IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No: 121/2021
SC/HC/LA/ Case No: 27/2020
UVA/HCCA/BDL Case No: 51/17(F)
D.C Mahiyanganaya Case No: SPL/57/15

Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Petitioner

- Vs -

1. Kodikara Gedara Seetha Sriyani Kumari

2. Attanayake Mudiyanselage Malki Sumudu Attanayake

3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake

4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake

All are at, 2nd Mile Post,
Morayaya, Minipe.

Respondents

And between

Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Petitioner – Appellant

- Vs -

1. Kodikara Gedara Seetha Sriyani Kumari

2. Attanayake Mudiyanselage Malki Sumudu Attanayake

3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake

4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake

   All are at, 2nd Mile Post,
   Morayaya, Minipe.

Respondents – Respondents

And Now between

Hatton National Bank PLC.,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Petitioner – Appellant – Appellant

- Vs -

1. Kodikara Gedara Seetha Sriyani Kumari

2. Attanayake Mudiyanselage Malki Sumudu Attanayake

3. Attanayake Mudiyanselage Malshan Nethsarani Attanayake

4. Attanayake Mudiyanselage Hirusha Deshan Adithya Attanayake

All are at, 2nd Mile Post,
Morayaya, Minipe.

Respondents – Respondents – Respondents

Before: **S. Thurairaja, PC, J**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Priyantha Alagiyawanna with Isuru Weerasooriya, Kavindu Liyanage and Sayuri Senanayake for the Petitioner – Appellant – Appellant

A M E B Atapattu for the Respondents – Respondents – Respondents

Argued on: 30th October 2023

Written Submissions: Tendered by the Petitioner – Appellant – Appellant on 25th January 2022

Tendered by the Respondents – Respondents – Respondents on 23rd June 2022

Decided on: 15th February 2024

Obeyesekere, J

This is an appeal against a judgment of the Provincial High Court of the Uva Province holden at Badulla [the High Court] delivered on 19th February 2020 by which the High Court affirmed the decision of the District Court of Mahiyanganaya to reject the petition filed by the Petitioner – Appellant – Appellant [the Petitioner] in terms of Section 14A of the Civil Procedure Code on the basis that the affidavit attached to the said petition is not in accordance with the law.

On 3rd December 2021, this Court granted leave to appeal on the following question of law:

> "Have the learned Judges of the Civil Appellate High Court failed to consider that the learned District Judge erred in dismissing the application of the Petitioner, when the Petitioner has filed a valid petition and affidavit which was duly executed before a Justice of the Peace in that the deponent of the said affidavit by opening paragraph as well as jurat of the said affidavit has sworn to the contents therein before a Justice of the Peace?"

Background facts

The Petitioner is a licensed commercial bank. Pursuant to an application made to its Mahiyanganaya Branch by Nayanananda Deshapriya Attanayake [the Borrower] and his wife, the 1st Respondent – Respondent – Respondent [the 1st Respondent], the Petitioner, the Borrower and the 1st Respondent had entered into an agreement on 21st June 2010 in terms of which *inter alia*:

(a) the Petitioner had agreed to grant the Borrower a sum of Rs. 1,300,000 by way of a 'Shanthi' housing loan to complete the ground floor of a building situated on a land belonging to the Borrower;

(b) the Borrower had agreed to repay the said sum of money together with interest in 120 equated monthly instalments;

(c) the Borrower had agreed to mortgage to the Petitioner the property on which the above building was situated as security for the said loan;

(d) the Borrower was required to tender a Mortgage Protection Policy to secure the payment of the monthly instalments in the event of his death or him becoming permanently disabled prior to the repayment of the loan.

Accordingly, (a) by Mortgage Bond No. 2034 executed on 16th June 2010, the Borrower had mortgaged the said land to the Petitioner; (b) the Borrower had submitted a Mortgage Protection Policy from HNB Assurance Limited [the Insurer]; and (c) the said loan had been disbursed to the current account of the Borrower in three instalments.

The Borrower had passed away on 18th January 2011, with the cause of death being declared as cardio respiratory failure and end stage renal failure. Upon the Insurer, an associate company of the Petitioner, declining to pay in terms of the aforementioned Mortgage Protection Policy, and in the absence of a testamentary case being filed in respect of the estate of the Borrower which would have enabled the Petitioner to make a claim in respect of the monies lent and advanced to the Borrower, the Petitioner had sent a letter of demand dated 21st May 2015 to the 1st Respondent and to the 2nd – 4th Respondents – Respondents – Respondents who are the three children of the Borrower and the 1st Respondent [collectively referred to as the Respondents], demanding the payment of a sum of Rs. 1,966,733.67, being the capital outstanding of the aforementioned loan and interest thereon as at 31st March 2015. It is admitted that the Respondents have not paid the sum so demanded.

Application under Section 14A

In terms of Section 14A(1) of the Civil Procedure Code, "*Where a person against whom the right to any relief is alleged to exist is dead and the right to sue for such relief survives, the person in whom such right is alleged to exist, may make an application by way of summary procedure supported by affidavit to the court in which an action for the same may be instituted …"* in the manner set out in paragraphs (a) or (b) of the said sub-section, seeking permission of Court to substitute in place of the deceased the person whom the

petitioner desires to be made the defendant in the proposed action. The procedure that should be followed by Court in dealing with such an application has been set out in Section 14A(2) – (5).

The Petitioner, acting in terms of Section 14A(1), filed a petition in the District Court of Mahiyanganaya on 10th August 2015 pleading the above matters and claiming that even though the Borrower has passed away, the right to sue to recover the said sum of money has survived, and therefore seeking an order of Court to permit the 1st Respondent to be named as the defendant in an action that the Petitioner intends filing in terms of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended. The said petition had been supported by an affidavit of Anton Jude Trevor Fernando, a Senior Manager of the Petitioner, who, being a Christian, had deposed to the facts contained in the petition. It is the alleged infirmities in the said affidavit that has culminated in this appeal.

Objections to the application

In her Statement of Objections, the 1st Respondent had pleaded that in terms of the aforementioned Mortgage Protection Policy, upon the death of the insured – i.e., the Borrower – the Insurer became liable to make the payments due from the Borrower to the Petitioner and that if the Insurer has repudiated liability, it is the responsibility of the Petitioner to take legal action against the Insurer, instead of pursuing legal action against the 1st Respondent. She had also disclosed that Case No. M/272 has been filed by her in the District Court of Mahiyanganaya against the Petitioner and the Insurer, seeking to enforce the terms of the said Mortgage Protection Policy, and stated that as the liability of the Insurer is the subject matter in Case No. M/272, it is futile to institute another action in respect of the '*same subject matter*'. The response of the Petitioner was that the claim of the Petitioner may be prescribed if it is to await the outcome of the said action. It must be noted that neither party has tendered to the District Court copies of the pleadings filed in the said case nor taken steps to apprise this Court of the present status of the said case.

Although not pleaded in the said Statement of Objections, the 1st Respondent had claimed in the written submissions that were tendered at the Inquiry held to consider the application of the Petitioner that the affidavit annexed to the petition is defective for the following reasons:

a) The jurat does not contain the name of the person making the affidavit;

b) It does not appear that the signature of the deponent has been placed before the Justice of the Peace;

c) The jurat does not reveal that the contents of the affidavit were read over to the deponent by the Justice of the Peace.

While I shall refer to in detail to the Order of the District Court and the Judgment of the High Court later in this judgment, it would suffice to state at this stage that the District Court had upheld the objections in paragraphs (b) and (c) above, and that the High Court, while affirming the said Order, had proceeded to reject the affidavit on grounds not referred to by the District Court.

Applicable legal provisions

In **Kumarasinghe v Ratnakumara and Others** [(1983) 2 Sri LR 393] Sharvananda, A.C.J., (as he then was) has observed that an "*Affidavit in support of the application thus serves the purpose of proof of facts stated therein. It furnishes the evidence verifying the allegation of facts contained in the petition. Affidavit evidence carries equal sanctity as oral evidence*." It has further been observed in **Kumarasiri and Another v Rajapakse** [(2006) 1 Sri LR 359] that "… *it is the flesh and blood of the affidavit which gives life to the skeleton in the petition. In the absence of a valid affidavit supporting the averments in the petition, the petition becomes a nullity*." Thus, it is important that an affidavit is prepared in accordance with the provisions of the applicable laws.

There are two laws that I must consider in determining the aforementioned question of law. The first is the Civil Procedure Code [the Code] and the second is the Oaths and Affirmations Ordinance [the Ordinance].

The starting point is Section 181 of the Code which provides that, "*Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit*."

Section 183A(b) provides that:

> "*Where any person is required under the provisions of this Code, or under any other law for the time being in force, to make an affidavit, then-*
>
> *(b) where the action is brought by or against a corporation, board, public body, or company, any secretary, director or other principal officer of such corporation, board, public body or company;*
>
> *may make an affidavit in respect of these matters, instead of the party to the action:*
>
> *Provided that in each of the foregoing cases the person who makes the affidavit instead of the party to the action, must be a person having personal knowledge of the facts of the cause of action, and must in his affidavit* ***swear*** *or affirm that he deposes from his own personal knowledge of the matter therein contained and shall be liable to be examined as to the subject-matter thereof at the discretion of the Judge, as the party to the action would have been, if the affidavit had been made by such party*." [emphasis added]

In terms of Section 437 of the Code, "*Whenever any order has been made by any court for the taking of evidence on affidavit, or whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, an affidavit or written statement of facts conforming to the provisions of section 181 may be* ***sworn*** *or affirmed to* ***by the person professing to make the statement*** *embodied in the affidavit* ***before any court or Justice of the Peace*** *or Commissioner for Oaths, or in the case of an affidavit sworn or affirmed in a country outside Sri Lanka, before any person qualified to administer oath or affirmation according*

to the law of that country, and the fact that the affidavit bears on its face the name of the court, the number of the action and the names of the parties shall be sufficient authority to such court or Justice of the Peace, or Commissioner for oaths or such person qualified to administer the oath or affirmation." [emphasis added]

Section 183(c) provides further that, "*In the case of any affidavit under this Chapter, … any person qualified to administer an Oath or affirmation according to the law of the country, in which the affidavit is sworn or affirmed, may administer the oath to the declarant*."

In terms of Section 438, "***Every affidavit*** *made in accordance with the preceding provisions* ***shall be signed by the declarant in the presence of the*** *court,* ***Justice of the Peace*** *or Commissioner for Oaths, or person qualified* ***before whom it is sworn*** *or affirmed*." [emphasis added]

Form 75 of the Code sets out what is referred to as the "*Formal parts of an affidavit in an Action*" and is re-produced below:

> "*In the Supreme Court of the Republic of Sri Lanka.*
>
> *(or)*
>
> *In the District / Primary Court of Colombo (or as the case may be).*
>
> *(Title.)*
>
> ***I, A. B.*** *(full name and description of deponent, and if a married woman, full name and description of her husband), of (place of residence) (and if a party, say so, and in what capacity), being a Buddhist (or being a Hindu or being a Muslim etc., as the case may he, or having a conscientious objection to making an oath) solemnly, sincerely, and truly affirm and declare (or if the deponent is* ***a Christian, make oath and say****) as follows :-*
>
> *Affirmed (or* ***Sworn****), [or if there are more than one deponent, Affirmed (or Sworn) by the deponents A. B.] at.....this.....day of..... 19.....*
>
> *Before me (name and office of person administering the affirmation or oath)"*

In terms of the above Form, (a) a Christian shall make an oath at the beginning of the affidavit; (b) it is only thereafter that the facts contained in the affidavit shall be stated; (c) the jurat shall specify that the declarant swore in the presence of the Justice of the Peace; (d) a Buddhist, Hindu or Muslim shall, instead of an oath, solemnly, sincerely and truly affirm to the facts in the affidavit and (e) the jurat shall confirm such fact of affirmation.

While Section 4 of the Ordinance requires a witness to take an oath, the requirement that a Buddhist, Muslim or a Hindu shall affirm instead of taking an oath is specified in Section 5 of the Ordinance, which is re-produced below:

> *"Where the person required by law to make an oath-*
>
> *(a) is a Buddhist, Hindu, or Muslim, or of some other religion according to which oaths are not of binding force; or*
>
> *(b) has a conscientious objection to make an oath,*
>
> *he may, instead of making an oath, make an affirmation*."

In **M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Freddie Perera** [SC/HCCA/LA/Case No. 279/2012; SC minutes of 17th December 2014] Priyantha Jayawardena, PC, J, having referred to the provisions of the Oaths and Affirmations Ordinance No. 6 of 1841 which was replaced by the Oaths and Affirmations Ordinance No. 3 of 1842 and which in turn was replaced by the Oaths and Affirmations Ordinance No. 9 of 1895 which is currently in force, stated that, *"A comparison of the law relating to affidavits in Sri Lanka shows that the legislature has been conscious of the fact that Sri Lanka has a multi - racial and a multi - religious population and amended the law relating to oaths and affirmations to suit the requirements of the society. Therefore, it is necessary to be conscious of the said fact in interpreting the Oaths and Affirmation Ordinance."*

In **Sooriya Enterprises (International) Limited v Michael White & Company Limited** [(2002) 3 Sri LR 371] Mark Fernando, J referred with approval to the following passage from **Rustomjee v Khan** [18 NLR 120] where Pereira, J. (de Sampayo, J. agreeing) stated as follows:

> *"While the old Ordinance No. 3 of 1842, made it compulsory on witnesses who were non-Christians to make affirmations, the new Ordinance (the Oaths Ordinance, 1895) made it optional with them to do so. The primary provision of the new Ordinance is that all witnesses shall make oaths. It then enacts that a witness who, being a non-Christian, is a Buddhist, Hindu or Muhammadan, or of some other religion according to which oaths are not of binding force, "may", instead of making an oath, make an affirmation. To swear is no more than to assert, calling God to witness, or invoking His help to the deponent in the matter in connection with which the oath is taken, and it is open to any person, be he Hindu, Muhammadan or Zoroastrian, who believes in God, to claim to be sworn (rather than to affirm) ..."*

Fernando, J went on to state as follows:

> *"This view that "may" in section 5 is permissive, rather than mandatory, is supported by sections 7 and 9 of the Ordinance, which manifest a legislative intention to allow a witness or a deponent some choice as to whether he will swear or affirm; so much so that the substitution of an oath for an affirmation (or vice versa) will not invalidate proceedings or shut out evidence.* ***The fundamental obligation of a witness or deponent is to tell the truth*** *(section 10),* ***and the purpose of an oath or affirmation is to reinforce that obligation.***
>
> *The ratio decidendi of Rustomjee v. Khan that section 5 gave an option "to any person, be he Hindu, Muhammadan or Zoroastrian, who believes in God, to 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."* [emphasis added]

In terms of Section 12 (3) of the Ordinance, "*Every Commissioner before* ***whom any oath or affirmation is administered****, or* ***before whom any affidavit is taken*** *under this Ordinance,* ***shall state truly in the jurat*** *or attestation at what place and on what date* ***the same was administered or taken****, and shall initial all alterations, erasures, and interlineations appearing on the face thereof and made before the same was so administered or taken*" [emphasis added]

What Section 12(3) requires to be stated in the jurat is the place and date on which the oath or affirmation was administered, which implicitly means that the jurat must specify that an oath or affirmation was administered to the declarant prior to such declarant stating the facts. It must be stated that there is no requirement for a further oath or affirmation to be administered once the facts have been stated and prior to the declarant placing his signature.

It would perhaps be important to refer to Section 9 of the Ordinance, in terms of which, "*No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth*."

The above provisions could therefore be summarised as follows:

(1) Where an affidavit is required to be made under the provisions of the Code, and where the action is brought by a company such as a bank, the affidavit must be made by the secretary, director or other principal officer of such company;

(2) The person who makes the affidavit must be a person having personal knowledge of the facts of the cause of action, and must **swear** or affirm (as the case may be) that the matters contained in the affidavit are within his own personal knowledge;

(3) A Christian must take an **oath** prior to stating the matters contained in the affidavit, unless he or she has a conscientious objection to taking an oath, in which event such fact shall be stated in the affidavit;

(4) A Buddhist, Hindu or Muslim shall, having stated so, and prior to narrating the facts contained therein, solemnly and sincerely affirm to the truthfulness of such facts;

(5) Such oath or affirmation shall be taken before a Justice of the Peace or a Commissioner for Oaths [collectively referred to as Justice of the Peace];

(6) The affidavit shall be signed by the declarant in the presence of the Justice of the Peace before whom the oath or affirmation is made;

(7) The jurat shall state the time and the place at which the affidavit was sworn or affirmed to;

(8) The Justice of the Peace shall thereafter cancel the stamp and place his signature and seal on the affidavit in the presence of the declarant.

The requirement that, prior to the declarant signing the affidavit before the Justice of the Peace, the contents of the affidavit must be read over to the declarant or that the declarant must read the contents of the affidavit or that the contents of the affidavit be explained to the declarant, are requirements that seek to ensure that the declarant has understood the contents of the affidavit, and is implied by the provisions of Section 12(3).

<u>The affidavit annexed to the petition</u>

The declarant in the impugned affidavit is Anton Jude Trevor Fernando, a Senior Manager of the Petitioner.

The said affidavit, which contains sixteen paragraphs, starts as follows:

> "කොළඹ 10, ටී.බී. ජයා මාවතේ අංක 479 දරණ ස්ථානයේ ඇන්ටන් ජූඩ් ට්‍රෙවර් ප්‍රනාන්දු, වන **මම ක්‍රිස්තු භක්තිකයෙකු වශයෙන් පහත සඳහන් පරිදි දිවුරා ප්‍රකාශ කරමි.**"

Paragraphs 1 and 2 read as follows:

> "01. මම ඉහත නම් සඳහන් දිවුරුම් ප්‍රකාශක වෙමි.

02. පෙත්සම්කාර බැංකුවේ ණය අධික්ෂණ හා අයකිරීම් අංශයේ ජ්‍යෙෂ්ඨ කළමණාකරුවෙකු වශයෙන් සහ මා සන්තකයේ ඇති ලේඛණ කියවා බැලීමෙන් පසු හා **මාගේ පුද්ගලික දැනීම** හා විශ්වාසය අනුව පහත සඳහන් පරිදි ප්‍රකාශ කිරීමට මා හට බලය පවරා ඇති බව මම ප්‍රකාශ කරමි."

Paragraphs 3 -16 supports the averments of fact in paragraphs 1-14 of the petition.

Paragraph 16 is followed by the jurat, which reads as follows:

"ඉහත නම් සඳහන් දිවුරුම් ප්‍රකාශ විසින් කියවා)
තේරුම්ගෙන දිවුරුම් දි වර්ෂ 2015 ක් වු ජුනි මස 18)
වන දින කොළඹ දි අත්සන් තබන ලදි)"

Mr. Priyantha Alagiyawanna, the learned Counsel for the Petitioner did concede that the word, 'ප්‍රකාශ' in the jurat should have read as 'ප්‍රකාශක', but stated it is only a typographical error and does not in any manner affect the sanctity that should be attached to such affidavit.

The signature of Trevor Fernando has been placed thereafter, followed by the statement that the signature was placed before the Justice of the Peace [මා ඉදිරිපිටදිය], followed by the signature of the Justice of the Peace, the cancellation of the stamp and the affixing of the seal of the Justice of the Peace.

While there is no dispute that the impugned affidavit has been affirmed by a principal officer of the Petitioner who had personal knowledge of the facts contained therein, Mr. Alagiyawanna pointed out that:

(a) prior to stating the matters contained in the affidavit, Trevor Fernando has **sworn** to the truthfulness of what he is going to state, by taking an oath;

(b) the fact that he took an oath is borne out by the jurat, as well;

(c) the fact that the contents of the affidavit were read over and understood by Trevor Fernando is borne out by the jurat;

(d) the fact that he has understood the contents of the affidavit is borne out by the jurat;

(e) the deponent has placed his signature before the Justice of the Peace;

(f) the Justice of the Peace has placed his signature below the signature of the deponent and the stamp.

It was therefore his position that the affidavit is compliant with the provisions of the law, and that the District Court as well as the High Court erred in law when it rejected the affidavit of Trevor Fernando.

Orders of the District Court and the High Court

On the face of it, the submission of Mr. Alagiyawanna appears to be correct, giving rise to the question as to why the District Court and the High Court held otherwise.

In the order delivered on 9th June 2017, the learned District Judge had stated as follows:

> "දිවුරුම් ආඥා පනත ප්‍රකාරව පෙත්සම්කරුවන් විසින් ඉදිරිපත් කර ඇති දිවුරුම් ප්‍රකාශය සලකා බැලිමේදී දිවුරුම් ප්‍රකාශයේ දිවුරුම කර ඇත්තේ කා විසින්ද යන්න පැහැදිලිව දක්වා නොමැත. එමෙන්ම එකී දිවුරුම කර ඇත්තේ සමාදාන විනිශ්චය කාරවරයෙකු ඉදිරිපිටදී යන්න සහතික කර නොමැත."

Having considered the judgments in **Ratwatte v Sumathipala** [(2001) 2 Sri LR 55], **Kumarasiri and Another v Rajapakse** [supra], **Navaratne v Wadugodapitiya and Others** [(2006) 1 Sri LR 275] and **Umma Anina v Jawahar** [(2004) 2 Sri LR 1], the learned District Judge had concluded as follows:

> "ඉහත කී නඩු තීන්දු, අනුව මෙම දිවුරුම් පත්‍රය දෝෂ සහගත බැවින් සිවිල් නඩු විධාන සංග්‍රහයේ 437 වගන්තිය ප්‍රකාරව නිසි පරිදි දිවුරුම් ප්‍රකාශය සකස් කර නොමැති බව තීරණය කරමි. තවද පෙත්සමේ ආයාචනයේ සඳහන් කරුණු දිවුරුම් ප්‍රකාශය මගින් සනාථ කිරීමට පෙත්සම්කරුවන් අපොහොසත් වී ඇත."

Aggrieved by the Order of the District Court rejecting its petition, the Petitioner had lodged an appeal in the High Court. By its judgment delivered on 19th February 2020, the High Court had affirmed the findings of the District Court for the following reasons:

> "ඒ අනුව එහි සඳහන් වන වචන කිහිපය සැළකිල්ලට ගැනීමේදි ඉහත සඳහන් "දිවුරුම් ප්‍රකාශ" විසින් තේරුම් ගෙන යන්නෙහිදි එය දිවුරුම් ප්‍රකාශක විසින් කියවා තේරුම් ගත්තේද නැත්නම් දිවුරුම් ප්‍රකාශකට කියවා තේරුම් කර දුන්නේද යන්න සම්බන්ධයෙන් නිශ්චිතව සඳහන්ව නැති බව බැලූ බැල්මටම පෙනී යයි.
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> මෙම දිවුරුම් ප්‍රකාශයේ කිසිදු, ස්ථානයක තමා විසින් දිවුරුම් ප්‍රකාශයේ සඳහන් කරනු ලබන කරුණු **සත්‍ය බවට හා නිවැරදි බවට වූ කිසිදු, ප්‍රකාශයක් ඇතුලත් කර නැත.**
>
> එය දිවුරුම් ප්‍රකාශය ආරම්භයේදි වූ දිවුරා ප්‍රකාශ කිරීමේදිද, ඉන් අනතුරුව ඇති 1 සිට 16 දක්වා වූ ඡේදවලද කිසිවක් සඳහන් නොවන අතර ඔහු විසින් ලේඛන සහ පුද්ගලික දැනිම හා විශ්වාසය අනුව කරනු ලබන ප්‍රකාශයක් පමණක් වන අතර, ඒ සුදහා වූ ප්‍රකාශය ඔහු විසින් කරනු ලබන්නේ ඔහුට පවරා ඇති බලය මත පමණක් බවත් 2 වන ඡේදය අනුව පෙනී යයි.
>
> **තමා කරනු ලබන ප්‍රකාශය සත්‍ය හෝ නිවැරදි බවට කිසිදු, ප්‍රකාශයක් දිවුරුම් ප්‍රකාශයේ ඇතුලත්ව නැත.**
>
> එසේම දිවුරුම් පෙත්සම අවසානයේදි සාමදාන විනිශ්චයකාරවරයා ඉදිරිපිටදි අත්සන් තබන අවස්ථාවේදි කියවා තේරුම් කර ගැනිමෙන් අනතුරුව හෝ කියවා තේරුම් කර දිමේන් පසුව පිලිගෙන අත්සන් තැබුවේද යන්න පිලිබඳව වූ අපැහැදිලි අවිනිශ්චිත භාවය නිසාම එම දිවුරුම් ප්‍රකාශය වලංගු දිවුරුම් ප්‍රකාශයක් ලෙස සලකා බැලිය නොහැක."

The above reasoning of the District Court and the High Court can be summarized as follows:

(a) The affidavit has not been sworn before a Justice of the Peace;

(b) The deponent has not stated anywhere in the affidavit that the facts contained therein are true;

(c) It is not clear if the contents of the affidavit have been read over to the deponent or whether the deponent read the contents himself.

Has the affidavit been sworn before a Justice of the Peace?

An allegation that is made time and again with regard to the validity of an affidavit is that (a) the declarant was never present before the Justice of the Peace; or (b) the affidavit was never read over to the declarant or by the declarant; or (c) the declarant did not sign the affidavit in the presence of the Justice of the Peace, and thus, the entire affidavit is a sham and lacks the sanctity that must be attached to an affidavit for a Court of Law to act upon it as evidence of the matters contained in the pleadings. What gives rise to such allegations are the multitude of "errors" committed in preparing an affidavit especially in the jurat of an affidavit, and with regard to the religion of the declarant and the oath or affirmation that is said to have been administered prior to stating the facts in an affidavit, with the argument being that such errors could not have either occurred or else gone unnoticed had both parties been present at the same time.

This Court has on numerous occasions stated that it is the responsibility of the Justice of the Peace who represents to the entire world that the declarant swore or affirmed to the truthfulness of the contents of such affidavit and placed his or her signature before him and that it is safe to act on the contents of such affidavit, to ensure that it is in fact so.

I would like to briefly consider the four judgments that the District Court has considered in order to ascertain if the District Court erred when it relied on such judgments. The first is **Ratwatte v Sumathipala** [supra], where in the affidavit filed along with the petition the declarant had stated that he is a Christian and made oath, but in the jurat it had been stated that the contents were "*Read over and explained to the deponent and the deponent having understood the contents thereof* ***affirmed*** *thereto in my presence in Colombo on this 19th day of June 1999*". [emphasis added]

The Court held that:

> "*If the contents of the affidavit were read and explained by the Justice of the Peace I cannot fathom how he could have, after having read that the deponent was a Christian and was making oath, at the end in the jurat clause could have stated that the deponent affirmed.*

I therefore hold that the Justice of the Peace did not read and explain to the deponent the contents of the affidavit as he claims he did in the jurat clause, nor did the deponent make oath and swear to the contents of the affidavit in the presence of the Justice of the Peace, but that the Justice of the Peace "blindly" signed an "affidavit" which had been already signed by the deponent in some other place at some other time, without even entering the date."

A similar situation arose in **Jeganathan v Safyath** [(2003) 2 Sri LR 372] where the Court of Appeal, while observing that, "*In a case of this nature where the plaintiff has commenced her affidavit after making an oath does not end the jurat in a manner consistent with the oath she has taken at the commencement it cannot be said that she has sworn to the contents of the affidavit in the true sense of the expression as expected by law.*", held that, "*Therefore a doubt arises, as to whether in fact the contents of the affidavit were read over and explained to the plaintiff, by the Commissioner of Oath before the plaintiff placed her signature.*"

An issue similar to that in **Ratwatte v Sumathipala** [supra] arose in **M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Freddie Perera** [supra], where the petitioner having stated at the commencement of the affidavit that being a Christian, he "*make oath and state as follows*" stated in the jurat that he "*affirms*" to the facts. The question arose whether the said affidavit was valid since the petitioner, being a Christian, had not sworn in the jurat. This Court adopted a liberal approach when it held that:

"*In the affidavit filed along with the instant application, the jurat expressly sets out the place and date on which the affidavit was signed. These are essential requirements of an affidavit. There is no dispute that the affidavit was signed before a Commissioner of Oaths and she had the authority to do so.*

What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation *as an affidavit is considered as evidence in law. Therefore, it is necessary to show that the person who swears or affirms to the facts stated in the affidavit did so before a competent authority or a*

person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of the jurat. [emphasis added]

Apart from stating that the Petitioner signed the affidavit before a Commissioner for Oaths, Jurat states the place and the date on which the affidavit was signed. Jurat in an affidavit is an integral part of an affidavit and it cannot be considered in isolation. In other words an affidavit should be considered in its totality. In applying this test and considering the totality of the affidavit and applying the relevant law and accepted practices, the fair conclusion that could be arrived is that the Petitioner has stated the facts in the affidavit under oath before the Commissioner for Oaths as demonstrated at the beginning of the affidavit and, the affidavit filed along with the instant petition fulfills the requirements of the Oaths and Affirmation Ordinance."

In **De Silva and Others v L.B. Finance Ltd** [(1993) 1 Sri LR 371], even though the affidavit commenced with the words - " *We .... being Buddhists do hereby solemnly, sincerely and truly declare and affirm as follows:*", the jurat only stated that, "*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*". A preliminary objection was raised that the affidavit was invalid for the reason that the jurat did not contain the fact of affirmation.

Chief Justice G. P. S De Silva, having considered the provisions of Section 438, the averments in the affidavit and the wording of the jurat that the affidavit was *"duly read over and explained..... to the within-named affirmants ....."* held 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***." [emphasis added]. I must however say that even though Section 438 is silent in this regard, Section 12(3) of the Ordinance, to which I have already referred to, suggests otherwise.

In each of the above cases, there was either a contradiction between the opening statement in the affidavit and the jurat as to whether what was administered was an oath or affirmation, or the jurat did not support the opening statement. The conservative and liberal approaches that our Courts have adopted over the years when confronted with

such errors and contradictions were considered by Amarasekara, J in **Weerawansa v Karunanayake** [SC Appeal No. 59A/2006; SC minutes of 29th July 2020], where having carried out a comprehensive survey of the cases in this regard including **Ratwatte v Sumathipala** [supra] and **Kumarasiri and Another v Rajapakse** [supra], he concluded as follows:

> "*The above decisions indicate that on some occasions where there was a defect in the jurat, our courts have acted somewhat strictly, and on other occasions more liberally. In some instances, our courts have expressed that even though technicalities should not be allowed to stand in the way of justice, the basic requirements of the law must be fulfilled; and in some cases the rationale behind making an oath or affirmation appears to have been considered and if it is visible from the affidavit as a whole that it is a responsible statement admitting the truth with regard to what is contained in the affidavit, it has been considered as valid. Thus, a mere declaration or statement of facts have been rejected. When there were contradictions between the contents of the affidavit and its jurat, in certain instances affidavit was not given the legal recognition, perhaps due to the doubt that the signing of the affidavit would have taken place blindly and not in a responsible manner. In some cases, even if there were contradictory statements as to whether it was affirmed or sworn, or when the jurat was silent as to whether it was affirmed or sworn, or when the contents indicated that either it was affirmed or sworn as required by law or when it was a responsible statement to vouch for the truth, the relevant affidavit was considered as valid*."

> "*After perusing the aforementioned decisions of our superior courts and the relevant provisions it is my view that what is necessary is whether the deponent made an oath or affirmed, as the case may be, as to the truthfulness of the contents of the affidavit, before the Justice of Peace or the Commissioner of oath. This has to be ascertained not only by looking at what is stated in the jurat but taking the affidavit as a whole*."

The second judgment relied upon by the District Court is **Kumarasiri and Another v Rajapakse** [supra] where the affidavit was rejected since "*it does not state where the affidavit was affirmed and thus violate the provisions contained in Section 12 (3) of the Oaths and Affirmation Ordinance*."

The third is **Navaratne v Wadugodapitiya and Others** [supra] where the purported affidavit tendered with the amended petition had not been signed by the petitioner, with the explanation being that the petitioner had by mistake placed the signature on the petition instead of placing the same on the affidavit. The Court of Appeal held that, "*the aforesaid mistake on the part of the plaintiff petitioner clearly indicates that the purported affidavit has not been read over and explained to the plaintiff-petitioner nor has the plaintiff - petitioner himself read the affidavit which is fatal to the validity of the said affidavit. If as the plaintiff-petitioner tries to make out that he placed his signature on the petition instead of on the affidavit then the purported affidavit has been signed by the Justice of Peace prior to the plaintiff - petitioner placing his signature on the petition, for it is obvious that the Justice of Peace should have observed that the affirmant's signature was not on the affidavit when he entered the jurat clause. In effect it is obvious that the purported affidavit does not comply with the provisions contained in section 438 of the Civil Procedure Code*…."

The fourth is **Umma Anina v Jawahar** [supra] where the affidavit filed by the power of attorney holder of the petitioner was rejected by Court since there was "*no averment in the affidavit that the facts stated therein are within the personal knowledge of the declarant and that he is able of his own knowledge and observation to testify to. … When there is no averment in the affidavit that the declarant deposes such facts from his personal knowledge, it contravenes the provisions of the proviso to section 183A of the Civil Procedure Code*."

It must be emphasised that the role played by a Justice of the Peace is sacred, and that when errors such as what I have referred to earlier do take place, it is not unreasonable to draw an inference that such errors occurred due to the declarant not being present before the Justice of the Peace as claimed in the jurat. Similarly, when there are no contradictions and on the face of it, the fact that an oath was taken before a Justice of

the Peace or the fact that the signature of the declarant was placed before the Justice of the Peace is borne out by the affidavit, it is not open for a Court to hold otherwise, unless there are cogent reasons for doing so.

The issue is, are the cases relied upon by the District Court relevant to the facts of this case? Trevor Fernando has stated at the beginning of the affidavit that he is a Christian and that he has taken an oath. The jurat does not contradict the above position but instead confirms that he has sworn in the presence of the Justice of the Peace on the date and place specified in the jurat. There is no mix-up as in the cases referred to by the learned District Judge. The Justice of the Peace has confirmed that Trevor Fernando placed his signature before him, prior to himself signing the affidavit. Thus, the said judgments had no relevance at all to the facts of this case.

Since what had been annexed to the appeal brief was only a black and white copy of the impugned affidavit and given the fact that on the face of it, the affidavit appeared to have been prepared in accordance with the law, I called for the record of the District Court out of an abundance of caution in order to examine the original of the impugned affidavit. Having done so, I am satisfied that nothing on the face of the affidavit could have given rise to the conclusion that Trevor Fernando did not present himself before the Justice of the Peace or that he did not take an oath or that he did not sign the affidavit in the presence of the Justice of the Peace.

In these circumstances, I am of the view that the District Court and the High Court erred (a) when it followed judgments which had no application to the facts of this case, and (b) when it failed to appreciate that the affidavit of Trevor Fernando has been prepared in accordance with the applicable legal provisions.

Has the deponent stated that the facts are true?

This brings me to the next ground on which the High Court rejected the affidavit, which is that Trevor Fernando has not stated in the affidavit that the facts contained in the affidavit are true.

Referring to the aforementioned statutory provisions, Mr. Alagiyawanna submitted that in the preparation of affidavits, the law draws a distinction between those who are of the Christian faith and those who are not. It was his position that if the person who makes an affidavit is a Christian, such person who is known as a deponent, is required to state so at the beginning of the affidavit, is required to take an oath that the material contained in such affidavit is within his personal knowledge and thereafter proceed to state the factual matters. He stated further that when a Christian makes an oath, he or she does so in the name of God, and therefore, it is presumed that once an oath is taken, what follows thereafter is the truth and that, that is the manner in which sanctity is attached to the contents of such affidavit.

The above submission is supported by the decision of this Court in **Sooriya Enterprises (International) Limited v Michael White & Company Limited** [supra] where it was held that, "*The fundamental obligation of a witness or deponent is to tell the truth and the purpose of an oath or affirmation is to reinforce that obligation*.", and the following definitions of the word, 'oath' referred to in **M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Freddie Perera** [supra]:

> "Stroud's Judicial Dictionary of Words and Phrase [Sixth Edition (Volume 2)]: *'An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth (R. v. White, Leach, 430, 431)'.*
>
> The Oxford Dictionary of Law [Seventh Edition]: *A* ***pronouncement swearing the truth of a statement or promise, usually by an appeal to God to witness its truth****. An oath is required by law for various purposes, in particular for affidavits and giving evidence in court. The usual witness's oath is: "I swear by Almighty God that the evidence which I shall give shall be the truth, the whole truth and nothing but the truth". Those who object to swearing an oath, on the grounds that to do so is contrary to their religious beliefs or that they have no religious beliefs, may instead 'affirm.'"*

Longman Dictionary of Contemporary English*: 'a formal promise to tell the truth in a court of law'*."

This Court also referred to the definition of deponent in the Oxford Dictionary of Law [Seventh Edition], where a deponent had been defined as *'a person who gives testimony under oath, which is reduced to writing for use on the trial of a cause'.*

Mr. Alagiyawanna submitted further that a person who is not a Christian or being a Christian has an objection to taking an oath, will not make an oath and hence, in order to give validity to an affidavit, the declarant is required to affirm to the contents of such affidavit by stating that he does so solemnly, sincerely and truly.

It was therefore his position that:

(a) non-Christians are allowed to make an affirmation instead of an oath and it is only such an affirmation that must carry the words, "*solemnly, sincerely and truly*";

(b) non-Christians who believe in God may take an oath;

(c) a Christian who does not have a conscientious objection to make an oath does not have to say that he is doing so "*solemnly, sincerely and truly*" for the simple reason that such person is taking an oath before stating the matters in the affidavit and in-built in such oath is a sworn statement to tell the truth in the name of God and the fact that such contents are true.

Having examined the original of the impugned affidavit, I am satisfied that Trevor Fernando, being a Christian has taken an oath prior to stating the facts in paragraphs 1 – 16 of the affidavit. This is clearly borne out by the use of the words, "**මම ක්‍රිස්තු භක්තිකයෙකු වශයෙන් පහත සඳහන් පරිදි දිවුරා ප්‍රකාශ කරමි.**" The definitions that I have already referred to make it clear that in taking an oath, the deponent is swearing by God to tell the truth. Thus, there was no further necessity for Trevor Fernando to state elsewhere in the affidavit that he is stating the truth or for him to state that he is stating so sincerely and truly. The High Court clearly erred when it concluded that the deponent has not stated

anywhere in the affidavit that the facts contained in the affidavit are true or that it is not clear who has sworn the affidavit.

Were the contents of the affidavit read over to Trevor Fernando?

The third ground on which the affidavit was rejected was that it is not clear if the contents of the affidavit have been read over to Trevor Fernando or whether Trevor Fernando has read the contents himself. Whether the contents of the affidavit were read over by Trevor Fernando on his own or whether the contents were read over or explained to Trevor Fernando by the Justice of the Peace, what is important is that Trevor Fernando must understand the contents of the affidavit and that the contents of the affidavit have been stated under an oath which then assures the truthfulness of the contents of the affidavit.

The jurat makes it clear that Trevor Fernando has read the contents of the affidavit, **has understood the contents thereof**, has sworn before the Justice of the Peace and thereafter placed his signature on 18th June 2015 [ඉහත නම් සඳහන් දිවුරුම් ප්‍රකාශ විසින් කියවා තේරුම්ගෙන දිවුරුම් දි වර්ෂ 2015 ක් වු ජුනි මස 18 වන දින කොළඹ දි අත්සන් තබන ලදි]. It is also clear that Trevor Fernando has signed before the Justice of the Peace and that the Justice of the Peace has signed thereafter.

I am therefore of the view that the High Court erred when it rejected the affidavit on the ground that it is not clear if the contents of the affidavit have been read over to the deponent or whether the deponent read the contents himself.

Conclusion

In the above circumstances, I answer the aforementioned question of law in the affirmative. The judgment of the High Court dated 19th February 2020 and the Order of the District Court dated 9th June 2017 are hereby set aside. The District Court of Mahiyanganaya is directed to act in terms of Section 14A of the Civil Procedure Code and consider in accordance with the law the application of the Petitioner contained in the petition filed on 10th August 2015.

I make no order for costs.

JUDGE OF THE SUPREME COURT

S. Thurairaja, PC, J

I agree

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree

JUDGE OF THE SUPREME COURT