FACY
v
SANOON AND OTHERS

COURT OF APPEAL
UDALAGAMA, J.
DISSANAYAKE, J.
FERNANDO, J.
C.A. 1093/2002
MAY 19 and 27.2003.
JUNE 9. 2003
JULY 9, 2003

Writ of Certiorari – Writ of Quo Warranto – To declare appointment as Deputy Mayor null and void - Preliminary Objection – Failure to comply with Court of Appeal (Appellate Procedure) Rules 1990 – Rule 3, 3(2) – Is it fatal? – Absence of a proper affidavit – Consequences – Constitution Article 140, 141 – Oaths and Affirmation Ordinance S. 5..

Held :

(i). Petition must be accompanied by a valid affidavit, as recognised by law.

Per Udalagama, J.

"The Petitioner is a Muslim who solemnly takes oath and swear, which he is free to do, having clearly elected to make oath and swear at the beginning of his affidavit, the Justice of the Peace who attested the affidavit could not have affirmed the petitioner purportedly having stated that he read and explained same to the affirmant. I would consider an affidavit which contains both to be totally flawed."

Per Udalagama, J.

"Having regard also to the need to maintain consistency in judgments I would also hold as held repeatedly by this Court that a faulty affidavit could not be considered a mere technicality but in fact fatal to the entire application and as also held by the Court on numerous occasions a defective affidavit is bad in law and warrants rejection."

(ii). Failure to aver in his petition that the jurisdiction of the Court had not previously been invoked (Rule 3 (2)) also warrants dismissal of the Petition - as there is no application to perfect the Petition/Affidavit, to comply with Rule 3(2).

APPLICATION for a *Writ of Certiorari* and/or *Quo Warranto.*

Cases referred to :

1. *De Alwis* v *Unantenne* - 76 NLR 180
2. *Ratwatte* v *Sumathipala* - 2001 - 2 Sri LR 55
3. *De Silva* v *L.B. Finance* - 1993 - 1 Sri LR 371 (Distinguished)
4. *Nicholas* v *Marcan Markar* - 1981 2 sri LR 1 at 5 (CA)
5. *Coomasaru* v *Leechman & Company* - S.C.217/72 - 307/72 SCM 26.5.1996
6. *Fernando* v *Sybil Fernando* - 1997 3 Sri LR 1
7. *Kiriwante* v *Navaratne* - 1996 2 Sri LR 393 (Distinguished)
8. *Marcan Marker* v *Nicholas* - BALR 1986 Vol. I part VI - 245 (SC) Distinguished.
9. CALA 182/2001 - CAM 2.4.2002

Romesh de Silva P.C., with *Hiran de Alwis*, *Chandimal Mendis* and *Sugath Caldera* for petitioner.

D.S. Wijesinghe, P.C., with *Sanjeewa Jayawardena* and *Priyanthi Guneratne* for 1st respondent.

A. Gnanathasan D.S.C., with *Janak de Siliva* for 2,3,5th respondents.

Daya Pelpola with *Niroshan Perera* for 4th respondent.

Cur.adv.vult

August 06, 2003

UDALAGAMA, J.

The petitioner in this application moves inter alia for the issue of 01
a mandate in the nature of a *writ of Quo Warranto* declaring the appointment of the 1st respondent as Deputy Mayor of Colombo be declared null and void and also for a mandate in the nature of a *writ of Certiorari* quashing the decision of the 4th respondent admittedly naming the 1st respondent for the said post of Deputy Mayor of Colombo.

Interim relief prayed for on behalf of the petitioner appears not to have been pursued.

The President of the Court of Appeal having acceded to the 10
application made by the learned President's Counsel for the peti-

tioner to constitute a three Bench Division on the basis that the case of *De Alwis v Unantenne* (1) was erroneously decided, the matter was taken up before three Judges of the Court of Appeal on 19.05.2003.

When the matter was taken up on 19.05.2003 learned President's Counsel for the 1st respondent raised a number of preliminary objections to this application and moved that the petition be dismissed in limine. Learned counsel for the parties, however, also made submissions on the substantial matters for decision.

However, I am inclined to the view that the preliminary objections raised on behalf of the 1st respondent need to be upheld and the petitioner's application dismissed in limine *inter alia* for the following fatal lapses which affect the validity of the application as the petitioner has singly failed to comply with the mandatory provisions of the Court of Appeal (Appellate Procedure) Rules 1990.

It is to be noted that where the petitioner failed to comply with the imperative provisions of the aforesaid rules court may *ex mero moto* or at the instance of any party dismiss such application.

The aforesaid rules mandate that a properly constituted application for relief prayed under Article 140 or 141 of the Constitution be made by way of a petition together with an affidavit in support of the averments stated in the petition.

It is also manifest that the petition must be accompanied by a valid affidavit as recognized by law.

In the instant case the affirmant to the petition being one Mohammed Facy unambiguously by the preamble to his affidavit dated 12.06.2002 had taken oath and sworn to the facts stated therein.

That where a person is required by law to make an oath is a Buddhist, Hindu or a Muslim or some other religion according to which oaths are not of binding force or has a consciencious objection to make an oath may instead of making an oath make an affirmation (vide provisions of section 5 of the Oaths and Affirmation Ordinance as amended).

In the above context the petitioner undoubtedly had a right to make an affirmation instead of an oath. However, I am of view that the petitioner needed to elect one of the two. I would also consider an affidavit which contains both to be totally flawed. The petitioner who solemnly takes oath and swear, which he is free to do as stated above, having clearly elected to make oath and swear at the beginning of his affidavit, the Justice of the Peace who attested the affidavit could not have affirmed the petitioner purportedly having stated that he read and explained same to the affirmant. It is obvious to this court that the Justice of the Peace had failed to read over the affidavit prior to obtaining the petitioner's signature and thereby ignored the need to observe the sanctity that is necessarily attached to an affidavit. If the Justice of the Peace read over the affidavit carefully as he was bound to do he could not possibly have got the petitioner to affirm to the averments as had been done vide the jurat clause of the affidavit.

The preamble to paragraph (1) of the affidavit and the jurat clause is totally inconsistent. No oath appears to have been administered either.

Most significantly the very same petitioner who appears to have filed a counter affidavit subsequently dated 31.12.2002 undoubtedly discovering the obvious error in the impugned affidavit without leave of court to correct same however had done so and clearly and unambiguously in the preamble to that affidavit "declared and affirmed" to the facts deposed to, which appears to be consistent with the jurat clause. The averments in the second affidavit had impliedly confirmed the flaw in the earlier affidavit. Thus the impugned affidavit dated 12.06.2002 is patently defective.

In the absence of a proper affidavit there is in fact no application and in the circumstance I would reject the submissions of the learned President's Counsel for the petitioner that the affidavit is in compliance with the law.

In *Ratwatte v Sumathipala* (2) Justice Edussuriya (with myself agreeing) held "the deponent states that he is a Christian and makes oath, the jurat clause at the end of the affidavit states that the deponent has affirmed. The affidavit is defective".

In *Ratwatte* v *Sumathipala (supra)* the objection to the affidavit was upheld and the petitioner's application rejected with costs.

In the instant case too the deponent although a Muslim who could if he wished to, make oath, once having done so at the preamble had at the end of the affidavit, affirmed to the facts deposed to.

Hence the impugned affidavit is clearly defective.

As also observed by Justice Edussuriya in the case cited above on the matter of an omission, the deponent in the instant case who at the preamble made oath but whereas before the Justice of the Peace affirmed to the facts deposed to, could not be considered an instance where there was an omission as contemplated by the provisions of section 9 of the Oaths and Affirmation Ordinance.

De Silva v *L.B. Finance*(3) cited by the learned President's Counsel for the petitioner could be distinguished in that in the said case cited the affidavit did not carry the word "affirmed" in the jurat clause although in the body of the affidavit the word 'affirm' had in fact appeared.

Contrary to the submission of the learned President's Counsel for the petitioner that non compliance of Rules does not warrant dismissal, I would disagree and respectully concur with the view expressed by Tennekoon C.J.cited in *Nicholas* v *Marcan Marker*(4) at 5 wherein His Lordship had in *Coomasaru v Leechman & Company* (5) held as follows - "the rules of procedure must not be regarded as mere technicalities which parties can ignore at their whims and pleasures".

Rules in my view are essential parts of procedural law, so made to be followed.

As held in *Fernando* v *Cybil Fernando*,(6) "There is substantial law and there is procedural law. Procedural law is not secondary. The maxim *ubi ius ibi remidium* reflects the complementary character of civil procedural law. The two branches are also interdependent. It is by procedure that the law is put into motion and it is procedural law which put life into substantive law gives its remedy effectiveness and brings it into action.

As stated above the lapse referred to in the affidavit goes to the basic validity of the affidavit. There is also no explanation as to the reasons *for the obvious flaw of the affidavit.* In such circumstances I would also distinguish *Kiriwante* v *Navaratna* [7] from the facts of this case.

Having regard also to the need to maintain consistency in judgments I would also hold as held repeatedly by this court that a faulty affidavit could not be considered a mere technicality but in fact fatal to the entire application and as also held by this court on numerous occasions a defective affidavit is bad in law and warrants rejection. In any event the petitioner is not entitled to benefit from the obvious ambiguity in his own affidavit.

Hence the obviously flawed impugned affidavit filed by the petitioner is in my view not a proper affidavit in law and in the absence of a proper affidavit there being no application, I would uphold the preliminary objection and dismiss this petition *in limine.*

Apart from the above the non compliance by the petitioner of the provisions of Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules 1990 also warrants dismissal of the petition as the petitioner had admittedly failed to aver in his petition that the jurisdiction of this court had not previously been invoked in respect of the matter in dispute. The petitioner even failed to explain his failure to comply.

As held in *Nicholas* v *Marken Markar (supra)* "the requirement in the Rules that an averment be made stating that the jurisdiction of court had not been previously invoked in respect of the same matter is mandatory. Non compliance with the said rule which is imperative would render such application to be rejected".

Although the judgment in the above case was reversed by the Supreme Court[8] in which case Wimalaratne J. with Soza J. agreeing allowed the petitioner to perfect his petition by the insertion of the missing averment, Wanasundera J. in a dissenting judgment stated however that even though the rule was directory as submitted by the learned Counsel for the petitioner, the order of rejection of the Court of Appeal ought not to be disturbed.

Importantly however it must be noted that the final relief granted was a direction to perfect the petition and affidavit and comply with the Rules. In the instant case however, there is not even an application to perfect the petition and affidavit thereby warranting the dismissal of the petition on the basis of non compliance of Rules 3(2) of part 11 of the Court of Appeal (Appellate Procedure) Rules 1990.

In any event it is also not the function of this court to relieve parties of the consequences of their own folly and negligence.

As held by Nanayakkara J. (with myself agreeing) in CALA 182/2001(3) which refers to a similar preliminary objection "the petitioner having been remiss and having not exercised due diligence in preparing his affidavit and having failed although an opportunity of amending same had been available dismissed in limine the application for non compliance of the Rules."

For the aforesaid reasons the non compliance with the mandatory provisions of the Rules of court warrant the dismissal of this application in limine and accordingly the application of the petitioner is dismissed with costs.

I am also of the view that in the circumstances the determination of other matters submitted before us would be an exercise in futility.

DISSANAYAKE, J. - I agree

FERNANDO J. - I agree

Preliminary objection upheld.
Application dismissed.