

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

In the matter of an application for special leave to appeal to the Supreme Court under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Dr. Sena Yaddehige,
Level 22,
Crescat Resdiencies,
Colombo 03.

SC/SPL/LA Application No. 100/2019

Petitioner

CA (Writ) Application No. 417/2017

Vs.

1. Securities and Exchange Commission
of Sri Lanka.

2. Dr. Tilak Karunaratne,
Chairman,
Securities and Exchange Commission
of Sri Lanka.

2A. Ranel T. Wijesinha,
Chairman,
Securities and Exchange Commission
of Sri Lanka.

Substituted Respondent

3. D. N. R. Siriwardena

4. Ranel T. Wijesinha

4A. Jayantha Fernando

Substituted Respondent

5. S. R. Attygalle

6. Marina Fernando

6A. Jagath Perera

7. Dilani Gayathri Wijemanne

7A. Manjula Hiranya de Silva

Substituted Respondent

8. Rajeev Amarasuriya

9. Suresh Shah

9A. Arjuna Herath

Substituted Respondent

10. C. J. P. Siriwardena

Members,
Securities and Exchange Commission
of Sri Lanka.

11. Vajira Wijegunawardena
Director General,
Securities and Exchange Commission
of Sri Lanka.

All of Securities and Exchange
Commission of Sri Lanka,
Level 28 and 29,
East Tower,
World Trade Centre,
Echeleon Square,
Colombo 01.

Respondents

AND NOW BETWEEN

Dr. Sena Yaddehige
Level 22,
Crescat Resdiencies,
Colombo 03.

Petitioner - Petitioner

Vs.

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Echelon Square,
Colombo 01.

Respondents - Respondents

Before : Priyantha Jayawardena PC J
E.A.G.R. Amarasekera, J
Achala Wengappuli, J

Counsel : Dr. Romesh De Silva PC with Chanaka de Silva, Manjuka
Fernandopulle, Niran Ankitell and Harith de Mel for the
Petitioner - Petitioner.

Susantha Balapatabendi PC, Additional Solicitor General with
Rajitha Perera Deputy Solicitor General for the 1st, 3rd, 4A, 6A,
7A, 8th, 9A and 11th Respondent – Respondents.

Argued on : 21st July, 2023

Decided on : 20th September, 2023

Priyantha Jayawardena PC J

Facts of the case

On the 9th of June 2017, the Securities and Exchange Commission of Sri Lanka (hereinafter referred to as the “Respondent”) issued a letter to the petitioner in the instant application (hereinafter referred to as the “Petitioner”) calling him to show cause as to why no action should be taken against him for trading on shares of Kegalle Plantations PLC during the period between the 30th of June and 10th of July 2015, whilst being in possession of unpublished price sensitive information relating to those securities, in contravention of section 32 of the Securities and Exchange Commission of Sri Lanka Act, No. 36 of 1987, as amended (hereinafter referred to as the “SEC Act”).

The said letter further alleged that the Petitioner had knowingly furnished false and misleading information, and concealed material facts during the course of the investigation conducted by the Respondent, in contravention of sections 46A (4) and 51 (1) (b) of the SEC Act.

At a meeting of the Respondent held on the 26th of October 2017, the counsel for the Petitioner was permitted to make representations on behalf of the Petitioner with respect to his innocence and as to why the Respondent should consider compounding the alleged offence.

After considering the representations made by the Petitioner to the Respondent, the Respondent issued a ‘notice of action’ dated the 1st of November 2017 informing the Petitioner that he had failed to satisfy the Respondent that no legal action should be taken against him.

The Petitioner thereafter filed a Writ Application in the Court of Appeal on the 8th of December 2017 alleging that, *inter alia*, the conduct of the Respondent, including the refusal to compound the offence, was arbitrary, irrational and unreasonable.

Further, the Petitioner prayed for, *inter alia*:

(a) Issue Notice upon the Respondents;

- (b) *Call for and inspect the records and / or files of the 1st Respondent relating to this matter, including the purported Inspection Report referred to in “P4”, “P8” and “P9”;*
- (c) *Issue an interim order restraining the Respondents from initiating any enforcement action against the Petitioner in respect of the alleged offences set out in “P4” pending the hearing and final determination of this matter;*
- (d) *Issue an interim order restraining the Respondents from initiating any enforcement action against the Petitioner in respect off the alleged offences set out in “P8” pending the hearing and final determination of this matter;*
- (e) *Issue an interim order restraining the Respondents from initiating any enforcement action against the Petitioner in respect off the alleged offences set out in “P9” pending the hearing and final determination of this matter;*

AND / OR

- (f) *Issue an interim order restraining the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in “P4” pending the hearing and final determination of this matter;*
- (g) *Issue an interim order restraining the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in “P8” pending the hearing and final determination of this matter;*
- (h) *Issue an interim order restraining the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in “P9” pending the hearing and final determination of this matter;*
- (i) *Issue a mandate in the nature of a writ of certiorari quashing “P4” and the decisions contained therein (show cause);*
- (j) *Issue a mandate in the nature of a writ of certiorari quashing “P8” and the decisions contained therein (show cause);*
- (k) *Issue a mandate in the nature of a writ of certiorari quashing “P9” and the decisions contained therein (show cause);*
- (l) *Issue a mandate in the nature of a writ of certiorari quashing “P7” and the decisions contained therein (compounding);*

(m) Issue a mandate in the nature of a writ of prohibition preventing the Respondents from initiating any enforcement action against the Petitioner in respect of the alleged offences set out in “P4” and / or “P8” and / or “P9”;

AND / OR

(n) Issue a mandate in the nature of a writ of prohibition preventing the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in “P4” and / or “P8” and / or “P9”.

Whilst the said Writ Application was pending before the Court of Appeal, the Respondent instituted proceedings in the Magistrates’ Court of Colombo on the 25th of February 2019 against the Petitioner and another in terms of the SEC Act.

Thereafter, the Magistrates Court issued summons on the Petitioner and another named as accused in the said case.

The learned President’s Counsel for the Petitioner had then supported the said Writ Application for notice and interim relief before the Court of Appeal. Having heard the parties to the said Writ Application, the Court of Appeal has delivered the order dated the 22nd of March 2019 declining to grant the interim relief prayed for by the Petitioner. Further, in the said Order, the Court of Appeal had directed the parties to file written submissions with regard to issuing notices on the Respondents in the said application.

Being aggrieved by the said order of the Court of Appeal, the Petitioner filed an application for Special Leave to Appeal dated the 28th of March 2019 and sought Special Leave to Appeal from this Court.

Preliminary objection raised by the Respondent

When this application was taken up for support on the 21st of July 2023, the learned Additional Solicitor General raised a preliminary objection on the maintainability of the application for Special Leave to Appeal on the basis that the affidavit dated the 28th of March 2019 tendered in support of the petition of Special Leave to Appeal to the Supreme Court was not in conformity with the Consular Functions Act, No. 4 of 1981, as amended (hereinafter referred to as the “Consular Functions Act”).

It is however pertinent to note that the Petitioner tendered the original affidavit to this Court, which was certified on behalf of the Ambassador of Sri Lanka in Japan, by way of a motion dated the 3rd of June 2019 in the Supreme Court.

Submissions of the Respondent

The learned Additional Solicitor General for the respondents submitted that Rule 2 read together with Rule 6 of the Supreme Court Rules 1990 mandatorily requires that a petition in an application for Special Leave to Appeal be supported by an affidavit.

He further submitted that foreign affidavits tendered to court are not automatically recognized as valid unless it conforms to the applicable laws. Moreover, in terms of section 3 (i) of the Consular Functions Act, a foreign affidavit would only be recognized as valid in the courts of Sri Lanka, if the document was certified by a diplomatic or consular officer, who is *ex officio* deemed to be a Justice of the Peace for Sri Lanka.

Accordingly, it was submitted that the affidavit filed by the petitioner purported to have been executed before a Notary Public in Japan cannot be recognized as a valid affidavit under our law as it has no consular authentication or validation by the Embassy of Sri Lanka in Japan.

Submissions of the Petitioner

The learned President's Counsel for the Petitioner submitted that the preliminary objection raised by the Respondent cannot be sustained, because an affidavit in support of a petition in an Application for Special Leave to Appeal is not mandatory. Rules 2 and 6 of the Supreme Court Rules of 1990 stipulates that a petition must be filed together with a supporting "affidavit or document" only where the application contains allegations of fact which cannot be verified by reference to the judgment of the Court of Appeal. The learned President's Counsel further submitted that in the instant application, the allegations of fact can be verified from the impugned Order, and therefore the instant application does not require an affidavit or other documents.

Without prejudice to the aforementioned submission, the learned President's Counsel further submitted that given the urgency of the matter, it would be frivolous and highly technical to insist that all steps pertaining to the certification of a foreign affidavit be carried out at the point of filing the petition for Special Leave to Appeal within the prescribed time frame.

The learned President's Counsel further submitted that, in any event, out of an abundance of caution the affidavit had been certified by the Sri Lankan Embassy in Japan and subsequently been tendered to this court.

Consideration of the preliminary objection

There are three main aspects to be considered in the instant application:

- (a) Whether it is mandatory under Rules 2 read with 6 of the Supreme Court Rules of 1990 to tender an affidavit in support of a petition in a Special Leave to Appeal Application;
- (b) Whether non-compliance with the Consular Functions Act can subsequently be cured; and
- (c) Whether the Petitioner has tendered a valid affidavit to court in support of the petition.

Is it mandatory to tender an affidavit under Rule 2 read with Rule 6 of the Supreme Court Rules 1990 in a Special Leave to Appeal Application?

Rule 2 of the Supreme Court Rules of 1990 reads as follows:

“Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and a certified copy, or uncertified photocopy, of the judgement or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits, documents and judgment or order shall also be filed;”

[Emphasis added]

Rule 6 further provides as follows:

“Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of

such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit."

[Emphasis added]

Rule 2 read with Rule 6 of the Supreme Court Rules of 1990 shows that an affidavit is needed to be filed together with a Petition of Appeal for Special Leave, in order to support the allegations of facts in the petition that cannot be verified by reference to the judgment or order in respect of which Special Leave to Appeal is sought.

Accordingly, a Petition of Appeal for Special Leave not containing allegations of facts which could be considered by reference to a judgment or order of the Court of Appeal, can be considered by the court even in the absence of a supporting affidavit.

However, an affidavit would be mandatory if the allegations of facts contained in the Petition of Appeal for Special Leave cannot be verified by referring to the impugned judgment or order of the Court of Appeal.

A careful consideration of the impugned Order shows that the instant application can be supported without an affidavit as the Petitioner is relying purely on questions of law arising out of the impugned Order of the Court of Appeal dated the 22nd of March 2019.

It is further pertinent to note that the Petitioner had tendered an affidavit sworn overseas along with the Application for Special Leave to Appeal. Moreover, the Petitioner had obtained certification from the embassy of Sri Lanka in Japan as required in terms of the Consular Functions Act, after the said objection was raised by the Respondents.

Furthermore, the proviso to Rule 2 of the Supreme Court Rules 1990 permits the court to deem compliance of the Rules where a petitioner is unable to tender such materials with the application, provided the Petitioner has set out the circumstances for his failure to do so in the petition and the said reasons are acceptable to court.

The proviso to Rule 2 reads as follows:

"Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together

with the requisite number of copies, as soon as he obtains the same. If the court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule.”

[Emphasis added]

The above proviso to Rule 2 has therefore conferred wide discretion on the Supreme Court to allow a petitioner to file an affidavit, if the petitioner has reserved his right to file an affidavit, document, impugned judgment, order or certified copy of the case record.

However, I am of the view that even if the Petitioner has not reserved the right to file such materials, the Supreme Court has a wide discretion to grant permission to a petitioner to file such materials if the circumstances warrant granting such permission in the interest of justice.

A similar view was expressed in **Priyani Soysa v Rienzie Arsecularatne [1999] 2 SLR 179**, where Wijetunga J in his dissenting judgement held that even the failure of the petitioner to obtain permission of the court to tender a valid affidavit would not necessarily dismiss a case unless there is a compelling reason to do so.

“Even assuming, though not agreeing, that the affidavit filed by the petitioner under Rule 6 was inadequate and that certified copies of the record of the Court of Appeal should have been submitted with the original application, the only lapse then on the part of the petitioner would be that she did not obtain the permission of the Court to tender the same, under the proviso to Rule 2, and that she tendered only 3 copies to Court. Having regard to the purpose of the Rules pertaining to special leave to appeal, it appears that non-compliance of this nature would not necessarily deprive a party of the opportunity of being heard on the merits at the threshold stage, unless there is some compelling reason to do so.”

[Emphasis added]

Further, in **Kiriwanthe and Another v Navaratne and Another [1990] 2 SLR 393**, Fernando J held:

“The weight of authority thus favours the view that while all these Rules must be complied with the law does not require or permit an automatic dismissal of the application or appeal

of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule. ”

[Emphasis added]

Can non-compliance with the Consular Functions Act subsequently be cured?

Section 3 (i) of the Consular Functions Act reads as follows:

“Upon the application of, a person who is a citizen of Sri Lanka or any other person, a diplomatic or consular officer may

(i) certify, attest, authenticate or do any other such act to validate any document”

[Emphasis added]

Further, section 4 (i) of the Consular Functions Act reads as follows:

“Every diplomatic or Consular Officer shall be deemed to be ex officio a Justice of the peace for the Republic of Sri Lanka and accordingly may administer any oath or affirmation or take any affidavit and such oath or affirmation or such affidavit shall be deemed to have been administered or take, as the case may be, in Sri Lanka. ”

[Emphasis added]

As stated above, consular certification by the Sri Lankan Embassy in Japan has been obtained after the Preliminary Objection was raised and the same was tendered to this Court. In the aforesaid circumstances, it is necessary to consider whether an affidavit for which an objection has been raised in terms of the Consular Functions Act can be cured.

Section 9 of the Oaths and Affirmation Ordinance reads as follows:

“No omission to take any oath or make any affirmation, no substitution of anyone for any other of them and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceedings or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.”

[Emphasis added]

In **Mohamed Rauf Mohamed Facy v Mohamed Azath Sanoon Sally** (SC/Appeal No. 04/2004), BASL Law Journal 2006 page 58 in considering the impact of technical defects in an affidavit, the court observed that section 9 of the Oaths and Affirmations Ordinance is a salutary provision which was intended to remedy such maladies.

In **Senok Trade Combine Ltd. v K.H.S. Pushpadeva** (SC/HC/LA Application No. 02/2014) SC Minutes dated 4th September 2014 it was held as follows:

“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.”

[Emphasis added]

In several other instances, the courts have held that the defects in affidavits are of a mere technical nature and allowed the litigants to seek redress from the justice system.

It is also worth placing on record that requiring certification, attestation, authentication or any other such act to validate any document in terms of section 3 of the Consular Functions Act, No. 4 of 1981 is not practical in urgent circumstances due to the geographical size of certain countries and the need to travel great distances to reach the embassy of Sri Lanka in certain countries. Thus, the courts should take such circumstances into account when considering objections as to the validity of such documents and allowing any defects in those documents to be rectified.

In this regard, it is useful to refer to instances where the courts accept proxies sent by fax from overseas and allow the original to be filed in courts when the original is available in Sri Lanka. Further, if there are defects in proxies, the courts allow the parties to rectify the defects if they are of a technical nature. The approach of the modern courts is to depart from dismissing cases based on mere technicalities and to allow the parties to present their respective cases for proper adjudication of facts by the courts in order to meet the ends of justice.

A similar view was expressed as far back as 1936 by Abrahams CJ in **Vellupille v Chairman, Urban District Council [1936] 39 NLR 464** who held “*this is a Court of Justice, it is not an Academy of Law.*”

Further, no prejudice whatsoever has been caused to the Respondents as a result of the alleged default and the smooth functioning of the court has not been interrupted.

Conclusion

In the aforesaid circumstances, I am of the view that:

- (a) for the reasons stated above, the instant application can be supported in court even without an affidavit in terms of Rule 2 read with Rule 6 of the Supreme Court Rules of 1990;
- (b) in any event, the Petitioner has obtained consular certification and rectified the defect in the affidavit filed along with the Petition to Appeal for Special Leave and the court accepts the said affidavit as a valid affidavit to support the averments in the Petition.

Hence, the preliminary objection is over-ruled.

No costs.

Judge of the Supreme Court

Achala Wengappuli, J

I agree.

Judge of the Supreme Court

E. A. G. R Amarasekera, J

I had the opportunity of reading the order written by His Lordship Justice Priyantha Jayawardena PC in its draft form. I totally agree with his Lordship that when Supreme Court Rules 2 and 6 are read together, an application for special leave to appeal containing allegations of fact which can be verified by reference only to the judgment or order, can be considered by Court even in the absence of a supporting affidavit. In other words, if the questions of law can be ascertained on the face of the judgment or order, there is no need of a supporting affidavit. So, I totally agree with the view taken by His Lordship Justice Jayawardena PC that the instant application can be

supported in court even without an affidavit in terms of Rule 2 read with Rule 6 of the Supreme Court Rules of 1990 to point out questions of law arising out of the impugned order itself.

Supreme Court Rules do not say that the affidavits mentioned in the said rules should be sworn or affirmed in Sri Lanka or that the affidavits referred to in the said rules preclude affidavits executed in foreign countries. Sections 437 and 438 of the Civil Procedure Code clearly identify the possibility of executing affidavits in a country outside Sri Lanka before a person qualified to administer oath or affirmation according to the law of that country. The question is how a court in Sri Lanka recognizes the person who administers oath or affirmation as a qualified person to administer oath or affirmation in the relevant country. If the opposite party does not challenge the qualification of the person who has administered oath or affirmation in the relevant case, there may not be an issue, but when there is a challenge, it may have to be established that it was done before a person qualified to administer oath or affirmation in the relevant country. Even with regard to an affidavit executed within the country, one can raise an objection that the oath or affirmation was not administered before a Justice of Peace or Commissioner of Oaths recognized by our law. Once it is established that the Justice of Peace or the Commissioner of Oaths had the authority to administer oath or affirmation, the affidavit is valid from the date it was made.

The objection was raised in terms of the Sections 3(1) and 4(1) of the Consular Functions Act No.4 of 1981. Other than that, no provision that states the making of an affidavit in a foreign country makes it ipso facto invalid or inadmissible in evidence has been brought to our notice. Further, no other defect with regard to formalities in making of an affidavit has been brought to our notice. Section 4(1) of the Consular Functions Act considers Diplomatic/ Consular officers as Justices of Peace and enables them to act as a Justices of Peace in administering oath or affirmations. Affidavits made before them are deemed to be made in Sri Lanka. This is only an enabling provision and it does not invalidate or make inadmissible other affidavits sworn or affirmed before a person qualified to administer oath or affirmation in terms of the law of the relevant country. If it is so interpreted to say that other affidavits sworn or affirmed in foreign countries are not valid before our courts, the relevant parts of sections 437 and 438 of Civil Procedure Code become redundant. On the other hand, if this is to disregard other affidavits made in foreign countries, litigants living abroad or in foreign countries at a given time, who have to tender affidavits within time limits, may have to face serious repercussions if there is no diplomatic/consular office within a close distance. The law does not expect to do impossible things. So, my view is that the said Section 4(1) has no relevance to the matter at hand. Our attention has not been brought to any

provision which states that the affidavit must be sworn or affirmed only before a consular or diplomatic officer if it is a foreign affidavit.

If there is any relevance, it is Section 3(1) of the said Consular Functions Act. It is questionable whether an affidavit falls within the term 'any document' contained therein as per the interpretation given to the said term in the interpretation section of the said Act. However, certain parts contained or attached to the affidavit to show that the person who administered the oath/affirmation is a qualified person may need verification by a proper authority.

In my view, the validation contemplated in Section 3(1) is not to certify the truth of the contents of a document which the officer is not the author. Even if the officer certifies the truth of the contents, it becomes hearsay. Thus, the validation contemplated there is to certify, attest or authenticate the genuineness or the authenticity of the document to the effect that it has originated from the correct or lawful source. However, it does not create a bar to accept foreign affidavits. It only provides for Sri Lankan citizens or any other person a mode to meet challenges to foreign documents on the basis of authenticity, legality etc. The Consular Functions Act does not say that such certification, attestation or authentication must always accompany with the document when it is tendered. It does not prevent one to provide the said certification or authentication when the authenticity or genuineness or legality is challenged. In this matter as His Lordship has mentioned in the draft judgment, certification has been tendered after the objection was raised. Now any doubt to the authenticity has been removed as per the law. Now there is no hindrance to accept the affidavit from the day it was sworn or affirmed.

In my view, there is nothing wrong with the affidavit per se as far as the formalities are concerned or regarding its validity except for the doubt created by the objection whether it was sworn or affirmed before a qualified person as per the laws of the relevant country. Such doubt cannot be sustained after a copy with the certification is tendered.

In other words, there was no defect in the affidavit in its making to reject or cure with amendments but the challenge to the validity created through objections cannot hold water from the moment the certification is tendered. Thus, I hold that there is a valid affidavit even to support the averments in the petition.

Thus, I agree with His Lordship's decision to overrule the preliminary objection.

Judge of the Supreme Court