

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

1. Tirathai Public Co.Ltd.,
516/1, Moo 4 Bangpoo Industrial
Estate, Praksa Muang
Samutprakan 10280
Thailand
2. H.R.Holdings (Pvt) Ltd.,
476/10, Galle Road
Colombo 03

Petitioners

S.C.[FR] No.108/2016

Vs.

1. Ceylon Electricity Board
No.50, Sir Chittampalam Gardiner
Mawatha, Colombo 2,
and 17 others

Respondents

BEFORE : **K. SRIPAVAN, C.J.**
K.T.CHITRASIRI, J.

COUNSEL : Romesh de Silva, P.C. with Palitha Kumarasinghe
P.C, Pubudini Wickramaratne and Viraj
Bandaranayake for the Petitioners

Viveka Siriwardane, DSG for the 1st to 13th and 18th
Respondents

ARGUED ON : 07.07.2016

WRITTEN : 14.07.2016 by the Petitioners
SUBMISSIONS ON : 14.07.2016 by the 1st to 13th and 18th Respondents
DECIDED ON : **08.08.2016**

CHITRASIRI, J.

When this matter was taken up for the consideration of granting leave to proceed with the application, learned Deputy Solicitor General submitted that the two affidavits affirmed to by Brandigampolage Hemantha Prasanna Perera and Adithep Sajjaviriyapong which were annexed to the petition dated 24.03.2016 contain plethora false material and also contradictions. In support of her submissions, she referred to the matters contained in paragraphs 1& 4 to 14, 39 to 43 of the two affidavits dated 24.03.2016 affirmed to by the aforesaid Brandigampolage Hemantha Prasanna Perera and Adithep Sajjaviriyapong. Accordingly, she argued that the petitioners cannot have and maintain this application since the petitioners have failed to file valid affidavits as required by Article 126 (2) of the Constitution which is to be read with the Rule 44 (1) (c) found in Part 4 of the Supreme Court Rules 1990.

Basically, the objection of the learned Deputy Solicitor General is that there is no valid affidavit filed by the petitioners for them to proceed with this application. The objection so raised poses two questions to be looked at. First issue is whether the two affidavits filed in this case would amount to non existence of an affidavit due to the inclusion therein of false material and the

second being the issue as to the requirement of an affidavit when invoking jurisdiction under Article 126 (2) of the Constitution.

I will now advert to the first issue namely the validity of the affidavit due to the inclusion of false material therein. Manner in which an oath or an affirmation is to be administered in an affidavit is described in the Oaths Ordinance No.9 of 1895 as amended. Section 12 of that Ordinance stipulates thus:

“A Commissioner for Oaths appointed under this Ordinance may administer any oaths or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law so to do ...”

The aforesaid Ordinance also provides for punishment on the persons who willfully or dishonestly swears or affirms falsehood in any oath or affirmation administered or taken for the purpose of any legal proceedings. However, it is to be noted that nothing is mentioned in that Ordinance, as to an affidavit becoming invalid when false material is included in such an affidavit. If the oath or affirmation had been properly administered or taken before a Justice of the Peace then it will become a valid affidavit made under and in terms of the Oaths Ordinance. Basically, criteria in determining the question of the existence of an affidavit depend on the manner in which the oath or affirmation was administered.

In this instance, there is no allegation as to the manner in which the affirmation of the deponents in the two affidavits was administered. *Jurat* in those affidavits has not been challenged either. Steps referred to in the Oaths Ordinance that is to be followed at the time, the affirmation of the deponents was administered by the Justice of Peace had been complied with. Therefore, it is clear that the affidavits filed in these proceedings cannot be considered as invalid. Accordingly, the two affidavits filed in this case are to be considered as valid affidavits though allegations had been made stating that it contains false material.

Inclusion of false material in the two affidavits is a matter that should be looked at by Court when considering the facts of the case. Section 13 of the Oaths Ordinance also provides as to the manner in which it is to be dealt with when false material is brought into an affidavit. Accordingly, for the reasons set out above, I am not inclined to accept the position that there is no valid affidavit filed with the petition in this instance.

The next question is whether it is mandatory to file an affidavit when invoking jurisdiction of this Court under Article 126 (2) of the Constitution read with Rule 44 (1) (c) of the Supreme Court Rules 1990. At this stage it is pertinent to refer to Article 17 of the Constitution too, since it ensures the right to make an application to the Supreme Court for relief when the fundamental rights enshrined in Chapter III of the Constitution have been infringed or to be infringed imminently by executive or administrative action.

The aforesaid Articles referred to in the Constitution provide for this Court to exercise sole and exclusive & *sui generis* jurisdiction. **[Jayanetti Vs. Land Reform Commission [1984 (2) SLR 179]** Therefore this Court is bound to entertain such applications filed under Article 126(2) of the Constitution and of course, the Court is also necessarily guided by the Rules of Procedure stipulated in the relevant rules if available when proceeding with such an application. Hence, it is necessary to refer to the procedure referred to in Article 126(2) of the Constitution and in Rule 44(1) (c) of the Supreme Court Rules 1990.

Article 126(2) of the Constitution reads thus:

*“Where any person alleges that any fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, **in accordance with such rules of court as may be in force**, apply to the Supreme Court by way of a petition in writing addressed to such Court ...”* (emphasis added)

Rule 44(1) (c) of the Supreme Court Rules 1990 reads as follows:

*“Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126(2) of the Constitution for relief or redress in respect of an infringement or an imminent infringement of any fundamental right or language right, by executive or administrative action, he shall - (c) tender in support of such petition such affidavits and documents **as are available to him.**”* (emphasis added)

By looking at the Rule 44(1) (c) above, it is seen that the affidavits and/or documents are to be produced only when those are available to the petitioner in such an application. Obviously, it does not mean that it is essential to file those documents with the application under Article 126(2). However, needless to say that there should be adequate material before Court to consider an application made to it. That material may be in the form of an affidavit or even by way of other documents which could be relied upon. Therefore, even the literal meaning of the Rule 44(1) does not indicate that it is mandatory to file affidavit evidence when invoking jurisdiction of this Court under Article 126(1) of the Constitution.

Be that as it may, requirement of affidavit evidence in applications under Article 126(1) of the Constitution had already been interpreted by this Court in numerous occasions. In the case of **Upaliratne and others vs. Tikiribanda and others, [1995 (1) SLR 165 at 172] Dr.Amerasinghe, J** has clearly stated that there is no obligation to tender an affidavit from any one or more of the petitioners in cases filed under Article 126(2) of the Constitution. He has clearly said that what is required is evidence of the facts submitted through affidavits and/or through other documents. His findings in that case are as follows:

“Mr.Jayasinghe raised another objection in limine. He submitted that the petitioners cannot have and maintain this application and/or that the application is not properly constituted due to non-compliance with Rule 44(1) in that all these petitioners have not given affidavits. The obligation of a petitioner is to tender in support of the petition” such affidavits and documents as are available to him. (Rule 44(1) (c).

There is no obligation to tender an affidavit from any one or more of the petitioners. What is required is evidence of the facts submitted through affidavits and other documents. I therefore overrule the objections.”

In Hewawasam Sarukkalige Rathnasiri Fernando v. Police Sergeant Dayaratne, [SCFR 514/2010 S.C.Minutes of 15.12.2014] Priyasath Dep.P.C.J has held thus:

“The next question that arises is whether a fundamental rights application could be dismissed due to want of an affidavit or defective affidavit in civil cases regulated by the Civil Procedure Code whenever there is a requirement to file a petition, the petition should be supported by an affidavit or accompanied by an affidavit. In Article 126(2) of the Constitution a person who invokes the jurisdiction of the Court can do so by way of a petition. The rules require the parties to tender in support of the petition affidavits and documents available to him. There is no requirement that a petition should be supported by an affidavit. The question that arises is whether an affidavit is a mandatory requirement or not. According to the rules under certain circumstances a person could invoke the jurisdiction of the Court by submitting a statement or a complaint. Rule 44(7) states by way of writing a person could bring to the notice of the court an alleged infringement or imminent infringement of fundamental rights by executive or administrative action the court could treat the statement/complaint as a petition and initiate action.

In fundamental rights applications, at the time of filing a petition it need not be supported by an affidavit. Rule 44(1) states ‘tender in support of

such petition such affidavits and documents available to him'. Therefore rules require the petitioner or the complainant to provide affidavits and documents available to him. However, for the Court to act on facts stated in the complaint or petition in the absence of other materials there should be evidence..."

By looking at the two decisions referred to above, it is clear that the issue as to the requirement to file an affidavit with the petition in fundamental rights applications filed under Article 126(2) have been clearly settled. Hence, it is not necessary for me to elaborate on the issue as it had been adequately dealt with by this Court.

In the circumstances, it is my considered opinion that it is not mandatory to file an affidavit along with a petition filed in terms of Article 126(2) of the Constitution. However, as mentioned in Rule 44(1) (c) of the Supreme Court Rules 1990 the petitioners in such applications may tender affidavits and documents that are available to them in support of their application. Unless it is supported by those materials, the Court will not be in a position to consider the grievance or the alleged infringement advanced by the petitioner but certainly not on false materials as alleged in this instance.

For the aforesaid reasons, the objection raised by the Deputy Solicitor General is overruled.

Petitioners are to support this application for leave of this Court on a future date fixed by Court.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, CJ.

I agree.

CHIEF JUSTICE