

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

S.C Spl. L.A 127/2015
C.A. No. 763/99 (F)
D.C. Gampola Case No. 2342/L

In the matter of an application for Special Leave
to Appeal under Article 128(2) of the
Constitution of the Republic of Sri Lanka.

Kuda Banda Dunuwila
55/12, Bawwagama,
Nawalapitiya.

PLAINTIFF

Vs.

Menikrama Mudalige Sriya Malani Piyadasa
No. 1, Kumarapaya, Meepitiya,
Nawalapitiya.

DEFENDANT

AND BETWEEN

Menikrama Mudalige Sriya Malanim Piyadasa
No. 1, Kumarapaya, Meepitiya,
Nawalapitiya.

DEFENDANT-APPELLANT

Vs.

Kuda Banda Dunuwila
55/12, Bawwagama,
Nawalapitiya.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Menikrama Mudalige Sriya Malanim Piiyadasa
No. 1, Kumarapaya, Meepitiya,
Nawalapitiya.

DEFENDANT-APPELLANT-PETITIONER

Vs.

Kuda Banda Dunuwila
55/12, Bawwagama,
Nawalapitiya.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., J
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: J. C. Boange for the Defendant-Appellant-Petitioner

Upendra Walgampaya for the Plaintiff-Respondent-Respondent

ARGUED ON: 14.07.2016

DECIDED ON: 08.08.2016

GOONERATNE J.

This is a Special Leave to Appeal Application to set aside the Judgment of the Court of Appeal dated 10.06.2015 and the Judgment of the learned District Judge dated 17.05.1999. Petition dated 20.07.2015 has been

filed in this court along with an affidavit affirmed on the said date. The seal of the Supreme Court Registry placed on the petition and affidavit bears the same date. When this application was to be supported on 25.04.2016 the learned counsel for Plaintiff-Respondent-Respondent submitted to court that the affidavit required to be filed as per the Supreme Court Rules by the Petitioner had not been filed in compliance with Rule 2 read with Rule 6 of the Supreme Court Rules. Accordingly on that point court permitted parties to file written submissions.

It would be convenient for all if one notes the material submitted to this court by the Defendant-Appellant--Petitioner with his Special Leave to Appeal Application, prior to court being called upon to delve into the preliminary objection. The application consists of:

- (a) Petition dated 20.07.2015 and an affidavit affirmed on the said date.
- (b) Photo copy of plaint filed in the District Court – P1
- (c) Photo copy of the Petition of Appeal filed in the Court of Appeal – P1A
- (d) Photo copy of answer filed in the District Court – P2
- (e) Photo copy of proceedings of the District Court marked – P3 & P3A
(issues)
- (f) Documents marked in the original court P3B & P3C (transfer Dead No. 13221)
- (g) Judgment of the District Court P4
- (h) Judgment of the Court of Appeal P5

Motion dated 09.12.2015 is also filed of record by which the Defendant-Appellant-Petitioner filed the full Judgment of the District Court according to a direction given by this court on 15.09.2015. The relevant rules relied upon by the Plaintiff-Respondent-Respondent reads thus:

Rule 2 of the Supreme Court Rules, 1990:-

“2 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 certified copy, or uncertified photocopy, of the judgment 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; 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, judgement 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.

Rule 6 in its entirety reads as follows:-

“6 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."

The above Rules read together indicate that a petition need to be filed supported with an affidavit and supporting documents. In the instant case as referred to above [(a) to (h)] are produced which more or less contains the entirety of the record of the original court and the Court of Appeal, other than the Journal Entries. Rule 6 adds a further requirement in a situation where an allegation of fact cannot be verified by reference to the Judgment, of the two courts. In such a situation the petitioner shall annex in support of such allegation an affidavit or other document. Such an affidavit could be sworn or affirmed by the Petitioner himself or his registered Attorney-at-Law or his recognised agent, provided any one of them has personal knowledge of the alleged fact.

I would envisage a situation where either the Petitioner could as required by Rule 2 above include averments in his affidavit (submitted with the petition) which cannot be gathered from the record of the case or file an affidavit of his registered Attorney-at-Law or recognised agent etc. along with documents contemplated under Rule 6.

Affidavit means a solemn 'assurance of a fact known to the person who states it and sworn to as his statement before some person in authority such as a Justice of the Peace. Van Zyl. Judicial practice in South Africa 4th Ed.

393. It is confined to facts which the declarant can of his own knowledge and observations testify to. Exception is made in case of an interlocutory affidavit in which statement regarding his belief may be admitted (Section 181 of the C.P.C – 47 NLR 512). Petition cannot be converted to affidavit (Section 182 of the Code). Section 437 to 440 of the Civil Procedure Code also deals with affidavit.

It is apparent that the Rules require the averments in the petition to be supported by an affidavit. Evidence and proof before court is provided by an affidavit. Once an affidavit is sworn or affirmed it is deemed to have an evidentiary value, but it is not so where the petition and other documents are concerned. The affidavit filed before this court consists of a bare statement which affirm to the veracity of paragraph 1 to 9 of the petition. It is definitely inadequate for the purpose and in terms of the Supreme Court Rules. These Rules no doubt have to be strictly interpreted. The affidavit filed of record does not support the averments in the petition but merely suggests that the truth of the matters in paragraphs 1 to 9 are affirmed. It is certainly insufficient in an application seeking leave of the Supreme Court.

The affidavit filed in this application does not support the view that it is her own knowledge and statement/observation but mainly indicate that the truth of the averments in the petition are admitted. As such requirements as per the Supreme Court Rules are not adhered to by the Defendant-Appellant-

Petitioner. This court cannot at the earliest stage decide on questions of law even a pure question of law unless pleadings are in a proper acceptable order. It is also impossible and difficult for the authority administering the oath as part of the affidavit to read over and explain the statement of fact in the affidavit as it contains no statement of facts. Therefore I hold that there is no affidavit filed of record as required by the Supreme Court Rules and law. I uphold the preliminary objections raised by the Plaintiff-Respondent-Respondent and reject and dismiss the Defendant-Appellant-Petitioner's Special Leave to Appeal application with costs.

Application dismissed with costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT