs Ordinance. Certiorari does not lie against a person unless he has legal authority to determine a question effecting the rights of a subject and at the same time, has the duty to act judicially when he determines such question.

In the instant case the Public Health Inspectors (PHIs) have no right what so ever to supervise the Public Health Field Officers (PHFOs) and at the same time the Director General of Health Services the 1st Respondent has no duty to act judicially when he decides to remove the supervision of the Public Health Inspectors (PHIs) over the Public Health Field Officers (PHFOs). Therefore a writ of certiorari will not lie to quash the direction of the 1st Respondent contained in P10 that the Public Health Field Officers (PHFOs) should not be supervised by Public Health Inspectors (PHIs).

For the above reasons this court dismisses the application without costs.

LECAMWASAM, J – I agree.

Application dismissed.

AIRPORT AND AVIATION SERVICES (SRI LANKA) LIMITED VS. BUILDMART LANKA (PVT.) LIMITED

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.,
RATNAYAKE, J. AND
EKANAYAKE, J.
S. C. (HC) L.A. NO. 4/2009
H. C. APPLICATION NOS. HC/ARB 998/2006 & 1249/2007
(Consolidated in terms of Section 35 of the Arbitration Act)
MARCH 23RD, 2010

Arbitration Act – Section 31 – Application for filing and enforcement of award – Section 32 – Application for setting aside an arbitral award – Oaths and Affirmation Ordinance – Section 12(2) proviso – Question of legal validity of an affidavit – Affidavit sworn before the deponent's own Attorney – Supreme Court Rules 6 – Civil Procedure Code - Section 437– Notaries ordinance Section 31, Section 32, Section 33.

This is an application for leave to appeal from a judgment of the High Court (Colombo). When the application came up for support before the Supreme Court, the Respondent took up a preliminary objection on the ground that the affidavit filed by the Petitioner is not in accordance with the proviso to Section 12(2) of the Oaths and Affirmations Ordinance and therefore the said affidavit has no validity as it is defective.

The preliminary objection was raised on the basis that when the dispute between the parties was referred to arbitration, M. R. Attorney-at-Law and Assistant Legal Officer of the Petitioner was present at the arbitral hearing as an employee and Attorney-at-Law. When the matter proceeded to the High Court the said MR had been the instructing Attorney-at-Law of the Petitioner. Later when the Petitioner preferred a leave to appeal application to the Supreme Court against the judgment of the High Court, the Commissioner for Oaths who had administered the affirmation in the affidavit, filed together with the petition in the Supreme Court, was the very same MR.

Held

(1) Although there is provision contained in the Notaries Ordinance granting relief when there is failure by the Notary to observe the

Rules in the Notaries Ordinance, a similar interpretation cannot be given to the proviso to Section 12(2) of the Oaths and Affirmations Ordinance, in the absence of such provision to that effect.

The Notaries Ordinance deals with the law relating to Notaries, whereas the Oaths and Affirmations Ordinance relates to oaths and affirmations in judicial proceedings and other matters.

(2) Rule 6 of the Supreme Court Rules, 1990 and Section 12(2) of the Oaths and Affirmations Ordinance are clearly different. Whilst Rule 6 provides for an Attorney-at-Law to file an affidavit in support of the allegations referred to in the Petition, Section 12(2) of the Oaths and Affirmations Ordinance deals with the administering of any oath or affirmation or taking of any affidavit. In such circumstances, even in a situation where an affidavit of an Instructing Attorney-at-Law is to be filed in support of an application for special leave to appeal, such an affidavit would have to be made strictly in terms of the provisions contained in the Oaths and Affirmations Ordinance.

(3) The proviso to Section 12(2) of the Oaths and Affirmation Ordinance has restricted the power of the Commissioner for Oaths to administer any oath or affirmation or take any affidavit for the purpose of any legal proceedings or matter in which he is the Attorney-at-Law to any of the parties or in which he is otherwise interested.

Per Dr. Shirani Bandaranayake, J., -

". . . It is apparent that the said MR, being the Assistant Legal Officer of the petitioner Company and the Attorney-at-Law for the petitioner at the arbitration proceedings and in the High Court, is a person, who has an interest in the leave to appeal application before the Supreme Court. Accordingly the affidavit filed along with the petition is not in compliance with the proviso to Section 12(2) of the Oaths and Affirmation Ordinance. In the circumstances. . . the affidavit filed by the petitioner has to be rejected."

Cases referred to:

1. *Kanagasabai v. Kirupamoorthi* – (1959) 62 N.L.R. 54
2. *Berry (Herbort) Associates vs. I.R.C.* - 1 WLR 1437

3. *Prior vs City Offices Co.* 10 QBD 504
4. *Jayathilake and another v. Kaleel and others* – (1994) 1 Sri L.R. 319
5. *Pakir Mohideen v. Mohamadu Casim* – (1900) 4 N.L.R. 299
6. *Cader Saibu vs. Sayadu BeeBee*

AN APPLICATION for leave to appeal to the Supreme Court from a judgment of the High Court, Colombo.

Gamini Marapana, P.C., with *Navin Marapana* for the Respondent-Petitioner-Petitioner

Nihal Fernando, P.C. with *Ruchira Anthonis* for the Claimant-Respondent-Respondent

Cur.adv.vult

August 4th 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an application for leave to appeal from the judgment of the High Court of the Western Province (sitting in Colombo) (hereinafter referred to as the High Court) dated 23.01.2009. By that judgment the High Court had made order dismissing the respondent-petitioner-petitioner's (hereinafter referred to as the petitioner) application preferred under section 32 of the Arbitration Act, No. 11 of 1995 and had allowed the claimant-respondent-respondent's (hereinafter referred to as the respondent) application, to execute the Arbitral Award in terms of section 31 of the Arbitration Act.

Being aggrieved by the said judgment of the High Court, the petitioner came before this court seeking leave to appeal.

When this matter came up for support for leave to appeal, learned President's Counsel for the respondent took up a preliminary objection on the basis that the affidavit filed by the petitioner dated 10.02.2009 is not in terms with the proviso to section 12(2) of the Oaths and affirmations Ordinance and therefore the said affidavit has no legal validity

as it is bad in law. Accordingly, both learned President's Counsel for the petitioner and the respondent were heard on the preliminary objection raised by the learned President's Counsel for the respondent.

The facts of this application for leave to appeal, as submitted by the petitioner, *albeit* brief are as follows:

On 04.09.2009 the respondent had initiated Arbitration proceedings against the petitioner, claiming *inter alia* damages for breach of contract. The Arbitration Tribunal had pronounced its Award in favour of the respondent on 31.05.2006, The petitioner thereafter had filed an application before the High Court on 08.02.2006, in terms of section 32 of the Arbitration Act to have the aforesaid Award set aside. The respondent had also made an application on 05.07.2007, to execute the said Award, in terms of section 31 of the Arbitration Act.

Both applications were consolidated by the High Court on 24.09.2007, in terms of section 35 of the Arbitration Act and on 23.01.2009 the High Court had delivered its judgment, enforcing the Arbitration Award given in favour of the respondent and dismissing the petitioner's application.

Referring to the preliminary objection raised, learned President's Counsel for the respondent submitted that when the matter in dispute was referred to arbitration, Malpethi Ratnasinghe, Attorney-at-Law and Assistant Legal Officer of the petitioner, viz., Airport and Aviation Services, was present at the arbitral hearing as an employee and Attorney-at-Law. Thereafter when the matter proceeded to the High Court, the said Malpethi Ratnasinghe had been the instructing Attorney-at-Law of the petitioner. Later when the petitioner preferred an application to the Supreme Court against the judgment of the High Court seeking leave to appeal, the Commissioner

for Oaths, who had admitted the affirmation in the purported affidavit, filed together with the petition in the Supreme Court was the said Malpethi Ratnasinghe.

The contention therefore by the learned President's Counsel for the respondent was that the said affidavit filed before the Supreme Court is not in compliance with the proviso to section 12(2) of the Oaths and Affirmations Ordinance as Malpethi Ratnasinghe is the Attorney-at-Law or a person otherwise interested in the proceedings before the Supreme Court.

Oaths and Affirmations Ordinance, No. 9 of 1895, had come into being as an Ordinance to consolidate the law relating to Oaths and Affirmations in judicial proceedings and for other purposes. Section 12 of the said Ordinance deals with the Commissioner for Oaths and section 12(1) refers to the ministerial authority to appoint fit and proper persons from time to time as Commissioner for Oaths. The function of the Commissioner for Oaths and the restrictions are referred to in section 12(2) and in the proviso to the said section, which reads as follows:

> *"A Commissioner for Oaths appointed under this Ordinance may administer any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a justice of the Peace is authorized by law so to do, and in all cases in which an oath, affirmation or affidavit is commonly administered or taken before a justice of the Peace; and any oath or affirmation or affidavit administered or taken by a Commissioner for Oaths shall in all legal proceedings and for all other purposes have the same effect as an oath, affirmation, or affidavit administered or taken before a*

justice of the Peace; and all enactments relating to oaths, affirmations and affidavits administered or taken before a justice of the Peace shall, with the necessary modifications, apply thereto:

Provided that a Commissioner for Oaths shall not exercise the powers given by this section in any proceeding or matter in which he is attorney-at-law to any of the parties, or in which he is otherwise interested."

Whilst the main section, referred to above, deals with the chief function of the Commissioner for Oaths, the proviso deals with instances, where a Commissioner for Oaths shall not be able to exercise the powers given in terms of section 12(2) of the Oaths and Affirmation Ordinance.

The contention of the learned President's Counsel for the petitioner was that since section 12 is only an enabling provision, the prohibition spelt out in the proviso to section 12(2) would only apply to the Commissioner for Oaths and therefore the said prohibition cannot affect the legal validity of the affidavit filed by the petitioner. In support of his contention, learned President's Counsel for the petitioner relied on the provisions contained in the Notaries Ordinance and section 437 of the Civil Procedure Code.

With regard to the Notaries Ordinance our attention was drawn to section 31 and 32 and the learned President's Counsel for the petitioner submitted that section 32 of the Notaries Ordinance specifically states that the failure of a Notary to observe the Rules specified in section 31 of the Notaries Ordinance, shall not invalidate the instrument attested by such Notary.

The Notaries Ordinance deals with the law relating to Notaries, whereas the Oaths and Affirmations Ordinance,

as stated earlier relates to Oaths and affirmations in judicial proceedings and other matters. The Notaries Ordinance does not deal with any such matter. Moreover, section 33 of the Notaries Ordinance has specifically stated that no instrument shall be deemed to be invalid by reason only of the failure of any matter of form. However, there is no such provision contained in the Oaths and affirmations Ordinance with regard to section 12(2), which states that an affidavit administered contrary to the provisions contained in the proviso to section 12(2) of the said Ordinance would nevertheless be valid. In such circumstances, although there is provision contained in the Notaries Ordinance granting relief when there is failure by the Notary to observe the Rules, a similar interpretation cannot be given to the proviso to section 12(2) of the Oaths and Affirmations Ordinance, in the absence of such provision to that effect.

Learned President's Counsel for the petitioner submitted that the disability imposed upon a Commissioner for Oaths in terms of the proviso to section 12 of the Oaths and Affirmations Ordinance has been impliedly repealed and rendered nugatory regarding the affidavits filed in Court proceedings, by the introduction of section 437 of the Civil Procedure Code under the Amendment to the Code of Civil Procedure Act, No. 79 of 1988. This section reads as follows:

> *"Whenever any order has been made by any Court for the taking of evidence on affidavit, or whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, an affidavit or written statement of facts conforming to the provisions of section 181 may be sworn or affirmed to by the person professing to make*

the statement embodied in the affidavit before any Court or Justice of the Peace or Commissioner for Oaths or in the case of an affidavit sworn or affirmed in a country outside Sri Lanka, before any person qualified to administer oath or affirmation according to the law of that country, and the fact that the affidavit bears on its face the name of the Court, the number of the action and the names of the parties shall be sufficient authority to such Court or Justice of the Peace, or Commissioner for Oaths or such person qualified to administer the oath or affirmation."

Section 437 of the Code of Civil Procedure Act deals with the evidence on affidavits. The provisions contained in section 437 of the Code of Civil Procedure Act, clearly refers to the applicability of the provisions contained in section 181 of the Code and in *Kanagasabai v. Kirupamoorthy*[1] the Court had held that when affidavits are filed in the course of civil prodeedings, it is the duty of the Judges, Justices of the Peace and proctors to see that the rules governing affidavits in sections 181, 437 etc. of the Civil Procedure Code are complied with. It is in this background that an interpretation has to be given to the words 'such person qualified to administer the oath or affirmations', stated in section 437 of the Code.

In the present application, the preliminary objections that were raised by the learned President's Counsel for the respondent relates to the person, who had administered the affirmation in the affidavit filed in Court. Section 437 on the other hand refers to a person, who had prepared the affidavit. In such circumstances, as rightly contended by the learned President's Counsel for the respondent, the provisions contained in section 437 of the Code of Civil Procedure Act, has not made the provisions contained in the proviso to section 12(2) of the Oaths and Affirmations Act irrelevant.

Learned President's Counsel for the petitioner took up another ground in support of his position.

In this regard reference was made to the Supreme Court Rules 1990 with particular reference to Rule 6. It was contended that Rule 6 allows for the affidavit that should be filed along with the application for special leave to appeal to be sworn or affirmed to even by the instructing Attorney-at-Law or the petitioner himself. Accordingly learned President's Counsel for the petitioner contended that in such circumstances, it is inconceivable that this Court would strike out an affidavit as invalid, which was sworn or affirmed to before a Commissioner for Oaths, who is otherwise interested in the proceeding or matter, in which such affidavit is filed.

Rule 6 of the Supreme Court Rules, 1990 refers to the filling of affidavits in support of allegations contained in an application filed before the Supreme Court. This Rule reads as follows:

> *"Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original Court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarent is able of his own knowledge and observation to testify to: provided that*

statements of such declarent's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit."

Rule 6 of the Supreme Court Rules 1990, deals with a situation where there is a need to file an affidavit in support of allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought. In such circumstances such an affidavit may be sworn to or affirmed by the petitioner, his instructing Attorney-at-Law, his recognized agent or by any other person having personal knowledge of such acts. Rule 6 of Supreme Court Rules, 1990 therefore refers to an affidavit that is sworn to or affirmed by the aforementioned persons in order to support the allegations referred to in the petition.

By section 12(2) of the Oaths and Affirmations Ordinance, provision has been made for a Commissioner for Oath to administrate any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law. The proviso to section 12(2) of the said Ordinance however has restricted this function as a Commissioner for Oath shall not exercise the power enumerated in section 12(2) in any proceeding or matter in which he is Attorney-at-Law to any of the parties or in which he is otherwise interested.

The provisions contained in Rule 6 of the Supreme Court Rule, 1990 and section 12(2) of the Oaths and Affirmations Ordinance therefore are clearly different. Whilst Rule 6 provides for an Attorney-at-Law to file an affidavit in support of the allegation referred to in the petition, section 12(2) and its proviso of the Oaths and affirmations Ordinance deals with the administering of any oath or affirmation or take any affidavit. In such circumstances even in a situation, where an affidavit of an Instructing Attorney-at-Law is to be filed

in support of an application for special leave to appeal, such an affidavit would also have to be made strictly in terms of the provisions contained in the Oaths and Affirmations Ordinance, whereas the provisions contained in section 12(2) of the Oaths and Affirmations Ordinance would undoubtedly be applied to such an affirmation.

The provision contained in the proviso to section 12(2) of the Oaths and Affirmations Ordinance clearly states that an Attorney-at-Law shall not exercise his powers in any proceeding or matter in which he is the Attorney-at-Law to any of the parties or in which he is otherwise interested. The word 'proceeding' is described in Stroud's Judicial Distionary of Words and Phrases (6th edition, Vol. 2. Pg 2060) as follows:

> "The primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of a court by writ; 'proceeding' the invocation of the jurisdiction of a court by process other than writ (per Lord Simon in *Berry (Herbert) Associates v. I.R.C.*[(2)]. "Any proceeding" (Judicature Act 1873 (C. 66) S. 89) is equivalent to "any action" and does not mean any step in an action (*Pryor v. City Offices Co.*[(3)]."

The Oxford English Dictionary (2nd edition, Vol. XII pg. 545) also refers to an action in clarifying the meaning of proceeding which reads as follows:

> "The instituting or carrying on of an action at law; a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party."

As stated earlier, the respondent in this application, being the claimant, had referred the dispute between the petitioner and the respondent to arbitration. At the time, the petitioner being the respondent in the arbitration proceedings has filed the statement of defence (X_2), which stated as follows:

"The statement of defence of the respondent above named appearing by Champika Mahipala and **Malpethi Ranasinghe** its Attorneys-at-Law state as follows." (emphasis added).

The said statement of defence of the respondent was subscribed to by Malpethi Ratnasinghe, as an Attorney-at-Law for the respondent. The seal of the said Malpethi Ratnasinghe was placed below her signature, which stated that she is the Assistant Legal Officer of the petitioner. It is not disputed that the said Malpethi Ratnasinghe, Attorney-at-Law and Assistant Legal Officer of the petitioner had subscribed to the admissions and issues, which were submitted by the petitioner at the arbitral proceedings. The arbitral proceedings were held on several dates and Malpethi Ratnasinghe as Attorney-at-Law and Assistant Legal Officer of the petitioner Company had been present at the arbitral proceedings as employee and Attorney-at-Law of the petitioner.

The arbitral proceedings of 14.06.2004 stated as follows:

"Malpethi Ratnasinghe, Attorney-at-Law with Mr. Rafeek are present on behalf of the respondent Company."

The arbitral proceedings of 23.09.2004 stated as follows:

"Malpethi Ratnasinghe, Attorney-at-Law, Legal Officer of Airport and Aviation Services (Sri Lanka) Ltd. for the respondent Company."

The arbitral proceedings of 29.10.2004 stated as follows:

"Ms. M. Ratnasinghe, Attorney-at-Law appears for respondent."

On a consideration of the totality of the aforementioned, it is evident that the Statement of Defence, issues and the arbitral proceedings establish that Ms. Malpethi Ratnasinghe was the Attorney-at-Law for the petitioner at the arbitration and also that she was a permanent employee of the petitioner Company as she is the Assistant Legal Officer of the Airport and Aviation Services (Sri Lanka) Ltd.

Thereafter whilst the respondent filed an application before the High Court for the enforcement of the arbitral Award, the petitioner instituted action in the High Court to set aside the arbitral Award. The petition filed by the petitioner in the High Court clearly stated as follows:

> "The petition of the petitioner above named appearing by Manorie Champika Gunaratne Mahipala Attorney-at-Law and her Assistant Malpethi Ratnasinghe Attorney-at-Law state as follows:

The High Court had entered its judgment in favour of the respondent enforcing the Arbitration Award and has dismissed the application filed by the petitioner in the High Court seeking to set aside the Award. Being aggrieved, the petitioner came before the Supreme Court seeking leave to appeal against the said judgment of the High Court. The petition was filed along with an affidavit of Shums Mufees Rahumathulla Refeek, being the Chief Engineer (Projects) of the petitioner, viz., Airport and Aviation Services (Sri Lanka) Ltd., dated 10.02.2009. The affidavit was affirmed by Malpethi Ratnasinghe, Attorney-at-Law and Commissioner for Oaths.

The question which arises at this point is, in a situation where the said Malpethi Ratnasinghe was the Attorney-at-Law for the petitioner at the arbitration and the Instructing

Attorney-at-Law of the petitioner in the High Court, whether she could administer the affirmation in the affidavit filed in the leave to appeal application before the Supreme Court.

Learned President's Counsel for the respondent contended that the leave to appeal application is a part of the proceedings in the matter, which was before the High Court and at the Arbitration. Also it was submitted that the word 'matter' referred to in the proviso to section 12(2) of the Oaths and Affirmations Ordinance, has a wider meaning than the word 'proceeding' and therefore the word matter would include the entire arbitral and High Court proceedings relating to the arbitral Award and its enforcement by the High Court.

Burton's Legal Thesaurus (4th edition, pg. 393) describes the word 'matter' in the following terms:

> "action, causa, cause, cause in court claim, court action, dispute, inquiry, lawsuit, legal action, **legal proceedings,** litigation, pleadings, proceedings, suit, suit at law, trial" (emphasis added).

According to the said description it is apparent that the word 'matter' means legal proceedings that would include entire proceedings commencing from the arbitral proceedings to the final application for leave to appeal before the Supreme Court.

Learned President's Counsel for the respondent also contended that the said Malpethi Ratnasinghe, who had administered the affirmation in the affidavit filed before this Court has an interest in this application. Learned President's Counsel for the petitioner submitted that neither the fact of employment in the petitioner Company nor the fact

that she had been the Instructing Attorney-at-Law for the petitioner in the High Court would not create in her an interest, which would be sufficient to disqualify Malpethi Ratnasinghe in terms of the proviso to section 12(2) of the Oaths and Affirmations Ordinance.

It is common ground that the said Malpethi Ratnasinghe is an employee of the petitioner as she is the Assistant Legal Officer of the Airport and Aviation Service (Sri Lanka) Ltd. It is not disputed that employees of an organization are stakeholders, who have an interest in the said organization.

An affidavit is a statement given in writing made on oath or affirmation. The administration of an oath is therefore an essential requirement of a valid affidavit. It is also an important requirement that such an administration of an oath should be carried out by a person, who is permitted to do so under our law.

There are several decisions which had considered that affidavits sworn before the deponent's own Attorney ought not to be received. In *Jayatillake and another v. Kaleel and others*[4] Fernando, J., had referred to the decisions in *Pakir Mohideen v. Mahamadu Casim*[5], where Bonser, C.J., had stated that,

> "This affidavit ought not to have been received by the District Judge, for it was sworn before the deponent's own Solicitor, Mr. Abeysingha. The practice in England has been uniform, that an affidavit sworn under such circumstances will not be received, and we think that the English practice should be followed here, and I have in previous cases so held."

This position was carefully considered by Mark Fernando, J. in *Jayatillake and another v. Kaleel and others (supra)*, where it was clearly stated that,

"In the course of the submissions it was observed that the counter-affidavits date 29.01.92 of both petitioners had been sworn before one of the junior counsel appearing for them. Although it was suggested that he been retained only after 29.01.92, in fact his appearance had been mentioned on 13.01.92 and 27.01.92. In *Pakir Mohidin v. Mahamadu Casim, (supra)* it was held by Bonser, C.J., that an affidavit sworn before the deponent's own Proctor ought not to be received in evidence (see also *Cader Saibu v. Sayadu Beebi*[6] . This rule of practice has been consistently observed and would apply to an Attorney-at-Law today. . . Mr. Athulathmudali moved for permission to file fresh affidavits in identical terms, but sworn before an independent Justice of the Peace. However, Mr. Choksy stated that the respondents did not object to the affidavits being received. It is in those circumstances that we refrained from rejecting these affidavits, without in any way intending to weaken the authority of *Pakir Mohidin v. Mohamadu Casim.*" *(supra)*

As stated earlier, learned President's Counsel for the respondent raised the preliminary objection stating that the affidavit being defective should be rejected and in these circumstances this matter differs from the situation which occurred in *Jayatillake and another v. Kaleel and others (supra),* where there was no objection raised for filing fresh affidavits. In the circumstances, it is necessary to follow the decision of this Court in *Pakir Mohidin v. Mahamadu Casim, (supra)* and *Jayatillake and another v. Keleel and others (supra).*

Considering the totality of the aforementioned circumstances thus it is apparent that the said Malpethi Ratnasinghe, being the Assistant Legal Officer of the petitioner

Company and the Attorney-at-Law for the petitioner at the arbitration proceedings and in the High Court, is a person, who has an interest in the leave to appeal application before the Supreme Court. Accordingly the affidavit filed along with the petition is not in compliance with the proviso to section 12(2) of the Oaths and Affirmations Ordinance. In such circumstances considering all the aforementioned, the affidavit filed by the petitioner had to be rejected.

For the reasons aforesaid, I uphold the preliminary objection raised by the learned President's Counsel for the respondent and this leave to appeal application is dismissed *in limine.* I make no order as to costs.

RATNAYAKE, J. – I agree.

EKANAYAKE, J. – I agree.

Preliminary objection upheld.

Application dismissed.