KIRIWANTHE AND ANOTHER
v.
NAWARATNE AND ANOTHER

COURT OF APPEAL
A. DE Z.. GUNAWARDANA.
CA 626/88
AGRARIAN SERVICES ENQUIRY No. BD/E/34/375
NOVEMBER, 28. 1989.

Writs - Writ of Certiorari - Failure to show uberrima fides *- Failure to comply with Rule 46 of the Supreme Court Rules.*

In an application for a Writ of Certiorari to quash the order of the Assistant Commissioner of Agrarian Services of Badulla District dated 15.6.88 the following preliminary objections were taken by the 2nd respondent :-

(i) that the petitioners have not disclosed material particulars in that they have not adverted to the determination made by the Assistant Commissioner of Agrarian Services at the conclusion of the inquiry upon which the said order dated 15.6.88 was based and thereby failed to show *uberrima fides* in placing full facts before the Court,

(ii) that the petitioners are relying on the failure to state the reasons for the said order as an error on the face of the record to obtain a Writ of Certiorari, whereas the petitioner should have disclosed that in fact the said order is based upon the reasons given in the said determination by the Assistant Commissioner of Agrarian Services,

(iii) that the petitioners have failed to comply with Rule 46 of the Supreme Court Rules of 1978 in that the petitioners have failed to file along with the petition and affidavit, the reasons and determination made by the Assistant Commissioner of Agrarian Services which is a part of the proceedings as contemplated in Rule 46, that would be necessary to understand the said order sought to be quashed and place it in its proper context.

Held :

(1) that the situation that has arisen in this case shows that if the petitioners made a true disclosure, then the Court may not have acted in this case in the first instance. The full disclosure of all material facts is insisted upon, exactly to avoid such situations and to ensure that the parties do not mislead the Court or misrepresent facts. If this requirement is followed it would help to wean out unnecessary litigation and keep channels of justice clear, clean and truthful.

(2) that the observance of Rule 46 is mandatory and the failure on the part of the petitioners to comply with the said Rule is a fatal irregularity, which would disable the petitioners from maintaining this application.

Cases referred to :

(1) *King v.General Commissioners for the purpose of the Income Tax Acts for the District of Kensington — ex parte Princess Edmond de Poignac 1917 KBD 486.*
(2) *Dalgish v. Garvie* 2 Mac & G 231, 238
(3) *Alfonso Appuhamy v. Hettiarachchi* 77 NLR 131
(4) *Navaratnasingham v. Arumugam* [1980] 2 Sri LR I
(5) *Collettes Ltd. v. Weerakoon and Four Others* : CA Application No. 77/ 88 - C.A Minutes of 8.9.1989
(6) *Mohamed Haniffa Rasheed Ali v. Khan Mohamed Ali* S.C. 6/81 S.C. Minutes of 20.11.81
(7) *Nicholas v. O.L. M.Macan Markar Ltd.* and others [1981] 2 Sri LR I

APPLICATION for Writ of Certiorari.

K.M.P. Rajaratne for Petitioners
J.C.T. Kotelawala with *Sunil de Silva* and *Mahanama Wicremaratne* for 2nd Respondent.

Cur.adv. vult.

January 19, 1990.

A.DE Z. GUNAWARDANA, J.

This is an application by the petitioners for a writ of Certiorari to quash the order dated 15.6.88 of the 1st respondent, the Assistant Commissioner of Agrarian Services, Badulla District, Hali - Ela. These petitioners also seek to have a Writ of Mandamus issued on the 1st respondent directing the 1st respondent to declare that the 1st petitioner W. Kiriwanthe and / or 2nd petitioner R.M. Wimalawathie are entitled to the rights of R.M. Suduhamy as a tenant cultivator, in respect of the field called Galpattiyaarawa.

On a complaint made by the 2nd respondent, N.M. Appuhamy, that a person who is not entitled to be a tenant cultivator in respect of the said field is in occupation and is using the same, an inquiry under section 14 (2) of the Agrarian Services Act No. 58 of 1979, was held by the 1st respondent. After the said inquiry, the 1st respondent by his letter dated 15.6.1988 addressed to the 1st petitioner marked P6, made order under section 14 (2) of the Agrarian Services Act that the said first petitioner is not entitled to the rights of R.M. Suduhamy as a tenant cultivator, and therefore the 1st petitioner should forthwith vacate the said field. It is the said order that the petitioners are seeking to quash by way of a Writ of Certiorari.

When his matter was taken up for hearing in this Court the following preliminary objections were taken by the Counsel for the 2nd respondent :-

(i) that the petitioners have not disclosed material particulars, in that they have not adverted to the determination made by the 1st respondent at the conclusion of the said inquiry upon which this said order dated 15.6.1988 was based and have thereby failed to show uberrima fides in placing the full facts before this court.

(ii) that the petitioners are relying on the failure to state the reasons for the said order, in the said letter dated 15.6.1988 as an error on the face of the record to obtain a Writ of Certiorari, whereas the petitioners should have disclosed that in fact the said order is based upon the reasons given in the determination marked P10, made by the 1st respondent after the said inquiry.

(iii) that the petitioners have failed to comply with Rule 46 of the Supreme Court Rules of 1978, in that the petitioners have failed to file along with the petition and affidavit, the reasons and determination made by the 1st respondent, upon the conclusion of the said inquiry, which is a part of the proceedings as contemplated under Rule 46, that would be necessary to understand the said order sought to be quashed and place it in its proper context.

The said objections arose mainly from the fact that the petitioners have failed to file the determination and the reasons given by the 1st respondent, at the conclusion of the said inquiry, along with the original petition and affidavit in this Court. However the petitioners have filed the said determination and the reasons along with their counter affidavit, later. The Counsel for the petitioners stated that the petitioners were unaware that there was a determination and that the reasons have been given for such determination, at the time this application was filed. In my view, this explanation is unsatisfactory. The petitioners have been represented by Counsel even at the stage of the said inquiry. In any event with the production of the said document, the legal consequences that have flown has given a different complexion to the whole case.

Counsel for the 2nd respondent submitted that the failure on the part of the petitioner to produce the document containing the reasons and the determination of the 1st respondent has enabled the petitioner to support this application before this Court and to get notice issued on the respondents, on the basis that the said order dated 15.6.1988 did not give

reasons. He referred to paragraph 14 (c) of the petition wherein the petitioner states :-

"The 1st respondent has not given any reasons for his order marked P6."

This averment the learned Counsel pointed out was erroneous because the said order marked P6 was based upon the reasons and the determination made by the 1st respondent at the conclusion of the said inquiry. The learned Counsel for the 2nd respondent submitted that this shows that the petitioner had not acted with uberrima fides in presenting the material particulars before this Court.

The Courts in Sri Lanka and in the United Kingdom have consistently held that it is imperative that uberrima fides must be shown by the parties before Court who invoke the discretionary remedies such as writs and injunctions. In the case of *King vs General Commissioners for the purpose of the Income Tax Acts for the District of Kensington - ex parte - Princes Edmond de Poignac* (1) which dealt with Writ of Prohibition, enunciated the principles applicable to all cases of Writs and Injunctions. In this case the Divisional Court when dealing with the merits of the case discharged the Writ on the ground that the applicant had suppressed or misrepresented facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court.

Lord Cozens - Hardy M.R. in his Judgment in the said case referred to the case of *Dalglish vs. Jarvie* (2) where Lord Langdale and Rolfe B. has stated that -

"It is the duty of a party asking for an Injunction to bring under the notice of the Court all facts material to the determination of his rights to that injunction, and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."

Lord Cozens - Hardy M.R. goes further to state :-

"That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex - parte application uberrima fides is required and unless that can

be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case but simply say, ' we will not listen to your application because of what you have done.' "

A similar view was expressed in the case of *Alfonso Appuhamy v. Hettiaratchi* (3) where it was stated :

"When an application for a prerogative Writ or an Injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all material facts. The petitioner must act with uberrima fides."

Justice Soza in dealing with the question of invoking the revisionary jurisdiction of this court in the case of *Navaratnasingham v. Arumugam* (4) states :

"I would like to emphasize that in applications of this type the Court expects and insists on *uberrima fides*."

In dealing with an application for a Writ of Certiorari in the case of *Colletes Ltd. v. Weerakoon and 4 others,* (5) the Court of Appeal in its judgment has stated that -

"Thus it is essential that when a party invokes the writ jurisdiction or applies for an injunction to this Court, all facts must be clearly, fairly and fully pleaded before the Court, so that the Court would be made aware of all the relevant matters. It is necessary that this procedure must be followed by all litigants who come before this Court in order to ensure that justice and fair play would prevail."

The above observations aptly sums up the basic norms that should be followed by the parties before this Court when they invoke discretionary jurisdiction of this Court such as Writs, Injunctions and Revision. Therefore it goes without saying that in this case too the petitioner should have followed the said norms ; unfortunately however, in my view, the petitioner has failed to do so.

The Counsel for the 2nd respondent submitted that as a result of the failure of the petitioner to disclose that the order dated 15.6.1988 is based upon the reasons and determination made by the 1st respondent, the

Court had been led to issue notice in this case. The Counsel further submitted that if a true disclosure was made, the error on the face of the record complained of, upon which the Writ of Certiorari is asked for would be non - existent. Therefore he submitted that there is no basis upon which a writ of Certiorari would issue in this case as the other grounds urged in the petition do not warrant the issue of a Writ of Certiorari. The situation that has arisen in this case shows that if the petitioner had made a true disclosure, then the court may not have acted in this case. Thus it is seen that, the observance of the full disclosure of all material facts is insisted upon exactly to avoid such situations, and to ensure that the parties do not mislead the Court or mis- represent facts. If this requirement is followed it would help to wean out unnecessary litigation and keep channels of justice clean and truthful. It is also important because when courts are called upon to exercise such discretionary powers the Courts must be apprised of the true and lawful position in all aspects of the case. It is then, and then alone, that miscarriage of justice and abuse of legal process would be effectively averted. In the circumstances, this Court is of the view that the petitioner should have disclosed that the order dated 15.6.1988 is based upon the reasons and the determination made by the 1st respondent after the said inquiry. In my view, the failure to do so justifies the denial of the remedy.

The Counsel for the 2nd respondent submitted that Rule 46 of the S.C. Rules require that originals or certified copies of material documents must be filed with the petition and affidavit when the Writ jurisdiction of this Court is invoked. In the case of *Mohamed Haniffa Rasheed Ali v. Khan Mohamed Ali and another* (6) the majority of the Judges expressed the view that Rule 46 is mandatory. Wanasundera, J. in delivering the majority judgment stated :-

> " While I am against mere technicalities standing in the way of this Court doing justice it must be admitted there are rules and rules. Sometimes Courts are expressly vested with powers to mitigate hardships. But more often we are called upon to decide which rules are merely directory and which mandatory, carrying certain adverse consequences for non compliance. Many procedural rules have been enacted in the interest of the due administration of justice, irrespective

of whether or not a non compliance causes prejudice to the opposite party. It is in this context that Judges have stressed the mandatory nature of some of the rules and the need to keep channels of procedure open for justice to flow freely and smoothly. The position of course would be worse if such non compliance also causes prejudice to the opposite party."

Having stated so Wanasundera, J. went on to point out that -

"If we are to accede to the appellant's plea that he should be excused from complying with the Rule, because the respondent has filed some of these docuements, we would be virtually investing the appellant with a discretion whether or not to comply with the Rule, because the required material has already been filed by the opposite party or it is anticipated that they would be filed by that party. Such I think is not the law."

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 v. O.L.M. Macan Markar Ltd. and others* (7) (1981) 2 SLR page 1.

The rules of procedure have been devised to eliminate delay and to facilitate due administration of justice. If the procedure set out in the said rules are not observed, the consequences that a litigant would have to face are illustrative in this case. If the petitioners followed the required proceedings at the appropriate time the situation that has arisen in this case would not have come to pass. Thus in my view the observance of Rule 46 is mandatory, and the failure on the part of the petitioners to comply with the said Rule is a fatal irregularity, which would disable the petitioners from maintaining this application.

For the above-reasons I am of the view that the application of the petitioners should be dismissed. The 2nd respondent will be entitled to costs fixed at Rs. 525/-.

Application dismissed.