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

In the matter of an application for mandates in the nature of writs of certiorari and mandamus under Article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Writ No. 85 / 2013

Billion Bay Apparels (Pvt) Ltd.,

No.291/B, Kandy Road,

Kiribathgoda.

Petitioner

-Vs-

1. **Chief Minister,**

   Sabaragamuwa Provincial Council,

   Secretariat Complex, New Town,

   Ratnapura.

2. **Secretary,**

   Sabaragamuwa Provincial Council,

   Secretariat Complex, New Town,

Ratnapura.

3. **Minister of Trade,**

   Housing, Culture Affairs and Rural Development of Sabaragamuwa Provincial Council,

   Sabaragamuwa Provincial Council,

   New Town,

   Ratnapura.

4. **Divisional Secretary – Aranayake,**

   Divisional Secretariat,

   Aranayake.

5. **Provincial Land Commissioner,**

   Sabaragamuwa Provincial Council,

   New Town,

   Ratnapura.

6. **Commissioner General of Lands,**

   Land Commissioner's Department,

   No.7, Gregory's Road,

   Colombo 07.

7. **Hon. Attorney General,**

   Attorney General's Department,

Colombo 12.

Respondents

BEFORE	:	**Vijith K. Malalgoda, P.C. J, (P/CA)** and **A.H.M.D. Nawaz, J.**
COUNSEL	:	Edward Samarasekara for the Petitioner. Janak de Silva, D.S.G. with for the Respondents.
Argued on	:	18.12.2014
Written Submissions on	:	12.02.2015
Decided on	:	18.01.2016

A.H.M.D. NAWAZ, J,

The issue before court is whether the 1st, 2nd, 4th, 5th, 6th and 7th Respondents should be permitted to amend the affidavits of the 4th and 5th Respondents in order to incorporate the place of attestation that has been omitted in the *jurats* of the respective affidavits. The preliminary objection to the maintainability of this application for judicial review arises in the following manner.

The Petitioner, by filing a counter affidavit dated 7th July 2014, raised the preliminary objection, pinpointing the defects in the *jurats* of the aforesaid two affidavits and has urged this Court to dismiss the statement of objections filed on behalf of 1st to 7th Respondents. The impugned *jurats* go as follows:-

"*Jurat* in the affidavit of the 4th Respondent

The foregoing affidavit having been duly read over and explained by me to the within named Affirmant and he appearing to have understood the contents therein, affirmed and placed his signature on this 30th day of January, 2014 **at**

Affirmant

Before me

Commissioner for oaths/

Justice of the Peace

***Jurat* in the affidavit of the 5th Respondent**

The foregoing affidavit having been duly read over and explained by me to the within named Affirmant and he appearing to have understood the contents therein, affirmed and placed his signature on this 30th day of January, 2014 **at**

Affirmant

Before me

Commissioner for oaths/

Justice of the Peace"

As could be seen *jurats* in both affidavits do not contain the name of the place where the affidavits were affirmed and signed. The objections raised by the learned Counsel for the Petitioner is that the statement of objections should be rejected for want of a valid affidavit, whilst the learned Deputy Solicitor General has contended that he should be permitted to amend the affidavits. It has to be observed that it is through a motion dated 9th December 2014 that the Attorney-at-Law for the 1st, 2nd, 4th, 5th and 6th Respondents (State Attorney) has moved in terms of Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules of 1990 seeking permission to amend the affidavits of the 4th and 5th Respondents.

In support of the argument that the application by the Attorney General to amend the affidavits should be rejected, the Petitioner relies on other matters including the alleged invalidity. The Petitioner contends that though the Petitioner highlighted the defects in the affidavits through his counter-affidavit, it took the State more than two months to move for an amendment to these two affidavits. In other words there was delay on the part of the State Attorney to move for an amendment to the two affidavits. As for this objection I observe that when this motion was supported by the learned Deputy Solicitor General on 18th December 2014, the Court took this matter off the argument roll and granted both counsel an opportunity to file written submissions on the question whether amended affidavits could be filed in Court. Thus the primary issue uppermost before Court was whether it was open to the Counsel for the Respondents to remedy the defects in the affidavits as have been pointed by the Petitioner in the counter-affidavit. No doubt the Respondents moved for the amendment rather belatedly but this Court will bear in mind the need to keep the channels of procedure open for the merits of the objections to be gone into and the

all important question disposed of-namely whether a deficiency in the *jurat* of an accompanying affidavit to a statement of objections is curable or not.

The Petitioner also alleges that the separate affidavits of the 4th and 5th Respondents contain hearsay and such hearsay emerges through contradictory and uncorroborated material contained in the affidavits. The Petitioner further points out that although a joint statement of objections of the 1st, 2nd, 4th and 5th Respondents and a separate statement of objections on behalf of the 6th Respondent have been filed, supporting affidavits have been filed only by the 4th and 5th Respondents independently and not with the consent or concurrence of the other Respondents.

Hearsay in Affidavits

On the question of hearsay I would observe that whether the evidence proffered by the affidavits contains hearsay or not is a matter that requires to be judged at the hearing of the petition and the question does not fall to be decided at this threshold stage when the Petitioner cries foul of defects in the *jurats* of the two affidavits. The requirement that a person who swears or affirms to the averments in a petition or a statement of objections must do so from his own personal knowledge introduces direct evidence and thus excludes hearsay as objections to reception of hearsay are usually premised on its inherent unreliability for adjudicative purposes and therefore it cannot be acted upon for testimonial trustworthiness. The requirement to adduce direct evidence in affidavits and the exception to the requirement are found in Section 181 of the Civil Procedure Code which declares,

> *"Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory*

applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief are set forth in the affidavit".[1]

What has to be ascertained through an affidavit was echoed by S.N.Silva J (as he then was) in ***Damayanthi Abeywardana v Hemalatha Abewardana***[2] as follows:

"Learned District Judge has observed that the affidavit confirms the averments in the petition. Indeed, on a comparison it is revealed that the affidavit is a verbatim repetition of the averments of the petition. However, the correct test is not to consider whether one confirms the other upon a comparison of this nature. Repetition of the averments of a petition in the affidavit is an evil that we often note in affidavits that are filed. Learned Judge has regrettably seen a virtue in this evil. ***The correct test is to ascertain whether the affidavit contains direct evidence, that is, statements of such facts as the declarant is able on his own knowledge and observation to testify to and whether this evidence together with the documentary evidence furnishes prima facie proof of the matters of fact set out or alleged in the petition"***

Be that as it may, these are questions that this Court need not address its mind right now as judicial review has not yet commenced and the material in the two affidavits vis-à-vis the counter affidavit tendered by the Petitioner is yet to be tested. So we would discountenance any argument based on hearsay at this stage. In any event one cannot lose sight of ***Rajapakse v Gunasekera***[3] which stated that hearsay evidence contained in the affidavit supporting corrupt or illegal practices filed with the petition under the Ceylon (Parliamentary Elections) Order in Council (as amended by Act No.9

[1] See identical requirements in Order 19, Rule 3 of the Indian Code of Civil Procedure
[2] 1993 I1) 272 at page 281
[3] (1984) 2 Sri.LR 1 at 15

of 1970) does not vitiate the election petition. So in some cases it is clear that even the existence of hearsay in affidavits has been condoned.

Should all Respondents file affidavits?

I also make short shrift of the argument that the 4th and 5th Respondents cannot file affidavits when there are one statement of objections filed on behalf of the 1st, 2nd, 4th and 5th Respondents and another on behalf of the 6th Respondent. I hold that the law is to the contrary.

Where the law requires that an "affidavit in support" be filed together with the petition,[4] or that a supporting affidavit be filed together with a statement of objections or a counter affidavit,[5] or that a statement of objections be supported by an affidavit,[6] it is not imperative that the necessary affidavit has to emanate from all Respondents. It is sufficient if the necessary affidavit or affidavits flow from one or more persons who can swear or affirm to the averments in the statement of objections from his or their own personal knowledge, and it is not necessary that all Respondents should have filed their own affidavits. Neither does the affidavit filed need an express concurrence from a Respondent who has not filed an affidavit.

So there need not be as many affidavits as there are Respondents and a particular Respondent is not under a duty to concur expressly in the affidavit of another Respondent though no doubt the Court would look for consistency inter se in the affidavits proffered to contradict or controvert the affidavit of the Petitioner.

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[4] Court of Appeal (Appellate Procedure) Rules, 1990, Rule 3(1) (a)
[5] Court of Appeal (Appellate Procedure) Rules, 1990, Rule 3 (5)
[6] Court of Appeal (Appellate Procedure) Rules, 1990, Rule 3 (7)

The court now proceeds to examine the objection that the affidavits filed by the 4th and 5th Respondents should be rejected by Court as they do not indicate the place of affirmation.

Whose obligation is it to formulate a proper *jurat*?

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

It is apparent that the obligation to state the place of affirmation in the *jurat* has been cast upon the Commissioner for Oaths. Such obligation was alluded to by M.D.H.Fernando J in ***Roshana Michael v Saleh, OIC Crimes, Police Station, Narahenpita***[7] when the learned judge stated-

> *"....As for jurat, it is true that it is the person administering the oath or affirmation who must state in the jurat that the oath or affirmation was administered in his presence, and the place and date...."*

Learned Deputy Solicitor General has cited ***Kanagasabai v Kirupamorthy***[8] wherein Basnayake C.J declared to the effect that when affidavits are filed in the course of civil proceedings it is the duty of Judges, Justices of the Peace and Proctors to see that the rules governing the affidavits found in Sections 181, 437 and etc., of the Civil Procedure Code are complied with. As to the absence of the date from the affidavit in the case, Basnayake C.J. commented,

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[7] (2002) 1 Sri.LR 345 at 356
[8] 62 N.L.R 54

".....the respondent's affidavit is undated. It is the duty of the Justice of the Peace before whom an affidavit is sworn to see that the jurat is properly made."[9]

If the duty to incorporate the date and place of attestation in the *jurat* of an affidavit is cast upon the Justice of the Peace or the Commissioner for Oaths, it is his obligation and obligation alone and the dereliction of that duty cannot be visited upon the person taking the oath or making the affirmation namely the affiant. Therefore remissness on the part of a Justice of the Peace or the Commissioner for Oaths in not making sure to insert the date and place of attestation in the *jurat* of an affidavit cannot be a ground for penalizing the affiant because his involvement is minimalist in the formulation of the *jurat*. Such remissness on the part of the Justice of the Peace or a Commissioner for Oaths to specify the place of attestation is his non-compliance with a statutory duty placed upon him in terms of Section 12(3) of the Oaths and Affirmation Ordinance and a breach of the statutory duty on the part of the Justice of the Peace or the Commissioner for Oaths cannot deprive the Respondents of their right to be heard on their statement of objections. In the circumstances it is iniquitous to render the defective affidavit liable to be rejected *in limine,* as the evidence which has been tendered to Court by way of the affidavit remains untested and uncontroverted.

The Court of Appeal precedent cited by the Petitioner in his written submissions-***Facy v Sanoon and Others***[10] which has since been reversed by the Supreme Court is in my view not germane to the instant application before us. This is a case in which the affidavit in question commenced with a statement that the party who signed it stated

[9] *Ibid p* 58-9
[10] (2003) 3 Sri.LR 8

at the beginning, "being a Muslim, do hereby make oath and swear as follows", but the *jurat* clause at the end of the affidavit stated that such party "affirmed" to the contents. The contention that was advanced before the Court of Appeal was that a party who signed the affidavit "having opted to take oath, cannot later 'affirm' to the affidavit before the Justice of the Peace or the Commissioner for Oaths."

Udalagama J (with two other judges agreeing with him) accepted this contention and rejected the affidavit stating that it was fatally defective.[11] It was in those circumstances of his holding that Udalagama J opined as follows in that case:-

> *"...I would also hold as held repeatedly by this Court that a faulty Affidavit could not be considered a mere technicality but in fact fatal to the entire application and as also held by the Court on numerous occasions a defective Affidavit is bad in law and warrants rejection."*

I hasten to point out that this dictum, albeit all embracing, does not hold true in light of the reversal of this case in appeal by the Supreme Court - vide ***Facy v Sanoon.***[12]

The contention that "if a party signed the affidavit "having opted to take oath", it was not open for him to affirm to the affidavit before the Justice of the Peace or the Commissioner for Oaths", was rejected by the Supreme Court which drew in aid Section 9 of the Oaths and Affirmation Ordinance for its conclusions.

Section 9 of the Oaths and Affirmation Ordinance which is a curative provision goes as follows:-

> *"No omission to take any oath or make any affirmation, no substitution of any one 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***

[11] Ibid at p 11
[12] (2006) BLR 58

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."*

So the Supreme Court held that the evidence proffered by an affidavit can be scrutinized by court notwithstanding any defect or irregularity therein in the administration of oath by the Justice of the Peace or Commissioner for Oaths. The affiant is not penalized and shut out of courts.

The observations of Saleem Marsoof J in relation to Section 9 of the Oaths and Affirmation Ordinance are pertinent,

"This [section 9 of the Oaths Ordinance] 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. This is not a case like Clifford Ratwatte v. Thilanga Sumathipalaor Jeganathan v. Safyath...in which there was material to show that neither an oath nor an affirmation was in fact administered by the Justice of the Peace..."

The learned Judge made the point that in ***Facy v Sanoon*** it was not contended by counsel that the contents of the affidavit in question showed that the deponent/affirmant was not present before, or that the contents of the affidavit were not read and explained to the deponent/affirmant by, the person who administered the oath/affirmation. Even in this case it is not even suggested by the Petitioner in its counter-affidavit that the respective affiants in the two affidavits were not present before, or that the contents of the affidavit were not read and explained to the deponent/affirmant by, the person who administered the oath/affirmation. The

gravamen of the complaint made in the instant case before us is that as a result of the absence of the place of attestation in the *jurat* there is no affidavit before us.

Substance over Form

The liberality shown by our Supreme Court in regard to defective affidavits is a tendency to look at substance rather than form. In fact ***Facy v Sanoon*** manifests the triumph of substance over form which is discernible in cases such as ***De Silva v L.B.Finance Ltd***[13] wherein the fact of affirmation was missing in the *jurat*. Whilst the Court of Appeal upheld the preliminary objection raised on the invalidity of the affidavit in the case, the Supreme Court accepted the impugned affidavit in appeal. I must however state that the place of attestation was mentioned in the *jurat* of that affidavit but the point of objection was that the affidavit was invalid for the reason that the *jurat* did not contain the fact of affirmation. The Court of Appeal upheld the objection. But when the matter went up in appeal to the Supreme Court, the submission that the affidavit was invalid because there was an absence of the word "affirmed" before the words "duly read over" in the *jurat,* was rejected. G.P.S. de Silva C.J (with Ramanathan and Wijetunga JJ. concurring) decided to accept the affidavit having regard to the substance of the other parts of the affidavit.

The welcome trend discernible in the approach of our Supreme Court towards defective affidavits has been one of facilitating the course of justice to be dispensed because the fundamental obligation of an affiant in an affidavit is to tell the truth and Courts would not be able to ascertain the veracity of the rival versions and discharge its dispensation if they were to be trammeled by technicalities. This gladsome approach of the Supreme Court is also reflected in a three Bench decision of the Court

[13] 1993 (1) Sri.LR 371

of Appeal where the propriety of an affidavit attested by a Justice of the Peace who was licensed to practice in a different judicial district other than the district where he attested the affidavit came up for consideration.

In the case of ***Ceylon Workers Congress v Sathasivam,***[14] Wijesurendra Lokuge, a Justice of the Peace, who was appointed for the judicial district of Homagama attested an affidavit within the Judicial District of Colombo. The Court of Appeal held that the affidavit attested by him within the judicial District of Colombo had no validity in law. A reconsideration of this issue came up before a Divisional Bench of the Court of Appeal in ***Senanayake v Commissioner of National Housing and Others,***[15] where the Petitioner had filed in the Court of Appeal, an affidavit affirmed to before a Justice of the Peace appointed for the Judicial District of Homagama; and a preliminary objection was raised by the Respondent as to its validity; The Divisional Bench of the Court of Appeal held that;

(i) In Applications for prerogative relief - the Court 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.

Ceylon Workers Congress v Sathasivam was not followed by the three Bench and Saleem Marsoof J (P/CA), expressed the view-

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[14]No. C.A.L.A. 86/2002 - CA Minutes of 16.10.2002
[15]2005 (1) Sri L.R. 182

"I am of the view that the Court of Appeal (Appellate Procedure) Rules 1990 have been formulated to facilitate the judicial process and with a view of achieving justice rather than injustice" (sic).

Once again recourse to substance of the affidavit was facilitated for ascertainment of truth - a trend which the Supreme Court has demonstrated. So this Court would adopt the same approach towards the defective affidavits before us.

No illegality or nullity in the affidavits other than an irregularity

I take the view that the absence of the place of attestation in the two impugned affidavits does not render them null and void, Nor are they illegal, No doubt *jurats* have been formulated by the Commissioner for Oaths without following the statutory rule in Section 12(3) of the Oaths and Affirmation Ordinance. To the extent of that non compliance the two affidavits are defective but they have by no stretch of imagination become null and void or illegal. The oversight or negligence of the Commissioner for Oaths if one were pitch it so high in not inserting the place of attestation cannot render the rest of the affidavits illegal or null and void. A defective *jurat* formulated by one person cannot go to contaminate the evidence which is declared to be from personal knowledge indicating the existence of direct evidence. Moreover the evidence contained in the two affidavits has been controverted by a counter-affidavit by the Petitioner who has then invited Court to ascertain the truth as to the issue before Court. So the parties must be heard by court in its supervisory jurisdiction. That is how due process would be best served.

This Court does not find a scintilla of illegality in any of the provisions of the Oaths and Affirmation Ordinance if a reference to the place of attestation is absent from the *jurat*. There is a positive duty on the part of the Justice of the Peace or the

Commissioner for Oaths to include it in the *jurat* but the failure to do so has not been declared an illegality or nullity anywhere in the Oaths and Affirmation Ordinance of such pristine antiquity. So we would desist from drawing any such implication in the absence of express stipulation and the jurisprudence of the Supreme Court has not spelled out such an eventuality.

A defective affidavit without reference to a place of affirmation is only an irregularity

If at all there would remain on the affidavit a defective *jurat* which at the most is an irregularity and not an illegality. A defective *jurat* without a mention of the place of attestation therein is an irregularity but not an illegality. We are fortified by Indian authorities which declare such a *jurat* to be an irregularity. Mulla on the Code of Civil Procedure[16] cites the precedent of ***Mehar Singh and Others v Mahendra Singh***[17] which holds-

> "A defect in a verification is only an irregularity and not fatal. It is no ground in rejecting the affidavit....."[18]

The verification of the affidavit in Indian case had been signed without specifying the date and place of the execution of the affidavit.

Thus this Court holds that the absence of the place of affirmation from the *jurat* is not an incurable defect. We would draw in aid Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990 which permits an amendment to cure a defect in an affidavit. There is judicial permission which has to be obtained for the purpose of amending pleadings which would include remedying the defect in an affidavit. The Court of

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[16] Vide Mulla on the Code of Civil Procedure 17th Edition Volume 2 at p 857
[17] AIR 1987 Delhi 300.
[18] Ibid at p 302.

Appeal (Appellate Procedure) Rules 1990 has been framed with a view to remedying the very situation that this Court is confronted with-the regularizing the reception of evidence after having remedied an irregularity. We hold that the application for amendment has been properly made and the Court allows the Respondents to amend the two affidavits only to the extent of including the place of affirmation in the respective *jurats.* In view of this holding for the above reasons we overrule the preliminary objections urged by the Petitioner.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda, P.C. J. (P/CA)

I agree

PRESIDENT OF THE COURT OF APPEAL