
**KUMARASIRI AND ANOTHER
VS.
RAJAPAKSE**

COURT OF APPEAL,
SOMAWANSA J (P/CA)
CA 132/04 (REV)
D. C. ANURADHAPURA 17801/M
JULY 8, 2005

Civil Procedure Code, section 754 (2) - Oaths and Affirmation Ordinance, section 12 (3) - Affidavit - Court of Appeal (Appellate Procedure) Rules 1990 - Rule 3 (1) (a) - Leave to appeal not filed - Revision - Exceptional circumstances.

The defendant petitioners sought to revise the order made by the District Court of Anuradhapura, overruling the objections taken to the acceptance of the amended plaint.

The plaintiff respondent raised two preliminary objections that (i) the affidavit filed is defective and (ii) that, the petitioner ought to have come by way of leave to appeal and not by way of revision.

HELD:

- (i) On an examination of the affidavit, it is clear that the jurat therein is not in conformity with the law. It is rather confusing and incorrectly worded; it does not state where the affidavit was affirmed.

Per Somawansa J., (P/CA)

"It is to be seen that, it is the flesh and blood of the affidavit which gives life to the skeleton in the petition."

HELD FURTHER:

- (ii) The defendant Petitioners have also failed to take steps in terms of the statutory right given to them before moving in revision, though reasons for the delay in filing the revision application are given, no

explanation as to why they failed to come by way of leave to appeal, which is the statutory right available to them, is given.

Per Somawansa, J (P/CA)

"Order accepting the amended plaint is a matter that can be canvassed in the final appeal and no prejudice is caused, if this court decides not to go into the merits of the application.

APPLICATION in revision from an order of the District Court of Anuradhapura.

Cases referred to :

1. *Selliah Marimuttu Vs. Sivapakkian* - (1986) 1 CALR 264
2. *Halwan and others Vs. Kaleelul Rahuman* - (2000)3 Sri LR 50 at 51

Cur. adv. vult

K. Patabendige for defendant petitioners.

C. Paranagama for plaintiff respondent.

July 08, 2005

ANDREW SOMAWANSA, J. (P/CA)

This is an application for revision seeking to set aside the order of the learned District Judge of Anuradhapura dated 12. 11. 2003 overruling the objection taken by the defendants - petitioners to the amended plaint and accepting the same.

Both parties have agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The plaintiff respondent in his objections have taken up two preliminary objections to the maintainability of this application in that-

- (a) The affidavit filed by the defendants petitioners is defective.
- (b) The defendants - petitioners have no right to come to this Court by way of a revision application against the order of the learned District Judge as the stipulated procedure in the Civil Procedure Code is by

way of leave to appeal and no special circumstance pleaded in the petition.

As for the first objection that the affidavit filed by the defendants petitioners is defective, I would say there is force in this argument. For on an examination of the affidavit tendered in support of the petition it is clear that the jurat therein is not in conformity with the law. The jurat reads as follows:

“Having read and explained to us and having understood the *impotence* if the foregoing facts and affirming to the veracity thereof placed our signatures on this 21 st day of January 2004”.

As it can be seen the jurat itself is rather confusing and incorrectly worded. On the other hand, it does not state where the affidavit was affirmed and thus violate the provisions contained in Section 12 (3) of the Oaths and Affirmation Ordinance. The affidavit in question has been affirmed before B. R. K. Patabandige, attorney - at - law and Commissioner for Oaths. It is useful to consider at this point Section 12 (3) of the Oaths and Affirmations Ordinance which reads as follows:

“Every Commissioner before whom any oath or affirmation is administered, or before whom any affidavit is taken under this Ordinance, shall state truly in the jurat or attestation at what place and on what date the same was administered or taken, and shall initial all alterations, arrears, and interlineations appearing on the face thereof and made before the same was so administrated or taken”.

Thus it could be seen that the jurat in question is certainly not in conformity with the aforesaid provisions of the Oaths and Affirmations Ordinance for it does not state at what place it was administered and cannot be accepted as a valid affidavit in law.

Court of Appeal Appellate Procedure Rules provides for the manner in which an application to Court of Appeal should be made. The relevant Court of Appeal (Appellate Procedure) Rules 1990 reads as follows:

“Rule 3 (1) (a) “Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or

141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, *ex-mero motu* or at the instance of any party, dismiss such application.

(b) Every application by way of revision or restitution in integrum under Article 138 of the Constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of First Instance, tribunal or other institution to which such application relates.”

It is to be seen that it is the flesh and blood of the affidavit which gives life to the skeleton in the petition. In the absence of a valid affidavit supporting the averments in the petition, the petition becomes a nullity. In the instant revision application the petition becomes a nullity for the affidavit filed in support of the revision application is a defective affidavit which does not bear any evidentiary value.

It must be stated that there is a line of thinking that the defect in the affidavit could be cured. However in the instant application objection had been taken in the objections filed by the plaintiff - respondent to the maintainability of this application in view of the defective affidavit. The same objection has been reiterated in the written submission of the plaintiff - respondent. However up to date the defendants petitioners have not taken any steps to cure the defect and the defendants - petitioners must suffer the consequences.

Considering the aforesaid second objection it is clear that the impugned order dated 12. 11. 2003 which is being canvassed in the instant revision application is only an incidental order falling within the ambit of Section 754 (2) of the Civil Procedure Code.

Section 754 (2) of the Civil Procedure Code reads as follows:

“Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding, or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained”.

In the circumstances as pointed out by the counsel for the plaintiff - respondent the defendants - petitioners also have failed to take steps in terms of the statutory right given to them before moving in revision. It was incumbent on the defendants petitioner to follow the procedure laid down in Section 754(2) before moving the matter in revision application, but does not give any explanation as to why they failed to come by way of leave to appeal which is the statutory right available to them. An application for revision is available where the failure to exercise the right of appeal is explained to the satisfaction of the Court.

Selliah Marimuttur Vs. Sivapakkiyam⁽¹⁾

In the case of *Halwan and Others Vs Kaleelul Rahuman*⁽²⁾ at 51 S. N. Silva, J as he then was observed:

“A party dissatisfied with a judgment or order, where a right of appeal is given either directly or with leave obtained has to invoke and pursue the appellate jurisdiction. When such a party seeks judicial review by way of an application for a writ, he has to establish an excuse for his failure to invoke and pursue the appellate jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavits and necessary documents. The same principle is applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal. The reason is that such appellate procedure as established by law being the ordinary procedure should be availed of before recourse is had to the extraordinary jurisdiction by way of judicial review as provided in Article 140 of the Constitution”.

Even to file this revision application, it appears that the defendants - petitioners have taken over two months from the date of the order. As per paragraph 16 of the petition the delay had been due to the delay in obtaining certified copies and consulting lawyers in Colombo.

In any event, the question of correctness of the learned District Judge's order in accepting the amended plaint is a matter that can be canvassed in the final appeal and no prejudice would be caused to the defendants - petitioners if this Court decides not to go into the merits of the application and I must say I do not intend to do so.

For the foregoing reasons the revision application will stand dismissed. In all the circumstances of the case, I make no order as to costs.

Application dismissed.