

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 26.07.2023
Pronounced on: 02.08.2023

WP(C) No.1544/2023

ABDUL RASHID BHAT

...PETITIONER(S)

*Through: - Mr. Mir Majid Bashir, Advocate,
Mr. Irshad Ahmad, Advocate.*

Vs.

FINANCIAL COMMISSIONER & ORS.

...RESPONDENT(S)

*Through: - Mr. M. A. Qayoom, Advocate,
With Mr. Mian Tufail, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) By this order, preliminary objection raised by respondents No.2 and 3 to the maintainability of the instant writ petition is proposed to be determined.

2) The petitioner has filed the instant writ petition challenging order dated 29.07.2022 passed by respondent No.1 in an appeal filed by the private respondents against the petitioner herein.

3) At the very outset, learned counsel for private respondents has raised a preliminary objection with regard to maintainability of the instant writ petition on the ground that the affidavit of the petitioner in support of the writ petition has not been attested and sworn in accordance with the law, inasmuch as the affidavit accompanying the

writ petition has been attested by a Notary and not by the Oath Commissioner as required by the provisions contained in the Writ Proceedings Rules, 1997. It has also been contended that the petitioner is an undertrial prisoner, as such, it would have been improbable for the Notary to administer oath to the petitioner inside the jail before attesting the affidavit.

4) Heard and considered.

5) The learned counsel appearing for the private respondents has contended that as per Rule 5 of the Writ Proceeding Rules of 1997, an affidavit in support of a writ petition is required to be attested by an Oath Commissioner but in the instant case, the affidavit in support of the writ petition has been attested by Notary which is not in accordance with law. The learned counsel in this regard has relied upon the judgment of Calcutta High Court in the case of **Sudebi Sundari Mondal vs State of West Bengal and Ors.**, AIR 1983 Cal.1.

6) It has been also contended that, admittedly, the petitioner is an undertrial prisoner in FIR 33/2022 for offences under Section 302, 307, 325, 427 and 34 of IPC of P/S Uri, who is presently lodged in Subsidiary Jail, Baramulla, therefore, without there being any proper permission from the Superintendent of the jail concerned or from the concerned Court, it is improbable to conceive that the petitioner had access to the petition and the affidavit for the purpose of appending his signature thereon and it would have been improbable for the Notary to visit the jail for the purpose of attesting the affidavit and administering oath to the petitioner.

7) The learned counsel appearing for the petitioner, on the other hand, has submitted that even an affidavit supporting a writ petition that has been attested by Notary is legally valid. The learned counsel has submitted that before obtaining signatures of the petitioner on the petition and the affidavit, proper permission was granted by the Court of 1st Additional Sessions Judge, Baramulla, in terms of its order dated 27.05.2023, as such, the objection raised by learned counsel for the private respondents is without any substance.

8) In order to determine the merits of rival contentions of the parties, it would be apt to refer to the provisions contained in Rule 5 of the Writ Proceeding Rules, 1997. It reads as under:

5. Every petition shall be signed by the petitioner(s) and is Advocate. In case the petitioner happens to be illiterate, his thumb impression should be attested by the Advocate. The petition shall be supported by an affidavit or affidavits, as in Schedule I appended to these rules, verifying the facts stated therein by reference to the numbers of the paragraphs of the petition containing the facts. It shall be drawn up in the name of first person and shall be attested by an Oath Commissioner.

While administering oath to the deponent, the Oath Commissioner shall indicate that the contents of the petition were read over to the deponent in the language understood by him and were admitted to be correct. He shall attest the affidavit after proper identification of the deponent. All cuttings on each page of the petition shall be signed/initialled by the Oath Commissioner.

9) From a perusal of the aforesaid provision, it is clear that a petition before the High Court has to be supported by an affidavit which has to

be attested by an Oath Commissioner in the manner as indicated in the aforesaid Rule.

10) Chapter XVIII of the Jammu & Kashmir and Ladakh High Court Rules (hereinafter referred to be as “the High Court Rules”) deals with Oath Commissioners. Rule 186 of the High Court Rules provides for manner of appointment of the Oath Commissioners whereas Rule 187 provides for qualification of an Oath Commissioner. Rule 191 of the said Rules provides the manner in which an Oath Commissioner has to attest an affidavit whereas Rule 192 provides for maintenance of Register by Oath Commissioners.

11) Chapter XVI of the High Court Rules deals with the affidavits. Rule 181 of the High Court Rules, as amended vide Notification No.1247 of 2021/RG dated 15.11.2021, is of great significance in the context of the instant case and the same is reproduced as under:

181. An affidavit intended for use in the Court may be sworn before any authority mentioned in Section 139 of the Code or before any officer of the court, or before the Presiding Officer of any court or before a Magistrate or a Sub-Registrar or before an Oath Commissioner, appointed under these rules.

12) From a perusal of the aforesaid Rule, it is clear that an affidavit intended for use in the High Court has to be sworn before any authority mentioned in Section 139 of the Code of Civil Procedure. It will be profitable to notice the provisions contained in Section 139 of the Civil Procedure Code, which reads as under:

139. Oath on affidavit by whom to be administered.— *In the case of any affidavit under this Code—*

- (a) any Court or Magistrate, or*
- (aa) any notary appointed under the Notaries Act, 1952 (53 of 1952); or*
- (b) any officer or other person whom a High Court may appoint in this behalf, or*
- (c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf, may administer the oath to the deponent*

13) Clause (aa), quoted above, clearly provides that oath on an affidavit can be administered by a Notary appointed under the Notaries Act. When this Clause is read with the provisions contained in Rule 181 of the High Court Rules, it becomes lucid that an affidavit intended for use in the High Court may be sworn before a Notary as well.

14) So far as appointment of the Oath Commissioners is concerned, the same is done by the High Court in exercise of its powers under Clause (b) of Section 139 of the CPC. This is clear from a reading of Rule 186 of the High Court Rules which provides the manner of appointment of Oath Commissioners.

15) From the above, it is clear that an affidavit intended for use in the High Court may be sworn before any Court or Magistrate, a Notary, an Oath Commissioner appointed by the High Court, or any other officer appointed by any other Court which the State Government has generally or specifically empowered in this behalf. So, any affidavit attested by any of the aforesaid authorities is legally permissible for its use in the High Court.

16) The judgment of the Calcutta High Court relied upon by learned counsel for the private respondents is not applicable to the instant case because in the said case, there was no rule in the Rules of Calcutta High Court that would provide for attestation of affidavits by an authority other than the Oath Commissioner. In fact, after the incorporation of Rule 53 in the Rules of High Court of Calcutta, which provide for applicability of the provisions of the Civil Procedure Code in all proceedings under Article 226 of the Constitution, the High Court of Calcutta in a later judgment in the case of **Naveen Goel vs Commissioner of Customs (Port) & anr.** 2017 SCC Online Cal. 327, held that the decision in **Sudebi Sundari Mondal's** case (supra) can no longer be held to contain the guiding principles regarding use of affidavits.

17) In the instant case, Rule 181 of the High Court Rules makes the provisions of Section 139 of the Code of Civil Procedure applicable to affidavits intended to be used in the High Court. Thus, a Notary appointed under the Notaries Act is empowered to attest an affidavit which is intended to be used in the High Court. In this regard, I am supported by the judgment of a Division Bench of Allahabad High Court in the case of **Sajan Kumar vs. C. L. Verma and anr.**, AIR 2006 Allahabad 36. The relevant observations of the said judgment are reproduced as under:

Similar view has also been taken by another learned Single Judge of this Court in Bata India Ltd. v. Addl. District Judge, Gorakhpur and Anr. 1999 (1) AWC 112. We are also in full agreement with the views expressed by the learned Single

Judges of this Court in decisions referred herein before and further for another simple reason that the provisions contained in Chapter IV of High Court Rules do not exclude either expressly or by necessary implication the presentation of such affidavits sworn before the Notaries in proceedings before High court which are to be disposed of on the basis of affidavits, therefore, it cannot be held that only those affidavits which are sworn before the Oath Commissioners appointed by the Chief Justice of High Court can be presented and accepted in proceeding before High Court. Thus, taking pedantic and technical view in the matter would virtually cause great hardship to the public at large and defeat the very purpose of Notaries Act 1952 and resulting which the provisions of aforesaid Act and Section 139 of C.P.C. would be rendered meaningless. Therefore, we have no hesitation to hold that affidavits sworn before Notaries appointed under Notaries Act, 1952 can be presented before the proceedings in question and cannot be excluded for consideration for the reasons aforesaid. In the result the objection raised by the learned counsel of the opposite party is not sustainable and liable to be rejected.

18) Having held that an affidavit attested by a Notary Public can be relied upon in proceedings before the High Court, the next question that comes up for discussion is as to whether it can be stated that the petitioner has appended his signatures on the petition and the affidavit having regard to the fact that he was lodged in the jail at the relevant time. As already noted, the learned counsel for the petitioner has produced a copy of order dated 27.05.2023 passed by the learned Sessions Judge, Baramulla, which clearly contains directions to the Superintendent, Subsidiary Jail, Baramulla, to get the signatures of the accused on the papers under rules and return the same to the Court. It is on the strength of this order that the petitioner has signed the documents including the affidavit which is attested by the Notary. Thus, it is clear

that the petitioner has appended his signatures on the petition and the affidavit under the permission of the Court.

19) The Notary has certified that the petitioner, who has been identified by a police officer, presented the affidavit before him and that he administered oath to him. There is a presumption of correctness attached to the aforesaid act of the Notary. It cannot be stated that the Notary had not visited the jail for the purposes of attestation of affidavit once he has certified that the deponent had presented the affidavit before him and he had administered oath to him. The respondents have not brought anything on record to rebut this presumption. The contention of learned counsel for the private respondents in this regard is, therefore, not sustainable.

20) For the foregoing reasons, the preliminary objection to the maintainability of the writ petition raised by the private respondents is overruled and it is held that the petition has been properly filed and it has been properly signed by the petitioner. It is also held that the affidavit in support of the petition, which is attested by the Notary, is permissible under law and the same can be relied upon by this Court in the present proceedings.

21) Before parting, it would be necessary to record certain observations as regards the difficulties that are being faced by the undertrial and convict prisoners who intend to file case before the High Court or before other Courts of the Union Territories of Jammu & Kashmir and Ladakh. In the cases that are to be filed by the litigants,

particularly of civil nature, more often than not, the petitioners/ respondents/applicants/plaintiffs/defendants are required to sign the pleadings and swear affidavits in support thereof. It becomes very difficult for the undertrial/convict prisoners who intend to file such affidavits before different courts to secure the services of a Notary or an Oath Commissioner inside the jail.

22) The High Court, in terms of Clause (b) of Section 139 of the Code of Civil Procedure, has power to appoint any officer who can administer oath on affidavit(s). It is in exercise of this power that the High Court appoints the Oath Commissioners. It would be in the interests of administration of justice if incharge of the jails are vested with powers of Oath Commissioners by the High Court so that the affidavits which are intended to be used by the prisoners before the Courts are attested by the said officers. This would obviate the difficulties that are generally being faced by the prisoners while filing their pleadings/affidavits before different courts, particularly in cases of civil nature. To overcome such difficulty, Allahabad High Court has, in terms of Proviso to Rule 4 of Chapter IV of the Rules of the said High Court, authorized an officer of jail in the State of Uttar Pradesh to attest an affidavit and the power of Oath Commissioner has been conferred upon such officers. Incorporation of a similar Rule in the Jammu & Kashmir and Ladakh High Court Rules can be considered.

23) In view of the above, it is directed that a copy of this order be forwarded to the Registrar General of this Court, who may place the

same before Hon'ble the Chief Justice for considering the aforesaid aspect of the matter.

24) The writ petition be listed for consideration on **14.08.2023**.

(Sanjay Dhar)
Judge

SRINAGAR
02.08.2023
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

