

**RODRIGO  
VS.  
THE FINANCE CO. LTD AND ANOTHER**

COURT OF APPEAL  
SOMAWANSA, J(P/CA) AND  
WIMALACHANDRA, J.  
CALA 1/2005  
D.C. NEGOMBO 2626/SPL

*Civil Procedure Code, Sections 37 and 384 - Registration of Documents Ordinance - Sections 32 and 33 - Caveat - Cancellation of Inquiry - Application to add new parties - material documents not tendered to Court of Appeal? - Applicability of Rule 3(1)(a) - Court of Appeal (Appellate Procedure) Rules 1990-Failure to explain why documents were not tendered - fatal?*

The Registrar of Lands registered a caveat at the instance of the Petitioner in respect of the land in question. The Court acting under Section 384 of the Code fixed the matter for Inquiry. The Petitioner thereafter sought to add 2 parties which application was rejected by the District Judge on leave being sought.

**HELD:**

- (i) The copies of the Petition and affidavit filed by the Petitioner by which he sought to add new parties and sought other reliefs, such as cancellation of the deed are necessary documents.
- (ii) The omission to tender same is fatal.
- (iii) The Petitioner has to comply with Rule 3(1)a of the Court of Appeal (Appellate Procedure) Rules 1990.
- (iv) The failure to explain the reasons as to why the documents were not tendered or to cure the default in terms of the said Rule is fatal to an application.
- (v) Whether a document is a material document or not would be decided by the Appellate Court and it is not for the parties to decide.
- (vi) If certified copies of the Petition and Affidavit could not have been obtained in time, it was the duty of the Petitioner to mention this fact to Court and obtain Courts permission.

**APPLICATION** for leave to Appeal from an Order of the District Court of Negombo.

**Cases Referred to :**

1. *S. M. P. Mohideen vs. Sigiri Weaving Mills Ltd.*, Cala 243/01, D. C. Colombo, Case No. 35768/MS, CAM 23.08.01
2. *Seylan Bank vs. Lanka Milk Foods (CWE) Ltd.*, - CA 697/96 - D. C. Colombo 12820/M - CAM 22.09.90

Petitioner in person.

Romesh de Silva P. C., with Hiran de Alwis for the 1st Respondent.

Anil Silva with Nandana Perera for 3rd Respondent.

cur adv vult

July 7, 2005.

**WIMALACHANDRA, J.**

This is an application for leave to appeal from the order of the District Judge of Negombo dated 16.12.2004.

Upon a caveat being received under section 32 of the Registration of Documents Ordinance from the respondent-petitioner(petitioner) affecting the land described in the caveat, which admittedly, belongs to the 1st petitioner-respondent (1st respondent), the Registrar registered the caveat in the manner provided by the said Ordinance.

Thereafter the 1st respondent filed an application in the District Court of Negombo under section 33 of the said Ordinance for an order for the cancellation of the said caveat and for damages. The District Court commenced the inquiry under chapter XXIV of the Civil Procedure Code, which is the summary procedure, and issued an Order *Nisi* under section 377 of the Code to take effect in the event of the petitioner not showing cause on the appointed day for that purpose. The petitioner filed objections in terms of section 384 of the Code. The Court fixed the matter for inquiry. The petitioner then filed an application in the Court of Appeal complaining that when the matter was taken for inquiry the learned Judge without proceeding with the inquiry, had directed the parties to file written submissions. The Court of Appeal made order on 04.06.2004 directing the District Judge to hold the inquiry in terms of section 384 of the Civil Procedure Code and any other provisions of law applicable to the inquiry. The learned District Judge, upon the receipt of the aforesaid direction from the Court of Appeal, fixed the matter for inquiry in terms of section 384 of the Code.

The proceedings of the District Court dated 25.11.2004 marked "RP10" shows that the petitioner filed an application in the District Court to add new parties and for an order to set aside the deed in question and other ancillary reliefs. However, the petitioner has not annexed the petition and affidavit by which he sought to add parties and set aside the deed, in addition to other reliefs prayed for, from the District Court. The order dated 16.12.2004 made by the learned District Judge is with regard to that application. In that order the learned Judge has stated thus:

"මෙම කටුවට කේටියටි තහනම් අවලංගු කිරීම පිළිබඳව කටුවකි.".....

"මේ අනුව මා පළමුවන වගඋත්තරකරු විසින් සඳහන් කර ඇති කැනෑක්කන් මැදිකන් කිරීමට කර ඇති ඉල්ලීම ප්‍රතික්ෂේප කරමි. දැනටමත් 3 සහ 4 වන උත්තරකරුවන් වශයෙන් මෙම කටුව මැදිකන් කර ඇති කැනෑක්කන් මෙම කටුවෙන් මුදා හැරීමට නියෝග කරමි."

It is against this order the petitioner has filed this application for leave to appeal.

Thereafter the learned Judge fixed the matter for inquiry with regard to the application made by the 1st petitioner-respondent for the cancellation of the said caveat and for damages.

It is crystal clear that the impugned order dated 16.12.2004 made by the learned Judge was on an application made by the petitioner seeking to add the 3rd and 4th respondents as parties and also to set aside the deed. Copies of the petition and affidavit filed by the petitioner, by which he sought to add new parties and sought other relief such as cancellation of the deed, are necessary documents to understand the impugned order made by the learned Judge. The omission to tender necessary documents with the petition is fatal to the application made by the petitioner to this Court. The petitioner has failed to comply with the mandatory provisions of Rule 3(1)a of the Court of Appeal (Appellate Procedure) Rules 1990.

Rule 3(1)(a) reads as follows:

**"Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application for duly certified copies thereof in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave to the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application."**

Rule 3(1)(a) is identified to the first part of Rule 46 of the Supreme Court Rules 1978 published in the Gazette Extraordinary No. 9/10 of 08.11.1978. The first part of Rule 46 reads as follows:

**"Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition and affidavit in support of the averments set out in the petition"**

**and shall be accompanied by originals of documents material to the case or duly certified copies thereof, in the form of exhibits"**

It was held in an unreported case of *S. M. P. Mohideen Vs. Sigiri Weaving Mills Ltd.*,<sup>(1)</sup> that the Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules, which is analogous to Rule 46 of the Supreme Court Rules of 1978, apply to every application to the Court of Appeal and as stated earlier non compliance is fatal to the application.

The petitioner has not explained as to why he failed to furnish the aforesaid documents. In the case of *Seylan Bank Ltd., Vs. Lanka Milk Foods (C. W. E.) Limited* <sup>(2)</sup> it was held that the failure to explain the reasons as to why the documents were not tendered or to cure the default in terms of Rule 3(1)(a) is fatal to an application.

Whether an application should be rejected for the failure to comply with a rule of the Appellate Court rules depends mainly on whether the relevant document is a material document. Whether a document is a material document or not, would be decided by the Appellate Court and it is not for the parties to decide. In the instant case the application made by the petitioner by way of petition to add parties and to set aside deeds is a material document and in my view without it, this Court is unable to understand the order made by the learned Judge. If certified copies of the petition and affidavit could not have been obtained in time, it was the duty of the petitioner to mention that fact to Court and obtain Court's permission to tender them later. The petitioner has failed to do so. Merely filing some documents without the material documents does not amount to compliance with Rule 3(1)(a). Hence on this ground alone the petitioner's application for leave to appeal should be dismissed. It is also to be noted that the petitioner has failed to annex a copy of the petition filed by the first respondent in its application made under section 33 of the Registration of Documents Ordinance, which is a relevant document.

The scope of the inquiry in respect of the application made by the 1st respondent under section 33 of the Registration of Documents Ordinance is solely concerned with the cancellation of the caveat registered at the instant of the petitioner. The learned Judge in his order correctly held that an inquiry should be conducted in respect of the application made by the

1st respondent to set aside the caveat, which was registered under section 32 of the Registration of Documents Ordinance, and refused the petitioner's application to add parties. I cannot see any illegality in the order made by the learned District Judge.

For these reasons, we see no reason to interfere with the impugned order made by the learned District Judge dated 16.12.2004. Accordingly, leave to appeal is refused and the petitioner's application is dismissed without costs.

ANDREW SOMAWANSA, J. (P/CA) — I agree.

*Application dismissed.*

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