

**KARIYAWASAM AND ANOTHER
VS.
DONA MERCY**

COURT OF APPEAL.
EKANAYAKE, J.
SRISKANDARAJAH, J.
CALA 280/2002.
DC COLOMBO 19481/L.
DECEMBER 7, 2005.

Civil Procedure Code, sections 438, 754, 757 - Oaths Ordinance No. 9 of 1835 amended by Act, No. 6 of 1841, Ordinance 03 of 1942 - Amendments in 1915 and 1954, section 5(a) - Affidavit - Can a Christian affirm? - Substitution of an oath for an affirmation - Will it invalidate an affidavit? - Sufficient compliance? - "May" as opposed to "shall"?

The respondent contended that, a leave to appeal application has to be filed by way of a petition supported by an affidavit. The plaintiff respondents being Catholics cannot affirm, as a Christian must necessarily swear when he makes oath, therefore the purported affidavit is not an affidavit - the application should be dismissed in *limine*.

HELD :

- (1) Section 5(a) of the Oaths Ordinance, should not be restrictively interpreted in the light of the later provisions and practice.

- (2) The use of the word "may" in the Oaths Ordinance of 1837 instead of shall must be regarded as deliberate, with the consequence that non Catholics who believed in God would have the option to swear or to affirm.

Per Sriskandaraja, J.

"Fundamental obligation of a deponent is to tell the truth and the purpose of an oath or an affirmation is to enforce an obligation, therefore the substitution of an oath for an affirmation (or vice versa) will not invalidate an affidavit".

APPLICATION for leave to appeal from an order of the District Court of Colombo, on a preliminary objection taken.

Cases referred to :

- (1) *De Silva and Others vs. L. B. Finance Ltd* 1993 1 Sri LR 371 at 373
- (2) *Clifford Ratwatte vs. Thilanga Sumathipala* 2001-2 Sri LR 55
- (3) *Sooriya Enterprises (International) Ltd vs. Michael White & Company Ltd* 2002 3 Sri LR 371.
- (4) *Rustomjee vs. Khan* 18 NLR 120, 123
- (5) *Inaya vs. Lanka Orix Leasing Company Ltd* 1993 2 Sri LR 19
- (6) *Trico Freighters (Pvt) Ltd vs. Yang Civil Engineering Lanka (Pvt) Ltd.* 2000 2 Sri LR 136
- (7) *Mohamed vs. Jayaratne and Others* 2000 3 Sri LR 181.

Manohara R. de Silva for petitioner.

Nihal Jayamanne, PC with Dilhara de Silva for respondent.

Cur. adv. vult.

February 1, 2006.

SRISKANDARAJAH, J.

The learned President's Counsel for the Respondent raised a preliminary objection that this Leave to Appeal application is not in compliance with section 757 of the Civil Procedure Code. This section provides that a Leave to Appeal application will have to be filed by way of a Petition supported by an affidavit. In this instant application the purported affidavit filed with the petition is not an affidavit. The learned President's Counsel submitted that the purported affidavit has been signed by the Plaintiff-Petitioners and they are Catholics. This is proved by the fact that the

affidavit annexed to the plaint in the District Court the 1st Plaintiff has sworn the said affidavit and he has specifically stated that **he is a Catholic**, the 2nd Plaintiff-Petitioner is the daughter of the 1st plaintiff-petitioner, But these plaintiff-petitioners in the purported affidavit filed in this Leave to Appeal application in paragraph 1 stated that **they solemnly, sincerely and truly declare and affirm to the facts set out therein, and in the jurat also they have stated that they affirmed to the facts** before the Justice of the Peace. In these circumstances the learned President's Counsel submitted that a Christian cannot affirm, a Christian must necessarily swear when he make oath therefore the document purporting to be an affidavit is not an affidavit.

The learned President's Counsel further submitted that a distinction must be made between an affidavit which is defective and/or not in sufficient compliance with section 438 of the Civil Procedure Code, and a document which is not on the face of it an affidavit at all. If the document is not an affidavit at all then that document must be rejected as not being an affidavit. The decision in *De Silva and Others v L. B. Finance*⁽¹⁾ has no application. In the case of *Clifford Ratwatte vs. Thilanga Sumathipala*⁽²⁾ the person who submitted the affidavit states that he is a Christian and makes an oath in the body of the document and in the jurat clause he says that he affirms. The court held that this document was not an affidavit. The learned President's Counsel submitted that this case is similar to the present case and it is clear that the purported document is not an affidavit as the Petitioners being Catholics have affirmed in the body of the document as well as in the Jurat.

In *De Silva and Others vs. L. B. Finance Ltd.* (Supra) at 373. G. P. S. de Silva C. J. observed :

"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 section 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 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."

In *Sooriya Enterprises (International) Limited vs. Michael White & Company Limited*⁽³⁾ - Fernando J, rejected the argument that in making an affidavit a Muslim is imperatively required by law to make an affirmation, with the consequence that if he makes an oath instead his affidavit must be rejected and observed that section 5 (a) of the Oaths Ordinance, No. 9 of 1835 (Cap. 17) should not be restrictively interpreted in the light of the later provisions and practice; rather, the meaning of that section when originally enacted has to be ascertained. He quoted with approval passages from Perera J's judgment in *Rustomjee vs. Khan*⁽⁴⁾ - and held:

The *ratio decidendi* of *Rustomjee vs. Khan*, that section 5 gave an option "to any person, be he Hindu, Muhammadan or Zoroastrian, who believes in God, claim to be sworn (rather than to affirm)" has not been doubted for 80 years. The Oaths Ordinance was twice amended thereafter: in 1915, and again in 1954 when section 5 (a) was amended. If the judicial interpretation of section 5 was erroneous, the legislature had the opportunity to correct it.

Because "much inconvenience arises from peculiar forms of oath being required to be administered to persons professing other than the Christian Religion", Ordinance No. 6 of 1841 required that such persons shall make an affirmation in the prescribed form. This provision was not considered satisfactory, and by Ordinance No. 3 of 1842 it was provided that:

“..... every individual not professing the Christian faith, and every Quaker, Moravian or Jew, shall, on all occasions whatsoever where an oath is required ... make a solemn affirmation ... in lieu thereof.”

“The use of the word “may” in the Oaths Ordinance of 1835, instead of “shall”, must be regarded as deliberate; with the consequence, as Pereira, J, held: that non-Christians who believed in God would have the option to swear or to affirm.”

The rationale in the above Supreme Court judgments and the Judgments of the Court of Appeal in *Inaya v Lanka Orix Leasing Company Ltd.*⁽⁵⁾ - *Trico Freighters (Pvt) Ltd v Yang Civil Engineering Lanka (Pvt) Ltd.*⁽⁶⁾ - and *Mohamed v Jayaratne and Others*⁽⁷⁾ - is that the fundamental obligation of a deponent is to tell the truth and the purpose of an oath or affirmation is to enforce that obligation. Therefore the substitution of an oath for an affirmation (or vice versa) will not invalidate an affidavit or on the other hand by reading the affidavit as a whole if a fair meaning could be given by the words used in the affidavit that the deponents have affirmed to the contents of the affidavit before the Justice of the Peace then it could be construed that there is sufficient compliance with the requirements of an affidavit.

In view of the above judgments the affidavit filed in the present case fulfils the requirements of an affidavit. Therefore this Court overrules the preliminary objection of the Respondent.

EKANAYAKE, J. - *I agree.*

Preliminary objection overruled. Matter set down for argument.
