

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application under
Article 126 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

Hewawasam Sarukkaligae Rathnasiri
Fernando
07 D, Warapitiya
Darga Nagaraya

Petitioner

SC (FR) Application
No. 514/2010

Vs.

1. Police Sergeant Dayarathna
(Service No. 501)
Police Station,
Welipenna
2. Police Constable Madusanka
(Service No. 501)
Police Station,
Welipenna.
3. Jayasinghe
Police Staff Assistant
Police Station,
Welipenna
4. Police Inspector A.D. Kariyawasam
Officer-in-Charge
Police Station,
Welipenna
5. Inspector General of Police
Police Headquarters
Colombo 01.
6. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

Before : Marsoof, PC, J
Ekanayake, J &
Dep, PC J

Counsel : Shantha Jayawardena with Duleeka Imbuldeniya
for the Petitioner

Shyamal A. Collure for the 1st to 3rd Respondents.

S. Wijesinghe, SSC for the 4th to 6th Respondents.

Argued on : 14.03.2013

Decided on : 15.12.2014

Priyasath Dep, PC, J

When this application was taken up for hearing the Learned Counsel for the 1st to the 3rd Respondents raised a preliminary objection. The objection is to the effect that the jurats of the affidavit of the Petitioner filed with the petition dated 08.09.2010 as well as the counter affidavit of the Petitioner dated 06.10.2011 are defective and that the affidavits have to be rejected in limine. The main basis of the contention of learned Counsel for the 1st to the 3rd Respondents is that the jurat does not state clearly that the affirmant affirmed to and sign before the Justice of the Peace after the affidavit was read over or explained to the affirmant by the Justice of the Peace, and that the affirmant understood the contents therein. He also submits that it is not stated that the signature of the affirmant was placed after he affirmed to the said affidavit.

The learned Counsel for the Petitioner states that he was taken by surprise as this objection has not been taken up in the statement of objections.

The learned Counsel for the Petitioner states that according to the decision of Kumarasinghe Vs. Rathnamumara , SC Application No. 57 of 1983, SC minutes of 15/12/1983, an Application under Article 126 of the Constitution should not be dismissed merely on the basis that the affidavit of the Petitioner is defective or that there is no valid affidavit from the Petitioner, if the averments of the Petition are supported by the other affidavits filed by the Petitioner in the case.

The only question that has to be decided before this matter is heard on the merits is whether the Petitioner's affidavit and counter affidavit should be rejected in terms of Rule 44 (1) (C) of the Supreme Court Rules 1990.

The learned Counsel for the 1st to the 3rd Respondents submits that under Article 126(2) of the Constitution a person who alleges that his fundamental rights has been infringed or about to be infringed, in accordance with the Rules of the Court shall apply by way of a petition in writing addressed to such court praying for relief or redress.

Article 126(2) of the Constitution read as follows:

‘Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action he may himself or by an Attorney-at-law on his behalf, within one month thereof, in accordance with such rules or court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.....’

Article 126 refers to a petition only but it states that in accordance with such rules of court as may be in force. Article 136 (1) of the Constitution provides that

‘subject to the provisions to the constitution and of any law the Chief Justice with any three judges of the Supreme Court nominated by him, may, from time to time make rules regulating generally practice and procedure of the Court ...’

The Supreme Court had made rules in 1990 and Part 1V applies to the applications under Article 126 and Rule No. 44 (a) requires that a person alleging infringement or imminent infringement of fundamental rights shall ‘set out in his petition a plain and concise statement of the facts and circumstances relating to such right and the infringement or imminent infringement thereof, including particulars of the executive or administrative action whereby such right has been, or is about to be infringed’

Rule No. 44 (1) (3) requires that a person alleging infringement or imminent infringement of fundamental rights ‘tender in support of that petition such affidavits and documents as are available to him’.

The learned Counsel for the 1st-3rd Respondents submits that under rule No. 44 petition has to be supported by an affidavit. He submits that the jurat of the affidavit of the instant application is defective and for that reason there is no valid affidavit to support the allegation contained in the petition.

The Rules does not provide forms or formalities for administration of oaths and affirmation. Our Courts generally follow provisions of the Oaths Ordinance No. 9 of 1895 as amended and sections 179 to 183 and sections 437 to 440 of the Civil Procedure Code.(dealing with evidence given on Affidavits)

The Learned Counsel for the 1st to 3rd Respondent cited following cases where affidavits were rejected as it was found to be defective namely. *Clifford Ratwatte vs. Thilanga*

Sumathipala and others . (2001) 2 SRI. L.R. 56, *Kumarasiri and another vs. Rajapakse* (2006) 1 SRI.LR. Page 360, *Mark Rajendran vs. First Capital Ltd., formally, Commercial Capital Ltd.*,(2010) 1 SRI. LR. 60, *Simon Singho vs. Government Agent, W.P. 47 NLR 545* *King vs. Ponnasamipillai* 28 NLR 156.

In *Clifford Ratwatte Vs. Thilanga Sumathipala and others* . (2001) 2 SRI. L.R 56. It was held ‘the deponents state that he is a Christian and makes oath, the jurat clause and the end of the affidavit states that the deponent has affirmed. The affidavit is defective.’

In *Mark Rajendran vs. First Capital Ltd., formally, Commercial Capital Ltd.*,(2010) 1 SRI. LR. Page 60 an objection was taken to the validity of the affidavit filed by the petitioner who is a Christian had made oath and in the Jurat he had affirmed to the averments before the justice of peace. The court upheld the objection and dismissed the petition on the basis that affidavit filed by the Petitioner is not in terms with the provisions contained in the Oaths Ordinance.

A different view was expressed by M.D.H.Fernndo J in *Rozana Michael vs. Saley*, 2002 1SLR 345 and *Sooriya Enterprise vs. Michael White & Co. Ltd* (2002) 3 SLR 371 at 373. In *Sooriya Enterprise vs. Michael White & Co. Ltd.* (supra) M.D.H.Fernando J (Perera J. and Wijethunge J agreeing) citing with approval the judgment in *Rustomjee vs. Khan* 18 NLR 120 observed thus:-

‘This view that "may" in section 5 is permissive, rather than mandatory, is supported by sections 7 and 9 of the Ordinance, which manifest a legislative intention to allow a witness or a deponent some choice as to whether he will swear or affirm; so much so that the substitution of an oath for an affirmation (or vice versa) will not invalidate proceedings or shut out evidence. The fundamental obligation of a witness or deponent is to tell the truth (section 10), and the purpose of an oath or affirmation is to reinforce that obligation’.

This decision was followed cited with approval by Marsoof, P.C., J. (S.N.Silva, P.C., C.J and R.A.N.G.Amaratunge, J. agreeing) in *Facy vs.. Sanoon and 5 others* 2006 BLR58.

These cases refer to a situation where a Christian in the preamble (first paragraph) having stated that he had taken oath and in the jurat had affirmed before signing the affidavit which involves the interpretation of sections 4 and 5 of the Oaths Ordinance.

In the case before us the affidavit was filed in English by a person who cannot understand the English Language. Therefore, Section 439 of the Civil Procedure Code is relevant to this affidavit. Section 439 reads thus:

“ In the event of the declarant being a blind or illiterate person, or not able to understand writing in the English Language, the affidavit shall at the same time be read over or interpreted to him in his own language, and the Jurat shall express that it was read over or interpreted to him in the presence of the court, Justice of the peace, or Commissioner; and

that he appeared to understand the contents; and also that he made his mark or wrote his signature in the presence of the court, Justice of the Peace, or Commissioner.....”

The Jurat of the Affidavits submitted by the Petitioner in this application reads as follows:

“ Having read over, explained)
 and understood the contents)
 hereof signed and affirmed to)
 at Colombo on this eighth Day of) sgd
 September 2010”.)

BEFORE ME
 Sgd

JUSTICE OF THE PEACE/
 COMMISSIONER FOR OATHS

The learned counsel for the 1st to 3rd Respondents submits that the Jurat is not clear as to who read over the affidavit and to whom it was read over and who understood the contents therein. According to the jurat affirmation has taken after signing the document. Therefore, the affidavit is defective. He cited several cases dealings with the validity of the affidavit.

In *Kumarasiri and another Vs. Rajapakse* (2006) 1 SRI.LR. Page 360 it was held

‘On an examination of the Affidavit, it is clear that the Jurat therein is not in conformity with the law. It is rather confusing and incorrectly worded it does not state where the affidavit was affirmed’. Somavansa J. remarked that ‘it is the flesh and blood of the affidavit which gives life to the Skelton in the Petition’

It is to be observed that the affidavit tendered in the instant application has similar defects.

In *Simon Singho vs. Government Agent, W.P.* 47 NLR 545 It was held that:-

“ in the absence of the Jurat in an Affidavit where the declarant is unable to understand writing in the English Language makes the affidavit valueless and inadmissible.”

Having considered the provisions in the Oaths Ordinance and section 439 of the Civil Procedure Code and the cases cited above, I hold that the affidavit tendered to court by the Petitioner in the instant case is not a valid affidavit as the Jurat is defective.

The next question that arises is whether a fundamental rights application could be dismissed due to want of an affidavit or defective affidavit. In civil cases regulated by the Civil Procedure Code whenever there is a requirement to file a petition, the petition should be supported by an Affidavit or accompanied by an affidavit. In Article 126(2) of the Constitution a person who invokes the jurisdiction of the Court can do so by way of a petition. The rules require the parties to tender in support of the petition affidavits and documents available to him. There is no requirement that a petition should be supported by an affidavit. The question that arises is whether an affidavit is a mandatory requirement or not. According to the rules under certain circumstances a person could invoke the jurisdiction of the Court by submitting a statement or a complaint. Rule 44(7) states by way of writing a person could bring to the notice of the court an alleged infringement or imminent infringement of a fundamental rights by executive or administrative action the court could treat the statement/complaint as a petition and initiate action.

In fundamental rights applications at the time of filing a petition it need not be supported by an affidavit. Rule 44.(1) (c) states 'tender in support of such petition such affidavits and documents available to him', Therefore rule requires the petitioner or the complainant to provide affidavits and documents available to him. However for the court to act on facts stated in the complaint or petition in the absence of other material there should be evidence. That evidence has to be placed by way of an affidavit. On the other hand for the court to deal with a person under section 11 of the Oaths Ordinance for giving false evidence there should be a valid affidavit. In King vs. Ponnasampillai 28 NLR 156 refers to a case where a person is charged with having made a false statement in an affidavit submitted by him in a civil suit and there was no indication that the affidavit had been read over and explained to him. The affidavit was rejected and he was acquitted of the charge. (In that case affirmant could not read, write or understand English.)

In order to establish the facts and circumstances stated in the petition/complaint there is a need to place the evidence by way of an affidavit. The court could call for affidavits if necessary.

The question that arises is whether a petition could be dismissed due to a want of an affidavit or defect in the affidavit. In order to answer this question we have to consider the jurisdiction of the Supreme Court and its role in fundamental rights applications. There is a difference in the exercise of fundamental rights jurisdiction and appellate and other jurisdiction by the Supreme Court.

At this stage it is relevant to refer to article 3 and 4 of the Constitution which deals with sovereignty and the exercise of sovereignty of the people.

Article 3 of the Constitution reads thus:-

‘In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.’

Article 4(d) reads thus:-

‘The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not abridged, restricted or denied, save in the manner and to the extent hereinafter provided; ‘

The fundamental rights are recognized as part of the sovereignty of the people and inalienable. It shall be respected, secured and advanced by all organs of the government. In order to secure and advance fundamental rights, the Supreme Court is given wide powers. When the Supreme Court exercises fundamental rights jurisdiction it has power to grant just and equitable relief. The Supreme Court is not hamstrung by a rigid procedure and rules. When Article 126 read with the Rule 44 (7) is considered, not only the party whose rights are violated but a third person in respect of that person or an Attorney-at-law can file a petition or complaint. Under Rule 44(7) a person could by way of writing bring to the notice of the court alleged infringement or imminent infringement of a fundamental rights by executive or administrative action and the court could treat the complaint as a petition and initiate action. Further, the Courts have expanded the locus standi doctrine to include public interest litigation. Similarly, court had extended the time limitation under certain circumstances.

In the circumstances if the affidavit is defective and it is vital to the determination of the application, the Supreme Court without dismissing the application can adjourned the inquiry and direct the Petitioner to file a fresh affidavit. A similar application where the affidavit is defective was considered by Mark Fernando, J. in *Rozana Michael vs. Saley*, 2002 1SLR 345. It was held that:-

‘---However, the Commissioner's attestation confirms that the document was signed under oath in his presence. Had that affidavit been vital, I would have adjourned the hearing and given the petitioner an opportunity of correcting that formal defect, but that was unnecessary as the other affidavits were more than adequate.’

I hold that the affidavit is defective. However in view of the fact that this is a fundamental rights application, I grant time to the Petitioner to file a fresh affidavit complying with the provisions of Oaths Ordinance and the relevant provisions of the Civil Procedure Code pertaining to affidavits.

This application was filed in 08-09-2010 and the 1st to the 3rd Respondent filed statement of objection referring to each and every averment of the affidavit and petitioner in response to that filed a counter affidavit. When the Application was taken up for argument the learned Counsel for the 1st to the 3rd Respondents for the first time raised an

objection to the validity of the affidavit which objection he could have taken up at the earliest opportunity .

As the affidavit of the Petitioner in vita for the determination of the Application, we adjourn the hearing and the Petitioner is granted three week's time to file a fresh affidavit. Statement of objections to be filed within three weeks of the receipt of the fresh affidavit and the counter affidavit if any to be filed within three weeks from the receipt of statement of objections.

The preliminary objection overruled. No costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court