

NICHOLAS
v.
O. L. M. MACAN MARKAR LTD. AND OTHERS

COURT OF APPEAL.
RATWATTE, P. AND ATUKORALE, J.
C. A. APPLICATION No. 97/80
JANUARY 26, 1981.

Supreme Court Rules, 1978, Rule 47—Requirement that petition and affidavit shall contain the averment that jurisdiction of the Court of Appeal not previously invoked—Whether mandatory—Consequences of non-compliance.

Held

Rule 47 of the Supreme Court Rules, 1978, which requires the petition and affidavit filed in the Court of Appeal to contain an averment that the jurisdiction of that Court has not previously been invoked in respect of the same matter is mandatory. Non-compliance with the said Rule which is in imperative terms would render such application liable to be rejected.

Cases referred to

- (1) *Nagalingam v. De Mel and others*, (1975) 78 N.L.R. 231.
- (2) *Coomarasu v. Leechman & Co., Ltd. and others* (S.C. Applications 217/72 and 307/72—S.C. Minutes of 26.5.1976).

APPLICATION for a Writ of Certiorari

H. L. de Silva, with *Bimal Rajapakse*, for the petitioner.
S. J. Kadirgamar, Q.C., with *D. S. Wijesinghe*, for the 1st respondent.
2nd to 7th respondents unrepresented.

Cur. adv. vult.

February 24, 1981.
Ratwatte, P.

The Petitioner, claiming to be the tenant of Flat No. 47, Galle Face Court 2, Colombo, under the 1st Respondent, filed an application in the Rent Board of Colombo, seeking a certificate of tenancy under Section 35 (2) of the Rent Act, No. 7 of 1972. The position taken up by the 1st Respondent was (a) that there was no contract of tenancy with the Petitioner; (b) that the Rent Board had no jurisdiction to inquire into whether a contract of tenancy existed for the purpose of issuing a certificate of tenancy under Section 35, where there was a genuine dispute as regards the Petitioner's claim to be the lawful tenant. After inquiry, the Rent Board held that the Board had jurisdiction to inquire into the

dispute regarding the existence of the contract of tenancy and further held on the evidence placed before the Board that the Petitioner was entitled to a certificate of tenancy. The 1st Respondent appealed from the Order of the Rent Board to the Rent Board of Review. After hearing the parties the board of Review set aside the decision of the Rent Board and dismissed the Petitioner's application for a certificate of tenancy. The Petitioner filed the present application seeking to quash the decision of the Rent Board of Review for the reasons set out in the Petition. The 2nd to 7th Respondents to this application are the members of the Rent Board of Review.

When this Application was taken up for hearing before us on 26.01.1981, learned Counsel for the 1st Respondent, Mr. Kadirgamar, raised a preliminary objection to the application being entertained. He referred us to paragraph 8 of the Statement of Objections filed by the 1st Respondent. After hearing Counsel for the parties we reserved our Order regarding the preliminary objection.

Mr. Kadirgamar submitted that there has been a non-compliance with Rule 47 of the Supreme Court Rules 1978, published in *Government Gazette* No. 9/10 dated 08.11.1978. These rules have been made by the Supreme court under Article 136 of the Constitution. Rule 47 reads as follows:

"The petition and affidavit except in the case an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. Where such an averment is found to be false and incorrect the application may be dismissed."

Rule 47 is in Part IV of the Rules under the heading "Writs and Examination of Records." Article 141 of the Constitution which is referred to in Rule 47 relates to the power of the Court of Appeal to issue writs of *habeas corpus*.

Mr. Kadirgamar submitted that Rule 47 is in imperative terms and must be regarded as mandatory. He contended that non-compliance with the Rule amounts to disobedience. He further submitted that parties who invoke the jurisdiction of the Courts cannot ignore these Rules and then ask to be heard. He referred us to Rule 59 which reads as follows:

"Where the parties fail to comply with the requirements set out in the preceding rules, the Registrar of the Court shall without any delay, list such application for an order of Court."

Mr. Kadirgamar submitted that if the Registrar had listed this Application for an order of Court the only order this Court could have made is one of dismissal. He argued that the failure on the part of the Registrar does not mean that the Petitioner can be excused.

Mr. H. L. de Silva for the Petitioner conceded that there has been non-compliance with the requirements of Rule 47, but he submitted that the non-compliance did not amount to disobedience. He argued that the non-compliance in this case was merely an inadvertence and that the Petitioner should be given an opportunity to amend his petition. Mr. de Silva drew our attention to the last sentence of Rule 47, particularly to the use of the word "may". He argued that if the Court has a discretion even though a false averment is made, then the penalty for not making an averment at all, should not be a dismissal.

The question that arises for consideration is what is the consequence of a Petitioner failing to comply with Rule 47. Under the Administration of Justice Law too, there was a similar Rule which was identical to Rule 47. It was not disputed that the object of this Rule was to prevent the invoking of the jurisdiction of this Court more than once and to ensure that no second order would be made on a second application regarding the same matter. Mr. Kadirgamar referred us to the case of *Nayalingam vs. Lakshman de Mel, Commissioner of Labour and two others* (1). That was an application for a Writ of Certiorari to quash an order made in terms of Section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, whereby the Commissioner of Labour had granted written approval to an employer to terminate the employment of a workman. Section 2 (2) (c) of Act No. 45 of 1971 states that when an application is made by an employer for the approval of the Commissioner of Labour for the termination of the employment of a workman, the Commissioner shall grant or refuse such approval within three months from the date of receipt of the application made by the employer. In that case the Commissioner admittedly made the order after the expiry of three months from the date of the receipt of the application made by the employer. It was argued on behalf of the workman

that the order was in breach of the provisions of Section 2 (2) (c) of the Act and hence was *ultra vires* the powers of the Commissioner and was null and void. Sharvananda, J. in the course of his judgment at page 236 referred to the fact that there was no express provision in the Act "indicative of the Legislature's intention regarding the effect of any non-compliance". Then after quoting a passage from Maxwell's Interpretation of Statutes, Sharvananda, J. stated as follows :

"it is trite law that it is the duty of the Court, in construing a statute, to ascertain and implement the intention of Parliament as can be gathered therein. When Parliament prescribes the manner or form in which a duty is to be performed, or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The Courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act'—*Smith Judicial Review of Administrative Action* (2nd Ed. at page 126)."

In the circumstances of that case Sharvananda, J. came to the conclusion that a failure to comply literally with the time limit stipulated in Section 2 (2) (c) does not affect the validity of the Commissioner's order. The reasoning seems to have been that to hold otherwise would be to cause grave hardship to innocent parties. He was further of the view that the object of the time limit in Section 2 (2) (c) is to discourage bureaucratic delay.

The question arises whether the procedural Rule No. 47 can be regarded as mandatory or merely as directory. In order to decide this question one has to consider the whole set of Rules. They are comprehensive and elaborate Rules made by the Supreme Court for regulating *inter alia* the form and manner of applications for Special leave to appeal to the Supreme Court, of applications for leave to appeal to the Supreme Court made in the Court of Appeal,

the mode of prosecuting appeals, and applications for Writs, etc. When one examines the entire scope of these Rules and their objects, it is clear that many of the Rules are mandatory. Rule 47 itself is in imperative terms and as stated earlier the object of Rule 47 was to ensure that that no second order would be made on a second application regarding an identical matter.

In the case of *C. Coomasaru vs. M/s Leechman and Co. Ltd., and 3 others* (2), Tennekoon, C. J. stated as follows:

“ Rules of Procedure must not always be regarded as mere technicalities which parties can ignore at their whim and pleasure.”

That was an appeal made to the Court of Appeal established under the Court of Appeal Act of 1971, from a judgment of the then Supreme Court. When the Court of Appeal was abolished in terms of Section 3 of the Administration of Justice Law, the appeal was transferred to the Supreme Court in terms of Section 53(1) of the A.J.L. The appeal was subsequently heard by five judges of the Supreme Court. In terms of certain Rules of the Appeal Procedure Rules (1972) made by the Court of Appeal, an Appellant had to file written submissions within a prescribed time. The Appellant in that case did not file written submissions. The question that arose for consideration by the Supreme Court was what was the consequence of an Appellant failing, in compliance with the Rules, to lodge his written submissions within the time prescribed by the Rules. Tennekoon, C. J. with whom the other four judges agreed, was of the view that the Appellant, by not complying with the Rules regarding written submissions, had not properly asserted the right which he had, to appeal to the Court of Appeal. Tennekoon, C. J. also took into consideration the fact that the appellant had not submitted any excuse for his failure to comply with the Rules. The Supreme Court accordingly dismissed that appeal. Applying the principle enunciated by Tennekoon, C. J. I am of the view that the Petitioner in the instant case has been guilty of non-compliance with a rule which is in imperative terms. I do not think that the Petitioner should be given an opportunity at this stage to amend his petition and affidavit. The Petitioner filed this application on 05.02.1980. The first respondent's Statement of Objections was filed on 25.03.1980. In paragraph 8 of the Statement the 1st Respondent has specifically taken up this objection, but the Petitioner has not thought it fit

to seek to amend his petition or to explain the non-compliance by filing a counter affidavit.

For these reasons I am of the view that the preliminary objections raised on behalf of the 1st Respondent should be upheld. I would accordingly reject the application of the Petitioner with costs.

ATUKORALE, J.—I agree.

Application rejected.