

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application under Article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka for mandates in the nature of Writs of Quo Warranto, Certiorari and Mandamus.

Shasheendra Kumara Rajapakshe,

No. 219, Pottuvil Road,

Monaragala.

Petitioner

CA /Writ/ 61/ 2015

Vs,

- 1. M.G. Jayasinghe,
Governor of the Uva Province,
Office of the Governor- Uva Province,
King's Street,
Badulla.**
- 2. C. Nanda Mathew,
Former Governor of the Uva Province,
C/O: Office of the Governor- Uva
Province,
King's Street,
Badulla.**
- 3. Anura Ravindra Vithanagamage,
Member,
Uva Provincial Council.**

4. **Arthur Chamara Sampath Disanayaka**
Don,
Member,
Uva Provincial Council.

5. **A.S. Thodaman Muttuvinayagam,**
Member,
Uva Provincial Council.

6. **Denipitiya Sudarshana Wasantha**
Kumara,
Member,
Uva Provincial Council.

7. **A.M. Buddadasa,**
Member,
Uva Provincial Council.

8. **W. Suresh,**
Member,
Uva Provincial Council.

9. **Hema Rathnayaka,**
Member,
Uva Provincial Council.

10. **M. Patabendige Leelasena,**
Member,
Uva Provincial Council.

11. **A. Ganeshamurthi,**
Member,
Uva Provincial Council.

12. **R.M . Kumarasiri Rathnayake,
Member,
Uva Provincial Council.**

13. **W. Udara Soysa,
Member,
Uva Provincial Council.**

14. **B.S.Sumeda de. Silva,
Member,
Uva Provincial Council.**

15. **A.M. Kithsiri Senarath Bandara,
Member,
Uva Provincial Council.**

16. **G.R. Wimaladasa,
Member,
Uva Provincial Council**

17. **R.M. Harindra Dharmadasa Bandara,
Member,
Uva Provincial Council.**

18. **R.M. Padma Udayasantha,
Member,
Uva Provincial Council.**

19. **A. Sivalingam,
Member,
Uva Provincial Council.**

20. **D.B.W. Mudiyansele,
Member,
Uva Provincial Council.**

21. **Harin Fernando,**
Member,
Uva Provincial Council.

22. **D. Rudradeepan,**
Member,
Uva Provincial Council.

23. **D. S. Jayantha Kannangara,**
Member,
Uva Provincial Council.

24. **U. D. Samaraweera,**
Member,
Uva Provincial Council.

25. **Ravindra Samaraweera,**
Member,
Uva Provincial Council.

26. **N.K. Senarath Jayasuriya,**
Member,
Uva Provincial Council.

27. **H.M. Upali Senathne,**
Member,
Uva Provincial Council.

28. **R.M.Rathnayake,**
Member,
Uva Provincial Council.

29. **J.M.Ananda Kumarasiri,**
Member,
Uva Provincial Council.

30. **H.W.M. Darmasena,**

**Member,
Uva Provincial Council.**

**31. T.A. Chaminda Janaka,
Member,
Uva Provincial Council.**

**32. R.M. Jayasighe Bandara,
Member,
Uva Provincial Council.**

**33. A.K. Weeraratne Jayasuriya
Patabendige,
Member,
Uva Provincial Council.**

**34. Sampath Vidyratne,
Member'
Uva Provincial Council.**

**35. R. M. JAYawardena,
Member,
Uva Provincial Council.**

**2nd to 35th Respondent all at:
Uva Provincial Council
Raja Veediya
Badulla.**

**36. United People's Freedom Alliance,
301, T.B. Jayah Mawatha,
Colombo 10.**

**37. Susil Premajyantha,
General Secretary,
United People's Freedom Alliance,
301, T.B. Jayah Mawatha,
Colombo 10.**

38. **United National Party,
Sirikotha,
Sri Jayawardanapura Kotte.**
39. **Kabir Hashim,
General Secretary,
United National Party,
Sirikotha,
Sri Jayawardanapura Kotte.**
40. **People's Liberation Front,
464/20, Pannipitiya Rd,
Pelawatta,
Battaramulla.**
41. **Tilvin Silva,
General Secretary,
People's Liberation Front,
464/20, Pannipitiya Rd,
Battaramulla.**

Respondents

Before : **Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel : **Manohara de. Silva PC with Avindra
Wijesundara for the Petitioner,
Indika Deumini de. Silva DSG with Avanthi
Perera for the 1st, 2nd, Respondents,**

Chandimal Mendis with V. Vithanage for the
3rd and 8th Respondents,

Riad Amin for 7th and 17th Respondents,

Ronald Perera PC with Chandimal Mendis,
Nalin Amarajeewa , Suren Fernando Akila
Amunugama for 21st ,31st and 39th
Respondents,

Suren Fernando for 25th and 29th
Respondents,

Inquiry on Preliminary Objection: 20.02.2015

Order on Preliminary Objection : 02.03.2015

Vijith K. Malalgoda PC J (P/CA)

Petitioner has filed the present application before this court praying that court be pleased to,

- a. Grant and issue a mandate in the nature of a writ of Quo Warranto declaring that the 21st Respondent is not entitled to be appointed to and/ or hold the office of Chief Minister of the Uva Province,
- b. Grant and issue a mandate in the nature of a writ of Certiorari to quash the decision to appoint the 21st Respondent as the Chief Minister of the Uva Province an evinced by letter dated 16. 01. 2015 marked P 10 and the said appointment of the 21st Respondent to the office of Chief Minister of the Uva Province,

- c. Grant and issue a mandate in the nature of a writ of Prohibition, prohibiting the 1st Respondent from appointing any other person other than the Petitioner as the Chief Minister of the Uva Provincial Council,
- d. Grant and issue a mandate in the nature of a writ of Mandamus to direct the 1st Respondent to re- appoint the Petitioner as the Chief Minister of the Uva Province,
- e. Grant and issue an interim order suspending the decision to appoint the 21st Respondent as the Chief Minister of the Uva Province as evinced by letter dated 16.01.2015 marked P 10,
- f. Grant and issue an interim order restraining the 1st Respondent from acting on the advice of the 21st Respondent and/or any other member of the Board of Ministers of the Uva Provincial Council if constituted,

When the matter was taken up for support before us, Respondents appearing through their counsel raised number of Preliminary objections challenging the validity of this application.

The objections raised by the Respondents can be categorized into two, i.e. firstly the respondents have raised number of objections on the failure by the Petitioner to comply with Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990 (here in after referred to as Court of Appeal Rules) and secondly raised several objections on the maintainability of some of the reliefs claimed by way of prerogative writs. At this stage this court is not in favour of looking at the second objection since it can be looked into at the time of when considering the final relief.

Therefore this court will at this stage only consider the preliminary objections raised by the Respondents with regard to the failure by the Petitioner to comply with Rule 3 (1) (a) of the Court of Appeal Rules.

Rule 3(1)(a) of the said Rules reads follow;

“3(1) (a) every application made to 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 there in, and shall be accompanied by the original of document 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.”

I will now proceed to identify some of the objections raised by the respondents based on the above rule.

- a) Failure by the Petitioner to submit that the facts averred in the affidavit are within his personal knowledge,
- b) Failure by the Petitioner to annex originals or certified copies of relevant documents,
- c) Failure by the Petitioner to file the decision he moves to quash, along within the application,
- d) Failure by the Petitioner to seek leave of this court to furnish such documents later.

(a) Failure by the Petitioner to submit that the fact averred in the affidavit are within his personal knowledge.

Requirement of the affidavit to be submitted along with the Petition is enshrined in the rule as;

“shall be by way of petition, together with an affidavit in support of the averments there in.” (emphasis added)

In this regard the objection raised before us was, that the petitioner has failed to submit in his affidavit that the facts pleaded in affidavit are within his personal knowledge. In support of this contention, respondents submitted the provisions in sec.181 of the Civil Procedure Code which sets out the requisites for a valid affidavit.

Sec. 181 of the Civil Procedure Code reads as follow;

Section 181; Affidavit shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to,.....

It is therefore, understood that the affidavit should only contain facts which are within the declarants own knowledge and observations.

When both those provisions are taken together it is clear that a person should not affirm to an affidavit without his own personal knowledge and therefore, it is not necessary to specifically state in the affidavit that the declarant has a personal knowledge with regard to the facts referred to in the affidavit.

On the other hand Sec. 3(1)(a) as discussed earlier only requires, an affidavit in support of the averment therein and rule does not specifically speaks of declarants personal knowledge but it is understood that the requirement under Sec. 181 has to be fulfilled when an affidavit is submitted.

In the case of Kobbekaduwa V. Jayawardena 1983 I Sri LR 416 the Supreme Court observed that "The function of an affidavit is to verify the fact alleged in the Petition. The affidavit Furni- shes prima facie evidence of the facts deposed to in the affidavit. In an affidavit a person can depose only to facts to which he is able to testify of his own knowledge and observation"

Even on this decision there is no finding to the effect that the petitioner has to state in the affidavit that the facts affirm are from his personal knowledge and from the documents perused.

With regard to the admissibility of the affidavit, Respondent referred to the decision in Kumarasiri and another Vs. Rahjapakshe 2006 I Sri LR 359 but I see no relevance in this decision to the objection raised, since this decision only refers to a Jurat under Oaths and Affirmation Ordinance.

For the reason adduced above I overrule this objection.

(b) Failure by the Petitioner to annex Originals or certified copies of relevant documents.

Article 3(1) (a) requires the Petition and affidavit “shall be accompanied by originals of documents material to such application (or duly certified copies thereof)

Petitioner has annexed documents marked P-1 a ,b, c, P2 - P11 along with his petition. Out of the said documents P-1a, b, c, P-3,P-4 and P-6 are true copies of Government Gazettes. The said P5 is a document purported to have been signed by the General Secretary of United People’s Freedom Alliance. Even though it is not addressed to a specific person, it appears to be an original document. P-7 and P-10 are true copies of letters received by the petitioner. P-8 is a true copy of an unsigned letter purportedly sent by the Petitioner to the Governor Uva Province and P11 is a true copy of a letter purportedly sent by an Attorney at Law to the Governor Uva Province. P-9 contains true copies of some newspaper articles.

Having perused these documents, this court observes that the petitioner has failed to fulfill some of the requirements stipulated in rule 3(1) (a). According to the petitioner the most important document is said to be P-10. If it is a letter received by him, he had no difficulty in filing the letter he received, in this Court. Instead, he had filed a true copy of the said letter. As P-8 he has filed an unsigned copy of a letter purportedly sent by him to the Governor Uva Province.

In the case of Browns & Company Ltd. and another V. Ratnayake 1994 3 Sri LR 91 the Supreme Court held that, Rule 46 of the Supreme Court Rules of 1978 requires the petition to be supported by affidavit and to be accompanied by original or duly certified copies of documents material to the case in the form of exhibits. The burden of presenting a proper application is on the party that seeks the intervention of the court. The procedure is specified for this threshold stage. The Rule regulates the mode of enforcing a legal right. The petitioner has to tender all relevant material to the Court in order to invoke its jurisdiction. If he has failed to do this, there is a failure to comply with a substantial aspect of the Rule.

However, in the unreported case of Yatagampiti Loku Acharige Piyasena and another Vs. Mary Jacintha Sandrasegaram SC Appeal 69/2001 Supreme Court decided that “An application for leave to appeal to the Court of Appeal was dismissed upon the preliminary objection that the eight documents annexed to the petition were only true photocopies certified by an Attorney at Law and that there was a failure to comply with the mandatory provisions of Rule 3 (1)(a) of the Court of Appeal (Appellate Procedure) Rule 1990.

Counsel for the plaintiff Respondent concedes that the eight documents produced by the defendant- Petitioner in the Court of Appeal were in fact “duly certified copies within the meaning of Rule 3 (1) (a). In any event the court should have exercised its discretion under that Rule not to dismiss the defendants’ application on that ground as the accuracy of the copies was not disputed. Besides, the court did not even consider whether those documents were material to the application.

The order of the Court of Appeal dated 21.09.2001 is set aside and the Court of Appeal is directed to hear and determined the defendant application on merits.”

Even in the Application before us, as referred by me earlier, the Petitioner has tendered True Copies of documents he is relying in this case. Majority of those are Government Gazettes. P7, 8, 10 and 11 are True Copies of letters either sent or received by the petitioner. Respondents are not challenging these documents for its accuracy except the admissibility of P-10 as a decision by the 2nd Respondent. This issue will be discussed separately by me at a later stage of this order. Considering all these issues the Court decides to follow the decision by the Supreme Court in SC Appeal 69/2001 and decides to overrule this objection.

- (c) **Failure by the Petitioner to file the decision he moves to quash, along within the application,**
- (d) **Failure by the Petitioner to seek leave of this court to furnish such documents later.**

Since these two objections are interwoven to each other, this court has decided to consider the two objections together. In paragraphs 20, 21 and 22 of the petition, the Petitioner explains as to how he was informed by the Governor Uva Province of his decision to appoint the 21st Respondent as the Chief Minister Uva Province and despite his objections, the appointment of 21st Respondent was informed to him by a letter dated 16.01.2015 which was marked as P-10. This document is only a letter sent by the Governor. Petitioner while tendering the said letter marked P-10 pleads before court to Grant and issue a mandate in the nature of a writ of Certiorari to quash the decision made by the Governor Uva Province as evinced by the said letter. This is the only document tendered by the Petitioner to the effect that Petitioner's rights to hold office of Chief Minister of Uva Province have been affected. Any decision purported to have been taken by the 1st and/or 2nd Respondent is not before this court.

During the argument Petitioner whilst referring to Wade and Forsyth in Administrative Law (10th Edition) which bears a passage titled "Decisions, Determinations and Acts" and submitted that there need not be a "Decision", but that even an "Act" can be quashed. This position taken up by the counsel before us is contradicted by paragraph 29 of his own petition. Therefore, we are not convinced with the above submission.

In the case of Wasana Trading Lanka (Pvt.) Ltd. Vs. Dr. Sarath Amunugama Minister of Finance and Planning and another (2005 2 Sri LR 290) His Lordship Sripawan J held that "This court cannot and will not quash a document that is not before it."

In the case of Appapillai Amirthalingam vs. M A Piyasekara Commissioner of Elections and another (1980 2 Sri LR 285) this court held that "there has necessarily to be a formal decision or determinationbefore a Writ of Certiorari could issue quashing that decision or determination." Petitioner is well aware as to how a Chief Minister is appointed. In fact the petitioner has documented his previous appointments marked P 1-C and P-6. Therefore, what is pleaded before this court by the Petitioner that, there is a decision to appoint the 21st Respondent as Chief Minister of Uva Province as evinced by letter dated 16.01.2015 is inadequate without submitting the purported decision before this Court.

The next objection raised before this court was the failure by the Petitioner to seek leave of this court to furnish such document later. As pointed out by me earlier, Rule 3(1)(a) stipulates "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'

Petitioner has neither pleaded the above to reserve the right to file any document later nor pleaded a direction from this court to call for the document from the relevant authorities.

When both these objections are considered together this Court observes that the failure by the Petitioner to produce before us the purported decision by the 1st and/or 2nd Respondent to appoint the 21st Respondent as the Chief Minister Uva Province and the petitioners failure to plead his inability and seek the leave of this Court to furnish such document later and/or failure to plead for a direction from this Court to call for such document from the relevant authority is a violation of Rule 3(1)(a) of the Rules of this Court. The above Rule further says "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.

Therefore this Court decides to uphold the 3rd and 4th objections referred to above and accordingly make order dismissing the application without cost.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala,

I agree.

JUDGE OF THE CUORT OF APPEAL