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

In the matter of an Application made under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka for Special Leave to Appeal against Judgment dated 19th June of 2015 of the Honourable Court of Appeal.

SC SPL LA No: 133/2015
Application No. CA(Writ) 603/2008

1. **A.A. Gunawardane**
   B 1/1, Jathika Mahal Niwasa
   Pamankada Road,
   Kirulapone,
   Colombo 06

2. **M.P. Perera**
   B 2/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

3. **R.E.D Amarasena**
   B 1/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

4. **P.H. Wimalasiri**
   B 3/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

5. **N.A. Illukpitiya**
   B 2/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

Complainants

Vs.

S.J. Sirisena
BG 1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,

Colombo 06

Respondent

AND THEN

In the matter of an application for a mandate or a writ in the nature of a writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.J. Sirisena
BG 1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

Respondent-Petitioner

Vs.

1. **A.A. Gunawardane**
B 1/1, Jathika Mahal Niwasa
Pamankada Road,
Kirulapone,
Colombo 06

1st Complainant-Respondent

2. **Mrs. Dombagahawattage Nandwathie Perera**
B 2/2 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

2nd Respondent

3. **R.E.D Amarasena**
B 1/2 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

3rd Complainant-Respondent

4. **P.H. Wimalasiri**
B 3/1 Jathika Mahal Niwasa,
Pamankada Road,

Kirulapone,
Colombo 06

4th Complainant-Respondent

5. **N.A. Illukpitiya**
   B 2/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

5th Complainant-Respondent

6. **Condominium Management Authority**
   First Floor, National Housing Department Building,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02

6th Respondent

AND NOW BETWEEN

S.J. Sirisena
BG 1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

Respondent – Petitioner-Petitioner

Vs.

1. **A.A. Gunawardane**
   B 1/1, Jathika Mahal Niwasa
   Pamankada Road,
   Kirulapone,
   Colombo 06

1st Complainant-Respondent-Respondent

2. **Mrs. Dombagahawattage Nandwathie Perera**
   B 2/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

2nd Respondent-Respondent

3. **R.E.D Amarasena**
B 1/2 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

3rd Complainant-Respondent-Respondent

4. **P.H. Wimalasiri**
B 3/1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

4th Complainant-Respondent-Respondent

5. **N.A. Illukpitiya**
B 2/1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

5th Complainant-Respondent-Respondent

6. **Condominium Management Authority**
First Floor, National Housing Department Building,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02

6th Respondent – Respondent

BEFORE: Priyasath Dep PC, CJ
Priyantha Jayawardena PC, J
Upaly Abeyrathne, J

COUNSEL: Ikram Mohamed, PC with Roshan Hettiarachchi and Nilanga Udalagama for the Respondent-Petitioner-Petitioner

Rajeev Amarasuriya for the 1st and 3rd Complainants-Respondents-Respondents

ARGUED ON: 29th May, 2017

DECIDED ON: 2nd August, 2017

Priyantha Jayawardena PC, J

The Respondent-Petitioner-Petitioner (hereinafter referred to as 'the Petitioner') filed an Application in the Court of Appeal seeking a Writ of Certiorari to quash an Order made by the Condominium Management Authority stating inter-alia that the actions of the Condominium Authority were ultra vires and that the said Order was arbitrary, unjust and in violation of the principles of natural justice.

The Court of Appeal delivered its Judgment, dismissing the application of the Petitioner. The Petitioner being aggrieved by the Judgment preferred an application for Leave to Appeal to this Court. When the matter was taken up for support, the following preliminary objections were raised by the 1st and 3rd Complainant-Respondent-Respondents (hereinafter referred to as 'the Respondents') and moved for the dismissal of the Application in limine:

(i) the Petitioner had not complied with Rules 8(3) and 40 of the Supreme Court Rules of 1990 (hereinafter referred to as the 'Supreme Court Rules'); and

(ii) the jurat of the supporting affidavit was defective thus there was no proper Leave to Appeal Application before Court.

Non-compliance with Rules 8(3) and 40 of the Supreme Court Rules

Raising the first preliminary objection, the Respondents submitted that the Court of Appeal delivered its judgment on 19th June, 2015. The last date to file the Special Leave to Appeal Application was on 31st July, 2015. On 30th July 2015, the Petitioner filed his Petition, affidavit and annexed documents but failed to file the required number of notices as mandated by Rules 8(3) and 40 of the Supreme Court Rules. Therefore, the Leave to Appeal Application should be dismissed in limine due to non-compliance with the said Rules.

In support of their argument, the Respondents cited the case of *Hon. A.H.M Fowzie and 2 Others v Vehicles Lanka (Private) Limited* (2008) BLR 127; where the Petitioners had tendered the notices to the Registry of the Supreme Court seven working days after filing the Leave to Appeal Application. The Court held that non-compliance with Rule 8(3) was fatal and did not amount to a technical objection.

The Respondents further submitted that in *Kumarapatti Pathrannehelage Namal Rohitha Peiris and One Other v Kumarapatti Pathiranalage Freeda Doreen Peiris (after marriage Gunathilaka*) (2015) BLR 101; the required notices were tendered 24 days after the filing of the Petition and the affidavit. As the appeal period had expired by the time the required notices were filed, the Court held that the Defendant had failed to invoke the jurisdiction of the Court during the appealable period.

In response to the said objections, the Petitioner submitted that the Petition was filed on 30th July, 2015 and the notices were filed on 7th August, 2015. As the 31st of July was the Esala Full Moon Poya Day and the 1st and 2nd of August, 2015 fell on a Saturday and Sunday, the delay in filing was minimal.

Further, the 1st and 3rd Respondents filed Proxy, Caveat and motions dated 22nd August, 2015 without raising any objections to the maintainability of the Leave to Appeal Application and the objection regarding non-compliance was only raised on 15th June, 2016. Consequently, it was contended that an inordinate delay did not occur in filing the notices and all Respondents had adequate time and notice to prepare to object to the application by the Petitioner. The Petitioner further submitted that there was substantial compliance with the Supreme Court Rules and in any event, raising the objection on the date of support amounted to acquiescence.

Moreover, the Respondents had not been prejudiced in any way by the failure to file the required number of notices along with the Petition and the smooth functioning of the Court had not been interrupted. It was further contended that the non-compliance was of a mere technical nature and the Courts can exercise discretion to entertain the said Leave to Appeal Application. The Petitioner supported his contention by referring to Abraham CJ in *Velupille v Chairman Urban Council Jaffna* 39 NLR 434 who observed, "This is a Court of Law. Not an academy of law".

It was also submitted that in *Dissanayake Mudiyanselage Senarath Bandara Dissanayaka v Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya* SC (LA) Application No 74/2016 (SC Minutes dated 01/04/2016), the question of whether service of the notice on the Respondent's earlier address amounted to non-compliance with Rule 8 of the Supreme Court Rules. The Court held that such a preliminary objection amounted to a technical objection. The Court followed the reasoning of His Lordship G.P.S. De Silva, CJ's observation in *Colgan and Others v Udeshi and Others* (1996) 2 SLR 220 wherein his Lordship stated, "[the] Court should not be fettered with technical objections."

Was Non-Compliance with Rules 8(3) and 40 of the Supreme Court Rules Fatal to the Leave to Appeal Application?

Article 136 of the Constitution states:

"(1) Subject to the provisions of the Constitution and of any law the Chief Justice with any three judges of the Supreme Court nominated by him, may, from to time, make rules regulating generally the practice and procedure of the Court including –

(a) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non-compliance with such rules;
(b) rules as to the proceedings in the Supreme Court and the Court of Appeal in the exercise of several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such courts and the dismissal of such matters for non-compliance with such rules;
(c) rules as to the granting of bail…"

Rule 8(3) of the Supreme Court Rules states as follows:

> "The Petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and address of the parties…., and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars." [Emphasis added]

Further, Rule 40 of the Supreme Court Rules provides the following:

> "An application for variation or an extension of time in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in Chambers:
>
> (a) tendering notices as required by rules 8(3) and 25(2);
> (b) deposit of brief fees as required by rules 16(5) or 27(5);
> (c) filing written submissions as required by rule 30;
> (d) furnishing the address of a respondent as required by rules 8(5) and 27(3);
> (e) filing counter-affidavits and submissions as required by rule 45;
> (f) furnishing material as required by rule 38."

A careful consideration of these Rules shows that a failure to comply with Rule 8(3) does not automatically debar a litigant from presenting his case in court. Rule 40 has conferred a discretion on the Court to allow a litigant to present his case upon considering the circumstances of individual cases. I am of the opinion that if there is substantial compliance with the Supreme Court Rules, an application shall be entertained by Court.

In this regard, I am also of the opinion that the Supreme Court Rules should be considered as a whole and each Rule should not be considered in isolation. The Supreme Court Rules stipulate the procedure for hearing appeals, other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of appeals if non-compliant with the Rules.

It is clear that the primary purpose of the Rules is to ensure the smooth functioning of the administration of justice. In this context, it is necessary to consider whether non-compliance with the Rules has adversely affected the functioning of justice and also whether any party to a case had been adversely affected by non-compliance with Rules.

I will now consider how the discretion of Court should be exercised in the instant Application. The last date to file the application for Leave to Appeal was on 31st July, 2015 and the Application for Leave had been filed on Thursday, 30th July, 2015 without the required number of notices. However, the notices were filed at the Registry on 7th August, 2015 and thus outside the six week time limit granted to file a Leave Application. Consideration must be given to the length of the delay in this instance. Since the 31st of July was the Esala Full Moon Poya Day

and the 1st and 2nd of August were Saturday and Sunday, the delay in filing the required notices was only 5 working days.

Access to Justice

The Magna Carta has long been considered the foundation stone of civil liberties. Its influence has been far ranging and has even extended to the Universal Declaration of Human Rights. Clause 40 of the Magna Carta, as extracted from the British Library's English translation, states;

> "To no one will we sell, to no one deny or delay right or justice."

Evidently, the principle of access to justice has been recognised since 1215. As litigants are the most important element in the court system, access to justice should not be denied due to mere technicalities. Since the role of the Court is to administer justice, technicalities should not obstruct the Court from fulfilling its role and resolving disputes between litigants.

In the case of *Mackinnon Mackenzie & Co v Grindlays Bank* (1986) 2 SLR 272, Chief Justice Sharvananda held:

> "All rules of court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and subordinate to that purpose."

N S Bindra's Interpretation of Statutes, Ninth Edition, distinguishes between the rules of construction applying to laws relating to substantive rights and laws relating to procedure. It provides:

> "Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. … The reason is obvious: procedure is a means to subserve and not rule the cause of justice."

It is also important to note that the Court is entitled to act *ex mero motu,* in terms of Rule 40, to reject an application for non-compliance with Rules. However, in this instance, the Court had not taken such a course of action.

As the final date granted to file the Petition i.e. the 31st of July, fell on a Poya day the Petitioner had filed on Thursday, 30th July 2015. 1st and 2nd of August had been Saturday and Sunday. The Petitioner had filed the required number of notices on the 5th working day. I am of the opinion that the cases cited by the Respondent in support of their objection have no application to the instant Application.

Following due consideration of all the facts and circumstances of the instant Application and the intervening public holidays between the filing of the Petition and the filing of the required notices, I am of the opinion that there was substantial compliance by the Petitioners with Rule 8(3) of the Supreme Court Rules.

In the interest of justice, I will also consider whether the Respondents have followed the procedure set out in the Supreme Court Rules in raising the said objection.

Have the Respondents Followed Proper Procedure for Raising the Aforementioned Preliminary Objection?

Rule 10(1) of the Supreme Court Rules states as follows:

> "A single Judge of the Supreme Court, sitting in Chambers, may refuse to entertain any application for special leave to appeal on the ground that it discloses no reasonable cause of appeal, or is frivolous or vexatious, or contains scandalous matter, or is preferred merely for the purpose of causing delay, or <u>that such application does not comply with these rules</u>." [Emphasis added]

Rule 10(1) stipulates the consequences of non-compliance with the Supreme Court Rules. I am of the view that the correct procedure for raising an objection of non-compliance of the Supreme Court Rules is to move the Court by filing a motion seeking for the rejection of the application. However, in this instance, the Respondents had failed to invoke the Rule 10(1) prior to raising the preliminary objection. Thus, the Respondents are not entitled to raise the said preliminary objection at a later stage.

For the reasons enumerated above, I overrule the aforementioned preliminary objection.

Validity of the Affidavit

The Respondent submitted that the Judgement of the Court of Appeal had been delivered on 19th June, 2015. The jurat of the affidavit filed along with the Petition on 30th July, 2015 stated that it was signed on 29th April, 2015. Thus, the Petition was not accompanied with a valid affidavit.

As per Rule 6, if an application contains allegations of fact that cannot be verified by reference to the Court of Appeal Judgment, an affidavit is mandatory. The failure to file a valid affidavit means that the application was not properly constituted and the Application should be dismissed in limine.

Responding to the above objection, the Petitioner submitted that the date of the impugned judgment i.e. 19th June, 2015 was correctly identified in the body of the affidavit although the date of affirmation in the jurat had been typed as 29th April, 2015. It was also submitted that the incorrect date in the affidavit was a typographic error and that Section 12(3) of Oaths and Affirmations Ordinance, places the duty on the Justice of the Peace to ensure that the jurat was correct.

It was further submitted that in terms of Rule 6, the present application may still proceed without an affidavit as the Leave to Appeal Application can be supported by reference to the Court of Appeal Judgment annexed to the Petition.

Is the Affidavit Not Valid Under the Law?

Rule 2 of the Supreme Court Rules states:

> "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 judgment or order in respect of which leave to appeal is sought…"

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 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 recognised agent, or by any other person having personal knowledge of such fact. …"

The Petition states, "On this 29th day of July, 2015" whereas the jurat of the accompanying affidavit states:

> "Having read over and explained to the above Affirmant, affirmed to and signed in Colombo on this 29th day of April, 2015".

Paragraph 7 of the affidavit further states:

> "I state that the Honourable Court of Appeal delivered its Judgment on 19th June, 2015 dismissing my application with costs fixed at Rs. 25,000, a Certified copy of which is filed herewith marked 'X9' and pleaded part and parcel of the Petition and Affidavit."

The objection in respect of the error in the jurat shall be considered in light of the relevant provisions of the Oaths and Affirmations Ordinance No. 09 of 1985. Section 9 of the Oaths and Affirmations Ordinance stipulates 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 proceeding 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."

Furthermore, Section 12(3) of the Oaths and Affirmations Ordinance provides 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, erasures and interlineations appearing on the face thereof and made before the same was so administered or taken."

It is clear that Sections 9 and 12(3) of the Oaths and Affirmations Ordinance when read together stipulate how to consider the contents of an affidavit, including the errors and omissions made by a Justice of the Peace.

In the case of *Kanagasabai v Kirupamoorthy* 62 NLR 54 it was held that it is the duty of Judges, Justices of the Peace and Proctors to ensure that affidavits are in compliance with the relevant provisions of the Civil Procedure Code. The Court further held that the duty rests upon the Justice of The Peace before whom an affidavit is sworn to ensure that the jurat is correct.

Further, in *M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Fredie Perera* (2017) 1 Hulftsdorp Law Journal issued by the Colombo Law Society 243, the facts involved a mistake in the jurat where a Christian had affirmed the contents of the affidavit. The Court observed the following:

> "What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation as an affidavit is considered as evidence in law. Therefore, it is necessary to show that the person who swears or affirms the facts stated in the affidavit did so before a competent authority or a person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of the jurat."

I am of the opinion that a jurat is an integral part of the affidavit and it cannot be considered in isolation. An affidavit should be considered in its totality. The Petitioner's submission that the date referred to in the jurat is a typographical error is evidenced by the correct reference to the date of the judgment in the body of the affidavit and the date of the Petition filed in Court and its averments. It is quite evident from a comparison of the date of the Petition and the jurat. The Petition is dated 25th of July, 2015 and the jurat states 25th of April, 2015.

Considering the totality of the pleadings filed in Court, I am of the opinion that the error pertaining to the month in the jurat is a typographical error. Therefore, although the date on which an affidavit was signed is an integral part of the affidavit, a mere typographical error should not render an affidavit invalid.

Upon consideration of the totality of the pleadings filed in Court, I am of the opinion that there is a valid affidavit in terms of the Oaths and Affirmations Ordinance.

For the aforesaid reasons, I overrule the Respondents' objections.

I order no costs.

Judge of the Supreme Court

Priyasath Dep PC, CJ — Chief Justice of the Supreme Court

I agree

Upaly Abeyrathne, J — Judge of the Supreme Court

I agree