

**WEERAMAN
v.
SADACHARAN**

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 370/2000
DC MT. LAVINIA NO. 138/96/sp
JANUARY 29, 2002

Civil Procedure Code, sections 83, 86, 338 and 437 – Affidavit Act, No. 23 of 1953, section 2 – Affidavit defective as it did not carry an affirmation.

Held:

- (1) Nowhere in the contents of the affidavit is the defendant-respondent referred to as an affirmant; he is referred to as a declarant.
- (2) It, therefore, appears that the Commissioner of Oaths had not administered an affirmation as required by law, even the jurat clause is without an affirmation.
- (3) The affidavit is fatally flawed – and should be rejected *in limine*.
Permitting the defendant-respondent to amend the affidavit is wrong.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia.

Kuvera de Soyza for petitioner.

Prinath Fernando for respondent.

Cur. adv. vult.

March 13, 2002

UDALAGAMA, J.

In DC Mt. Lavinia case No. 138/96/Spl. judgment and decree appears to have been entered against the defendant-respondent in default of appearance. The defendant-respondent preferred an application dated 01. 04. 1999 to vacate the said judgment and decree. The said application made under the provisions of section 86 (1) of the Civil Procedure Code was so made by petition and affidavit. At a subsequent inquiry held on 28. 07. 2000 the plaintiff-petitioner raised a preliminary objection, namely, that there was no proper application made to court under the provisions of section 86 of the Civil Procedure Code as the affidavit referred to above was defective as it did not carry an affirmant and that the defendant-respondent's application warranted a dismissal *in limine*.

The learned District Judge by his impugned order dated 13. 11. 2000 appears to have accepted the fact that the affidavit was defective as he had by his said order permitted the defendant-respondent to amend his affidavit subject to costs.

The plaintiff-petitioner being aggrieved by the said order appeals therefrom.

Section 2 of the Affidavits Act, No. 23 of 1953 provides that an affidavit received for any purpose whatsoever may be written and sworn or affirmed to in the Sinhala, Tamil or English language.

The provisions of sections 83, 437 and 438 of the Civil Procedure Code too refer to affidavits having to be sworn or affirmed.

It is apparent to this court that nowhere in the contents of the affidavit dated 01. 04. 1999 is the defendant-respondent referred to as an affirmant. The defendant-respondent is referred to as a mere declarant

and it is also amply clear that the Commissioner of Oaths had not administered an affirmation as required by law. He is, as stated above, referred to as a declarant. A mere declaration, in my view, would not tantamount to an affirmation. The sanctity attached to an affirmation ³⁰ is clearly lacking. Even the jurat clause is without an affirmation. The affidavit, in my view, being fatally flawed need to have been rejected *in limine* resulting in the absence of a proper affidavit under the provisions of section 86 (3) of the Civil Procedure Code referred to above.

The learned District Judge appears to have considered matters of ethnicity by allowing the defendant-respondent to file amended papers notwithstanding the fatal irregularity referred to above and notwithstanding also the fact that section 2 of the Affidavits Act referred to above clearly entitles the defendant-respondent to tender the ⁴⁰ affidavit in Sinhala, Tamil or English. It is the defendant-respondent who has chosen to file his affidavit in Sinhala.

On a consideration of the provisions of the law and precedent, I would hold that the application of the petitioner be allowed and the impugned order dated 13. 11. 2000 be set aside. The impugned order is set aside with costs fixed at Rs. 5,250.

NANAYAKKARA, J. – I agree.

Application allowed.