

AFFIDAVIT

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

Nihal Sri Amarasekera
of 167/4, Sri Vipulasena
Mawatha,
Colombo 10.

Plaintiff

Vs.

Gamini Lakshman Peiris,
of "Visumpaya", Staples
Street, Colombo 2 and also
of 37, Kirula Place, Colombo 5.

Defendant

Court of Appeal
Revision Application No: 775/98

DC Colombo Case No. 19849/MR

And

In the matter of an application
for Revision in terms of the
Constitution of the Democratic
Socialist Republic of Sri Lanka
read with the Civil Procedure
Code from an order of the
District Court of Colombo dated
30th July 1998 in Case
No.19849/MR

Gamini Lakshman Peiris,
of "Visumpaya", Staples
Street, Colombo 2 and also
of 37, Kirula Place, Colombo 5.

Defendant Petitioner

Vs.

Nihal Sri Amarasekera
of 167/4, Sri Vipulasena
Mawatha,
Colombo 10.

Plaintiff Respondent

I, Gamini Lakshman Peiris of "Visumpaya", Staples Street, Colombo 2 and also of 37, Kirula Place, Colombo 5, being a Buddhist, do hereby solemnly, sincerely and truly declare and affirm as follows:

1. I am the Defendant - Petitioner above named and have perused the statement of objections and affidavit of the Plaintiff - Respondent above named (hereinafter referred to as the Plaintiff) dated 14.8.1998 and reply to the same as follows.
2. I deny the averments contained therein, save and except those which are admitted herein.
3. I state that the application dated 5th March 1998, which was purported to be made under Section 102 of the Civil Procedure Code, referred to in paragraph 8 of the Plaintiff's statement of objections and the corresponding paragraph of his affidavit was bad in law in that he did not specify the matter or matters in question in the action in relation to which the Plaintiff alleged the existence of documents in my possession or power and in respect of which an order was sought from court under that section.
4. I state that the Court was accordingly disabled from making any order thereon without first satisfying itself as to what "matters in question in the action" the documents sought to be discovered, were alleged to relate and accordingly the order purported to be made by court was not made upon a proper exercise of the judicial discretion vested in it by Section 102 of the Civil Procedure Code, but made as a matter of course.
5. I state that the application made to court contained only an unsworn statement made by the Plaintiff's Attorneys-at-Law to the effect that there were "matters attended to" by me and "actions taken" by me "in the course of (my) duties as Deputy Minister of Finance which said matters and/or actions have been recorded in certain files maintained by and kept at the Ministry of Finance/Treasury under (my) supervision and/or control and/or authority as the Deputy Minister of Finance".
6. I state that the aforesaid statements made on behalf of the Plaintiff by his Attorneys-at-Law are of a speculative nature and assumes the existence of a state of facts of which he could have no direct knowledge and are hearsay statements which do not even aver the grounds for such a belief or assumption. Nor does the record disclose how the trial judge came to the conclusion that documents of this description in fact exist and/or how the cause of action pleaded in the plaint "had arisen from" the aforesaid "matters and/or actions" attributed to me.
7. I state that the statement in my affidavit that the documents referred to in the notice aforementioned are "in any event privileged" is in no way an admission that documents of this description in fact existed but is merely a plea in law that privilege may be claimed in respect of documents so described. The inference drawn by the trial judge is accordingly erroneous in law and in fact.

8. I state that documents in files maintained or kept in the Ministry of Finance/Treasury are not documents in my possession or power, as no power or duty pertaining to the subject of finance has been delegated to me under Article 46(2) of the Constitution by Notification published in the Gazette.
9. I state that the trial judge has in his order dated 9.3.98 contained in the record of proceedings requested the production of the documents referred to in the Plaintiff's application which is not an order he could have lawfully made under Section 102 of the Civil Procedure Code and that the notice of the order drafted by the Plaintiff's Attorneys-at-Law and signed by the Additional Registrar of the District Court is not in conformity with the order of the trial judge and is accordingly a nullity.
10. I respectfully state that the trial judge has erroneously concluded that I have not complied with the order made by him on the mistaken assumption that the documents referred to by the Plaintiff were in fact in my possession or power when there was no such evidence before him.
11. I state that I was not granted any opportunity of showing cause against any order being made under Section 109 striking out my answer in the case and fixing the case for ex parte trial and the order made by him was contrary to rules of natural justice and accordingly void.
12. I state that the trial judge could not have made an order under Section 109 without a finding that such non-compliance with the order amounted to a wilful and contumacious refusal to comply with the order of court. There was no evidence on the record from which such an inference could ever have been drawn.
13. (a) I state that the documents marked "A6"-"A7" are not material to this application; in any event I plead that the said documents were referred to by Counsel for the Plaintiff in Court on 10th August 1998.
- (b) I state that I have not wilfully suppressed or omitted any document material to this application and the documents inadvertently omitted were later furnished to court and the Plaintiff having notice of my Application in Revision the Court granted a stay of the proceedings of the District Court in proceedings before this Court which were not held ex parte but inter partes.
14. I state that by reason of the determination made under Section 109 (1) that I have been guilty of non-compliance of an order of Court under Chapter XVI of the Civil Procedure Code, I am also deemed in law to be guilty of the offence of contempt of Court under Section 109 (2) and reasonably apprehend that steps may be taken against under Chapter XVI of the Civil Procedure Code.

15. I am advised that in the premises aforesaid that Your Lordship's Court may be pleased to set aside the order of the Learned Trial Judge dated 30th July 1998.

Read over, affirmed and }
signed at Colombo }
this 29th day of August }
1998 }



Before Me.

Justice of Peace

S. M. K. GUNASEKARA
Justice of the Peace (All Island)
No: 36/43, Araliya Uyana,
Polwatta, Pannipitiya.

TENDERED BY ME :

Attorney-at-Law

I do hereby certify that the tendered photo copy of the Affidavit dated 29.08.1998, filed of record in CA.No.775/98, DC.Colombe No.19849/MR.

Ranmyake
Chief Clerk, Court of Appeal.

Compare with: *gls*

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