

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

In the matter of an Application for Special Leave to Appeal under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Roylin Fernando,
Borelessa, Lunuwila

Plaintiff

SC/APPEAL No.18A/09

SC/HC/CALA No. 138/08.

NWP/HCCA/KUR No.15/2008(LA) vs.

D.C.Marawila Case No.1133/L.

1. W.A.Christian Gamini Fernando,
of Shantha Sevana,
Nainamadama -West
Nainamadama

Waduge Henry Livera

Warnakulasuriya Mary Sarijini
both of Dummaladeniya West,
Wennappuwa

Waduge Anuradha Livera

Waduge Nimala Rosary Livera
both of 36, Main Street,
Nuwara Eliya

1st to 5th Defendants

AND

Roylin Fernando,
Borelessa, Lunuwila

Plaintiff-Petitioner

vs.

1. W.A.Christian Gamini Fernando,
of Shantha Sevana,
Nainamadama -West
Nainamadama

both of Dummaladeniya West,
Wennappuwa.

2. Waduge Henry Livera
3. Warnakulasuriya Mary Sarijini

4. Waduge Anuradha Livera

5. Rosary Livera

both of 36, Main Street,
Nuwara Eliya

1st to 5th Defendants-Respondents

AND NOW BETWEEN

Roylin Fernando,
Borelessa, Lunuwila

Plaintiff-Petitioner-Petitioner

vs.

1. W.A.Christian Gamini Fernando,
of Shantha Sevana,
Nainamadama -West
Nainamadama

2. Waduge Henry Livera
3. Warnakulasuriya Mary Sarijini

both of Dummaladeniya West.
Wennappuwa.

4. Waduge Anuradha Livera

5. Waduge Nimala Rosary Livera

both of 36, Main Street,
Nuwara Eliya

1st to 5th Defendants-Respondents-Respondents

Before: Chandra Ekanayake Acting C.J,
Aluwihare PC J &
Anil Gooneratne, J

Counsel: Ranjan Gooneratne, Attorney-at-Law for
Plaintiff -Petitioner – Appellant
Kalinga Dias Abeysinghe, Attorney-at-Law
for 2 Defendant-Respondent-Respondent

Written Submissions 16th July 2009 (by 2nd Defendant-Respondent-
tendered on: Respondent)
4th May 2009 (by Plaintiff-Petitioner-Appellant)

Decided on: 04.03.2016.

Chandra Ekanayake, Acting C.J,

The plaintiff -petitioner-appellant (hereinafter referred to as the plaintiff) by petition to this Court dated 06.11.2008 supported by her affidavit of the same date had moved for Leave

to Appeal against the judgement of High Court of Civil Appeal of the North Western Province (holden in Kurunegala) dated 25.09.2008 (X14), to set aside the same and to direct the District Judge of Marawila to accept the amended plaint dated 18.10.2007. When the above application was supported this Court by its order dated 27.03.2009 had granted leave to appeal on the questions of law set out in paragraph 16(a) to (c) of the above mentioned petition to this Court dated 06.11.2008. The above questions of law are reproduced below:

- 16 (a) the said order is contrary to law and against the weight of the evidence,
- (b) the insertion of the wrong date by the Justice of Peace after attesting the affidavit, cannot vitiate the affidavit,
- (c) that the insertion of the wrong date is clearly a clerical error.

The 2nd defendant -respondent-respondent shall be hereinafter referred to as the 2nd defendant.

The impugned judgement of the High Court of Civil Appeal dated 25.09.2008 was delivered after considering an application for leave to appeal against the order of the Learned Additional District Judge of Marawila dated 05.06.2008. When this order was assailed by the plaintiff in the High Court of Civil Appeal, on the date of support for leave to appeal an objection had been raised on behalf of 2nd and 3rd defendant-respondent-respondents on the basis that there was no valid affidavit before that Court for the reason that the affidavit tendered to that Court in support of the petition as required by provisions of section 757(1) of the Civil Procedure Code was an affidavit dated 20.06.2006 (X11) sworn prior to the date in the petition to that Court. By the above petition the plaintiff had sought leave to appeal against the order of Additional District Judge dated 05.06.2008, to set aside the same and to direct the District Court of Marawila to accept the amended plaint dated 18.10.2007.

The date in the petition (X10) is given as -- June 2008 (only with month and the year). The affidavit of the plaintiff is one dated 20.06.2006. The above affidavit appears to have been sworn on 20.06.2006 at Chilaw (as per the jurat of the said affidavit). Learned High Court Judges having examined the aforesaid affidavit at page 3 of the judgement have proceeded to state as follows:

“It is the duty of Justice of the Peace who administers the oath or affirmation to include the date on which the affidavit was signed, in the jurat. If the impugned affidavit was read over and explained to the plaintiff

as stated in the jurat she could have noticed the mistakes referred to above and corrected them before signing it. Therefore the only conclusion one could arrive at is that the impugned affidavit had not been read over and explained to the plaintiff before signing it. The Justice of the Peace who administered the oath had not been careful enough to read and understand the jurat if it was already there when the affidavit was brought to him for administration of the oath.

In the circumstances it cannot be held that mistakes found in the impugned affidavit are mere clerical errors.”

In my view necessity has now arisen to consider section 757 (1) of the Civil Procedure Code which deals with the procedure in respect of applications for leave to appeal. The above sub section is reproduced below:

“ 757(1). Every application for leave to appeal against an order of Court made in the course of any civil action, preceding 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, and shall contain the particulars required by section 758, and shall be presented to the Court of Appeal by the party appellant or his registered attorney within a period of fourteen days from the date when the order appealed against was pronounced, exclusive of the day of that date itself, and of the day when the application is presented and of Sundays and public holidays, and the Court of Appeal shall receive it and deal with it as hereinafter provided and if such conditions are not fulfilled the Court of Appeal shall reject it. The appellant shall along with such petition, tender as many copies as may be require for service on the respondents.”

As per the above sub section every application for leave to appeal against an order of Court made in the course of any civil action, shall be made by way of a petition by the party aggrieved or his registered attorney and such petition shall be supported by affidavit, and shall contain the particulars required by section 758. In the case at hand the supporting affidavit of the plaintiff appears to have been sworn on 20.06.2006 at Chilaw. However no material is available to ascertain the date of filing of the said petition of – June 2008(X10).

At the stage of making submissions before the High Court of Civil Appeal the learned counsel for the plaintiff had heavily laid stress on the submission that the place and the date on which the affidavit was signed need not necessarily be in the jurat and it is not an essential requirement. Learned High Court Judges having carefully examined the pronouncement made in *Thiyarasa vs Arunodayam* 1987 (2SLR) 184 - which too being an authority on which the Counsel for the plaintiff placed heavy reliance, had quite correctly concluded that unlike a notarially executed deed, an affidavit is sworn evidence and the wrong date may not vitiate a deed but it affects the validity of an affidavit. On the other hand if the affidavit in question was in fact read over and explained to the plaintiff before signing the same she could have easily noticed the mistake with regard to the date appearing in the affidavit. According to section 757(1) also an affidavit should be filed to support the averments in the petition. It is noted that the words used in the above sub-section are also to the effect that such petition shall be supported by affidavit. In this instance it has become amply clear that when the date of swearing the affidavit is 20.06.2006, the petition of - June 2008 could not have been in existence when the affidavit was signed.

In this regard it would be pertinent to consider the observation by His. Lordship G P S de Silva J, in the case of *De Silva vs L B Finance* 1993 (1SLR) 371 to the effect that the place and the date on which an affidavit was signed is an essential requirement of an affidavit.

According to *The New Shorter Oxford English Dictionary on Historical Principles*. Edited by : Lesley Brown. Vol.2 N - Z – 1993 at page 3153 'support' means -

“Provide authority for or corroboration of (a statement etc.); bear out, substantiate.”

In this case the affidavit in question has been sworn almost 2 years prior to the date of the petition. The petition to High Court (X10) only gives the year and the month. Since the affidavit appears to have been sworn on 20.06.2006 in no circumstance could it be considered to be an affidavit supporting the facts averred in the petition X10. Further there is no material available to conclude that this was occasioned due to a clerical error. For the above reasons the affidavit cannot be considered as an affidavit supporting the petition as contemplated in section 757(1) of Civil Procedure Code.

In view of the foregoing, I see no basis to interfere with the findings in the impugned judgement of the High Court of Civil Appeal. I proceed to answer all questions of law on which leave to appeal

was granted against the Plaintiff. The impugned judgement of the High Court of Civil Appeal dated 25.09.2008 is therefore affirmed. This appeal is hereby dismissed. In all circumstances of this case no order is made with regard to costs .

Acting Chief Justice.

Aluwihare PC, J &

I agree.

Judge of the Supreme Court.

Anil Gooneratne, J

I agree.

Judge of the Supreme Court.