

ASSEMBLES OF GOD OF CEYLON
v
URBAN COUNCIL, ANURADAPURA AND ANOTHER

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 325/2000
OCTOBER 31, 2006
NOVEMBER 17, 2006

Court of Appeal (Appellate Procedure) Rules 1990 Filing of objections – is an affidavit necessary? Objections in the form of an affidavit alone – Does it suffice? Does it deprive the respondent's right to appear in opposition ?

The petitioner raised a preliminary objection to the respondent being heard on the basis that there is no statement of objections but only an affidavit.

Held:

- (1) Respondent when filing objections to an application has to file a statement of objections distinct from an affidavit of the respondent. An affidavit is necessary to support any averment of facts that are averred in the statement of objections.
- (2) An affidavit alone cannot be construed as a statement of objections even if he has objected to the application in his affidavit.
- (3) There is no mandatory requirement in the Rules to file a statement of objections. Therefore a respondent who fails to file a statement of objections or files an objection not in compliance with the Rules cannot be deprived from appearing and objecting to the application on grounds of law or to submit to Court on the infirmities of the petitioner's application.

Per Sriskandarajah, J.

"The intention of the framers of the Rule is not to deprive a party to a fair hearing but to maintain the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law".

APPLICATION for a *Writ of Certiorari / Mandamus*.

Cases referred to :-

1. *Gita Shirene Fonseka v Monetary Board of the Central Bank of Sri Lanka* – 2004 – 1 Sri LR –149.
- 1(a). *Kiriwanthe and another v Navaratne and others* – 1990 – 2 Sri LR 393.
2. *K. Shanmugavadiva v J. M. Kulatilake* – SCM 50/2002 – SC Spl LA 44/2002.
3. *Ranaweera v Mahaweli Authority of Sri Lanka* – 2004 -2 Sri LR 346 (Distinguished).
4. *Union Apparels (Pvt) Ltd v Director General of Customs and others* – 2000 – 1 Sri LR 38.
5. *Piyadasa v Law Reform Commission*. SC (AP) 30/97 - SCM 8.7.1998.

M. A. Sumanthiran for petitioner

Ms. B. Tilakaratne DSG for 2nd respondent

S. A. D. S. Suraweera for intervenient respondent.

Cur.adv.vult.

January 29, 2007

SRISKANDARAJAH, J.

The petitioner raised a preliminary objection objecting to the 2nd respondent being heard on the basis that there is no statement of objection filed by the 2nd respondent in this application. 01

It is an admitted fact that the 2nd respondent filed its objections by way of an affidavit on the 10th of September 2000. The questions that have to be determined by this court are whether an objection in the form of an affidavit alone could be considered as a statement of objections in terms of Court of Appeal Rules? If it cannot be considered as a statement of objection whether the 2nd respondent can be offered an opportunity to be heard? 10

The 2nd respondent submitted that nowhere in the Court of Appeal (Appellate Procedure) Rules a format of a statement of objections which the respondent is required to adopt is given, whereas the Rules do specify various other forms that parties are required to adopt e.g. the Notice of Hearing, Form of Proxy, Notice of Appeal, etc. The 2nd respondent filed its objections by way of an affidavit on the 10th of September 2000 with a motion.

The motion states as follows:

“ I file herewith the objections by way of an affidavit together with the documents”

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A similar objection was raised in *Gita Shirene Fonseka v The Monetary Board of the Central Bank of Sri Lanka*.⁽¹⁾

Wijayaratne, J. with Ms. Shiranee Tilakawardana, J. (P/C.A) agreeing referring to the relevant Rules of the Court of Appeal held:

“Rule 3 (4) (b) (i) of the Court of Appeal Rules 1990 states, ‘A statement of objection shall be filed by each respondent within four weeks . . .’

Rule 3 (7) states,

‘. . . A statement of objection containing any averment of facts shall be supported by an affidavit in support of such averments’

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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*^(1a) case 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. Kulatillake*⁽²⁾ considering the ambit of rule 3 of the Court of Appeal (Appellate Rule) 1990, observed that,

‘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’

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

The learned D.S.G. submitted that in *Ranaweera v Mahaweli Authority of Sri Lanka*⁽³⁾ Marsoof, J. (P/C.A) with Sripavan, J. agreeing had taken a different view;

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Marsoof, J. (P/C.A) in his Judgment observed;

“The 1st and 2nd respondent did not file a statement of objections but instead filed only the affidavit of the 2nd

respondent, who is the Director General of the 1st respondent Mahàweli Authority of Sri Lanka by way of objections. It is necessary to mention at the outset that the petitioner has in Paragraph 3 of his counter affidavit pointed out that the respondents have failed to comply with Rule 3 (4)(b)(i) Court of Appeal (Appellate Procedure) Rules 1990 and therefore the affidavit filed by the 2nd respondent by way of objection should be rejected. I am inclined to the view that the petitioner should have in the 1st instance invited the attention of the Court to the alleged non compliance with the rules and got the matter listed for an order of Court as contemplated by rule 3(14) of the aforesaid Rules. The said rule is quoted below:

“Where the parties fail to comply with the requirements set out in the preceding rules the Registrar shall without any delay, list such application for an order of court”.

The object of this Rule appears to be to give an opportunity to a party in default to take steps to comply with the rules of court. In my view the petitioner should have objected to the alleged “Objections” filed by the respondents by way of a motion and had the matter referred for an order of court. Instead, the petitioner has chosen to file counter affidavit wherein he has taken up the question of non compliance with Rules in the counter affidavit. In terms of Rules 3(4)(b)(i) counter affidavit have to be filed by the petitioner within 4 weeks of the date of receipt of the Statement of objection, unless a different date is fixed by court which was what happened in this case. By filing counter affidavits the petitioner has waived the right to take objection to the non compliance of the rules by the respondent.

Having observed the above the court in the above case decided not to rely on the objections filed in the said application. The court when arriving at the final decision in the above application held:

“Having carefully considered the application made by the petitioner to this court without taking into consideration any of the averments contained in the so called ‘objection’ of the respondents I have come to the conclusion”

In the above case even though the court had made several observations with regard to the objections filed in the form of affidavit finally in its judgment preferred not to consider the objections filed and it named the objections as the "so called objection". Therefore the above case cannot be considered as accepting affidavits on the form of an objection.

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Rule 3 (5) specifically provides that:

"Every respondent who lodges a statement of objections, and every petitioner who lodges a counter affidavit, shall forthwith serve a copy thereof, together with any supporting affidavit and exhibits on every party.

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Rule 3(7) A statement of objections containing any averments of fact shall be supported an affidavit in support of such averments.

From the above rules and from the line of judgments it is clear that the respondent when filing objections to an application has to file a statement of objection distinct from an affidavit of the respondent. An affidavit is necessary to support any averments of facts that are averred in the statement of objections.

Therefore an affidavit of the respondent alone cannot be construed as a statement of objection even if he has objected to the application in his affidavit. Therefore this Court upholds the preliminary objection that the affidavits filed by the 2nd respondent cannot be considered as a statement of objection.

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This court now proceeds to consider the consequence of the failure to file a statement of objection. The learned counsel for the petitioner submitted that the failure to comply with the mandatory applicable rules 3(4)(b)(i) read with rule 3(7) deprives the respondents right to appear in these proceedings in opposition to the petition.

Rules 3 (4)(b) provides:

"the court **shall fix dates** for the filing of statements of objections by the respondents, for the filing of counter affidavits by the petitioner and for the hearing of the application; if any of such dates is not fixed by the court, the following provisions shall apply:

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(1) A statement of objection **shall be filed** by the respondent **within four weeks of the date of service of notice**;

(Emphasis added)

(ii) . . .

The above rules only provide the mandatory time frame within which the statement of objection has to be filed. 130

Rule 3(7) A statement of objections containing any averments of fact **shall be supported by an affidavit** in support of such averments. (Emphasis added)

The above rule only provides that if a statement of objection is filed and if that statement of objection contains any averments of facts it shall be supported by an affidavit.

There is no mandatory requirement in the above rules to file a statement of objections. Therefore a respondent who fails to file a statement objection or files an objection not in compliance with the rules cannot be deprived from appearing and objecting to the application on grounds of law or to submit to court on the infirmities of the petitioners application. 140

Even in situations where the rules have specifically stated that a party is not entitled to be heard has exemptions and the court has interpreted that a party should not be deprived from affording an opportunity of being heard.

The Court of Appeal (Appellate Procedure) Rules 4(2) which deals with Appeal provides:

“No party to an appeal shall be entitled to be heard unless he has previously lodged three copies of his written submissions (herein after referred to as “submissions”) Complying with the provisions of this rule.” 150

But Rule 4(6) provides

“Where a party fails to lodge submissions, or lodges submissions which are not in substantial compliance with the foregoing provisions, the Court may restrict the duration of the oral submissions of such party at the hearing of the appeal or application to 45 minutes.”

It could be seen from the above rules that the intention of the framers of these rules is not to deprive a party to a fair hearing but to maintain the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. 160

Unlike in The Court of Appeal (Appellate Procedure) Rules Supreme Court Rules have not provided any exemptions to Rule 30: Supreme Court Rules, Rule 30 provides:

“No party to an appeal shall be entitled to be heard unless he has previously lodged five copies of his written submission (hereinafter referred to as “submissions”, complying with the provisions of this Rule.”

In *Union Apparels (Pvt) Limited v Director-General of Customs and Others*⁽⁴⁾ at 38 Shirani Bandaranayake, J., quoted with approval the observation of Amerasinghe J., in *Piyadasa and others v Land Reform Commission*⁽⁵⁾: 170

“In my view Rule 30 is meant to assist the court in its work and not to obstruct the discovery of the truth. There were numerous documents that had to be considered; and, in order, we needed the assistance of the learned counsel for the petitioner as well as the respondents, including their written submissions to properly evaluate the information that we had before us. It was therefore, decided that the preliminary objection should be over ruled.” 180

Even though I uphold the preliminary objection of the petitioner that the 2nd respondent's affidavit could not be entertained as a statement of objection, the 2nd respondent is entitled to appear and on its behalf the counsel could make any submission to court on questions of law or in relation to the material available before court for the purpose of this court to arrive at a decision.

Preliminary objection upheld. The respondent/Counsel could make submissions on questions of law or in relation to material before Court.