

1964 Present : T. S. Fernando, J., and Sri Skanda Rajah, J.

MEERUPPE SUMANATISSA TERUNNANSE, Petitioner, and
WARAKAPITIYA SANGANANDA TERUNNANSE, Respondent

S. C. 283/1963—Application for Conditional Leave to Appeal to Her Majesty in Council under the Appeals (Privy Council) Ordinance

Privy Council—Application for conditional leave to appeal—Failure of petitioner to file affidavit—Effect—Affidavit—Form of jurat—Appeals (Privy Council) Ordinance, Schedule, Rules 1 (a), 2, 3—Civil Procedure Code, ss. 376, 439.

In an application for conditional leave to appeal to the Privy Council in terms of Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance, the absence of an affidavit is not fatal to a grant of leave.

An affidavit filed by a person who is not able to understand writing in the English language is liable to be rejected if the jurat is not in the form required by section 439 of the Civil Procedure Code.

APPPLICATION for conditional leave to appeal to the Privy Council.

H. Wanigatunga, for the petitioner.

A. F. Wijemanne, for the respondent.

Cur. adv. vult.

May 7, 1964. T. S. FERNANDO, J.—

At the conclusion of the argument on this application we granted leave to appeal subject to the usual conditions, but, in view of the novelty of the point raised on behalf of the respondent, decided to set down later the reasons for our order.

The respondent objected to the granting of the petitioner's application for conditional leave to appeal to Her Majesty in Council, and based his objection on the ground that the application was bad in law inasmuch as the affidavit which was attached to the petition did not conform to the requirements of law.

The affidavit had been drafted in the English language. The petitioner did not dispute that he is a person who is not able to understand writing in the English language. The respondent pointed to section 439 of the Civil Procedure Code which requires that an affidavit, in a situation such as this, shall at the time of affirmation be interpreted to the affirmant in his own language (which in the case of the petitioner is the Sinhala language), and that the jurat shall express that it was so interpreted to him in the presence of the Justice of the Peace and that he appeared to understand the contents thereof. The jurat of the affidavit which was attached to the petition presented to court by the petitioner is in the undermentioned form :—

“ Read over signed and affirmed to at Weligama on this 12th day of June 1963.”

It was not seriously doubted that the affidavit is not in the form required by section 439 of the Civil Procedure Code and that it should be rejected.

Did the rejection of the affidavit militate against the granting of the application of the petitioner? Rule 1(a) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance confers a right of appeal in certain specified circumstances. Rule 2 requires any party desirous of appealing to make application to the Supreme Court by petition within a stated time. The Rule is silent as to any requirement of affidavit evidence. The petition presented by the petitioner contained statements which, if true, entitled him to a grant of leave upon conditions set out in Rule 3. The correctness of the statements in the petition could have been ascertained, if necessary, by this Court by merely calling for and examining the final judgment of this Court and/or the record of the court of trial.

In the present instance the correctness of the statements in the petition was not challenged by the respondent who based his objection solely on the defect in the affidavit which, according to him, left this Court without proof of the correctness of the statements in the petition. Learned counsel for the respondent referred to Chapter XXIV of the Civil Procedure Code relating to summary procedure. Section 376 of the Code requires that a petition upon which an application or action of summary procedure is instituted shall be supported by affidavits etc. as may be requisite to furnish prima facie proof of the material facts set out in the petition. I am aware that there exists a practice

of applications to the Supreme Court for leave to appeal to Her Majesty in Council being supported by affidavit. I wish to say nothing to deter that practice being continued ; but the question now before us is whether the absence of an affidavit is fatal to the granting of the leave. In order to support the objection, learned counsel for the respondent argued that an application for leave to appeal to Her Majesty in Council is an application of summary procedure attracting to it compliance with the provisions, inter alia, of section 376 of the Civil Procedure Code. We found ourselves unable to agree with that argument of Counsel.

The burden of satisfying this Court that the petitioner was entitled to a grant of leave was, no doubt, on the petitioner himself. The presentation of an affidavit may be one form of discharging that burden, and an applicant might ordinarily be advised to take that step. It is however, quite a different thing to say that the absence of an affidavit is fatal to a grant of leave. In this case it was not alleged by the respondent that the appeal proposed is not one from a final judgment of this Court where the matter in dispute on the appeal is upward of Rs. 5,000 in value. There was no attempt at any stage to controvert the statements in the petition and I could find no legal bar in these circumstances to an acceptance of the statements in the petition as being correct.

Learned counsel for the respondent suggested that the petitioner will not be left without some remedy as Rule 32 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance recognises his right to petition Her Majesty in Council direct even where he has failed to comply with those Rules. Such a circumvolant and, if I may add, expensive step would have become necessary only if we had not been satisfied that the petitioner's case fell within Rule 1(a). As I have stated already, we were so satisfied and, it is permissible to add, we found some comfort in the circumstance that thereby we were advancing the prosecution of a citizen's legal right rather than denying it.

SRI SKANDA RAJAH, J.—I agree.

Application allowed.