DE SILVA AND OTHERS
v.
L. B. FINANCE LTD.,

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
RAMANATHAN, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 61/92.
S.C. SPECIAL (L.A) NO. 109/92.
C.A./L.A. NO. 155/91.
D.C. COLOMBO NO. 95404/MHP.
DECEMBER 1st, 1992 AND MARCH 12th, 1993.

Affidavit – Validity – Jurat – Failure to include the words " affirmed thereto" in jurat – Meaning of the word 'affirmant' – Description of the deponents as 'affirmants' – Civil Procedure Code Section 438 – Form 75 – Section 439.

1. Where the affidavit stated that deponents " affirm " and in the body of the affidavit the deponents described themselves as " affirmants " and in the jurat there was a statement that the affidavit was read over and explained to the " within – named affirmants " there was a sufficient compliance with Section 438 CPC and the affidavit was valid despite the fact that the jurat did not contain the fact of affirmation.

2. There was no reference to Form 75 in section 438 of the Civil Procedure Code. Only the marginal note in Form 75 makes reference to section 438. Compliance with Form 75 is not essential.

3. The word " affirmant " is not infrequently found in affidavits filed in the courts. Its meaning is well known and accepted in this country even though it does not find a place in the Oxford Dictionary. It means " one who affirms " and it is so defined in Chambers Dictionary (1983 Ed.) Webster's Collegiate Dictionary (3rd Ed.) and Odhams Dictionary.

Cases referred to :

1. *King v. Ponnasamy Pillai,* 28 N.L.R. 156.
2. *Simon Singho v. Government Agent W.P.,* 47 N.L.R. 545.
3. *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Sangananda Terunnanse* 66 N.L.R. 333.

4. *Kanagasabai v. Kirupamoorthy* 62 N.L.R. 54, 58.
5. *Sivagurunathan v. Doresamy,* 52 N.L.R. 207.
6. *De Silva v. Seenathumma,* 41 N.L.R. 241.
7. *Kandiah v. Abeykoon Sriskantha's Law Reports,* Vol. IV 96.

APPEAL from judgment of Court of Appeal.

Manohara de Silva for defendant – appellants.

Harsha Soza for plaintiff – respondent.

Cur. adv. vult.

March 29, 1993.

G. P. S. DE SILVA, C. J.

The plaintiff instituted action against the defendants on a hire purchase agreement. At the commencement of the trial, issues1–6 were raised on behalf of the plaintiff and issues 7–16 on behalf of the defendants. On an objection taken by Counsel for the plaintiff, the District Judge made order rejecting all the issues raised by the defendants, except issue No. 8. Thereupon the defendants moved the Court of Appeal by way of an application for leave to appeal against the order of the District Court. When the application for leave to appeal came up for hearing before the Court of Appeal, Counsel for the plaintiff raised a preliminary objection which was upheld by the Court of Appeal and the application for leave to appeal was dismissed. The defendants have now preferred an appeal to this court from the judgment of the Court of Appeal dismissing the application for leave to appeal filed in terms of section 754 (2) read with section 756(2) of the Civil Procedure Code.

The preliminary objection raised before the Court of Appeal related to the validity of the affidavit filed in support of the petition as required by section 756 (2) of the Civil Procedure Code. The short point raised was that the affidavit was invalid for the reason that the *jurat* did not contain the fact of affirmation. At the hearing before us Mr. Harsha Soza for the plaintiff-respondent strenuously contended that strict compliance with the provisions of section 438 of the Civil Procedure Code was essential ; that the wording in section 438 of the Civil Procedure Code brings in Form 75 in the first Schedule

to the Civil Procedure Code ; that the affidavit must be in accord with Form 75; that the affidavit filed by the defendants-appellants was invalid for the reason that the *jurat* does not expressly state that the defendants who have declared themselves to be Buddhists have " affirmed thereto ".

The affidavit in question commences with the words – " We .... being Buddhists do hereby solemnly, sincerely and truly declare and *affirm* as follows : " It is also to be noted that Paragraph (1) reads thus:– We are the petitioners above–named and the *affirmants* hereto. The *jurat* is as follows :– " The foregoing affidavit was duly read over and explained by me to the *within-named affirmants* who having understood the nature and contents signed same in my presence at Colombo on this 16th day of August 1991 ". (The emphasis is mine)

On a consideration of the averments in the affidavit set out above and the wording of the *jurat* it seems to me that the provisions of s. 438 of the Civil Procedure Code have been complied with. The *jurat* expressly sets out the place and date on which the affidavit was signed. This is an essential requirement of an affidavit. There is no dispute that the affidavit was signed before a Justice of the Peace. There is specific reference in the *jurat* that the affidavit was " duly read over and explained..... to the within–named affirmants .....". The submission that the affidavit is invalid was really based on the absence of the word " affirmed " before the words " duly read over " in the *jurat*. It seems to me, however, that a meaning has to be given to the expression " within-named affirmants " in the context of the other averments in the affidavit referred to above. Reading the affidavit as a whole, the fair meaning that could be given to these words is that the deponents have affirmed to the contents of the affidavit before the Justice of the Peace.

As submitted by Mr. Manohara de Silva for the defendants–appellants, s. 438 of the Civil Procedure Code makes no express reference to Form 75 of the Civil Procedure Code. On the other hand, there are sections in the Civil Procedure Code, as rightly pointed out by Mr. de Silva, where there is specific mention of a particular " form " set out in the Schedule – vide sections 793, 974, 797, 757, 703, 651, 516 and 529 (2). It is only the marginal note in Form 75 which makes reference to section 438. I hold that section 438 of the

Civil Procedure Code does not require that the fact of affirmation should be expressly stated in the *jurat* of the affidavit.

There is a further matter to which I must refer. Mr. Soza submitted that there is no such word as " affirmant " in the English language; it is a word which is not found in the Oxford Dictionary. However, it does find a place in the Chambers Dictionary (1983 Edition) in Webster's Collegiate Dictionary (3rd Edition) and Odhams Dictionary. The meaning as given in these dictionaries is " one who affirms ". Moreover, it is an expression which is not infrequently found in affidavits filed in our courts. Its meaning is well known and accepted in this country, even though it does not find a place in the Oxford Dictionary.

Mr. Soza cited the case of *King vs. Ponnasamy Pillai* [1], in support of his submissions. But that was a case where the accused was charged under ss. 196 and 190 of the Penal Code and the affidavit constituted the foundation of the charge. Further, the court was concerned with the question whether the affidavit complied with the provisions of s. 439 of the Civil Procedure Code and not of s. 438 of the Civil Procedure Code. It seems to me that this case is of little assistance in the appeal before us. Reliance was also placed on *Simon Singho vs. Government Agent W.P.,* [2]. This too was a case where the court was concerned with s. 439 of the Civil Procedure Code which expressly enacts that, " in the event of the declarant being ..... not able to understand writing in the English Language, the affidavit shall at the same time be read over or interpreted to him in his own language, and the *jurat shall express that it was read over or interpreted to him in the presence of..... the Justice of the Peace.....and that he appeared to understand the contents.....".* (The emphasis is mine) The affidavit in question in that case contained no such *jurat* and Dias J. held that such an affidavit is valueless. Mr. Soza also cited the case of *Meeruppe Sumanatissa Terunnanse vs. Warakapitiya Sangananda Terunnanse* [3], which again was a case concerned with the provisions of s. 439 of the Civil Procedure Code.

Mr. Soza also referred us to the following observations of Basnayake C.J. in *Kanagasabai vs. Kirupamoorthy* [4] :– " Before I part with this judgment I wish to point out that 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 ". Apart from the fact that this statement is obiter, the appeal before us is not concerned with an undated affidavit or one where the place it was affirmed to is left blank.Counsel further relied on the case of *Sivagurunathan vs. Doresamy* [5], where Basnayake J. took the view that notice of tendering security required by s. 756 of the Civil Procedure Code must be in Form 126 of the First Schedule to the Code, following the decision of the Full Bench in *de Silva vs. Seenathumma* [6].The Court observed " the omission to mention the 7th respondent in the notice appears to be not accidental but deliberate. Therefore there has been no intention to give her the prescribed notice". It seems to me that this case too is of little assistance on the question before us in the instant appeal.

There remains for me to consider *Kandiah vs. Abeykoon* [7] (Sriskantha's Law Reports, Vol. IV 96) which was also relied on by Mr. Soza. That was a case which dealt with proceedings taken under the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended. Section 5(2) of the Act itself required that the affidavit has to be in Form C set out in the Schedule. However, the *jurat* was not in terms of Form C and, what is more, there was no indication of the " place of deposition ". It was further noticed that " both according to the body of the affidavit and the *jurat* one does not know whether the deponent took an oath or made an affirmation .....". (at page 99) The defects in the affidavit were considered in the context of the special jurisdiction conferred on the Magistrate's court, a jurisdiction which has far reaching consequences. The court concluded, " there can be no doubt that the operation of the Act and its provisions could well have a serious impact upon proprietory rights ". It appears to me that this case is of minimal assistance in deciding the appeal before us.

On a fair reading of the entirety of the impugned affidavit it seems to me that the preliminary objection taken was of a technical nature and the Court of Appeal was in error in upholding it. I accordingly allow the appeal, set aside the judgment of the Court of Appeal and direct the Registrar to return the record to the Court of Appeal so that the application for leave to appeal may now be heard on its merits.

In all the circumstances, I make no order for costs.

RAMANATHAN, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.
Case sent back for hearing on merits.