

GITA FONSEKA
v
THE MONETARY BOARD OF
THE CENTRAL BANK OF SRI LANKA

COURT OF APPEAL
TILAKAWARDENA, J., (P/CA) AND
WIJAYARATNE, J.
JULY 22, 2003 AND
SEPTEMBER 23, 2003

*Court of Appeal (Appellate Rules) 1990 – Rules 3 (4) (b) (i), 3 (7), 3(8) and 3 (14)
– Is filing of an affidavit only without a statement of objections sufficient compliance with the Rules of Court?*

The Attorney-General appearing for the respondent filed “ objections ” of the respondent solely by way of affidavit of the Chairman of the respondent Board.

The petitioner raised a preliminary issue that the filing of an affidavit without a statement of objections is not sufficient compliance with the Rules of Court.

On the preliminary objection –

Held:

- (i) Gravity of the burden of court is no reason to dispense with or ignore Rules of Court. The discretion of court considered in Kiriwanthe's case does not exist any longer after the promulgamation of the Court of Appeal (Appellate Rules) 1990.
- (ii) The court has no discretion to dispense with the requirement of a statement of objections to be filed by a respondent, in terms of the Rules of Court.

Per Wijayaratne, J.

“There is no *cursus curiae* or the practice of the court to permit non compliance by a respondent of Rules requiring him to file a statement of objections, and a practice specially of the Attorney-General's Department cannot override or supercede the provisions of the Rules of Court which are held to be mandatory by the Supreme Court as well as this court.”

- (iii) Amendments can be considered or permitted only where there is a valid pleading; when there is no valid pleading, there is nothing to amend; even the petitioner filing a counter affidavit cannot legitimize the act of the respondent when such is in conflict with the Rules.

APPLICATION for a writ of certiorari.

Cases referred to :

1. *Attorney-General v Chandrasena* – 1991 1 Sri LR 81
2. *Kiriwanthe and another v Navarathne* – 1990 2 Sri LR 393 (SC) (distinguished)
3. *Shanmugavadi v J.M. Kulatilake* – S.C. 50/2002 S.C. Spl. L.A. 44/2002

K. Kanag Iswaran, P.C., with M.A. Sumanthiran for petitioner.

Sathya Hetige, Deputy Solicitor-General with *M. Gunatilake* for respondent.

WIJAYARATNE, J.

The petitioner filed this application invoking the writ jurisdiction of this court seeking the grant of a mandate in the nature of *writ of certiorari* quashing the decision of the respondent to reject her application for voluntary retirement and a further mandate in the nature of a *writ of mandamus* compelling the respondent to permit the petitioner to retire under Voluntary Retirement Scheme Circular No. 6 dated 01.10.2001 and be entitled to all benefits therein. 01

Upon notice being served, the respondent represented by counsel on 26. 11.2002 moved court for time to file objections. On 10.2.2003 it was recorded that "OBJECTIONS" were tendered to the registry and a copy of the same handed over to the counsel for the petitioner. The petitioner filed her counter affidavit on 24.2.2003 and arguments was fixed for 23.5.2003. When arguments commenced both parties gave notice to each other of preliminary objections that were to be considered as fresh issues in the case. 10

The petitioner raised the preliminary issue

- a) that the failure of the respondent to have filed a statement of objections in terms of the mandatory applicable rules of court, deprives him of his right to appear in these proceedings in opposition to the petition.

It is an admitted fact that the purported "objections" of the respondent was solely by way of affidavit of the Chairman of the respondent Board dated 10.2.2003. Thus the issue that is before court for determination is whether filing of an affidavit only without a statement of objection is sufficient compliance with the rules of court.

Rule 3 (4) (b) (i) of the COURT OF APPEAL (APPELLATE RULES) 1990 states,

"A statement of objections shall be filed by each respondent within four weeks"

Rule 3 (7) states,

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"..... A statement of objections containing any averment of facts shall be supported by an affidavit in support of such averments."

The learned Deputy Solicitor General in meeting the preliminary objection conceded that an affidavit only of the respondent is filed. He argued that

- (a) It is the practice of the Attorney-General's Department to file only an affidavit from the respondents it represent and that has been accepted as a practice which has hardened into a rule and should be followed as *curiae*;
- (b) That the registry has accepted the affidavit filed as objections of the respondent and the registrar has not acted in compliance with rule 3 (14) of the rule and the petitioner filed her counter affidavit denoting her acceptance of the affidavit as objections.
- (c) That the court should exercise its discretion and permit the respondent to oppose the petition on the strength of the affidavit filed as its objection to the petition.

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The learned DSG representing the respondent however has tendered a motion on 4.9.2003, along with an affidavit and statement of objections and further moved to amend the same. This is contrary to the so-called practice the counsel stated that had hardened into a rule. However it amounts to his conceding that even the respondents represented by the Attorney-General need file a statement of objec-

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tions and not an affidavit only. The learned counsel for the respondent relying on many a decision of the Supreme Court as well as this court has not referred this court to a single decision that makes exception to the rules where Attorney-General is representing a respondent. The decision of *Attorney-General v Chandrasena*⁽¹⁾ is distinct and has no relevance to the facts of this case. In the said case Attorney-General made application to court on a pure question of law and hence the requirement of an affidavit was dispensed with. However the facts of the present case related to the filing of statement of objections and there was not a single instance where the requirement of a statement of objection was dispensed with, referred to by the counsel; nor is there any authority to say that an affidavit alone is sufficient to meet the requirement of the rule. Especially in view of the provisions of rule 3 (7) it is abundantly clear that the rules envisaged the filing of a statement of objection and an affidavit supporting averments of fact, as two distinct documents.

The practice however, may be of the Department of the Attorney General and certainly not of the court. A practice of the department and not of the court cannot amount to or considered as *cursus curiae*. Besides the very fact that the learned Deputy Silicitor General moved to file an affidavit and a statement of objections on 4.9.2003 itself fails his argument and contrary to such practice which he says was hardened to a rule.

On the question of the registry accepting the affidavit and not complying with rule 3 (14) even if considered a non-compliance with the rule, cannot rectify the fault that occurred when the respondent failed to comply with the rules. Even the petitioner filing counter affidavit cannot legitimize the act of the respondent when such is in conflict with the rules. The so-called practice that has hardened in to a rule as the learned Deputy Solicitor General argue nor the acts on the part of the registrar or the petitioner which are not in harmony with the provisions of the rules cannot override or supercede the provisions of the rules of court which are held to be mandatory by almost all the decisions cited by the respondent.

The last ground upon which the learned Deputy Solicitor General has sought to support his case is that the court should exercise its discretion in allowing the affidavit of the respondent in place of a statement of objection, specially considering the fact that when the respon-

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dent is not permitted to oppose the application the court has a greater burden on it.

Gravity of the burden of court is no reason to dispense with or ignore rules of court. The discretion of court considered in *Kiriwanthe's case*⁽²⁾ does not exist any longer after the promulgation of the Court of Appeal (Appellate Rules) 1990. This aspect of the discretion is adequately dealt with by the Supreme Court in the case of *K. Shanmugavadivu v J. M. Kulatilake*⁽²⁾ considering the ambit of rule 3 of the Court of Appeal (Appellate Rule) 1990, observed that,

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"In such circumstances, the only kind of discretion that could be exercised by court is to see whether and how much time could be permitted for the filing of papers in due course."

The several cases cited by the learned Deputy Solicitor General were on matters related to the rules that were repealed and as commented by the Supreme Court in the aforesaid case of Shanmugavadivu, "The new rules (of 1990) indicate that the objectivity of exercising judicial discretion, as intended in Kiriwanthe's case has been incorporated as it enables an applicant to submit to court the relevant documents at a later stage,..."

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Rule 3 (4) (b) (i) read with rule 3 (7) however leaves no discretion to the court in the case of filing of statement of objections to dispense with either the statement of objections or the affidavit in support of averments of fact.

Accordingly this court has no discretion to dispense with the requirement of a statement of objection to be filed by a respondent in terms of the rules of the court. There is no *cursus curiae* or the practice of the court to permit non-compliance by a respondent of rules requiring him to file statement of objection and a practice specially of the Attorney General's Department cannot override or supercede the provisions of the Rules of Court which are held to be mandatory by the Supreme Court as well as this court as referred to by the learned Deputy Solicitor General in all the cases cited in his written submissions.

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Finally the learned Deputy Solicitor General argued that in terms of his motion, the amendment of the pleading in terms of rule 3 (8) should be permitted. Amendment can be considered or permitted only

where there is a valid pleading. When there is no valid pleading, there is nothing to amend. There does not arise the question of application of rule 3 (8) to permit any amendment of pleadings that is not before 130 the court.

Accordingly the preliminary objection of the petitioner is upheld and this court rules that the respondent which failed to comply with mandatory applicable rules 3 (4) (b) (i) read with rule 3 (7) is deprived of its right to appear in these proceedings in opposition to the petition.

Consequently the matter of the application of the petitioner is to be fixed for inquiry on a date appointed by the court.

SHIRANEE TILAKAWARDENA, J. (P/CA)

I agree.

Preliminary objection upheld; main matter fixed for inquiry.