

**IN THE COURT APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Application for Revision and
Restitutio in Integrum in terms of Article 138 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.

Bhathiya Anuruddha Kumarasinghe, No.
42/25A, Thappa Watte Road,
Godigamuwa, Maharagama.

C.A. RII/23/2022

Judgment Debtor **PETITIONER**

M. C. Nugegoda case No. 5039/22

1. Sammu Arachchige Krishanthi, No.
24/3A. Eksath Mawatha, Mahara
Kadawatha.
2. Sammu Arachchige Pradeepa Mahindrani,
No. 114/08/A, Makola North, Makola.

Judgment Creditor **RESPONDENTS**

Galhenage Dhammika Perera, No. 37,
Katuwawala Road, Boralesgamuwa.

Judgment Debtor **Respondent**

Before: Hon. Justice D. N. Samarakoon

Hon. Justice Neil Iddawala

Counsel: Sandamal Rajapakse instructed by Aruni Dhanapala Arachchi
for the Judgment Debtor petitioner

Varuna Nanayakkara for Judgment Creditor Respondents

Written Submissions on: 06.04.2023 by the Judgment Debtor petitioner
06.04.2023 and 16.02.2023 by 01st and 02nd
Judgment Creditor respondents

Date: 28.06.2023

D. N. Samarakoon J.

Judgment

It is difficult to understand as to why in 66 cases, such a confusing way of naming of parties is employed, such as 1st respondent of the Party of the First Part and 2nd petitioner of the Party of the Second Part. It is from the Fiscal's report of the Execution of the Writ dated 18th October 2022, that, this Court finally understands that Galhenage Dhammika Perera and Bhathiya Anuruddha are the persons evicted from the premises in question, whereas, Sammuarachchige Krishanthi and Sammuarachchige Pradeepa Mahendrani are the persons who obtained possession.

Hence it appears that the 2nd party 1st respondent petitioner before this Court in his application dated 18th November 2022 is Bhathiya Anuruddha alias Bhathiya Anuruddha Kumarasinghe. For clarity he will be known as the judgment debtor **petitioner**. The opponent parties, S. A. Krishanthi and S. A. Pradeepa Mahindrani will be known as judgment creditor **respondents**. Galhenage Dhammika Perera, who was evicted by the above writ, but not added himself as a petitioner before this Court is judgment debtor respondent.

As per the petition of Bhathiya Anuruddha Kumarasinghe, judgment debtor petitioner, proceedings were instituted by the OIC, Police Station, Maharagama on 15.06.2022 under section 66(1) of Primary Court Procedure Act No. 44 of 1979. Hence the task of the learned Primary Court Judge is to find out as to who was in possession on the said date and to determine whether any person has

been forcibly ousted from possession during the 2 month period immediately prior to the said date.

AS per the Petitioner, the judgment creditor respondents have appeared before the learned Primary Court Judge on 15.06.2022. They were the parties who made complaints dated 07.04.2022 and 06.06.2022 to the Police that the petitioner has threatened the respondents to vacate the premises. There was another complaint made by the respondent 10.06.2022 and two other complaints dated 12.06.2022 and 13.06.2022 that the petitioner has entered into the premises and not allowing the respondent to enter.

On 15.06.2022, the learned Primary Court Judge has issued notices to be affixed on the land and the next date was 06.07.2022.

The original case record was called by the Court and it shows the above at page 04 of the Journal Sheet.

The petitioner states that he attended the Court on 06.07.2022 but due to the fuel crisis cases were not called in open court and by notice rescheduled for 09.11.2022.

This is shown by the seal affixed at the top of page 06 of the Journal Sheet which says the next date is 09.11.2022.

But on 06.07.2022 the case has been called upon the motion of Mrs. S. M. E. Nanayakkara, Attorney-at-Law for the respondents. The learned Primary Court Judge has (re)issued notices to be affixed on the land for 15.07.2022.

The petitioner admits that he received a notice to appear in Court on 15.07.2022 (vide., paragraph 06 of the original petition)

His position is that he attended on that day, i.e., 15.07.2022, but the cases were not called in open court and by notice they were postponed for 18.11.2022. Although there is no seal to this effect in the journal sheet, it appears that Mrs. Nanayakkara has again made an application on 15.07.2022 and the Court has

re issued notices to be affixed on the land for 29.07.2022. The position of the petitioner is that despite that order no notice was affixed on the land or served on him. Hence his understanding was that the next date of the case is 18.11.2022.

On 29.07.2022 the learned Primary Court Judge has treated the petitioner as a party defaulted. The Court has fixed the case for order giving a date for the respondents, Krishanthi and Mahindrani to file written submissions. The order was delivered on 07.10.2022 and possession was given to the said respondents. It was thus, the writ of possession, referred to at the beginning of this judgment, was executed.

The respondents when noticed took up two preliminary objections before this Court. They are,

- (i) The seal of the Justice of the Peace who placed his signature on the affidavit of the petitioner before this Court is at Hemmathagama in the Sabaragamuwa Province, whereas the affidavit says it was affirmed to in Colombo and
- (ii) The petitioner has not acted with due diligence

In *SENANAYAKE VS COMMISSIONER OF NATIONAL HOUSING AND OTHERS, C. A. 848/2001*, the facts were,

“This matter was taken up before a Divisional Bench in view of the necessity to reconsider the decision of this Court in *Ceylon Workers' Congress v. S. Sathasivam and Another(1)* in the context of a preliminary objection taken on behalf of the 6th Respondent that the affidavit of the Petitioner dated 8th June, 2001 affirmed to at Colombo before Wijesurendra Lokuge, Justice of the Peace in not valid insofar as he has only been appointed as a Justice of the Peace for the Judicial District of Homagama”.

It was decided,

“(i) Application for prerogative relief - the Court of Appeal enjoys a supervisory jurisdiction. (ii) Court should not non-suit a party where the non-compliance with Rules takes place due to no fault of the party. (iii) Strict or absolute compliance with a Rule is not essential; it is sufficient if there is compliance which is substantial, this being judged in the light of the object and purpose of these Rules. It is not to be mechanically applied”.

Courts in this country have moved from applying strict rules in respect of affidavits to being more liberal, taking a pragmatic approach conducive of unalloyed justice.

In *M. Tudor Danister Anthony Fernando Vs. Rankiri Hettiarachchige Freddie Perera*, SC/HCCA/L.A Case No. 279/2012, Priyantha Jayawardane J., said,

“In *Mohamed Rauf Mohamed Facy v. Mohamed Azath Sanoon Sally* SC minutes S.C. Appeal No. 4/2004 Marsoof J. analyzed Section 9 of the Oaths and Affirmation Ordinance and stated ' This is a salutary provision which was intended to remedy the very malady that has occurred in this case, and clearly covers a situation in which there is a substitution in the jurat of an affirmation for an oath.

Edussuriya J. in *Trico Freighters (Pvt) Ltd. v. Yang Civil Engineering Lanka (Pvt). Ltd* (2000) 2 SLR 136 was of the view ' Substitution of an oath for an affirmation (or vice versa) will not invalidate proceedings or shut out evidence. The fundamental objection of a witness or the deponent is to tell the truth and the purpose of an oath is to enforce that obligation. '

However, in the case of *Mark Rajandran v. First Capital Ltd. Formerly, Commercial Capital Ltd.* (2010) 1 SLR 60 it was held that the Petitioner has clearly averred that he is a Christian in the affidavit and making oath, in the jurat, the Petitioner had affirmed to the averments before the Justice of Peace. 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 Affirmation Ordinance, the exception would not be applicable to him to make an affirmation instead of the oath he should have made.

I am inclined to agree with the cases of Mohamed Rauf Mohamed Facy v. Mohamed Azath Sanoon Sally and Trico Freighters (Pvt) Ltd. v. Yang Civil Engineering Lanka (Pvt). Ltd and not with the decision in the case of Mark Rajandran v. First Capital Ltd. Formerly, Commercial Capital Ltd”.

It cannot be said that the petitioner did not act with due diligence or utmost promptitude, because he could not have, as the facts would show, been aware of proceedings in his absence until he was evicted on 18.10.2022 and by 14.11.2022 he has come before this Court.

As far as the facts of the case are concerned, it is clear that the petitioner Kumarasinghe has not been informed of the date 29.07.2022, which was obtained by the respondents upon filing a motion on 15.07.2022. Not only that he was not informed of 29.07.2022 date but misled by the notice to the effect that the cases for 15.07.2022 will be called on 18.11.2022. Hence he could not have been treated a party at default. In making a decision to that effect on 29.07.2022, the learned Primary Court Judge has not acted with due diligence. It has violated the fundamental principle of audi alteram partem.

On the other hand, the petitioner himself has referred to complaints made by the respondents closer upon the date of the filing of the information, that, the petitioner Kumarasinghe recently forcibly entered into possession.

As per the Fiscal's report, when Fiscal visited the premises on 18.10.2022, the house in the possession of Bhathiya Anuruddha Kumarasinghe, the petitioner was being painted. Although this is not conclusive evidence of recently assumed possession, for people paint their houses even long after first occupation, as per the fiscal's report there is no evidence of a family being evicted from a dwelling house.

Therefore, although the powers of this Court in restitutio in integrum and revision do compel this Court to decide in favour of the petitioner Kumarasinghe, since the said powers are discretionary, this Court does not order the eviction of the respondents placed in possession of the premises on 18.10.2022, pending the determination of the Primary Court Action.

The learned Primary Court Judge has failed to consider the affidavits of the parties she thought duly before her, the respondents, too. She had only considered written submissions which has no evidentiary value. In addition the petitioner, Kumarasinghe, as said above was not clearly a defaulted party. Hence the order and the proceedings in the Primary Court after 15.07.2022 are bad in law. Hence, exercising the power of restitutio in integrum setting aside the order and the said proceedings, parties are restored to their respective positions on 15.07.2022.

Hence, whereas the status quo as to the possession of the premises shall be maintained, the learned Primary Court Judge will allow the petitioner and respondents to file affidavits, counter affidavits and documents and shall determine the following,

- (1) Who was in possession of the premises on 15.06.2022,
- (2) Whether any person or persons was forcibly evicted from that possession during the period of 02 months prior to the said date,

The learned Primary Court Judge will accordingly made his/her order. It is further directed that the proceedings shall be continued before a learned Judge other than the learned Judge who already made the order dated 07.10.2022.

The Registrar is directed to send the original case record to the Magistrates Court of Nugegoda.

There is no order on costs.

Judge of the Court of Appeal

Hon. Neil Iddawala, J.

I agree.

Judge of the High Court of Civil Appeal