

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

In the matter of an Application under and in
terms of Articles 17 and 126 of the Constitution
of the Democratic Socialist Republic of Sri Lanka

SC (FR) Application
No.SC/Special/04/2014

Ms. P. Thavarajanie,
Nursing Tutor – Grade 1,
No.154, Thambimuthu Road,
Thambiluvil – 2,
Thirukkivil.

Petitioner

Vs.

1. Kanaganayagam
Acting Principal
College of Nursing
Ampara.
2. Sriwardena (Mrs.)
Director, Nursing Education,
Ministry of Health,
“Suwasiripaya”
Colombo 10.
3. Indranee (Mrs.)
Acting Warden,
College of Nursing,
Ampara.

4. Anil. (Mr.)
Management Assistant
College of Nursing,
Ampara.
5. Anjan (Mr.)
College of Nursing,
Ampara
6. Honourable Attorney General,
Attorney General's Chambers,
Colombo 12.

Respondents

BEFORE: B.P.ALUWIHARE, PC, J,
SISIRA J. DE ABREW, J, &
UPALY ABEYRATHNE, J.

COUNSEL: A.Mohamed Farook with S.Manasudeen for the Petitioner
Dr. Avanti Perera, SSC for the Respondents.

ARGUED ON: 18.11.2016

DECIDED ON: 04.08.2017

ALUWIHARE, PC, J:

A preliminary objection was raised on behalf of the Hon. Attorney General when this matter was taken up for support,

It was pointed out that the Petition was not in compliance with Rule 44 (i) (d) of the Supreme Court Rules in that the prayer did not specify the relief (sought by the Petitioner) for granting of leave to proceed in the first instance.

Petitioner herself had invoked the epistolary jurisdiction of this court by filing a complaint dated 7th April, 2014, addressed to the Hon. Chief Justice. When this matter was mentioned on 4th August, 2014, the Petitioner was represented by her counsel of choice. The court directed the learned counsel to file formal papers, that is the Petition and an Affidavit. Thereafter, this court granted the learned Counsel several dates to file papers and the matter was fixed for support on 20th January, 2015. Even on the 20th January, 2015 no petition was available to the court and the learned counsel had made submissions based on the original complaint dated 7th April, 2014.

The Hon. Attorney General had not been cited as a Respondent in the original complaint, the Hon. Attorney General appeared as amicus. On that date, the court made certain observations with regard to resolving this matter and the Senior State Counsel undertook to convey the observations of the court to the Ministry of Health. On the 1st December, 2015 both, the counsel for the Petitioner and the learned Senior State Counsel informed the court that the

matter cannot be resolved and accordingly was fixed for support for the 11th February, 2016 and thereafter on 26th April, 2016.

It appears that a fresh Petition dated 9th September 2014 and an Affidavit had been filed by the Attorney-at-Law for the Petitioner. The said documents, however had not been available to the judges and as a result the Attorney-at-Law for the Petitioner by his letter dated 10th August, 2015 to the Registrar had requested that the Petition and Affidavit filed on behalf of the Petitioner be included in the briefs and the docket.

When the matter came up on 26th April, 2016, the learned counsel for the Petitioner sought to support the Petition and affidavit filed on 9th September, 2014 and the preliminary objection was raised in relation to the same.

It was argued on behalf of the Respondents that, the directive of this court of 4th August, 2014 was to afford an opportunity to the Petitioner to regularise her application by filing the requisite documents in conformity with Rule 44 (1) of the Supreme Court Rules.

The Petitioner availing herself of the opportunity afforded, had filed a petition and affidavit through her Attorney-at-Law. Further, she was represented by her counsel at the hearings of this case.

The learned Senior State Counsel pointed out that, in this backdrop, the regular Application which had been filed under and in terms of Articles 17 and 126 of the Constitution should be in compliance with all applicable laws, rules and procedures and should bear no irregularities and drew the attention of this court to Rule 44 (1) of the Supreme Court Rules.

The Rule 44 (1) (d) stipulates:

“Shall specify in such Petition the relief or redress prayed for, including the grant of leave to proceed in the first instance.”

In the prayer to the petition, it is prayed for certain reliefs, but had failed to advert to the alleged violations under the Chapter III of the Constitution.

It was the submission of the learned Senior State counsel that this court cannot consider granting of leave to proceed as the Petitioner had failed to specify the fundamental right or the rights the Respondents alleged to have infringed and to that extent Rule 44 (1) (d) is a mandatory provision. As referred to earlier, the Attorney-at-Law for the Petitioner had been afforded more than one occasion to have a regular application filed.

The learned Senior State Counsel further pointed out that the Supreme Court Rules provides for invoking epistolary jurisdiction. Rule 44 (7) (a) specifically provides for entertaining such complaints if it appears to the Judge to whom it is referred for consideration, that the complaint discloses an infringement of the fundamental right and in such event the judge can direct such complaint be treated as a Petition in writing under and in terms of Article 126 (2), notwithstanding non-compliance with any of the applicable Rules.

In terms of the same Rule, a further direction can be given by the Judge who considers the complaint to refer the matter to the Legal Aid Commission or to any Attorney-at-Law who is a member of any panel or organization established for

such purpose, for the purpose of enabling the preparation and submission of an amended Petition, Affidavit, documents, written submissions and other material in clarification and support of such complaint.

It is significant to note that the said Rule further states that “**the complaint thereupon be deemed to be the Petition filed in the Supreme Court** on the date on which the complaint was received”. (Emphasis added)

In the present case the counsel for the Petitioner was permitted to avail himself of the above Rule and the Attorney-at-Law for the Petitioner had filed a Petition and an affidavit.

In response to the preliminary objection raised by the Respondents, it was submitted on behalf of the Petitioner, that the present application is not subject to the ordinary rules as the application originated through a complaint to this Court and should be considered as a special matter and differ from regular applications. The Petitioner had submitted further that Rule 44 (1) of S.C. Rules is not mandatory, but only directory and had referred to the decision in SC Appeal 172/2011 Leelawathie Manike Vs. Dharmasinghe Bandara and another, where this court remarked that “Rules should not obstruct the path of justice.”

I wish however to rely on the pronouncement made by Justice Dr. Amarasinghe in the case of Fernando v Sybil Fernando 1997 (3) S.L.R page1, wherein Justice Amarasinghe, signifying the importance of procedural law, stated:

“There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim ubi ius, ibi remedium reflects the complementary character of civil procedure law. The two branches

are also interdependent. Halsbury (ibid.) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives its remedy and effectiveness and brings it into being.”

It was the submission of the learned Senior State Counsel that when the fresh Petition was filed by the Attorney-at-law for the Petitioner, it no longer can be treated as an informal complaint which attracts the first part of Rule 44 (7).

It was further submitted that when such permission was granted to file a fresh Petition, he was expected to act with due diligence and was required to comply with the applicable Rules and therefore the prayer to the Petition should have specified the threshold relief or redress including the grant of leave to proceed in the first instance, in terms of Rule 44(1)(d) of the Supreme Court Rules.

I am of the view that, the compliance with the Rule referred to is mandatory and the Petition filed on behalf of the Petitioner dated 9th September, 2014 is defective for the reasons set out above. The Petitioner had failed to offer any explanation nor has the Petitioner averred any reasons for the default.

I am of the view that even in instances where the epistolary jurisdiction of this Court is invoked, once the court grants permission to formalize the documents, parties are required to comply with the applicable rules and procedure.

I hold that there is no valid Petition before this Court and I uphold the preliminary objection raised on behalf of the Respondents.

Accordingly, I dismiss the application *in limine*.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J. DE ABREW

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYTRATHNE

I agree

JUDGE OF THE SUPREME COURT

