

**SENANAYAKE
VS
COMMISSIONER OF NATIONAL HOUSING AND OTHERS**

COURT OF APPEAL,
SALEEM MARSOOF, P. C., (P/CA),
WIJAYARATNE, J., AND
SRIPAVAN J.,
CA 848/2001,
DECEMBER 13, 2004.

Affidavit - Validity of an affidavit affirmed outside jurisdiction - Justice of the Peace appointed for Judicial District of Homagama - Judicature Act No. 2 of 1978, section 45-Court of Appeal (Appellate Procedure) Rules 1990, Rule 3(1) (a). Filing of a fresh affidavit - Is it permitted? - Strict or absolute compliance with a Rule. Is it essential?

Held :

- (i) Application for prerogative relief – the Court of Appeal enjoys a supervisory jurisdiction.
- (ii) Court should not non-suit a party where the non-compliance with Rules takes place due to no fault of the party.
- (iii) Strict or absolute compliance with a Rule is not essential; it is sufficient if there is compliance which is substantial, this being judged in the light of the object and purpose of these Rules. It is not to be mechanically applied.

APPLICATION for a writ of certiorari on a preliminary objection that the affidavit of the petitioner is bad in law.

Cases referred to :

1. *Ceylon Workers Congress vs S. Sathasivam and others*, Cala 86/2000 – CAM 16.10.2002. Not followed.
2. *Pakir Mohideen vs Mohamadu Cassim* – 4 NLR 299.
3. *Jayatilake and another vs Kaleel and others* (1994) 1 Sri LR 319.
4. *Kiriwanthe vs Navaratne* (1990) 2 Sri LR 393

Rohan Sahabandu for petitioner.

Manohara R. de Silva for 6th respondent.

December 13, 2004

Saleem Marsoof, P/CA

This matter was taken up before a Divisional Bench in view of the necessity to reconsider the decision of this Court in *Ceylon Workers' Congress v. S. Sathasivam and Another*⁽¹⁾ in the context of a preliminary objection taken on behalf of the 6th Respondent that the affidavit of the Petitioner dated 8th June, 2001 affirmed to at Colombo before Wijesurendra Lokuge, Justice of the Peace in not valid insofar as he has only been appointed as a Justice of the Peace for the Judicial District of Homagama.

Learned Counsel for the 6th Respondent relies on Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules, 1990 which requires that every application seeking to invoke the jurisdiction of this Court under Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein. That rule further provides that where a Petitioner fails to comply with the requirements contained in this Rule, the Court *may ex mero motu* or at the instance of any party, dismiss such application. Learned Counsel for the 6th Respondent submits that this Court in *Ceylon Workers' Congress v. S. Sathasivam* (*supra*) has held that the same Justice of the Peace, namely Wijesurendra Lokuge, who had attested an affidavit in Colombo which has been filed in that case had acted outside his territorial jurisdiction and that the said affidavit was therefore invalid. It is common ground that Wijesurendra Lokuge was the Justice of the Peace before whom the affidavit of the Petitioner in the instant case was affirmed in Colombo and the only issue is whether he has also been appointed as a Justice of the Peace for the Judicial District of Colombo.

Learned Counsel for the Petitioner submits that since the office of the said Justice of the Peace situated in Homagama was burnt down, he has been functioning from an office in Colombo, and there are hundreds of affidavits attested by him in Colombo which have been filed in various applications before this Court. He further submits that although he had endeavoured to ascertain from the Ministry of Justice, the Minister in charge of which Ministry is the appointing authority of Justices of the Peace under Section 45 of the Judicature Act, No. 2 of 1978, as to the date and other particulars of the appointment of the said Justice of the Peace for the Judicial District of Colombo, he has failed to obtain this information as the

Ministry had not maintained complete records of such appointments at the relevant time. In the circumstances, he submits that he be permitted to renew the application he made in his written submissions dated 24th May 2004 filed in these proceedings to tender a fresh affidavit in support of the averments contained in the petition. He submits that his client should not be penalized for a defect which may have occurred due to no fault of his. He further submits that when the objection to the validity of the affidavit was first taken up by learned Counsel for the 6th Respondent on 26th September 2003, that he had moved that he be permitted to reply on 9th November, 2003. However, it appears from the docket that the case was not mentioned on that date as contemplated by the Order of Court dated 26th September, 2003 and that when the case came up on 30th January, 2004 time was sought for filing written submissions and after several dates the written submissions dated 24th May, 2004 were filed on behalf of the Petitioner in which the said application had been made for permission to tender a fresh affidavit in the same tenor.

I am of the view that the Court of Appeal (Appellate Procedure) Rules, 1990 have been formulated to facilitate the judicial process and with a view of achieving justice rather than injustice. It appears from Rule 3(14) that it is contemplated that where there is some non-compliance with the Rules, the Registrar should put up the application for an order of Court. The intention of this Rule is to give an opportunity for the Court to exercise its discretion with respect to the matter as is implicit from the use of the word "may" in the last sentence of Rule 3(1)(a). Furthermore I am of the view that in applications for prerogative relief where this Court enjoys a supervisory jurisdiction, Court should not non-suit a party where the non compliance with Rules takes place due to no fault of that party. In *Pakir Mohideen v. Mohamodu Casim*⁽²⁾ the Supreme Court had in an instance where an affidavit was found to be defective by reason of it having been sworn before the Defendant's own Proctor, the Supreme Court nevertheless considered the contents of the affidavit in arriving at its decision. In *Jayatillaka and Another v Kaleel and Others*⁽³⁾ where a similar difficulty arose as a result of an affidavit having been affirmed before the relevant party's attorney-at-law, the President's Counsel appearing for the opposite party did not object to the affidavit being admitted in evidence, and the Court refrained from rejecting the affidavit in question. This Court is mindful of the decision in *Kiriwanthie v Nawaratne*⁽⁴⁾ in which the Supreme Court held that strict or absolute compliance with a similar Rule was not essential, and that "it is sufficient if there is compliance which is substantial – this being judged in

the light of the object and purpose of the Rule. It is not to be mechanically applied". In the circumstances, Court is inclined to grant the Petitioner permission to file a fresh affidavit in identical terms attested by a Justice of the Peace, Commissioner of Oaths or any other authority before whom the Petitioner is entitled to depose to an affidavit. For this purpose time is granted till 20th January 2005, on which date this case will be mentioned for re-fixing the matter for argument on a date convenient to Court.

WIJAYARATNE, J. - I agree.

SRIPAVAN, J. - I agree.

Preliminary objection overruled ; petitioner permitted to file a fresh affidavit in identical terms.
