

**MARK RAJANDRAN VS. FIRST CAPITAL LTD., FORMERLY,
COMMERCIAL CAPITAL LTD.,**

SUPREME COURT

DR. SHIRANI BANDARANAYAKE, ACTING C. J.

RATNAYAKE, J., AND

EKANAYAKE, J.

S. C. H. C. (C. A.) LA NO. 289/2009

WP/HCCA/COL. NO. 67/2007 (F)

D. C. COLOMBO NO. 17543/MR

JUNE 7TH, 2010

Oaths and Affirmations Ordinance – Section 4 – provisions as to how an oath should be given – Section 5 – only exemption to Section 4 – Supreme Court Rules – Rule 2 – every application for special leave to appeal should be made by way of petition & affidavit – Rule 6 – an application contains allegation of facts which cannot be verified by reference to the judgment or order of the Lower Court in respect of which, leave is sought, should the petitioner annex in support of such allegation an affidavit?

The petitioner preferred an application for leave to appeal to the Supreme Court from a judgment of the Provincial High Court of the Western Province (Sitting in Colombo).

When the matter was taken up for support the respondent took up a preliminary objection to the affidavit filed by the petitioner in terms of the provisions of the Oaths and Affirmations Ordinance.

The respondent contended that in the affidavit, the petitioner has averred that he is a Christian and had made oath. Having averred that he being a Christian in the affidavit, in the jurat, the petitioner had affirmed to the averments before the Justice of Peace.

The respondent took up the objection on the basis that the affidavit filed by the petitioner is not in terms with the provisions contained in the Oaths and Affirmation Ordinance, and therefore there is no valid affidavit and accordingly, the petitioner has not complied with the Supreme Court Rules of 1990.

Held:

- (1) Rule 2 read with Rule 6 of the Supreme Court Rules, 1990, clearly indicate that an application for leave should be made by way of a petition with affidavit and documents in support of that application.
- (2) The Oaths and Affirmations Ordinance, deals with the law relating to Oaths and Affirmations in judicial proceedings and for other purposes. Whilst Section 4 deals with the provisions, where oaths to be made by persons, the exemptions to the said, Section is referred to in Section 5 of the Oaths and Affirmations Ordinance.
- (3) If a person does not come within the category of religions referred to in Section 5 of the Oaths and affirmations Ordinance, the exemption would not be applicable to him to make an affirmation instead of the oath he should have made.

Per Dr. Bandaranayake, Acting C. J., -

“Rule 2 read with Rule 6 of the Supreme Court Rules, 1990 clearly indicate that an application for leave should be made by way of a petition with affidavits and documents in support of that application. In such circumstances, it is the affidavit that breathes life into the petition. It would therefore be futile to attempt to support an application, where leave is sought against the judgment without a valid affidavit.”

Cases referred to:

- (1) *Ratwatte v. Sumathipala* (2001) 2 SLR 55
- (2) *Kumarasiri and another v. Rajapaksha* (2006) 1 SLR 395
- (3) *Nanayakkara v. Kyoto Kyuma S. C. (Spl.)* L. A. No. 115/2008 S. C. S.CM 1.10.2009

AN APPLICATION for leave to appeal from a judgment of the Provincial High Court of the Western Province (sitting in Colombo), on a preliminary objection taken.

K. Kanag Iswaran, P. C. with M. U. M. Ali Sc: bry an L. Jayakumar for the Plaintiff – Appellant – Petitioner.

Romesh de Silva P. C. with Harsha Amarasekera for the Respondent – Respondent.

June 07th, 2010

DR. SHIRANI BANDARANAYAKE, ACTING, C. J.

This is an application for leave to appeal from the judgment of the Provincial High Court of the Western Province (sitting in Colombo) (hereinafter referred to as the High Court) dated 01.10.2009. By that judgment the High Court had affirmed the judgment of the District Court dated 02.02.2007 and dismissed the appeal instituted by the plaintiff-appellant-petitioner (hereinafter referred to as the petitioner).

The petitioner preferred an application for leave to appeal before this Court.

When this application was taken up for support, learned President's Counsel for the defendant-respondent-respondent (hereinafter referred to as the respondent) took up a preliminary objection on the basis that the affidavit dated 05.11.2009 filed by the petitioner, is not in terms with the provisions contained in the Oaths and Affirmations Ordinance and therefore the petitioner has not complied with the Supreme Court Rules of 1990.

Learned President's Counsel for the respondent contended that in the affidavit, the petitioner has clearly averred that he is a Christian and had made oath. However, having averred that he being a Christian in the affidavit and making oath, in the jurat, the petitioner had affirmed to the averments before the Justice of Peace.

In support of his contention, learned President's Counsel for the respondent referred to the decisions in *Ratwatte v. Sumathipala*⁽¹⁾ and *Kumarasiri and another v. Rajapaksha*⁽²⁾. Learned President's Counsel for the respondent also drew our attention to section 4 of the Oaths and Affirmations Ordinance

which sets out the provisions as to how oaths should be given and submitted that the only exemption to the provisions contained in section 4 of the Oaths and Affirmations Ordinance, is given in section 5 of the said Ordinance.

The Oaths and Affirmations Ordinance, deals with the law relating to Oaths and Affirmations in judicial proceedings and for other purposes. Whilst section 4 deals with the provisions, where oaths to be made by persons, the exemptions to the said section is referred to in section 5 of the Oaths and Affirmations Ordinance. The said section 5 reads as follows:

“Where the person required by law to make an oath-

- (a) Is a Buddhist, Hindu or Muslim, or of some other religion according to which oaths are not of binding force; or*
- (b) Has a conscientious objection to make an oath, he may, instead of making an oath, make an affirmation.”*

It is therefore clearly evident that since the petitioner does not come within the category of religions referred to in section 5 of the Oaths and Affirmations Ordinance, the exemption would not be applicable to him to make an affirmation instead of the oath he should have made.

In *Ratwatte v. Sumathipala (supra)* the Court of Appeal had to consider whether the affidavit was defective in a matter, where the deponent had stated that he is a Christian and had made oath whilst the jurat had stated that the deponent had affirmed. In that the Court of Appeal had held that the affidavit in question was defective. In *Kumarasiri v. Rajapaksha (supra)*, the Court of Appeal had considered not only the validity of the affidavit, but also the necessity

in having an affidavit along with the petition to consider an application for revision. In considering the question of filing a valid affidavit, Somawansa, J. had stated that it is the flesh and blood of the affidavit, which gives life to the skeleton in the petition.

Considering sections 4 and 5 of the Oaths and Affirmations Ordinance, stated above, it is quite clear that the affidavit filed by the petitioner is not in terms with the aforesaid provisions and therefore cannot be accepted as a valid affidavit.

Learned President's Counsel for the petitioner, contended that although reference has been made in Rule 6 of the Supreme Court Rules 1990 of filing an affidavit, the said filing of an affidavit is not a mandatory requirement and therefore there is no necessity to file an affidavit along with the petition, which has clearly set out the facts relevant to the application. It was further contended that the requirement of an affidavit arises only when there is a necessity to ascertain facts which cannot be verified and therefore the application could be considered only on the petition even though the affidavit filed is defective.

Rule 2 of the Supreme Court Rules, 1990 states that every application for special leave to appeal to the Supreme Court should be made by way of a petition together with affidavits and documents in support thereof as prescribed by Rule 6.

A careful perusal of Rule 2 of the Supreme Court Rules, 1990 as stated in *Nanayakkara v. Kyoko Kyuma*⁽³⁾ clearly indicates that affidavit is filed in support of the application as prescribed by Rule 6 of the Supreme Courts Rules, 1990. The emphasis is given to the petition and the affidavit and the

other documents become secondary to the petition, as they are filed for the purpose of supporting the application.

Rule 6 of the Supreme Court Rules, 1990, clearly refers to the instances, where an affidavit and other documents have to be filed by the petitioner along with his application. Accordingly when an application contains allegations of fact, which cannot be verified by reference to the judgment or order of the lower Court, in respect of which, leave is sought, the petitioner **shall** annex in support of such allegation an affidavit or other relevant documents.

Rule 2 read with Rule 6 of the Supreme Court Rules, 1990 clearly indicate that an application for leave should be made by way of a petition with affidavits and documents in support of that application. In such circumstances, it is the affidavit that breathes life in to the petition. It would therefore be futile to attempt to support an application, where leave is sought against the judgment of the High Court without a valid affidavit.

For the aforementioned reasons, the preliminary objection raised by learned President's Counsel for the respondent is upheld. This application is accordingly dismissed.

There will be no costs.

RATNAYAKE, J. – I agree.

EKANAYAKE, J. – I agree.

Preliminary objection upheld.

Application dismissed.