

INAYA
v.
LANKA ORIX LEASING COMPANY LTD.

COURT OF APPEAL.

EDUSSURIYA, J.,

JAYASINGHE, J.

C.A. NO. 464/94 (F).

D.C. COLOMBO NO. 9399/MR.

JANUARY 24, 1998.

Civil Procedure Code – Section 86 (2) (3) – Form 75 – Ex parte judgment – Purge default – Proper affidavit – Oaths and Affirmation Ordinance S. 5.

After decree was served, the defendant-appellants filed petition and affidavit to have the *ex parte* judgment and decree set aside. It was contended that there was no proper application under sections 86 (2) - (3) as there was no proper affidavit; the defendant-appellants have made a declaration only and not a declaration under the Oaths and Affirmation Ordinance. District Court upheld the objection.

Held:

1. Section 5 – Oaths and Affirmation Ordinance provides that where the person required by law to make an oath is a Buddhist, a Hindu or a Muslim (or some other religion) according to which oaths are not of binding force . . . he may instead of making an oath make an affirmation.
2. In the affidavit before Court the defendants being Muslims had failed to solemnly, sincerely and truly declare and affirm the specific averments set out in the affidavit. The recital merely states that they make a declaration and in the jurat there is no reference as to whether the purported affidavit was sworn to or affirmed to.

Per Jayasinghe, J.

"I am firmly of the view that technicalities should not be allowed to stand in the way of justice, but, however, the basic requirements of the law must be fulfilled."

APPEAL from the judgment of the District Court of Colombo.

M. F. Miskin for defendants-appellants.

Romesh de Silva, PC, with Palitha Kumarasinghe and Anusha Fernando for plaintiff-respondent.

Cur. adv. vult.

March 11, 1999.

JAYASINGHE, J.

The plaintiff instituted action in the District Court of Colombo against the defendants for the recovery of a sum of Rs. 445,186 together with interest at the rate of 36% from 1st July, 1989, and for the recovery of a further sum of Rs. 75,000 together with interest at the rate of 36% from 22nd August, 1987, and for costs. The defendants failed to file answer. Thereafter, an *ex parte* trial was held and the learned Additional District Judge entered judgment for the plaintiff as prayed for. After the decree was served on the defendants on 4. 7. 1991 the defendants filed petition and affidavit to have the said *ex parte* judgment and decree of the learned Additional District Judge set aside. At the inquiry counsel for the plaintiff raised a preliminary objection that there was no proper application under section 86 (2) read together with 86 (3) of the Civil Procedure Code on the basis that there was no proper affidavit before Court. It was contended on behalf of the plaintiff that the defendants-appellants have made a declaration only and not a declaration under oath or affirmation. The learned trial Judge upheld the objection on the basis that the jurat in the affidavit is defective in that the appellants have only placed their signatures in the presence of the Justice of the Peace and that there is no oath or affirmation. Accordingly, he refused the application of the appellant to have the *ex parte* judgment and the decree set aside.

The plaintiff-respondent drew the attention of Court to form 75 of the Civil Procedure Code. It sets out the format and the necessary

elements required in an affidavit. According to which there shall be a recital stating that the declarant is a Christian or a non-Christian. In the case of Christian there shall be a declaration made under oath while in the case of a non-Christian there shall be an affirmation and the jurat will also specify that the contents of the foregoing averments in the affidavit are sworn or affirmed to by the deponent before a Justice of the Peace. In the affidavit before Court the defendants being Muslims had failed to solemnly, sincerely and truly declare and affirm the specific averments set out in the affidavit. The recital merely states that they make a declaration and in the jurat, there is no reference as to whether the purported affidavit was sworn to or affirmed to and merely states that it was signed in Colombo in the presence of a Justice of the Peace. It is the contention of the plaintiff-respondent that the said affidavit is not an affidavit in law as found in form 75 and in the circumstances there was no proper application by the defendants-petitioners to have the decree entered in the case set aside. It was submitted on behalf of the defendants that in terms of section 86 of the Civil Procedure Code, that upon an application being made under this section the affidavit tendered to Court becomes insignificant and no reliance is placed thereon thereafter since there is a burden cast on the petitioner to satisfy Court that there were reasonable grounds for default. I am unable to agree with this contention. The jurisdiction of Court is activated by a proper application to have the *ex parte* judgment and the decree set aside. This, the petitioner has to do by way of an affidavit. If what the petitioner says is sustainable then a mere statement giving reasons for the default would satisfy the requirements of section 86 (2). The Court has to be satisfied as to the accuracy of what is stated. This can be done only by sworn testimony. An affidavit satisfies this requirement. If this Court is to accept the argument of the petitioner then all that the Court has to do is to exercise its jurisdiction on an unsworn testimony.

Section 5 of the Oaths and Affirmation Ordinance provides that where the person required by law to make an oath is a Buddhist, a Hindu or a Muslim (or some other religion) according to which oaths are not of binding force . . . he may instead of making an oath, make

an affirmation. It appears, therefore, that in the case of a non-Christian it is not compulsory that they should affirm. I am firmly of the view that technicalities should not be allowed to stand in the way of justice. But, however, the basic requirements of the law must be fulfilled. In the written submissions filed by the petitioners in the District Court the defendants have taken up the position that the affidavit tendered to Court becomes insignificant and no reliance should be placed thereon since the petitioner is required to satisfy Court that he has reasonable grounds for such default. The content of the submission of the petitioner is that the validity or otherwise of the affidavit is not material or relevant as the petitioner has in any event to satisfy Court that he has reasonable grounds for such default. What the petitioner failed to realise is that the application to have an *ex parte* judgment and decree set aside can be disposed of even without any oral testimony. To this extent an affidavit sworn or affirmed according to law is necessary. If I understood the petitioner's written submissions correctly, then an affidavit drawn up according to law is unnecessary. I am unable to subscribe to this submission. I see no reason to interfere with the learned Additional District Judge's findings and dismiss the petitioner's application with costs fixed at Rs. 2,100.

EDUSSURIYA, J. – I agree.

Appeal dismissed.