SCIENCE HOUSE (CEYLON) LIMITED
V.
I. P. C. A. LABORATORIES PRIVATE LIMITED

SUPREME COURT.
TAMBIAH J., SENEVIRATNE J. & FERNANDO J.
S. C. APPEAL NO: 4/87.
CA/LA NO: 147/82.
D. C. COLOMBO NO: 32689/S.
NOVEMBER 21, 1988.
DECEMBER 01, 08 and 09, 1988.

Civil Procedure — Summary procedure (on liquid claims) under Chapter LIII of the Civil Procedure Code — Ss. 25, 703, 704, 705 and 706 (1) CPC — Attorney —Recognised Agent — Companies Ordinance S. 34 (1) — Security.

In a suit by way of summary procedure under Chapter LIII of the Civil Procedure Code for recovery of monies due on two Bills of Exchange on a sale of drugs, the plaintiff a company incorporated in India filed plaint through its Attorney in Sri Lanka who held a power of attorney from it. To the plaint was annexed an affidavit from the said Attorney stating, inter alia, that the sums claimed in the plaint were justly and truly due to the plaintiff.

The defendant-company asked for unconditional leave to appear and defend the action on the ground that part of the drugs were of poor quality and had deteriorated and had to be destroyed and the plaintiff had failed to contribute towards the remuneration and expenses of two medical representatives. Further there had been delay in presentment for payment and the monies were therefore not recoverable. At the hearing the defendant-company took up the position that as the plaintiff was a company it could not avail itself of the summary procedure on liquid claims provided by Chapter LIII of the Civil Procedure Code in that it could not make an affidavit as required by S. 705 (1) of the Code. The District Judge held that S. 34 (1) of the Companies Ordinance permitted any document requiring authentication by a company to be signed by a Director, Secretary or other officer of the Company and therefore the affidavit filed along with the plaint fulfilled the requirements of S. 705 (1) of the C. P. C. In the correspondence between the parties the defendant company had not complained that any quantity of the drugs had to be destroyed owing to poor quality or deterioration or that the plaintiff had failed to contribute towards the expenses and disbursements on account of Medical Representatives and the District Judge concluded the defence was not prima facie sustainable and he had reasonable doubt as to its good faith. He ordered the defendant-company to deposit Rs. 400,000/- as security. In appeal the Court of Appeal held with the District Judge.

Held

(1) The District Judge's conclusions that the defence was not prima facie sustainable and that he had reasonable doubt as to its good faith are justifiable and should be upheld.

(2) A Corporation or a Company can avail itself of the special procedure in Chapter LIII of the Civil Procedure Code and it can make an affidavit as required by S. 705 (1) of the Civil Procedure Code through one of its principal officers.

(3) The Plaintiff-Company's Attorney in Colombo was a "recognised agent" within the meaning of S. 25 (b) of the Code and his affidavit was sufficient and satisfied the requirements of S. 705(1) of the Code.

(4) Section 34(1) of the Companies Ordinance permits juristic persons to file affidavits in proceedings under Chapter LIII of the CPC.

(5) Sections 704 and 706 of the CPC stipulate that only the sum mentioned in the summons could be ordered as security. The security of Rs. 400,000/- is in excess of the amount that could be ordered. No more than the amount mentioned in the summons can be ordered as security.

Cases referred to:—

1. *The Bank of Madras v. Ponnesamy* — 9 SCC 169.
2. *The Bank of Montreal v. Cameron* — LR 2 QBD 536.
3. *Royal Crown Derby Porcelain Co. Ltd. v. Russell* [1949] 1 All ER 749.
4. *Martin Perera v. Madadombe* — 73 NLR 25, 34.
5. *Collettes Ltd. v. Bank of Ceylon* [1984] — 2 SRI LR — 243, 314.
6. *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd* [1956] — 3 ALL ER 624, 630.

(The Bank of Madras v. Ponnesamy (supra) not followed)

APPEAL from judgment of the Court of Appeal.

P. Nagendran P.C. with *S. Mithrakrishnan* and *J. Salwatura* for Defendant-Appellant.

K. N. Choksy P.C. with *S. A. Parathalingam, Mrs. C. D. Amerasinghe* and *Mrs. D. Wimaladharma* for the Plaintiff-Respondent.

Cur. adv. vult.

January 20, 1989

TAMBIAH, J.

The plaintiff-respondent (hereinafter called the plaintiff-company) on or about 19.3.1982 instituted action under Chapter LIII of the Civil Procedure Code in the District Court of Colombo against the defendant-appellant (hereinafter called the defendant-company) for the recovery of Rs. 122,967/42 due on a Bill of Exchange marked "A" filed with the plaint, and another sum of Rs. 195,030/17 due on a second Bill of Exchange marked "B" filed with the plaint. The plaintiff-company also claimed interest at 15% per annum from 10.1.1979 on the first Bill of Exchange and from 5.1.1979 on the second Bill of Exchange. The plaintiff-company, which was a Company incorporated under the Laws of India, annexed to its plaint an affidavit by its attorney in Sri Lanka under a Power of Attorney stating, inter alia, that the sums claimed in the plaint were justly and truly due to the plaintiff-company.

Upon service of summons, the defendant-company, filed an affidavit of one of its Directors and requested that the defendent-company be granted unconditional leave to appear and defend the action. In this affidavit, it was stated on behalf of the defendant-company, that part of the drugs purchased from the plaintiff-company to the value of Indian Rupees 34,861/- had to be destroyed because of deterioration and poor quality, and that another Rs. 5,000/-(Indian Rupees) worth of stock was also of poor quality and had deteriorated; that although the plaintiff-company had agreed to contribute towards the remuneration and expenses of two medical representatives in Sri Lanka to popularise their products, it had failed to do so and there was due and owing to the defendant-company Rs. 57,000/- (Indian Rupees) from the plaintiff-company; that the defendant-company was entitled to set off these sums of Rs. 34,861/-, Rs. 5,000/- and Rs. 57,000/- (Indian Rupees) which in Sri Lankan Rupees amounted to Rs. 215,032/53. It was also the defendant-company's position that the two Bills of Exchange were payable on sight but there had been a delay in presentment for payment and had been presented only on 4.4.1981, and hence the

plaintiff-company cannot recover the monies on the said two Bills of Exchange.

However, when the application for unconditional leave to appear and defend came up for hearing, it was submitted on behalf of the defendant-company that the plaintiff-company, being a Company, it could not avail itself of the summary procedure on liquid claims provided by Chapter LIII of the Civil Procedure Code, in that, it could not make an affidavit as required by s. 705 (1) of the Code.

The learned District Judge by his order dated 24.9.1982 took the view that s. 34 (1) of the Companies Ordinance permitted any document requiring authentication by a Company to be signed by a Director, Secretary, or other officer of the Company concerned. As the affidavit in the case has been made by the Company's attorney, in Sri Lanka, the learned District Judge held that the plaintiff-company had filed a good and valid affidavit as required by s. 705 (1) of the Civil Procedure Code.

The correspondence between the parties does not bear out the defendant-company's claim that the goods were of poor quality and were destroyed because of its deterioration and poor quality; nor does it bear out the claim of the defendant-company with regard to expenses and disbursements on account of Medical Representatives. The correspondence further establishes that the defendant-company throughout accepted liability in the amount claimed by the plaintiff-company. Having examined the correspondence, the learned District Judge concluded that the defence was not prima facie sustainable and that he had reasonable doubt as to its good faith, and ordered the defendant-company to deposit a sum of Rs. 400,000/- as security in the case.

On appeal, the Court of Appeal by its judgment dated 18.12.1986 affirmed the judgment of the learned District Judge and dismissed the appeal with costs, but granted leave to the defendant-company to appeal to this Court on the following questions of law:

(a) Whether a Corporation or a Company is precluded by the terms of Chapter 53 of the Civil Procedure Code from utilizing the provisions of that Chapter relating to summary procedure on liquid claims as that Chapter does not specifically provide for such a Company or Corporation making an affidavit.

(b) Whether the provisions for the institution of proceedings by way of summary procedure under Chapter 53 of the Civil Procedure Code permit an affidavit authenticated in terms of Section 34 (1) of the Companies Ordinance being admitted as fulfilling the requirements of Section 705 (1) of the Civil Procedure Code.

In the District Court and the Court of Appeal and also before this Court, learned President's Counsel for the defendant-company relied strongly on the decision in *The Bank of Madras v. Ponnesamy* (1). In this case, which was decided on 30th June, 1891, the plaintiffs, a banking corporation constituted and regulated under the Indian Presidency Bank Act, 1876, sued the defendant as endorser to them of twenty-two promissory notes. The plaintiffs proceeded summarily under Chapter LIII of the Civil Procedure Code and in terms of s. 705 (1) filed an affidavit from the Colombo Manager of the Bank and obtained summons on the defendant. It was contended for the defence that such an affidavit does not satisfy the requirements of s. 705 (1) which reads:

> "The plaintiff who so sues and obtains such summons as aforesaid must on presenting the plaint produce to the Court the instrument on which he sues, and **he must make affidavit** that the sum which he claims is justly due to him from the defendant thereon." (emphasis is mine).

Clarence J. said (p. 171):

> "The words of s. 705 are 'he must make affidavit that', etc. A corporation cannot make affidavit. It is capable of satisfying

a court by the affidavit of some individual person, where the court is at liberty to accept such an affidavit, but it is not capable itself of making an affidavit. Therefore if we are to give the words of s. 705 their plain and ordinary meaning the affidavit of Mr. Noble offered in the present case does not satisfy the requirement.

In another chapter of the Code, Chapter XLVII dealing with provisional remedies, certain applications made by a plaintiff are required to be 'supported by his own affidavit'; and s. 655 makes this special provision for corporation plaintiffs and others — that 'when the action is brought by a corporation, board, public body, or company, then any principal officer of such corporation, board, public body or company may be allowed by the court to make an affidavit in these matters instead of the plaintiff'. There is no similar provision in Chapter LIII. I see no alternative but to conclude that the legislature has not extended to corporations the summary procedure under Chapter LIII. I certainly arrive at this conclusion with regret and not without surprise. The corporate banks which carry on business in Ceylon are probably the largest holders of the class of instruments for which this summary procedure is designed, and one can conceive of no possible reason why they should be precluded from so proceeding. We have however no option open to us, and must, to borrow Lord Bramwell's words, 'let the oversight, if it be one, be set right by the proper authority' — i.e., in this case, the legislature."

and Dias, J. said (p. 172):

"The judgment in favour of the plaintiffs was passed under s. 705 of the Civil Procedure Code. To entitle plaintiff to a judgment under this section, he, the plaintiff 'must make affidavit that the sum which he claims is justly due to him from the defendant,' and according to the plain meaning of this sentence the affidavit must be made by the plaintiff personally and not by agent, and there is nothing in s. 705 or in any part of Chapter LIII which would justify the inference, that the plaintiff could do by proxy what he could

do himself. S. 705 gives the plaintiff an advantage over the defendant, who can only defend the action under the circumstances set forth in sections 706, and we are bound to strictly construe s. 705. the plaintiffs in this case are a banking company and the affidavit was sworn by the local manager, and I very much regret to be obliged to hold that the plaintiffs cannot avail themselves of the summary procedure laid down in the 53rd Chapter of the Code. I do not believe the legislature had any intention to exclude corporations from the benefit of the Code—it is a mere oversight — but it can only be rectified by the legislature."

Both learned Judges were greatly influenced by the decision in the English case of *The Bank of Montreal v. Cameron* (2). In that case, the Judges had to construe rule 1 under Order 14 of the rules under the Judicature Act. The words of the rule are: "where the defendant appears on a writ of summons specially endorsed under Order 3, rule 6, the plaintiff may, on affidavit verifying the cause of action and swearing that in his belief there is no defence to the action, call on the defendant" etc. The plaintiffs were a banking corporation and the affidavit was sworn by the secretary of the company and the Judges held that the special procedure was not open to a corporation because a corporation cannot be a plaintiff capable of swearing to his belief.

I find that the submission made by learned Counsel for the plaintiffs in the *Bank of Madras* case that s. 24 of the Civil Procedure Code enables a recognised agent of a party to make or do any appearance, application, or act required to be made or done by a party himself and that the plaintiffs' manager in Colombo was the Bank's recognised agent and therefore his affidavit was sufficient, was not considered at all by either of the two learned Judges.

Learned President's Counsel for the defendant-company went on to submit that it was this judgment which led the Legislature to amend the Civil Procedure Code by Ordinance No. 12 of 1895, and, by s. 11 of the said Ordinance, to enact s. 829A (3) which stated that "the provisions of s. 655 in respect of the

affidavit of the plaintiff required by sections 650 and 653 shall extend to affidavits required by s. 705 in actions instituted under Chapter LIII of this Ordinance to District Courts and Courts of Requests"; that Chapter LXVI of the Civil Procedure Code, in which s. 829A (3) was found, was repealed by s. 124 of the Civil Procedure Code (Amendment) Law, No. 20 of 1977, and thus there is now no provision similar to s. 829A(3) in the Civil Procedure Code which was reintroduced to the Statute Book in 1977. He, therefore, submitted that we are now back in the same position as in 1891 and the judgment in the *Bank of Madras* case is applicable. He cited a passage from Bindra's "Interpretation of Statutes" (6th Edn. p. 197):

> "There is a presumption that the Legislature, when it repeats in substance in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before."

Learned President's Counsel also referred us to the Report of the Committee appointed by the Minister of Justice on the "Law and Practice relating to Debt Recovery" published in 1985. The Committee in its Report observed that one of the main reasons for the reluctance of creditors to invoke the procedure under Chapter LIII "is the lacuna in the law which precludes a Company or an unincorporated association from coming into Court under this Chapter" and recommended the "inclusion of a provision for the plaintiff's affidavit where the plaintiff is not an individual as required by s. 705 (1) as well as for the defendant's affidavit as required by s. 706.".

Learned President's Counsel for the plaintiff-company submitted that the decision in the *Bank of Madras* case was wrong and that there is no lacuna in the law; that the learned Judges who decided that case did not consider the provisions of s. 703 which is the governing section and which empowered a Company or other Corporate Body to institute an action under Chapter 53 of the Civil Procedure Code; that s. 705 must be read with s. 703; nor did they consider the other relevant provisions of the Code; that our legal system contemplates both a natural and a legal person being either a plaintiff or a

defendant in a civil proceeding; that a Company or other Corporate Body can apply to Court for relief by way of summary procedure and support its application with written evidence, that is, an affidavit sworn to or affirmed by its principal officers.

I am inclined to agree with the submissions of learned President's Counsel for the plaintiff-company. In my view the decision in the *Bank of Madras* case was erroneous.

It is a well settled rule of construction that when a Statute is repealed and re-enacted and words in the repealed Statute are reproduced in the new Statute, they should be interpreted in the sense which had been judicially put on them in the repealed Act, because the Legislature is presumed to be acquainted with the construction which the Courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind. This opinion was discussed by the Court of Appeal in *Royal Crown Derby Porcelain Co. Ltd. v. Russell* (3) where it was argued that certain words contained in s. 5(1) of the increase of Rent and Mortgage Interest (Restrictions) Act 1920, and re-enacted in the amending Act of 1933 having been judicially construed by the Divisional Court in 1925, must bear that construction in the 1933 Act. The Court of Appeal decided that the construction placed upon the words by the Divisional Court was erroneous and Denning L. J. said (p. 755):

> "I do not believe that whenever Parliament re-enacts a provision of a Statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it.
>
> The true view is that the Court will be slow to overrule a previous decision when it has been long acted on and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted a Statute in the same terms, but if a decision is in fact shown to be erroneous, there is no rule of law which prevents it being overruled."

Maxwell too in his "Interpretation of Statutes" (12th Edn. pp. 71, 72) points out:

> "This is not a canon of absolute obligation, but merely a presumption that Parliament intended that the Language used by it in the subsequent Statute should be given the meaning which meantime has been judicially atttributed to it. The Court may find that the previous judicial construction was erroneous, and in any event that construction is not conclusive, but is merely one factor to be taken into consideration."

In *Martin Perera v. Madadombe* (4) H. N. G. Fernando, C. J. pointed out the circumstances in which a Court will be reluctant to overrule a previous judicial interpretation of a Statute— (1) where the interpretation affects property and disagreeing with it "would thereby be shaking rights and titles which have been founded through so many years upon the conviction that that interpretation is the legal and proper one, and is one which will not be departed from." (2) "a decision of long standing on the basis of which many persons will in course of time have arranged their affairs."

It can hardly be said that debtors or borrowers have acquired rights and titles or would have arranged their affairs on the basis that a corporate plaintiff was not entitled to institute an action under Chapter LIII of the Civil Procedure Code.

The Judgment in the *Bank of Madras case* was based on the decision in the *Bank of Montreal* case which considered the procedural provisions of Order 14 Rule 1. This provision required of the plaintiff an "affidavit verifying the cause of action and swearing that **in his belief** there is no defence to the action" (emphasis is mine). The English Judges therefore held that the procedure was not open to a Corporation, because a Corporation cannot be a plaintiff capable of swearing to his belief. S. 705 (1) of our Civil Procedure Code does not contain the words "in his belief", but the words "the plaintiff who so sues must make affidavit".

Clarence, J. in the *Bank of Madras* case was also influenced by the fact that under Chapter XLVII of the Civil Procedure Code, s. 655 (b) makes special provision where action is brought by a

Corporation or a Company, for the principal officer of such Corporation or Compnay to make an affidavit instead of the plaintiff, and that Chapter LIII contained no similar provision. Here too it must be noted that s. 650 which deals with the arrest of the defendant before judgment, and s. 653 which deals with sequestration of property before judgment, contain the words "plaintiff on petition supported **by his own affidavit"** (emphasis is mine). The word "own" is used in these two sections because they deal with extreme and severe remedies of arrest and sequestration of property before judgment. Before a Court grants either of these remedies, it must have material before it that a debtor is about to quit the Island under circumstances rendering it improbable that the debt would be paid or that the defendant is alienating his property to avoid plaintiff's claim. s. 655 (b) merely requires that such material by way of affidavit, shall be made by a responsible person like the principal officer of the Corporation or Company because of the extreme nature of the remedy. The words "his own affidavit" are not found in s. 705 (1) of the Code.

S. 11 of the Civil Procedure Code states that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action." s. 2(e) of the Interpretation Ordinance defines a "person" to include any body of persons corporate or incorporate. The word "persons" in the opening sentence of s. 11 of the Code read with s. 2 (f) of the Interpretation Ordinance would therefore include a natural person or a Corporate Body. Similarly, under s. 14 of the Code, a natural person or a Corporate Body can be defendant.

S. 470 of the Code provides generally that in actions by or against corporations, the plaint or answer may be subscribed on behalf of the corporation by any member, director, secretary, manager or other principal officer who is able to depose to the facts of the case. S. 703 empowers a Corporate Body, in case it desires to proceed under Chapter LIII of the Code, to institute action by presenting a plaint. S. 7 states that the procedure in an action may be either "regular" or "summary" and summary

procedure is explained in the illustration thus: "In actions of which the procedure is summary, the applicant simultaneously with preferring his application supports with proper evidence the statement of fact made therein."

The question arises, how does a Company or other Corporate Body furnish the evidence to support its application? S. 705 (1) of the Code requires the plaintiff to make affidavit that the sum which he claims is justly due to him. In *Collettes Ltd. v. Bank of Ceylon* (5) Sharvananda, J. (as he then was) quoted with approval what Denning, L. J., said in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* (6)

> "A Company may in many ways be likened to a human body. They have a brain and nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the Company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such."

Sharvananda, J. (at p. 285) also quoted with approval a passage from *Atiyah* in his "Vicarious liability in the Law of Torts":

> "However in the case of companies and other corporations, knowledge of directors and managers and other 'responsible officials' is normally treated, in accordance with modern principles of company law, as knowledge of the company itself."

So, it seems to me that a Company or other Corporate Body can support its plaint by written evidence on oath or affirmation, that is, an affidavit through its principal officers like a Managing Director, Director, Secretary or a responsible officer, and when they do so, it becomes an affidavit of the Company or other Corporate Body itself.

Learned President's Counsel for the defendant-company conceded that a Company or other Corporate Body can be a plaintiff in an action by summary procedure on liquid claims in terms of s. 703 of the Code; but maintained that it cannot make affidavit because s. 705 (1) plainly and expressly says "he must make affidavit"; he contended that the use of the pronoun "he" permits only a natural person to make affidavit and excludes a juristic person.

S. 705 (1) opens with the words "The plaintiff" and goes on to say "he must make affidavit", that is, "he" the plaintiff. I find that the pronoun "he" is used three times in s. 705 (1), and the pronoun "him" once. As was correctly pointed out by learned President's Counsel for the plaintiff-company, the draftsman instead of indulging in monotonous repetition of the word "plaintiff" used the pronoun "he". Otherwise, the word "plaintiff" would have had to be used three times over again, wherever the pronoun "he" is used.

Under s. 704 of the Code, the defendant can be a Corporate Body. In this section too, after the use of the word "defendant", the pronoun "he" had been used. This method and style of draftsmanship appears throughout the Civil Procedure Code. For example, in sections 11, 34 (2), 50, 51 and 52, every one of which is applicable to a Company or other Corporate Body, after the initial use of the word "plaintiff", thereafter the pronoun "he" is used.

If as contended for the defendant-company, a Company cannot make affidavit, there are provisions in the Companies Act, No. 17 of 1982, which cannot be worked and given effect to. S. 68(1) contemplates an application by the Company to the District Court for an order confirming the reduction of share capital. S. 441(1) sets out the procedure that the application shall be by way of petition and affidavit. Sections 210 and 211 contemplate an application to the District Court against the Company for the prevention of oppression and mismanagement. S. 213 contemplates an application for ex-parte interim orders against the Company, and s. 213 (3) states that the application by the

Company for the revocation or variation of the exparte interim order shall be by petition supported by affidavit. The legislature is proceeding on the basis that a Company can make affidavit and how does it do so except through its principal officers who are natural persons?

The answer to the first question of law on which leave to appeal to this Court was granted is that a Corporation or a Company could avail itself of the special procedure in Chapter LIII of the Civil Procedure Code, and it could make an affidavit as required by s. 705 (1) of the Code through one of its principal officers.

In the present case, the attorney of the plaintiff-company, on oath has stated that he can depose to the facts of the case from his personal knowledge and from the particulars acquired from the papers and correspondence in his possession; on oath, he has also deposed to the fact that the monies are justly and truly owing from the defendant to the plaintiff. He holds a Power of Attorney from the plaintiff-company which is incorporated in India. The term "Power of Attorney" is not defined in the Civil Procedure Code.

> "Broadly speaking, it is a formal instrument by which authority is conferred on an agent. Such an instrument should be construed strictly and as giving only such authority as it confers expressly or by necessary implication."
> ("Code of Civil Procedure" by *Chitaley & Rao, 3rd Edn. Vol. 2. p. 1398)*

The Stamps Ordinance in s. 94 defines "Power of Attorney: "Power of Attorney includes an instrument empowering a specified person to act for and in the name of the person executing it." In short, a person holding a Power of Attorney is an **agent** appointed under a writing by a Principal to act for him. As such he cannot be considered a **principal officer** of the Company and put in the same class or category as the Directors, Managers and other responsible officers of a Company or other Corporate Body. (emphasis is mine).

Does S. 25 (b) of the Civil Procedure Code enable an attorney, under a power of attorney, to make an affidavit on behalf of the plaintiff-company, for satisfying the requirements of S. 705(1)? S. 24 of the Code enacts that an appearance, application or act in or to any Court may be done by a party in person or by his recognised agent etc. A person holding a general power of attorney is a recognised agent in terms of S. 25 (b).

Learned President's Counsel for the defendant-company, however, contended that S. 24 of the Code be read with Forms No. 6 and No. 7 contained in the First Schedule to the Civil Procedure Code and that the Forms which set out a summary of the acts that can be done by a recognised agent exclude the making of an affidavit on behalf of a party to an action. I cannot agree.

The words in S. 24 of the Code are "any appearance, application or act in or to any Court". In case the plaintiff desires to proceed under Chapter LIII, he applies to Court for relief by way of summary procedure by presenting to Court a plaint supported by an affidavit. It is an "application to Court" which can be made by the party to an action or by his recognised agent. Where an "application" to Court is required to be made by plaint and affidavit (and not by plaint alone), the word "application" in S. 24 comprises both such plaint and affidavit. The plaintiff-company's attorney in Colombo was a "recognised agent" within the meaning of S. 25 (b) of the Code and his affidavit was sufficient and satisfied the requirements of S. 705 (1) of the Code.

The second question that arises for consideration is whether S. 34 (1) of the Companies Ordinance permitted juristic persons to file affidavits in proceedings under Chapter LIII of the Civil Procedure Code. S. 34 (1) reads: "A document or proceeding requiring authentication by a Company may be signed by a director, secretary, or other authorised officer of the Company, and need not be under common seal."

Learned President's Counsel for the defendant-company contended that the term "authenticate" in S. 34 (1) means

nothing more than this — that one holds out that the document is genuine but not that what is stated in the document is true; while in the case of an affidavit, the person who swears or affirms an affidavit not only states the facts, but also states that the facts are true to his personal knowledge.

Learned President's Counsel for the plaintiff-company referred us to the meaning given to "authenticate" in the Dictionaries. He referred us to Black's "Law Dictionary" (4th Edn.) which defines the term "authentic" as "genuine, true, reliable, trustworthy, credible, reliable as evidence", and submitted that when one signs an affidavit, one holds out that an affidavit is reliable evidence.

Learned President's Counsel also referred us to the Oxford English Dictionary (Vol. 1; 1933) wherein "authenticate" is defined, as, inter alia, "to establish the title to credibility and acceptance of a statement", "to establish the genuineness of"; "authenticated" is defined as "invested with correctness, truth, genuineness"; "authenticator" is defined as "he who guarantees a thing as valid, true or reliable", "the quality of being entitled to acceptance", and "as being in accordance with fact, as being true in substance."

Applying these definitions, learned President's Counsel submitted that when one signs an affidavit and presents it to Court, he asks Court to accept it as being in accordance with fact.

S. 34 (1) of the Companies Ordinance contains the word "proceeding". Learned President's Counsel also submitted that when a plaintiff files an action by way of summary procedure, it is a proceeding. He must present the plaint and the instrument sued upon to Court, and also make affidavit that the sum which he claims is justly due to him from the defendant. The plaintiff authenticates the proceeding by filing an affidavit.

On this matter, the learned District Judge stated that S. 34 (1) permits any document requiring authentication by a Company to be signed by a Director, Secretary or other authorised officer of

the Company concerned; that the affidavit in this case has been subscribed on its behalf by its attorney in Sri Lanka and the plaintiff, therefore, has filed a good and valid affidavit as required by S. 705 (1) of the Code.

The plaintiff-company's attorney in Sri Lanka cannot be classed as an "other authorised **officer"** of the Company.

The Court of Appeal stated that "authenticated" according to the Oxford Dictionary means "to establish the truth of, or make valid, or prove to be genuine, prove beyond doubt the origin or authorship by oath"; that it is reduced to writing, signed and sworn; that an affidavit is also a written statement, signed, and confirmed by oath. They both mean the same thing".

The definition in the Dictionary does not go to the extent of saying that authenticate means to establish the truth of etc. "by oath".

I am inclined to agree with the submission of learned President's Counsel for the defendant-company.

S. 34 of the Companies Ordinance appears among a group of sections which tell us when a document requires the affixing of the seal of the Company and when the mere signature of a person on a document acting under the Company's authority, would suffice. Written contracts, which if made between private persons would be by law required to be in writing, have to be made under the common seal of the Company, and where the law requires a writing signed by the parties, the contract can be made by a person authorised by the Company by merely signing. Parol contracts neither need the seal of the Company nor the signature of the person authorised to make such contract (S. 30). In the case of deeds executed abroad, the attorney executing the deed must be empowered to do so by a writing under the common seal in order to bind the Company (S. 32). So also, a document or a proceeding requiring authentication by a Company need not be under the common seal of the Company and can be signed by the principal officers mentioned in S. 34 (1).

Affidavit means a solemn assurance of a fact known to the person who states it and sworn to as his statement before some person in authority such as a Justice of the Peace. A person acquainted with the facts must make the affidavit and the contents must be read over to the deponent and vouched by him to be correct. I do not think that the Legislature had in mind an affidavit when it enacted S. 34 (1) of the Companies Ordinance.

The Companies Ordinance by S. 118 required that a Company entered in the Minute Book, the proceedings of general meetings and meetings of its Directors. An extract from the Minute Book of the proceeding of a particular meeting signed by a Director or the Secretary of a Company will be a "document" authenticated by him; it may also be considered a "proceeding" of a meeting, authenticated by him. Suppose, such a document is signed and produced in a Court of Law years later by a present Director or Secretary, who was not a Director or Secretary when the meeting was in fact held. The utmost he can do is to sign and certify that the extract is a true copy from the Minute Book, and it may be evidence of the proceedings, but, he cannot hold out that what is stated therein is true to his personal knowledge. The answer to the second question of law on which leave to appeal to this Court was granted, is in the negative.

The learned District Judge ordered the defendant-company to deposit a sum of Rs. 400,000/- as security. The Court of Appeal has affirmed this Order. Sections 704 and 706 of the Civil Procedure Code stipulate that only the sum mentioned in the summons could be ordered as security. Learned President's Counsel for the defendant-company stated that the learned District Judge has ordered a sum in excess of the amount stated in the summons. This is not disputed by learned President's Counsel for the plaintiff-company. This Court made order calling for the Record in order to ascertain the sum stated in the summons and has been informed that the Record is missing and is being traced. I, therefore, have no alternative but to make order reducing the amount of the security to the sum mentioned in the summons.

Subject to this variation, the appeal is dismissed with costs.

SENEVIRATNE, J. — I agree

FERNANDO, J. — I agree

Security varied — subject to this Appeal dismissed