
**NAVARATNE
vs
WADUGODAPITIYA AND OTHERS**

COURT OF APPEAL
SOMAWANSA, J. (P/CA)
CALA 452/2004
DC KANDY 21172/1
MARCH 17, 2005

Civil Procedure Code, sections 438/754(2)/757 and 759(2) — Leave to appeal — Not supported by a valid affidavit — Consequences ? — Affidavit not signed by the party — Bona fide mistake in signing the petition and not the affidavit ? — Acceptance of same ? — Could a corrected affidavit be submitted later ? Should an affidavit accompany the petition ?

The defendants respondents contended that the application for leave to appeal is not properly constituted in that the plaintiff petitioner's amended petition is not supported by a valid affidavit – not being signed by the plaintiff-petitioner – and in the circumstances should be dismissed *in limine*.

The position of the plaintiff petitioner was that after reading the affidavit, thinking he signed the affidavit placed his signature on the petition instead of placing same on the affidavit, and that it is a *bona fide* mistake.

HELD:

- (i) The purported affidavit does not comply with the provisions contained in section 438.
- (ii) It is seen that in the instant application for leave, the averments contained in the petition are not supported by a valid affidavit. The application for leave to appeal is not properly constituted and has to be rejected.

Per **SOMAWANSA, J. (P/CA)**

“In the instant application in making the purported affidavit, I would say not only the attorney-at-law on record, but the plaintiff petitioner as well as the Justice of Peace had been negligent and careless. Such acts should not be condoned or considered as technicalities that should be overlooked.”

Per SOMAWANSA, J. (P/CA)

"Though in section 757 the words used are "such petition shall be supported by affidavit" which indicate that the affidavit need not be accompanied with the petition and the supporting affidavit could be tendered after any mistake has been corrected with permission of court, I am not inclined to hold such a view – my considered view is that a valid affidavit in compliance with section 438 should be tendered supporting the averments in the petition, and section 759(2) cannot be made use of to bring about legal validity or sanctity to a purported affidavit invalid and unacceptable in law."

APPLICATION for leave to appeal from an order of the District Court of Kandy, on a preliminary objection raised.

Cases referred to :

1. *Clifford Ratwatte vs Thilanga Sumathipala* (2001) 2 Sri LR 56
2. *Keerthiratne vs Udena Jayasekera* (1990) 2 Sri LR 346
3. *Meeruppe Sumanatissa Therunnanse vs Warakapitiya Sangananda Therunanse* 66 NLR 333

A. *Anees* for petitioner.

D. *Jayasuriya* with *Jeffry Zainudeen* for respondents.

June 03, 2005

ANDREW SOMAWANSA, J. (P/CA)

When this application for leave to appeal was taken up for inquiry, counsel for the defendants-respondents took up a preliminary objection that the application for leave to appeal is not properly constituted in that the plaintiff-petitioner's amended petition filed in this Court is not supported by a valid affidavit. Since the purported affidavit tendered with the amended petition has not been signed by the plaintiff-petitioner, the plaintiff-petitioner's purported application ought to be dismissed *in limine*. On the aforesaid preliminary objection both parties agreed to tender written submissions and have tendered their submissions.

The relevant facts are the plaintiff-petitioner filed the instant application for leave to appeal initially by a petition and affidavit dated 01.12.2004. Thereafter the plaintiff-petitioner obtained leave of this Court and filed an amended petition and an affidavit purported to be that of the plaintiff-petitioner but not signed by the plaintiff-petitioner.

This fact is conceded by the counsel for the plaintiff-petitioner in his written submissions wherein he says the plaintiff-petitioner has filed an affidavit but apparently not placed the signature at the end of the affidavit against the jurat clause. He submits that this is a bona fide mistake on the part of the petitioner who obviously placed the signature after reading the affidavit thinking that he signed the affidavit in the presence of the Justice of Peace who attested his signature, but that the affirmant by mistake has placed the signature on the petition instead of placing the same on the affidavit. He further submits that a *bona fide* mistake in not placing the signature on to the right paper should not jeopardize the genuine application for leave to appeal for the plaintiff-petitioner in the belief that he signed an affidavit has by mistake placed his signature on to the petition.

Be that as it may, the aforesaid mistake on the part of the plaintiff-petitioner clearly indicates that the purported affidavit has not been read over and explained to the plaintiff-petitioner nor has the plaintiff-petitioner himself read the affidavit which is fatal to the validity of the said affidavit. If as the plaintiff-petitioner tries to make out that he placed his signature on the petition instead of on the affidavit then the purported affidavit has been signed by the Justice of Peace prior to the plaintiff-petitioner placing his signature on the petition, for it is obvious that the Justice of Peace should have observed that the affirmant's signature was not on the affidavit when he entered the jurat clause. In effect it is obvious that the purported affidavit does not comply with the provisions contained in section 438 of the Civil Procedure Code which reads as follows :

“Every affidavit made in accordance with the proceeding provisions shall be signed by the declarant in the presence of

the court, Justice of the Peace, or Commissioner for Oaths or person qualified before whom it is sworn or affirmed”.

Provision relating to application for leave to appeal are laid down in Section 754(2) read together with section 757 of the Civil Procedure Code. The relevant provisions of section 757 of the Civil Procedure Code reads as follows :

“Every application for leave to appeal against an order of court made in the course of any civil action, proceeding or matter shall be made by petition duly stamped, addressed to the Court of Appeal and signed by the party aggrieved or his registered attorney. Such petition shall be supported by affidavit”.

Thus it is to be seen that in the instant application for leave, the averments contained in the petition are not supported by a valid affidavit. Therefore one has to concede that the plaintiff-petitioner’s application for leave to appeal is not properly constituted and has to be rejected.

In the case of *Clifford Ratwatte vs Thilanga Sumathipala*⁽¹⁾

it was 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.”

It was further held :

“Subsequent explanation cannot be used to correct in any way what is obvious on the face of the affidavit in question and therefore it is not an affidavit which has any legal validity or sanctity and therefore there was no affidavit as required by law filed with the Petition within 14 days, as contemplated in section 757(1) – C.P.C. “It is not a mistake as to formality that can be cured under s. 759(2).”

Counsel for the plaintiff-petitioner also refers to section 759 of the Civil Procedure Code which reads as follows :

759(1) "If the petition of appeal is not drawn up in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court ; or be amended then and there. When the court rejects under this section any petition of appeal, it shall record the reasons for such rejection. And when any petition of appeal is amended under this section, the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature."

(2) "In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just".

In this respect, I would refer to the decision in *Keerthiratne vs Udena Jayasekera*⁽²⁾

wherein it was held :

"The provisions of section 759(2) of the Civil Procedure Code cannot be invoked to condone the negligence and carelessness of the attorney-at-law on record".

In the instant application in making the purported affidavit, I would say not only the Attorney-at-Law on record but the plaintiff-petitioner as well as the Justice of Peace had been negligent and careless. Such acts should not be condoned or considered as technicalities that should be over-looked.

Counsel for the plaintiff-petitioner also invites us to compare provisions contained in section 757 of the Civil Procedure Code with section 766 of

the Civil Procedure Code and submits that in section 757 of the Civil Procedure Code words used are "such petition shall be supported by affidavit" which indicate that the affidavit need not be accompanied with the petition and the supporting affidavit could be tendered after any mistake has been corrected with permission of Court. However I am not inclined to hold such a view. My considered view is that a valid affidavit in compliance with section 438 of the Civil Procedure Code should be tendered supporting the averments in the petition and section 759(2) cannot be made use of to bring about legal validity or sanctity to a purported affidavit invalid and unacceptable in law.

Counsel for the plaintiff-petitioner also has cited the decision in *Meeruppe Sumanatissa Therunnanse vs Warakapitiya Sangananda Terunnanse*⁽³⁾

where it was held :

"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."

However the aforesaid decision has no relevance to the facts of the instant application for that decision dealt with appeals (Privy Council) Ordinance Schedule Rules 1(a) 2 and 3 which are repealed and no longer operative.

For the foregoing reasons, I would hold that the purported affidavit accompanying the petition tendered by the plaintiff-petitioner is not a valid affidavit. In the circumstances, I would uphold the preliminary objection taken on behalf of the defendants-respondents and dismiss the plaintiff-petitioner's application for leave to appeal with costs fixed at Rs. 5000.

Preliminary objection upheld ; application dismissed.