

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for appeal in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 9 (A) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD (1) of the Industrial Disputes Act from a Judgment of the Provincial High Court of the Western Province (Holden in Colombo).

SC/HC/LA 02 /2014

HCAIT 80/2009

LT Colombo No. 1/Addl. /49/06

IN THE LABOUR TRIBUNAL

K.H.S Pushpadeva,
No.233/33,
Mahawatta Road,
Colombo-14.

Applicant.

Senok Trade Combine Ltd.,
No. 03,
R.A. de Mel Mawatha,
Colombo-05.

Respondent.

In the provincial High Court of the Western
Province (Holden in Colombo).

K.H.S Pushpadeva,
No. 233/33, Mahawatta Road,
Colombo- 14.

Applicant-Appellant.

Vs.

Senok Trade Combine Ltd.,
No. 03,
R.A. de Mel Mawatha,
Colombo-05.

Respondent-Respondnet.

AND NOW

In the Supreme Court

Senok Trade Combine Ltd.,
No.03,
R.A. de Mel Mawatha
Colombo-05.

Respondent-Respondent-
Petitioner.

Vs.

K.H.S. Pushpadeva,
No.233/33, Mahawatta Road,
Colombo- 14.

Applicant-Appellant-Respondent.

BEFORE: Saleem Marsoof PC. J

Marasinghe J.

Aluwihare P.C., J

COUNSEL; Suren de Silva instructed by Ms. M.N.T Pieris for Respondent-Respondent-Petitioner.

A. Sri Nammuni for Applicant-Appellant-Respondent.

ARGUED ON: 05.03.2014

WRITTEN SUBMISSIONS: 2. 04. 2014 and 6. 05. 2014

DECIDED ON: 4. 09. 2014

ALUWIHARE J.

This is an application for leave to appeal challenging the judgment pronounced by the learned High Court Judge of Colombo in exercising appellate jurisdiction in respect of an order of the Labour Tribunal of Colombo.

When this application was taken up for support, learned counsel for the Applicant–Appellant Respondent (hereinafter the Respondent) raised the preliminary objections referred to below and moved court that the affidavit filed by the Respondent –Respondent Petitioner (hereinafter the Petitioner) in this application be rejected:~

- (1) The purported affidavit of Jerome Anil Ratnayake, is not an affidavit known to law as at the commencement of the said affidavit, there is no affirmation and also it has been formulated as a mere statement.

- (2) In any event the affirmant to the purported affidavit has not specified his religion and has not taken an oath or affirmation.

Both parties filed written submissions relating to the preliminary objections raised, having been directed by this court.

The learned counsel for the Respondent elaborating on the objections raised, contends that the “office of the attesting person” is not clearly disclosed, in that, the words “Before me Justice of Peace/ Commissioner for Oath” appear just below the Jurat and a person cannot be a Justice of Peace and a Commissioner of Oath at the same time.

This court observes that the Commissioner for Oaths who attested the affidavit has affixed the seal and the same clearly conveys that that the person who attested the affidavit is a Commissioner for Oaths and I see no ambiguity as to the capacity of the person who attested the affidavit.

The learned counsel for the Respondent has also taken up the position that the Jurat of the affidavit is false in that, paragraph 18 of the affidavit makes reference to the Petitioner seeking special leave to appeal from this court whereas the nature of these proceedings are for Leave to Appeal and not Special Leave. The learned counsel for the Respondent further contends that the Commissioner for oath being an Attorney-at-law ought to have advised the deponent to consult his lawyer on this aspect. The learned Counsel for the Respondent invites this court to draw the conclusion that such a step was not taken by the Commissioner for Oaths for the reason that the deponent was not present before the Commissioner for Oaths and the affidavit is false for that reason. Upon close scrutiny of the position taken up on behalf of the Respondent I am of the view that the attendant circumstances do not warrant the drawing of such a conclusion by this court, and in any event the submission advanced by the learned counsel for the Respondent go beyond the ambit of the preliminary objections raised by him.

The learned counsel for the Respondent further contends that the affidavit had not been read over to the deponent before he placed his signature, although the jurat of the affidavit makes reference to the affidavit having been read over to the affirmant. To substantiate this position, the attention of this court has been drawn to Form 75 of the Civil Procedure Code, which prescribes that it is a mandatory requirement that the place of residence of the deponent should be set forth in the affidavit. The learned counsel for Respondent contends that the address of the deponent in the affidavit is stated as “No.3 R.A. De l Mawatha, Colombo 5” whereas in the caption the address is given as “No.3 R. A. De **Mel** Mawatha Colombo 5”. The learned counsel for the Respondent raises two issues based on this irregularity. Firstly, there is noncompliance with the requirements of Form 75 of the Civil Procedure Code as the affirmant had not set forth the correct residential address, and secondly, this error further strengthens the Respondent’s position that the affidavit was not read over to the affirmant in that, had it been read over the defect would have come to light and would have been rectified.

In response to the above contention of the Respondent, the learned counsel for Petitioner whilst admitting the error relating to the address, submits that the error is a result of an oversight. I am of the view that this irregularity referred to above by the learned counsel for the Respondent is of technical nature and in all probability may have been the result of lack of diligence on the part of the Attornry –at law who was responsible for drafting the affidavit. His Laordship Justice Marsoof President Court of Appeal as he then was has observed “ Court should not non-suit a party where the non compliance with the Rules takes place due to no fault of the party” (*Senanayake v Commissioner of National Housing and Others* 2005 1 SLR 182). I hold that the irregularity is not sufficiently grave to have an effect on the validity of the impugned affidavit.

It is also contended on behalf of the Respondent that the impugned affidavit does violence to Form 75 of the Civil Procedure Code in that the deponent has neither affirmed nor sworn and that the affidavit is invalid for that reason.

The impugned affidavit commences with the words “ I Jerome Anil Ratnayake of No.3, R.A. De l Mawatha, Colombo 5 sates as follows.....”. However Form 75 requires an affidavit to carry the words after the name and address of the deponent , ... “sincerely, and truly affirm and declare (or if the deponent is a Christian, make oath and say) as follows:” and to this extent the affidavit is not in conformity with Form 75. However, the fact that the affirmant has affirmed before the Commissioner for Oaths, is clearly reflected in the Jurat to the affidavit. In the case of *De Silva and others Vs. L.B. Finanace Ltd 1993 1 SLR 371*, Chief Justice G.P.S De Silva, in considering whether the absence of the word “affirmed” in the jurat makes the affidavit invalid, held that section 438 of the Civil Procedure Code does not require that the fact of affirmation should be expressly stated in the Jurat of the affidavit. His Lordship, in the same case, went on to observe that “there is no reference to Form 75 in section 438 of the Civil Procedure Code. Only the marginal note in Form 75 makes reference to section 438 and that compliance with Form 75 is not essential.”

Although, the learned counsel for the Respondent challenged the validity of the affidavit filed in this application on the basis that the affidavit has not specified the religion of the affirmant when this application was taken up for support, he has not referred to this aspect in his written submissions.

In the case of *Trico Freighters (PVT) Ltd v. Yang Civil Engineering Lanka (PVT) Ltd 2000 2 SLR 136*, Justice Eddusuriya President Court of Appeal, as he then was, expressed the view that “an affirmation is not bad in law merely because the deponent has made an affirmation without stating that he is a Buddhist, Hindu or Muslim”. As observed by his lordship Justice Fernando, in the case of *Sooriya Enterprises (International) Limited v Michael White & Company Ltd 2002 3 SLR 371*, “the fundamental obligation of a witness or a deponent is to tell the truth and the purpose of the oath or affirmation is to reinforce that obligation”.

Accordingly, I hold that, the fact that an affidavit does not state the religion of the affirmant, does not make the affidavit invalid.

It is further contended on behalf of the Respondent that the affirmant does not have the capacity to swear an affidavit on behalf of the Petitioner and relies on Section 183A (b) of the Civil Procedure Code to substantiate this position.

Section 183A (b) reads as follows:-

*“Where the action is brought by or against a corporation, board, public body, or **company**, any secretary, **director** or other principal officer of such corporation, board, public body or company;.....*

..may make an affidavit in respect of these matters, instead of the party to the action:

Provided that in each of the foregoing cases the person who makes the affidavit instead of the party to the action, must be a person having personal knowledge of the facts of the cause of action..... (emphasis added)

The learned counsel for the Respondent has argued that the term Director is defined in Section 529 (1) of the Companies Act and where the Petitioner is a company and a party to an action, if an affidavit is to be made, such an affidavit can only be made by a person holding one of the positions referred to in section 183A (b) of the Companies Act. He has further submitted that the affirmant is not a Director of the Petitioner company within the meaning of section 529 (1) of the Companies Act though he is called the *Director* in charge of Human Resources and Administration.

Section 183A (b) does not only stipulate that the affidavit must be from a person holding the position of secretary, director or **other principal officer** as the case may be but the said provision also requires that the affidavit must

emanate from a person who has personal knowledge of the facts of the cause of action. In view of the second requirement in Section 183A (b) that I have referred to, the statute permits **any principal officer** of the organization to swear an affidavit in instances where a company is a party to a litigation if such person has personal knowledge of the facts of the cause of action.

A principal officer of an organisation is an officer who heads a high level office in an organisation or an officer who is at the same level as a department head.

As the capacity of the affirrant is Director of Human Resources and Administration, of the Petitioner company, I see no reason as to why the affirrant cannot be considered as a principal officer, especially in a matter concerning a workman of the Petitioner company. In this context, I hold that the affirrant, in the eyes of the law, is a person having capacity to make an affidavit within the meaning of section 183A (b) of the Civil Procedure Code.

As observed by Justice Sharvannda as he then was, in the case of *Kobbekaduwa V Jayawardene 1983 1 SLR 419* “The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmation Ordinance (Cap.17) furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false evidence. In an affidavit a person can depose only to facts which he is able of his own knowledge and observation to testify”.

Affidavits are valuable documents in presenting evidence in court not only when a witness is unable to testify in person, but also when the procedure (appellate) lays down that evidence that is material, be placed before court by way of affidavits effectively shutting out oral evidence from such legal proceedings. Thereby, when a litigant is aggrieved by an order of court and seeks redress by way of an appeal such a person has no option other than to follow the procedure laid down by law which is to present his case through

the medium of an affidavit. This court is mindful of the fact that litigants who are not fully conversant with the procedures established by law have no option but to rely on legal advice not only regarding the nature of redress, but also regarding the procedure to be followed in placing their case before the forum vested with jurisdiction to adjudicate on the matter.

Although the infirmities referred to by the Respondent are, in my view technical in nature, I wish to state that in the instant application, in making the affidavit in question, the Attorney-at-Law on record has failed to exercise due diligence required of him. Such conduct should not be condoned. He has failed to discharge his professional duty as an attorney-at-law and has shown scant concern for the interest of his client whom he is professionally bound to serve.

Justice Nanayakkara observed in the case of *Distilleries Company V Kariyawasam & Others 2001 SLR 119* “the object of the Civil Procedure is to prevent civil proceedings from being frustrated by any kind of technical irregularity or lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a court from dispensing justice.”

In the case of *Mohamed Facy Vs. Mohamed Azath Sanoon Sally and Others* S.C.Appeal 4/ 2004 (BASL Law Journal 2006 pg 58) his Lordship Justice Marsoof, in considering the impact of defects of technical nature of an affidavit, observed in reference to Section 9 of the Oaths Ordinance, that the said section is a salutary provision which was intended to remedy such maladies.

In conclusion It must be said that the infirmities and irregularities in the affidavit of the petitioner referred to by the Respondent are technical in nature that can be cured by application of Section 9 of the Oaths Ordinance and therefore do not impact on the validity the affidavit.

For the reasons set out above, I reject the preliminary objections raised by counsel for the Respondent and hold that the impugned affidavit filed in this application is valid before the law.

JUDGE OF THE SUPREME COURT

Saleem Marsoor, PC J

I agree

JUDGE OF THE SUPREME COURT

Rohini Marasinghe, J

I agree

JUDGE OF THE SUPREME COURT