

JEGANATHAN
v
SAFYATH

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
C.A.LA., NO. 257/99
D.C. MT. LAVINIA NO. 420/99 (SPL)
MAY 11, AND
JULY 9, 2001

Oaths and Affirmation Ordinance – Affidavit - Commencement with an oath – Conclusion with an affirmation – Validity – Doubt whether contents were read over – Certified copies not filed – Non compliance – Is it fatal?

Held:

- i) Commencement of the affidavit with an Oath by the plaintiff and its conclusion with an affirmation in the jurat clause is contradictory and irreconcilable, violating the express provisions of the Oaths and Affirmation Ordinance.

- ii) Failure of the petitioner to file certified copies of the order, along with certified copies of other relevant documents contravenes the mandatory provisions of the Rules of the Supreme Court.

APPLICATION for leave to appeal from the order of the District Court of Mt. Lavinia.

Case referred to:

1. *Clifford Ratwatte v Sumathipala* – (2001) 2 SLR 55

Manohara de Silva for petitioner

Reeza Muzni for 2nd defendant

Cur.adv.vult

16 November, 2001

NANAYAKKARA, J.

The plaintiff-petitioner (plaintiff) instituted proceedings against the defendants-respondents (defendants) seeking relief, *inter alia*, that the deed annexed to the plaint be declared null and void, that the defendants be restrained by way of enjoining order, interim injunction and permanent injunction from dispossessing the plaintiff and all those holding under her from the premises in suit and from alienating the said premises to a third party. 01

Thereafter on an application made by the plaintiff, the court granted an enjoining order in favour of the plaintiff, consequent to which the defendants lodged their objections. 10

The learned District Judge, who made an inquiry into the objections lodged by the defendants on the basis of the written submissions tendered by parties made an order on 25.10.99 refusing the interim injunction pleaded by the plaintiff, subject to the grant of an interim injunction restraining the defendants from dispossessing the plaintiff except by way of due process of law from the portion of the land where she resides.

It is against that order that the plaintiff has presented this application by way of leave to appeal seeking the relief prayed for.

When this matter was taken up for inquiry in respect of leave, on 11th May 2001, on behalf of the 2nd defendant two preliminary objections, which have a bearing on the question of maintainability of this application were raised by Counsel for the 2nd defendant. The two preliminary objections raised were as follows:- 20

1. that the affidavit filed by the plaintiff is fatally flawed, resulting in no proper application before court.
2. that there is no certified copy of the impugned order dated 25.10.99

Thereafter, the respective counsel were permitted by Court to tender written submissions on the matter. In compliance with this order, it appears only the 2nd defendant has tendered his written submissions, and there is no evidence of written submissions being filed by the plaintiff. 30

The learned Counsel for the 2nd defendant adverting to the affidavit filed by the plaintiff in this case has contended, that the commencement of the affidavit with an oath by the plaintiff and its conclusion, with an affirmation in the jurat clause is contradictory and irreconcilable, violating the express provisions of the Oaths and Affirmation Ordinance.

The learned Counsel has also referred to the alteration made in jurat clause and the location where the plaintiff has sworn to averments in the affidavit and the Commissioner of Oath has placed his signature, and submitted that the affidavit filed in this case cannot be considered a proper affidavit in the eyes of the law as the plaintiff has sworn to the averments contained in the affidavit and placed her signature at a location different from the location where the Commissioner of Oath is purported to have administered the oath to the plaintiff and placed his signature, and thus depriving of its legal validity and sanctity. 40

Counsel referring to the documents filed in this case has urged, that the failure on the part of the plaintiff to file a certified copy of an impugned order dated 25.10.99 along with certified copies of other relevant documents contravenes the mandatory provisions of the rules of the Supreme Court relating to the presentation of an application by way of leave to appeal. 50

In order to determine the validity of the two preliminary objections that have been taken by the 2nd defendant in his submissions, one has to carefully scrutinize the impugned affidavit, order and other related documents filed in this case.

In regard to the affidavit, it should be observed, as the defendant's Counsel has rightly pointed out that the plaintiff has commenced her affidavit by taking an oath but has concluded it by making an affirmation in the jurat clause. In a case of this nature where the plaintiff has commenced her affidavit after making an oath does not end the jurat in a manner consistent with the oath she has taken, at the commencement it cannot be said that she has sworn to the contents of the affidavit in the true sense of the expression as expected by law. The reasoning adopted by his Lordship Justice Edussuriya with Justice Udagama agreeing with the case of *Clifford Ratwatte v T. Sumathipala*¹ will be relevant and pertinent in resolving the matter in issue in this case. 60 70

There is no certainty in this case, as in the case of *Clifford Ratwatte v T. Sumathipala* (*supra*) whether the affidavit containing matters to which the plaintiff has deposed to by making an oath as a Christian and concluded by making an affirmation in the jurat clause was in fact read over and explained to the plaintiff before she placed her signature. If it was in fact read over and explained to the plaintiff, this discrepancy between the swearing and the affirmation would have been detected by the Commissioner of Oath. Therefore a doubt arises, as to whether in fact the contents of the affidavit were read over and explained to the plaintiff, by the Commissioner of Oath before the plaintiff placed her signature. Therefore it can be reasonably deduced from the circumstances of this case that the affidavit was not explained and read over to the plaintiff, by the Commissioner of Oath as he is expected under the law. In view of the foregoing reasons, I am of the view that the first preliminary objection raised should sustain. 80

In regard to the failure of the plaintiff to file certified copies of the documents it should be observed that it has been held over and over again by this court as well as the Supreme Court, non-compliance with the Court of Appeal (Appellate Procedure) Rules 1990 is fatal to the application. The importance, and the mandatory nature of the observance of the rules of the Court of Appeal in presenting 90

an application has been repeatedly emphasised, and discussed in a long line, of decided authorities, by the Court of Appeal and the Supreme Court, and the difficulty of complying, if any, with the rules should be adequately explained by the party who seeks relief from this Court.

As far as the present case is concerned, although the petitioner while annexing the photo copies of the documents has undertaken to furnish certified copies of the same, which she has failed to comply with. Although the petitioner has taken an inordinately long period of time to tender the certified copies, she has failed to do so. The failure on her part to ensure compliance with the rules, disentitles her to the relief prayed for. Therefore it is my considered view that the petitioner has not invoked the jurisdiction of this court in a proper manner. The preliminary objection raised by the defendant in regard to the non compliance of the rules should also prevail. 100

For the reasons stated above, I uphold the two preliminary objections raised by Counsel for the 2nd defendant, and refuse leave. The 2nd defendant is entitled to a cost in a sum of Rs. 5000/. 110

UDALAGAMA, J. - I agree.

Application dismissed.