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

1. Environmental Foundation
   (Guarantee) Limited,
   No.3A, 1st Lane, High Level Road,
   Kirulapone,
   Colombo 5.
2. Wildlife and Nature Protection
   Society of Sri Lanka,
   No.86, Rajamalwatte Road,
   Battaramulla.

   Petitioners

CASE NO: CA/WRIT/51/2018

Vs.

1. M.G. Suriyabandara,
   Director General of Wildlife
   Conservation,
   Department of Wildlife
   Conservation
   No.811A, Jayanthipura,
   Battaramulla.

2. Hon. Gamini J. Perera,
Minister of Sustainable
Development and Wildlife,
Ministry of Sustainable
Development and Wildlife,
9th Floor, Stage I, “Sethsiripaya”,
Battaramulla.

2a. Hon. Ravindra Samaraweera,
Minister of Sustainable
Development and Wildlife,
Ministry of Sustainable
Development and Wildlife,
9th Floor, Stage I, “Sethsiripaya”,
Battaramulla.

2b. Hon. Sarath Fonseka,
Minister of Sustainable
Development, Wildlife and
Regional Development,
Ministry of Sustainable
Development, Wildlife and
Regional Development,
Sino Lanka Tower, No.1090,
Sri Jayawardenapura Road,
Rajagiriya.

2c. Hon. John Amaratunga,
Minister of Wildlife,
Ministry of Wildlife,
Sino Lanka Tower, No.1090,
Sri Jayawardenapura Road,
Rajagiriya.

2d. Hon. S.M. Chandrasena,
Minister of Environment and
Wildlife Resources,
Ministry of Environment and
Wildlife Resources,
"Sobadam Piyasa", No.416/C/1,
Robert Gunawardena Mawatha,
Battaramulla.

3. Hon. W. Milroy S. Fernando,
Minister of Christian and
Parliamentary Affairs,
Ministry of Christian and
Parliamentary Affairs,
No.98, D.S. Senanayake
Mawatha,
Colombo 08.

3a. Hon. John Amaratunga,
Minister of Tourism Development
and Christian Religious Affairs,
Ministry of Tourism Development
and Christian Religious Affairs,
No.53, Vauxhall Street,
Colombo 02.

3b. Hon. John Amaratunga,
Minister of Tourism Development
and Christian Religious Affairs,
Ministry of Tourism Development
and Christian Religious Affairs,
6th Floor, Rakshana Mandiriya,
No.21, Vauxhall Street,
Colombo 02.

3a. Hon. Mahinda Rajapakse,
Minister of Buddha Sasana,
Cultural and Religious Affairs,
Ministry of Buddha Sasana,
Cultural and Religious Affairs,
No.135, Srimath Anagarika
Dharmapala Mawatha,
Colombo 07.

4. Most Reverend Bishop of Chilaw,
Diocese of Chilaw,
Bishop House,
Chilaw.

Respondents

5. Rev. Fr. Anton Thavarajah,
Parish Priest,
Our Lady of Assumption Church,
Mullikulam, Marichchukatti,
Mannar.
6. Thomas Amalathasan Croos,
Mullikulam, Marichchukatti,
Mannar.
7. Sinnappu Amalan Coonghe,
Mullikulam, Marichchukatti,
Mannar.
8. Rev. Fr. Christie Perera,
Parish Priest,
St. Jude's Church,
Wanathavilluwa.

9. A.M. Buddhika Gihan,
   Serakkuliya, Karaithiv,
   Batticaloa.
10. A.M. Janaka Abeysinghe,
    Wanathavilluwa,
    Batticaloa.
11. W.N.M. Fernando,
    Serakkuliya, Karaithiv,
    Batticaloa.
12. W.N. Lasantha,
    Mangalapura,
    Batticaloa.

    Added-Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Dr. K. Kanag-Iswaran, P.C., with Wardani Karunaratne, Bhagya Wickramasinghe and C. Liyanage for the Petitioners.
Sumathi Dharmawardena, A.S.G., P.C., with Thilanka Peiris, S.S.C., for the 1st Respondent.
Rienzie Arasecularatne, P.C., with Riad Ameen for the 4th Respondent.
Shammil Perera, P.C., with Duthika Perera for the 5th-7th Respondents.
Sanjeewa Jayawardena, P.C., with Lakmini Warusawithana for the 8th-12th Added-Respondents.

Argued on: 02.07.2020

Decided on: 25.09.2020

Mahinda Samayawardhena, J.

The two Petitioners filed this application as public interest litigation seeking certain reliefs mainly against the 1st and 2nd Respondents, the Director General of Wildlife Conservation and the Minister of Sustainable Development and Wildlife, respectively, on the basis that the (religious) festivities of the Pallekandal St. Anthony's (Roman Catholic) Church located inside the Wilpattu National Park are in violation of the Fauna and Flora Protection Ordinance, No.2 of 1937, as amended.

The Petitioners seek the following reliefs in the prayer to the petition:

(i) *A writ of mandamus directing the 1st and 2nd Respondents and/or officers of the 1st Respondent Department to act in terms of the law and accurately determine and/or demarcate the lawful location and physical existence of the Pallekandal church inside Wilpattu National Park in view of the gazette and established boundaries of the said Wilpattu National Park;*

(ii) *A writ of mandamus directing the 1st and 2nd Respondents and/or officers of the 1st Respondent Department to formulate a set of rules and regulations providing for a comprehensive and transparent system of identifying/recognising/prescribing traditional practices/customs/usages in terms of section 3(3)b of the FFPO that can be allowed in respect of festivities of the Pallekandal church that can be permitted within the boundaries of the Wilpattu National park;*

(iii) *A writ of mandamus directing the 1st and 2nd Respondents and/or officers of the 1st Respondent Department to cause*

the cessation of any festival activities inside the Wilpattu National Park contrary to the FFPO and rules and regulations on National Park Management made under the FFPO;

(iv) *A writ of prohibition preventing the 1st and/or 2nd or any one or more Respondents from permitting the 4th Respondent / his agents/servants/representatives and/or any other person whether connected/related to the 4th Respondent or any other person from entering the said Wilpattu National Park for festivities, religious purposes or otherwise, other than by the due procedure prescribed for entry of park visitors under the FFPO;*

(v) *A writ of prohibition refraining the 1st and 2nd Respondents permitting or carrying out any further construction and/or development and/or clearing and/or church feast and/or any other festival activities within the Wilpattu National Park and/or within a distance of one (01) kilometre radius from the boundary of the Wilpattu National Park by the 4th Respondent His Lordship's agents/servants/representatives and/or any other person whether connected/related to the said church.*

The 4th Respondent, the Most Reverend Bishop of Chilaw, and the other added Respondents take up two preliminary objections.

The first preliminary objection is that there is no proper application before this Court, as the purported supporting affidavit tendered by the 1st Petitioner is not valid in the eyes of the law.

The second preliminary objection is that the declaration of the area by the subject Minister as the "Wilpattu National Park Block V" (in which, according to the Petitioners, the festivities of the Church take place), by the Gazette marked P3(e) dated 07.12.1973, was not approved by Parliament as required by section 2(5)(b) of the Fauna and Flora Protection Ordinance, and therefore the said Gazette has no legal validity.

Let me first deal with the second preliminary objection, as it is an important question of law on which the parties are at variance.

By the Amendment Act No. 1 of 1970, sub-section (5) to section 2 of the principal enactment was introduced. It reads as follows:

> *5(a) The Minister may, by Order, declare that the limits of any National Reserve or Sanctuary shall be altered or varied.*
>
> *(b) Any Order made by the Minister under this sub-section shall have no effect unless it has been approved by the Senate and the House of Representatives and notification of such approval is published in the Gazette.*

The Gazette P3(e), which contains the Minister's Order, commences as follows:

> *ORDER made by the Minister of Shipping and Tourism under sub-section (1) of section 2 of the Fauna and Flora Protection Ordinance (Chapter 469) as amended by Act No. 44 of 1964 and Act No. 1 of 1970.*

Order

> *The area of Crown land specified in the Schedule hereto is hereby declared to be a National Reserve for the purpose of the Fauna and Flora Protection Ordinance (Chapter 469) as amended by Act No. 44 of 1964 and Act No. 1 of 1970.*
>
> *2. The whole area of the aforesaid National Reserve is hereby declared to be a National Park for the purpose of the aforesaid Ordinance.*

This preliminary objection is unsustainable, as the area of Crown land was declared to be firstly a National Reserve and secondly a National Park under section 2(1) of the Fauna and Flora Protection Ordinance as amended by Act No. 44 of 1964 and Act No. 1 of 1970.

A careful reading of section 2(5) quoted above goes to show that section 2(5)(b) is applicable only to section 2(5)(a), that is, when the Minister decides to alter or vary the limits of any National Reserve or Sanctuary.

Section 2(5)(b) has no application to section 2(1) by which the Minister made the impugned Order declaring a specified area of Crown land to be a National Reserve and National Park by Gazette P3(e).

Let me reproduce how section 2(1) stood after the amendments by Act Nos. 44 of 1964 and 1 of 1970.

> *2(1) The Minister may by Order published in the Gazette declare that any specified area of State land shall for the purposes of this Ordinance be a National Reserve and may by that Order or by any Order subsequently published in*

the Gazette declare that the whole or any specified part of any such National Reserve shall be—

(a) a Strict Natural Reserve; or
(b) a National Park; or
(c) a Nature Reserve; or
(d) a Jungle Corridor; or
(e) an Intermediate Zone.

It was for the first time by Act No. 22 of 2009 that approval by Parliament was made necessary for Orders made by the Minister under section 2(1). By this 2009 amendment, section 2A was introduced to be inserted immediately after section 2(2). Section 2A reads as follows:

An Order made under subsection (1) and subsection (2) of this section shall have no effect unless it has been approved by Parliament and the notification of such approval is published in the Gazette.

Section 2A has no retrospective effect. The 4th Respondent or added Respondents do not make such a claim either.

I overrule the second preliminary objection.

This leads me to consider the first preliminary objection. The first preliminary objection is that there is no valid application before this Court, inasmuch as the supporting affidavit of the petition was attested by an employee of the 1st Petitioner.

Rule 46 of the Supreme Court Rules 1978 states that every application made to the Court of Appeal invoking the writ jurisdiction of the Court "*shall be by way of petition and affidavit in support of the averments set out in the petition*". Rule 3(1)(a) of

the Court of Appeal (Appellate Procedure) Rules 1990 is also to the same effect. It says the application "*shall be by way of petition together with an affidavit in support of the averments therein*". Hence, there cannot be any dispute that an accompanying affidavit in support of the averments contained in the petition is a *sine qua non* for the constitution of a proper application. This is a threshold requirement.

There are two Petitioners in this case. In compliance with the said Rules, the Petitioners have tendered two affidavits along with the petition. Are these affidavits valid in the eyes of the law?

It is undisputed that the Commissioner for Oaths who attested the affidavit of the 1st Petitioner was an employee of the 1st Petitioner at the time of the attestation of the affidavit. She was the Manager (Investigations and Legal Projects) of the 1st Petitioner at that time.

This is contrary to the express provisions contained in the proviso to section 12(2) of the Oaths and Affirmation Ordinance, No. 9 of 1895, as amended, which reads as follows:

> *A Commissioner for Oaths appointed under this Ordinance may administer any oath 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, and in all cases in which an oath, affirmation, or affidavit is commonly administered or taken before a Justice of the Peace; and any oath or affirmation or affidavit administered or taken by a Commissioner for Oaths shall in all legal proceedings and*

> *for all other purposes have the same effect as an oath, affirmation, or affidavit administered or taken before a Justice of the Peace; and all enactments relating to oaths, affirmations, and affidavits administered or taken before a Justice of the Peace shall, with the necessary modifications, apply thereto:*
>
> *Provided that a Commissioner for Oaths shall not exercise the powers given by this section in any proceeding or matter in which he is attorney-at-law to any of the parties, or in which he is otherwise interested.*

It is undeniable that the Commissioner for Oaths who attested the affidavit of the 1st Petitioner, being an employee of the 1st Petitioner at the time of attestation, was "*otherwise interested*" in the matter affirmed to before her.

The applicability of the proviso to section 12(2) of the Oaths and Affirmations Ordinance was considered in the Supreme Court case of *Airport and Aviation Services (Sri Lanka) Limited v. Buildmart Lanka (Pvt) Limited*[1] where the facts were similar. In the said case, when the application for leave to appeal came up for support before the Supreme Court, the Respondent took up a preliminary objection on the ground that the supporting affidavit filed by the Petitioner was in violation of the proviso to section 12(2) of the Oaths and Affirmations Ordinance, in that, the Commissioner for Oaths who attested the affidavit had been the Attorney-at-Law for the Petitioner at the related arbitration proceedings and the instructing Attorney in the High Court case and was also an employee of the Petitioner in the capacity of Assistant Legal Officer. The Respondent contended that the

[1] [2010] 1 Sri LR 292.

Commissioner for Oaths who attested the supporting affidavit was therefore "*otherwise interested*" in the application filed before the Supreme Court. It is to be noted that the Attorney-at-Law for the Petitioner before the Supreme Court was different. The Supreme Court, having considered *inter alia* previous decisions of the same Court,[2] upheld the preliminary objection and dismissed the application *in limine*, on the basis that the Commissioner for Oaths who administered the affirmation in the affidavit filed before the Supreme Court had an interest in the application and therefore the affidavit was not in compliance with the proviso to section 12(2) of the Oaths and Affirmations Ordinance.

The Supreme Court considered the proviso to section 12(2) of the Oaths and Affirmations Ordinance as a core issue which goes to the root of the validity of the affidavit.

Section 9 of the Oaths and Affirmations Ordinance reads 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 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.*

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[2] *Jayatillake v. Kaleel* [1994] 1 Sri LR 319, *Pakir Mohideen v. Mohamadu Casim* (1900) 4 NLR 299, *Cardar Saibu v. Sayadu Beebi* [1900] 4 NLR 130.

The Supreme Court did not consider that this defect is curable under section 9 of the Oaths and Affirmation Ordinance. The reason is obvious. When there is an express prohibition in the statute – i.e. the proviso to section 12(2) – the Court cannot override it by application of a former general provision – i.e. section 9.

In the words of Maxwell, "*If two sections of the same statute are repugnant, the known rule is that the last must prevail. But, on general principle that an author must be supposed not to have intended to contradict himself, the court will endeavour to construe the language of the legislature in such a way as to avoid having to apply the rule, leges posteriores priores contrarias abrogant [later laws abrogate earlier contrary ones].*[3]

In the course of the Judgment, at page 306, the Supreme Court observed:

> *It is common ground that the said [Attorney at Law and the Commissioner for Oaths who attested the supporting affidavit] is an employee of the Petitioner as she is the Assistant Legal Officer of the Airport and Aviation Service (Sri Lanka) Ltd. It is not disputed that employees of an organization are stakeholders, who have an interest in the said organization.*
>
> *An affidavit is a statement given in writing made on oath or affirmation. The administration of an oath is therefore an essential requirement of a valid affidavit. It is also an important requirement that such an administration of an*

[3] *Maxwell on The Interpretation of Statutes* (12th Edition), p.187.

oath should be carried out by a person who is permitted to do so under our law.

None of the cases cited by the Petitioners dealt with the effect of the proviso to section 12(2) of the Oaths and Affirmations Ordinance. *Airport and Aviation Services (Sri Lanka) Limited* is the only case, as far as I am aware, that particularly deals with this section. The Petitioners do not cite any other authority that has given a different interpretation to the proviso to section 12(2) of the Oaths and Affirmations Ordinance. The dicta contained in the said Supreme Court Judgment in relation to the proviso to section 12(2) is the *ratio decidendi* of the Judgment. This Court is bound by that Judgment.

In the Supreme Court case of *Pushpadeva v. Senok Trade Combine Ltd*,[4] cited by the Petitioners, the proviso to section 12 of the Oaths and Affirmations Ordinance was not considered. In the said case, the two preliminary objections raised in respect of the supporting affidavit were: (a) there was no affirmation at the beginning of the affidavit, and (b) the affirmant did not specify his religion in the affidavit. The Supreme Court rejected both objections for obvious reasons. Although there was no affirmation at the commencement of the affidavit, it was observed "*the fact that the affirmant has affirmed before the Commissioner for Oaths is clearly reflected in the jurat to the affidavit.*" The Supreme Court further held that so long as the deponent has affirmed to the averments of the affidavit, failure to mention the religion does not affect the validity of the affidavit. The religion, according to the Respondent, was necessary to decide whether the deponent shall swear or affirm

[4] [2015] BLR 40.

to the contents of the affidavit. However, in terms of section 9 of the Oaths and Affirmations Ordinance, substitution of the oath for the affirmation and *vice versa* does not make the affidavit invalid.

The other Supreme Court Judgment the Petitioners refer to is *Facy v. Sanoon*,[5] where the supporting affidavit was held to be defective by the Court of Appeal, as the Appellant being Muslim and having stated at the commencement of the affidavit that he takes the oath and swears, stated in the jurat that he affirmed to the facts of the affidavit. The Court of Appeal took the view that the Appellant having first opted to take the oath, cannot thereafter affirm to the facts of the affidavit. The Supreme Court did not find favour with this view. The Supreme Court at page 62, quoting section 9 of the Oaths and Affirmations Ordinance, held "*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.*"

The Petitioners say that when there are several parties to an application, there is no requirement for each party to file separate affidavits. I agree. Based on this submission, the Petitioners say "*In the instant application the issue pertaining to the defect in the affidavit has arisen with regard to the affidavit furnished by the 1st Petitioner Organisation, and the said defect can be cured by consideration of the affidavit furnished by the 2nd Petitioner Organisation.*" This argument would be entitled to succeed if the affidavit furnished by the 2nd Petitioner supports the averments in the petition. But it does not. The affidavit

[5] [2006] BLR 58.

tendered by the 2nd Petitioner is flawless in form but worthless in substance. It has no independent existence and is dependent upon the purported affidavit tendered by the 1st Petitioner. The purported affidavit tendered by the 1st Petitioner is exhaustive. It purports to support each and every averment in the petition. The affidavit tendered by the 2nd Petitioner has only four averments. All that is said by the affirmant therein is:

> *I have perused the Petition, Main Affidavit given by Dr. Eric Devapriya Wickramanayake – the Chairman of the 1st Petitioner Organization and annexed documents submitted with this Petition, and associate myself fully with all the contents setout therein.*

This affidavit tendered by the 2nd Petitioner does not cure the defect of the affidavit tendered by the 1st Petitioner. The objection that the petition is not supported by a proper affidavit stands.

Another point the Petitioners make is that this is public interest litigation, as opposed to private interest litigation, and therefore "*the same rules and technicalities that are applicable in other instances are not applicable in matters related to public interest [litigation].*" I cannot agree. Public interest litigation is not governed by different laws. The Court cannot give preferential treatment to public interest litigants. All are equal before the law and are entitled to the equal protection of the law – Article 12 of the Constitution.

As this preliminary objection was not raised at the first instance, the Petitioners contend it is not maintainable. I accept that it is a healthy practice to take preliminary objections at the earliest

possible opportunity. But this does not mean preliminary objections can never be taken for the first time at the argument, before going into the merits of the matter. Preliminary objections are sometimes taken at the last moment, preventing the opposite party from meeting those objections effectively. For instance, if the preliminary objection on the defective affidavit was taken by the 4th Respondent in the statement of objections, the Petitioners could have sought the indulgence of the Court to tender a fresh affidavit in the same tenor, sworn before another Commissioner for Oaths or Justice of the Peace.

Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990 permits it:

> *A party may, with the prior permission of the Court, amend his pleadings, or file additional pleadings, affidavits or other documents, within two weeks of the grant of such permission, unless the Court otherwise directs. After notice has been issued, such permission shall not be granted ex parte.*

But, I must stress, the same was open to the Petitioners, had they made such an application even when the 4th Respondent took up the said objection for the first time at the argument. This view is fortified by several decisions.[6]

In the Divisional Bench decision of this Court in *Senanayake v. Commissioner of National Housing*,[7] the affidavit tendered in support of the petition in the writ application was defective, in

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[6] *Vide Cadar Saibu v. Sayadu Beebi* (1900) 4 NLR 130, *Billion Bay Apparels (Pvt) Ltd v. Chief Minister, Sabaragamuwa Provincial Council*, CA/WRIT/85/2013, CA minutes of 18.01.2016.
[7] [2005] 1 Sri LR 182.

that, the Justice of the Peace before whom the affidavit of the Petitioner was affirmed did not have territorial jurisdiction to attest the affidavit. When this objection was raised, apparently at the stage of the argument, the Counsel for the Petitioner in his written submission sought the permission of the Court to file a fresh affidavit in support of the averments contained in the petition. The Divisional Bench, which was constituted for the sole purpose of deciding this question of law (i.e. whether a fresh affidavit can be allowed at that stage of the case) held in favour of the Petitioner and granted permission to file a fresh affidavit on identical terms. It is unfortunate that the Petitioners in the instant case did not make an application to file a fresh affidavit in place of the defective one, even at least in their written submissions tendered after the argument.

Unless such an application is made by the Petitioners, the Court cannot, in this contested matter where eminent senior President's Counsel are appearing for the opposing parties, direct the Petitioners to file a fresh affidavit instead of the defective one. Such conduct, in my view, would give the impression to the contesting Respondents that the Court is biased in favour of the Petitioners, which does not auger well for the justice system. The dicta of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy*[8] is worth repeating:

> *It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*

I am fully conscious that the Court shall, as far as possible, endeavour to dispose of cases on merits and not on technical

[8] [1924] 1 KB 256 at 259.

grounds. But this is not an absolute principle. If the technical objection shatters the very foundation of a case, the Court cannot disregard it merely on the basis that the objection is technical. In this case, as I have explained, although the objection was, perhaps strategically, taken belatedly, it could have been successfully met, had the Petitioners responded in a timely manner.

If there is no valid supporting affidavit, there is no valid application before the Court. Hence there is no necessity to go into the merits of the case.

The preliminary objection on the defective affidavit is upheld and the application of the Petitioners is dismissed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal