1950 *Present:* **Nagalingam J.**

BISO MENIKA, Appellant, *and* WIJERATNE BANDA, Respondent

S. C. 775—M. C. Matale, 15,066

Oaths Ordinance (Cap. 14)—Section 8 (2)—Non-compliance—Fatal irregularity.

Where the applicant challenged the defendant to take oath at a *devale*—

Held, that the failure of the person authorised by Court to administer the oath to make a record in writing of the terms of the oath at the time it was taken by the defendant, in terms of section 8 (2) of the Oaths Ordinance, was a fatal irregularity.

Quaere, whether the oath should have been taken during the hours of worship at the *devale.*

APPEAL from a judgment of the Magistrate's Court, Matale.

T. B. Dissanayake, for the applicant appellant.

D. S. Jayawickrama, with *M. D. H. Jayawardene,* for the defendant respondent.

Cur. adv. vult.

October 18, 1950. NAGALINGAM J.—

The applicant who claimed maintenance for an illegitimate child from the respondent appeals from the order of the learned Magistrate dismissing her application on the ground that the respondent had taken the oath which the applicant had challenged him to take.

Two grounds have been urged in support of the appeal. The first is that though the agreement was that the oath was to be taken at Minneriya Dewale it was taken at a time when the *devale* was not open for worship and while its doors remained closed. It may be a moot point as to whether the respondent understood that the oath should be taken during the hours of worship at the *devale* but on the other hand it is impossible to negative the contention on the applicant's behalf that when a party is required to take the oath in a *devale* that it would be expected that the oath would be taken during the hours of worship. There was no time fixed at which the oath was to be administered, for had a time been fixed and the time happened to be one at which the *devale* is normally closed, then it may be possible to take the view that it was within the contemplation of the parties that irrespective of the circumstance of the *devale* being closed for worship the oath was to be taken at that time. To say the least, the question is one of grave doubt as to whether the oath was to be taken during hours of worship or not.

The second point urged on behalf of the appellant is that there has not been a compliance with section 8 (2) of the Oaths Ordinance, Cap. 14 L. E., in that the person authorised by Court to administer the oath failed to take and record in writing the evidence of the person to be sworn or affirmed and return it to the Court. The Interpreter-Mudaliyar of the Court was authorised to administer the oath on the 28th May, 1950. This order was made on the 22nd May, 1950. In point of fact the Interpreter-Mudaliyar did not make a record in writing of the terms of the oath taken by the respondent at the time it was taken or at any other time. On 31st May, however, he gave oral evidence in Court and stated: " In terms of order of 22.5.50 I accompanied applicant and respondent to the Minneriya Dewale in Minneriya and administered the oath agreed upon to the respondent in the presence of the applicant."

It would be noticed that there is no evidence as to when the oath was administered in fact. It is, however, not suggested that it was taken on any date other than 28th May, as directed by Court. Nevertheless, though it is a small point, I think there should have been specific evidence as to when the oath was taken.

The main objection taken, however, is not purely a technical one. According to the record, while the respondent was yet under cross-examination, the applicant appears to have made the challenge, and the learned Magistrate records: " The applicant at this stage challenges the respondent to take oath that he had nothing to do with her." The Magistrate's order, however, is, " The respondent will swear that he never had sexual intercourse with the applicant ". It is difficult to say that the oath directed to be taken by the learned Magistrate is identical with that by which the applicant agreed to be bound.

The applicant in her testimony had affirmed that the respondent kept her as his mistress for about one and a half years, on the understanding

that he would marry her, that he used to visit her in her house and that he had written two verses avowing his love to her, which she produced. The respondent when he gave evidence denied that he promised to marry the applicant or kept her as his mistress and further denied the paternity of the child.

In the light of these conflicting statements of the two parties, it is easy to see that the applicant's challenge was very much wider than what the Magistrate ordered the oath should be. Her challenge was that the respondent had to swear that *he had nothing to do with her.* It may be that on a basic analysis of the terms of the oath the applicant required the respondent to take, it may be said that the respondent should be absolved on his taking the oath that he had never had sexual intercourse with the appellant. Yet I think that the oath suggested by the appellant is much wider, for while the fact of sexual intercourse having taken place between the appellant and the respondent may only have been known to the two of them, the visits of the respondent to the applicant's house and the fact that he had written verses to the applicant and his promise to marry her may have been within the knowledge of others and this may have tended to make the respondent hesitate to take the oath in the manner suggested by the applicant.

The Interpreter-Mudaliyar's evidence does not assist one in determining what were the precise terms of the oath taken by the respondent, whether it was on the terms suggested by the applicant or those indicated by the Magistrate in his order. It is clear to see that the requirements of the law that the terms of the oath should be reduced to writing is not a mere formality but one of great substance. This provision of the law has received judicial interpretation. In the case of *Dharmasena v. Sudumale* [1] the facts were almost similar. There too it was the Interpreter who was commissioned to administer the oath but he failed to make a written record of the terms of the oath at the time it was administered, but on the day following the Interpreter gave evidence on oath in Court setting out, however, the terms of the oath which had been taken. Lascelles C.J. held that the procedure prescribed by the section (section 9 as it then stood) had not been complied with and that it was an irregularity which was fatal to the proceedings.

The section requires that the person authorised to administer the oath should take and record in writing the evidence of the person to be affirmed. This implies that the record in writing of the evidence should be made at the time the evidence is affirmed to, namely at the time and as the oath is taken by the party. See observations of Pereira J. in *Tissera v. Annaiya* [2]

Having regard to these considerations, I do not think it can be said that there has been a compliance with the provision of the law. The objection is sound and must be upheld. I would therefore set aside the order of the learned Magistrate and remit the case for trial on its merits. In all the circumstances of the case I think it desirable that the fresh trial should be before another Magistrate. The applicant will be entitled to the costs of appeal.

Order set aside.

[1] *(1912) 15 N. L. R. 377.* [2] *(1913) 17 N. L. R. 154.*