

**SAMARASEKERA**  
**v.**  
**MUDIYANSE AND OTHERS**

COURT OF APPEAL.  
A. DE Z. GUNAWARDANA, J.  
C.A. 253/86 - M.C. HAMBANTOTA 644.  
FEBRUARY 26 AND 28, 1990.

*S.C. Rules, 1978, Rule 46 - Mandatory nature of the said Rule.*

The petitioner filed this application to revise an Order made by the Magistrate Hambantota on 24.1.86, sitting as a Judge of the Primary Court, in a complaint made under section 62 of the Primary Courts Procedure Act. The petitioner filed only a certified copy of the said order along with the petition and affidavit and failed to file the relevant proceedings of the original Court as required under Rule 46. A preliminary objection was taken by the Counsel for the 1st respondent that the petitioner cannot maintain the said application as he has failed to comply with Rule 46 of the S.C. Rules.

**Held:**

(i) Following the decision in *Navaratnasingham vs. Arumugam and Another* (1980) 2 SLR page 1, that proceedings under Rule 46 would mean "so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context."

(ii) The rules of procedure have been devised to eliminate delay and facilitate due administration of justice. The instant case is a good example which illustrates that the revisionary powers of this Court cannot be exercised without the petitioner furnishing to this Court the relevant proceedings on which the order sought to be revised is based on. Rule 46 had been formulated to avert such situations. The observance of Rule 46 is mandatory.

**Cases referred to :**

- (1) *Navaratnasingham vs. Arumugam and Another* (1980) 2 Sri LR 1
- (2) *Mohamed Haniffa Rasheed Ali vs. Khan Mohamed Ali and Another* S.C. 6/81 and S.C. Minutes of 20.11.81.
- (3) *W.M. Kiriwanthe vs. N.M.A. Navaratne and Another* C.A. 626/89 - C.A. Minutes of 19.01.90
- (4) *Nicholas vs. O.L.M. Macan Markar Ltd. and Others* (1981) 2 Sri LR 1

PRELIMINARY OBJECTION to Application in Revision of an order of the Magistrate of Hambantota.

*Batty Weerakoon* for petitioner.

*K. Balapatabendi* for 1st respondent.

*Cur.adv. vult.*

April 14, 1990.

**A. DE Z. GUNAWARDANA, J.**

This is an application for Revision of an order made by the Magistrate Hambantota on 24.1.86 sitting as Primary Court Judge, on a complaint made under section 62 of the Primary Courts Procedure Act. After inquiry, the learned Magistrate by his said order has held that the 1st respondent was in possession of the lands called Mailagahakumbura, Kongahakumbura and Siyabalagahawatte, at the relevant time, and that the petitioner has not been evicted from the said lands.

A preliminary objection was raised by the 1st respondent's Counsel that the petitioner cannot maintain this application as he has failed to comply with Rule 46 of the Supreme Court Rules, in not having filed the relevant proceedings of the original court as required under the said Rule. At the time the said application was filed in court the petitioner has filed only a certified copy of the said order along with the petition and affidavit. The evidence upon which the said order was based and the documents relating thereto, have not been filed along with the said order. The petition had been filed on the 5th of March 1986 and was supported on 11.3.86 before this Court on which date the Court has issued notice on the respondents. On the notice returnable date Counsel for the 1st respondent

had appeared and had asked for time to file objections. On or about 28.5.86 objections have been filed by the 1st respondent. On 24.1.90 when this application came up for argument before this Court the petitioner had moved to file a certified copy of the proceedings containing the evidence led and the documents produced before the Primary Court. At this stage Counsel for the 1st respondent had objected to the filing of these documents as they ought to have been filed with the petition as required under Rule 46. The Court however had allowed the documents to be filed and fixed the matter in regard to the said objection to the admission of the said documents for argument on 31.1.90. Thereafter both parties have filed written submissions relating to the said objection taken by the 1st respondent.

At the out set it would be appropriate to quote the relevant Rule which reads as follows :

Rule 46, "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. Application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner and be accompanied by two sets of copies of proceedings in the Court of First Instance, tribunal or other institution."

Thus according to Rule 46 when an application for revision or restitutio in integrum is made to the Court of Appeal it is necessary that two sets of copies of *proceedings* in the Court of First Instance, Tribunal or Institution should be filed along with the said application. The word "proceedings" is not defined in the said Rule. However in the case of *Navaratnasingham vs. Arumugam and Another* (1) Justice Soza has held that:-

"... the term 'proceedings' as used in Rule 46 means so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context. This expression can, and often will, include the pleadings, statements, evidence and judgment."

I am in respectfull agreement with the above definition of the word "proceedings" as referred to in the said Rule 46.

The petitioner in his prayer to the petition has sought—

“to revise the order of the learned Magistrate by setting it aside and to hold that the complainant/ petitioner is entitled to be put into possession of the lands in suit;”

Since, by this plea, the petitioner is seeking to canvass the said order made by the learned trial Judge, based upon the evidence and the documents placed before him, it will be incumbent on this Court to examine the evidence and the documents produced in the case, if in fact this Court is to review the said order. In my view it would be practically impossible to do so without considering the evidence and the documents that were presented to the learned trial Judge. However the petitioner when he filed this application has filed only a copy of the said order of the learned Magistrate. He had failed to file the proceedings upon which the said order was based. The present step taken by the petitioner appears to be, an effort to cover that lacuna by seeking to file the said proceedings at this stage. This, in my view, is, a clear case of non-compliance with the mandatory requirements of Rule 46.

Further more the petitioner in his petition had urged in para 14 that:

“..... the learned Magistrate erred both on the law and on the facts when he failed to appreciate the fact that the 3 lands were possessed as one continuous stretch of lands and the dispossession took place when the complainant-petitioner's Agent was turned out of the 2 roomed structure which stood on the land. He further states that the learned Magistrate erred on the facts when he held that the dispossession or the alleged dispossession took place on different dates and/or that the dispossession took place more than two months prior to the information being filed.”

In paragraph 15 the petitioner states:

It is further respectfully stated that the learned Magistrate failed to take into consideration that:

- (a) the documentary evidence of the complainant - petitioner showed that he was in possession of the said lands, and that this documentary evidence consisted of licences issued to the complainant-petitioner and his agents in respect of the land and of entries in official records;

- (b) the only basis on which the 1st respondent claimed he was in possession, which is the alleged ownership of the said lands by his father-in-law Dionis was proved false from the certified records of a previous action in respect of this land."

Thus the above two paragraphs of the petition shows that the petitioner is canvassing the facts proved in this case based upon the evidence and the documents. For this Court to look into these averments, it is essential that the evidence and the documents which were presented to the learned Magistrate be available to this Court, but the petitioner when he filed his petition has failed to furnish the said documents and the evidence. This he cannot do now, because Rule 46 required that proceedings which are material to the case should be filed along with the petition and affidavit.

In the case of *Mohamed Haniffa Rasheed Ali vs. Khan Mohamed Ali and Another* (2) the majority of the judges expressed the view that Rule 46 is mandatory. This view in regard to Rule 46 had been followed by this Court in the case of *W. M. Kiriwanthe vs. N. M. A. Navaratne and Another* (3). A similar view had been adopted by this Court in construing the mandatory nature of Rule 47 of S.C. Rules, in the case of *Nicholas vs. O. L. M. Macan Markar Ltd. and Others* (4).

The rules of procedure have been devised to eliminate delay and to facilitate due administration of justice. The instant case is a good example which illustrates that the revisionary powers of this Court cannot be exercised without the petitioner furnishing to this Court the relevant proceedings upon which the order sought to be revised, is based on. Thus it is seen that Rule 46 had been formulated to avert such situations. Hence in my view the observance of Rule 46 is mandatory.

The petitioner in this application had failed to file the relevant proceedings as required under Rule 46 and therefore I am of the view that the 1st respondent is entitled to succeed in his preliminary objection. Hence this application is dismissed with costs fixed at Rs. 210/-.

*Objection upheld.*

*Application dismissed.*