

THE ATTORNEY-GENERAL

v.
WILSON SILVA

COURT OF APPEAL
GRERO, J.
C.A. APPLICATION
NO. 18/91
M.C. TANGALLE NO. 33085
26 NOVEMBER 1991

Revision – Application for revision by Attorney-General – Rule 46 of the Supreme Court Rules.

Even the Attorney-General must comply with Rule 46 of the Supreme Court Rules. Non-compliance is fatal. The Attorney-General may not be able to file an affidavit and this may not be necessary where the question is one of law and not of fact. But he must file the documents and relevant proceeding in the absence of a satisfactory explanation for not doing it.

Cases referred to:

- (1) *Kiriwanthe and Another v. Navaratne and Another* (C.A. No. 16/90).
- (2) *A. G. v. Chandrasena* (C.A. No. 589/90).

APPLICATION to revise order of the Magistrate of Tangalle.

A. R. C. Perera, S.S.C. for Attorney-General.

P. Nawana for accused-respondent.

Cur adv vult.

21st January, 1992.

GRERO, J.

The Attorney-General had filed this application for the revision of the order made by the learned Magistrate of Tangalle on 9.11.90. He requested to grant reliefs as stated in the prayer to the petition.

When this matter came up for inquiry on 26.11.1991, the learned Counsel for the accused-respondent raised a preliminary objection in the form of an issue. It is as follows:-

"Whether non-compliance of the Supreme Court Rules 46, 47 and 49 in particular and in general would be fatal to this application? If so, can the petitioner (the Attorney-General) proceed with this application?"

This Court decided without going into the matters raised in the petition, to inquire into the question in view of the said issue, whether the petitioner can proceed or not with his application.

The contention of the learned Counsel for the accused-respondent was, that the petitioner has not filed an affidavit along with the petition as required by the aforesaid Rule 46. He also submitted to Court that the petitioner has failed to comply with the said Rule 46, in that, the petition was not accompanied by the documents material to the case in the form of exhibits. He further submitted that the compliance with Rule 46 is mandatory and as such, even the Attorney-General who is the petitioner to this application must comply with the requirements of the said Rule 46. As he has not complied with the said Rule 46, he contended that he cannot proceed with this application. He cited a number of decided cases to support his contention.

The learned Senior State Counsel in reply, submitted to Court that strict compliance of rules is not necessary in a matter a revision. He cited the decision of the Supreme Court in *Kiriwanthe and Another v. Navaratne and Another* ⁽¹⁾ (Appeal Case No. 16/90) to support his contention to the effect simply because there had not been a compliance with the said rules the application should not automatically be dismissed. He heavily relied upon the decision of the said case and submitted to Court that the Attorney-General made this application to this Court as there had been a miscarriage of justice and therefore, this Court should consider the said application and make a suitable order.

The decision of the Supreme Court in the case of *Kiriwanthe and Another* (cited by the learned Senior State Counsel) is a very important one and the Supreme Court had considered all the cases previously decided in regard to the question of the Supreme Court Rules, and had made its decision. His Lordships have considered in particular S.C. Rule 46 in their decision. In the said case Fernando, J. observed thus:

"The weight of authority thus favours the view that while all these rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuses or explanation thereof, in the context of the object of the particular Rule". (page 9 of the decision).

The views expressed by Fernando, J. reveal, that non-compliance of the rules is not a matter calling for automatic dismissal of an application, but a discretion lies in the hands of the Court to consider the reasons for such non-compliance; along with the object of the particular rule and thereafter to make an appropriate order whether the application is to be dismissed or not. In other words, simply because there had been a non-compliance of a Rule it does not permit dismissal of an application without considering the reasons for

such non-compliance. Well if the petitioner could adduce a reasonable explanation or satisfy Court for example that he was prevented by reason of impossibility to comply with the required Rule; then the Court may excuse such non-compliance, and proceed with the petitioner's application. The burden is on the petitioner to satisfy Court as to why he could not comply with the provisions of the particular Rule.

This Court considered as to why the petitioner had not filed an affidavit along with the petition. The learned Senior State Counsel submitted to Court that an affidavit has to be filed on facts personally known to declarant, and in a matter of this nature when the Attorney-General comes before this Court with a grievance that a miscarriage of justice has taken place, it is not possible like any other declarant (who is personally aware of the facts) to file a proper affidavit. But the learned Counsel for the accused-respondent submitted to Court that even the Attorney-General when he is a petitioner must strictly comply with Rule 46.

In the case of *Attorney-General v. M. L. Chandrasena*⁽²⁾ Justice A. De Z. Gunawardana held as follows:-

"It is appropriate to note that an affidavit should be confined to the statement of such facts as the declarant is able to his own knowledge and observation to testify to. The Attorney-General being a State Officer, acting in his official capacity would generally be not able to testify to facts of a given case of his own personal knowledge. Hence, he would not be able to submit an affidavit relating to the facts through his personal knowledge, although he is the petitioner. However, in a case where he is inviting the Court to decide on questions of facts, he will be required to file affidavits through persons who have personal knowledge of the relevant facts". (page 4 of the judgment).

This Court perused of the petition of the petitioner. It shows that paragraphs 9 to 15 are based on questions of law and not on

questions of facts, and on the basis of the averments contained in the said paragraphs he is inviting Court to go into the question whether there had been a miscarriage of justice and if so, grant reliefs as prayed for in the petition.

Following the decision of the said case⁽²⁾ and the circumstances upon which the Attorney-General has come to this Court, this Court is of the view that the absence of an affidavit has not violated the provisions of the said Rule 46.

The next question is whether the petitioner has complied with the latter part of the said Rule 46, to wit, that the **“petition shall be accompanied by originals of documents material to the case or duly certified copies thereof, in the form of exhibits?”**

The petitioner in his petition states that the order made by the learned Magistrate cannot be tenable in law. He gives reasons in paragraphs 9 to 15. He has not filed at least a duly certified copy of the learned Magistrate's order for this Court to consider whether what is stated by the petitioner is correct or not. He further states that the learned Magistrate had acted contrary to law and the weight of the evidence led at the trial. Has he filed certified copies of the evidence of the witnesses in this case? No. This Court is of the view, that before granting any relief asked by the petitioner, this Court has to go through such evidence given by the witnesses before the learned Magistrate. Then only this Court can consider whether the learned Magistrate had acted contrary to such evidence and made a decision contrary to both law and facts of the case.

The petitioner in his petition has not given any reason as to why he was not able to submit to this Court, the original or certified copies of the said order and the evidence given by the witnesses in this case as exhibits in this application. The petitioner has not satisfied this Court with a reasonable explanation regarding the impossibility of obtaining such copies in order to submit to this Court along with this application.

At least no attempt has been made by him to tender them to this Court even subsequently. This Court is of the view that the said documents are very essential and they must be before this Court when this Court goes into the merits of the application. Non-compliance of the requirement regarding the tendering of such documents has not been satisfactorily explained by the petitioner and therefore, this Court is of the view that there is a violation of the provisions of Rule 46, which is fatal to this application.

In view of the fact that the petitioner has violated the provisions of Rule 46, (in regard to the failure to submit the relevant documents in the form of exhibits) this Court upholds the preliminary objection raised by the Counsel for the accused-respondent and the petitioner's application is hereby dismissed.

The learned Counsel for the accused-respondent raised some other matter that the petitioner has not complied with Rule 49. As this Court has dismissed the petitioner's application for the above stated reasons, this Court is of the view that it is not necessary to go into the said matter raised by the Counsel.

Appeal dismissed.
