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

In the matter of an Application made under sections 224 and/or 225 and 128 read with section 521 of the Companies Act, No. 07 of 2007.

Supreme Court Case No.
SC/CHC/Appeal No. 26/2017
SC/HCCA/LA/13/2017
Civil Appellate High Court
Kegalle Case No.
SP (HCCA) KEG 07/2016
DC/Kegalle Case No. 7294/L

1. Siddiaratchchige Noel Anthony Nihal de Silva,
   No. 236, Waragoda Road,
   Kelaniya.

2. Siddiaratchige Dulanjan Shamal Siddiaratchi,

3. Siddiaratchige Isuru Chinthaka Augustine Siddiaratchi,
   Both of No. 236, Waragoda Road,
   Kelaniya.

   Both presently at
   2, Zimmer St.,
   Brampton Ontario, L6S6L3,
   Canada.
   Appearing by their lawful Attorney

PETITIONERS

Vs.

1. Augustine Motors (Pvt) Limited,
   No. 57 & 59, Jayantha
   Weerasekera Mawatha,
   Colombo 10.

2. K. A. D. T. A. R. Shanthapriya,
   No. 59, 1/1, Jayantha
   Weerasekera Mawatha,
   Colombo 10.

3. K. D. K. D. A. Kathriarachchi,
   No. 86, Galpoththa Road,
   Nawala.

4. K. D. G. A. C. Kathriarachchi,
   No. 86, Galpoththa Road,
   Nawala.

5. Cyrus Corporate Services (Pvt) Ltd.,
   No. A2, Matha Road,
   Colombo 08.

6. A. J. S. Associates Chartered Accountants,
   No. 100/20, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

7. The Registrar of Companies,
   No. 400, D. R. Wijewardena
   Mawatha, Colombo 10.

RESPONDENTS

AND NOW BETWEEN

In the matter of an appeal under and in terms of the Provision in sections 754 and 755 of Chapter LVIII of the Civil Procedure Code read with section 05 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

1. Siddiaratchchige Noel Anthony Nihal de Silva,
   No. 236, Waragoda Road,
   Kelaniya.

2. Siddiaratchige Dulanjan Shamal Siddiaratchi,

3. Siddiaratchige Isuru Chinthaka Augustine Siddiaratchi,
   Both of No. 236, Waragoda Road,
   Kelaniya.

   Both presently at
   2, Zimmer St.,
   Brampton Ontario, L6S6L3,
   Canada.
   Appearing by their lawful Attorney

PETITIONER-APPELLANTS

Vs.

1. Augustine Motors (Pvt) Limited,
   No. 57 & 59, Jayantha
   Weerasekera Mawatha,
   Colombo 10.

2. K. A. D. T. A. R. Shanthapriya,

No. 59, 1/1, Jayantha
Weerasekera Mawatha,
Colombo 10.

3. K. D. K. D. A. Kathriarachchi,
No. 86, Galpoththa Road,
Nawala.

4. K. D. G. A. C. Kathriarachchi,
No. 86, Galpoththa Road,
Nawala.

5. Cyrus Corporate Services (Pvt)
Ltd., No. A2, Matha Road,
Colombo 08.

6. A. J. S. Associates Chartered
Accountants,
No. 100/20, Sir Chittampalam A.
Gardiner Mawatha, Colombo 02.

7. The Registrar of Companies,
No. 400, D. R. Wijewardena
Mawatha, Colombo 10.

RESPONDENT-RESPONDENTS

BEFORE : JANAK DE SILVA, J.
DR. SOBHITHA RAJAKARUNA, J.
K. M. G. H. KULATUNGA, J.

COUNSEL : Chandaka Jayasundera P.C., with Imaz Imthiyaz and Praveen Wijayaweera, instructed by Gayan Salwathure, for the Petitioner-Appellant.

Dr. Lasantha Hettiarachchi, with Minali Haputantri and Nishadini Gunawardana, instructed by Medavini Thilakaratne for the 1st - 4th Respondent-Respondents.

Sabrina Ahmed SSC for the 7th Respondent.

WRITTEN SUBMISSIONS ON : 24.01.2022 and 05.10.2022

ARGUED ON **:** 19.02.2026

DECIDED ON **:** 18.05.2026

JUDGMENT

K. M. G. H. KULATUNGA, J.

1. The petitioner-appellants (hereinafter referred to as "the petitioners") initially preferred an application to the Commercial High Court under sections 224 and/or 225 and 128 read with section 521 of the Companies Act, No. 07 of 2007. The petitioner *inter alia* sought interim relief. The 1st - 4th respondent-respondents (hereinafter referred to as "the respondents") tendered limited objections to the granting of interim relief by statement of objections dated 23.07.2015.

2. Upon fixing the matter for order, the learned Commercial High Court Judge in the interim has directed and called upon the parties to make submissions on two specific grounds, namely, (i) whether the Articles of Association of the 1st respondent company intend to devolve shares held by a female shareholder to any third party after her demise; and (ii) whether the affidavit tendered in support of the petition in the said action is defective.

3. Upon hearing both parties, the learned Commercial High Court Judge, by order dated 12.05.2017, dismissed the entire application on the basis that the affidavit filed along with the petition, dated 14.11.2014, was defective and not valid. This final appeal is preferred by the petitioner against the said order on the questions of law:

    a) *Did the learned High Court Judge misdirect himself in law in not finding that the court should not non-suit a party where the non-compliance with the rules takes place due to no fault of the party?*

    b) *Did the learned High Court Judge err in law in not coming to the finding that the irregularity in the impugned affidavit is not sufficiently grave enough to have an effect on the validity of the entire application of the appellants?*

    c) *Was the learned High Court Judge in error, and thereby vitiating the entire order that a deficient affidavit can be and ought to be amended or tendered afresh to continue with the application?*

4. The facts in brief are as follows. The petitioners are the husband and children of late K.A.D.A.C. Deepthi. The 1st appellant is also the administrator of the estate of the deceased K.A.D.A.C. Deepthi. During her lifetime, the said K.A.D.A.C. Deepthi was a Director and shareholder of the 1st respondent company and held 1,566 ordinary shares, amounting to approximately 49% of the issued shares of the company.

5. Upon the demise of the said K.A.D.A.C. Deepthi, the petitioners claim that they became entitled to her rights and interests in the said shares as her legal heirs and representatives. The petitioners allege that thereafter certain Respondents took certain steps in relation to the management and shareholding of the 1st Respondent Company which were prejudicial to their interests. The petitioners further state that the Respondents attempted to alter the shareholding structure of the company, including to issue further shares of the 1st Respondent Company, thereby diluting the shareholding attributable to the estate of the deceased.

6. In these circumstances, the petitioners instituted proceedings in the Commercial High Court under sections 224 and/or 225 and 128 read with section 521 of the Companies Act, No. 07 of 2007. This was by way of petition dated 14.11.2014 and affidavit, seeking *inter alia* interim relief restraining the Respondents from issuing further shares of the 1st Respondent Company or otherwise acting in a manner that would prejudice the petitioners' rights in respect of the said shares.

7. An enjoining order was initially issued and the Respondents thereafter filed objections to the said interim relief. The matter was subsequently fixed for inquiry on the question of interim relief, and the learned High Court Judge heard oral submissions of the parties around 30.06.2016. Upon consideration of the matter, the learned High Court Judge, by Order dated 12.05.2017, dismissed the petitioners' application *in limine*. The dismissal was based on the finding that the affidavit filed together with the petition was defective.

8. Section 520 (1) of the Companies Act provides the manner and mode of making an application under the Companies Act, as follows:

> *"**520.** (1) Every application or reference to court under the provisions of this Act shall, unless otherwise expressly provided or unless the court otherwise directs, be by way of petition and affidavit, and every person against whom such application or reference is made, shall be named a respondent in the petition and be entitled to be given notice of the same and to object to such application or reference."*

Accordingly, an application under section 224 or 225 is thus necessarily required to be by way of petition and affidavit. The impugned application was in fact tendered with an affidavit which the High Court Judge held to be defective, as the deponent, claiming to be a Catholic, had neither sworn nor affirmed as required by the section 5 of the Oaths and Affirmations Ordinance. Now let's consider if this finding is correct.

9. The commencement of the impugned affidavit, signed by the 1st petitioner, is as follows:

> *"I, Siddhaarachchige Noel Anthony Nihal De Silva, of 236, Waragoda Road, Kelaniya, being a Catholic, do hereby solemnly, sincerely and truly declare to the following"*

Then, the jurat reads thus:

> *"Read over and explained and after having understood the contents herein and having admitted to the same being correct, declared and signed at Colombo, on this 14th day of November, 2014."*

Section 5 of the Oaths and Affirmations Ordinance reads as follows:

> "**5.** *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."*

It is common ground that the 1st petitioner is a Catholic of the Christian faith. On a plain reading of section 5, there is no debate that the 1st petitioner is required to make an oath and swear to the contents. It is also common ground that the affidavit does not contain either and is defective to that extent.

10. The legal effect and import of defective affidavits, time and again, have been the subject matter of many a decision and judgement, including that of the superior courts. Both parties, therefore, have cited several judgements and decisions in support of their respective assertions. This Court is now called upon to determine if upholding of the objection and rejecting the application *in limine* is lawful and correct. At this juncture, it may be opportune to advert to some of the said decisions relevant in the context of the present appeal.

11. Sri Lankan case law demonstrates that the validity of an affidavit depends on whether the defect affects the substance of the oath or merely its form. In early and leading authorities such as ***Weeraman v. Sadacharan*** (2002) 3 Sri L R 222 and ***Mark Rajendran v. First Capital***

Ltd (2010) 1 Sri L R 60, the courts adopted a strict approach, holding that where an affidavit fails to disclose that it was duly sworn or affirmed, or where the jurat is absent or fundamentally defective, the document is not an affidavit in law and must be rejected *in limine*. This position was reaffirmed in ***Clifford Ratwatte v. Thilanga Sumathipala*** (2001) 2 Sri L.R. 55, where an inconsistency between the oath and the jurat was treated as a fatal defect going to the root of the affidavit. The Court of Appeal held as follows:

> *"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."*

12. A more liberal approach had been taken in the decision of ***M. Tudor Danister Anthony Fernando v. Rankiri Hettiarachchige Fredie Perera*** SC/HCCA/LA 279/2012, decided on 17.12.2014, where the petitioner, having stated at the commencement of the affidavit that being a Christian, he does "*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. Priyantha Jayawardena, P.C., J., held that,

> *"**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.*

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."* [emphasis added]

13. Amarasekara, J., in ***Weerawansa v. Karunanayake*** SC/Appeal No. 59A/2006, decided on 29.07.2020, analyses the above dichotomy in Sri Lankan case law and opines 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 Oaths***. *This has to be ascertained not only by looking at what is stated in the jurat* ***but taking the affidavit as a whole***." (emphasis added).

14. In ***Senok Trade Combine Ltd. v. K. H. S. Pushpadeva***, SC/HC/LA/02/2014, decided on 04.09.2014, Aluwihare P.C., J., considered a similar defect in the affidavit and held as follows:

> *"In response to the above contention of the Respondent, the learned counsel for Petitioner whilst admitting the error relating to the address, submits that the error is a result of an oversight. I am of the view that this irregularity referred to above by the learned counsel for the Respondent is of technical nature and in all probability may have been the result of lack of diligence on the part of the Attorney-at-Law who was responsible for drafting the affidavit. His Lordship Justice Marsoof, President Court of Appeal as he then was, has observed*
>
> > *"Court should not non-suit a party where the non-compliance with the Rules takes place due to no fault of the party" (**Senanayake v. Commissioner of National Housing and Others** 2005 1 SLR 182).*
>
> *I hold that the irregularity is not sufficiently grave to have an effect on the validity of the impugned affidavit."*

15. The above decisions have considered the effect of errors and defects in affidavits, in general terms, without reference to section 9. In considering the present appeal, the relevant provision is section 9 of the Oaths and Affirmations Ordinance No. 9 of 1895. The Oaths and Affirmations Ordinance consolidated the law relating to oaths and affirmations in judicial proceedings and for other purposes. I find that section 9 of the Oaths and Affirmations Ordinance, on a plain reading, prohibits the invalidation of proceedings due to particular defects or irregularities in affidavits. Section 9 reads thus:

> *"**9.** 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."

Section 9 is couched in the negative, prohibitory form, which is a clear indicator of the legislative intent that it is mandatory. Thus, the sum total of section 9 simply is that:

a. the omission to take any oath or make any affirmation; or
b. the substitution of any one for any one of them; and
c. irregularity of whatever form in which any one of them is administered,

shall not:

i. invalidate any proceeding; or
ii. render inadmissible any evidence, whatever or in respect of which such omission, substitution, or irregularity took place.

Thus, section 9 in the mandatory form expressly and specifically provides that the *omission to take any oath or make any affirmation* shall not *invalidate any proceeding* or *render inadmissible any evidence*. As I see, section 9 prevents and prohibits the invalidation of proceedings if there be an omission to take any oath or make any affirmation in an affidavit.

16. In ***Facy v. Sanoon*** (2006) BLR 58, Marsoof, J. addressed a similar objection, where the petitioner-appellant, who was a Muslim, stated at the commencement of the affidavit that he "takes oath and swears" to its contents, while the jurat certified by the Justice of the Peace indicated that the affidavit had been "signed and affirmed" before him. This is the substitution of *an oath* for *an affirmation* [defect *(b)* above]. Considering the effect and import of section 9, His Lordship, at page 62, held as follows:

"I am unable to agree with the aforesaid submission of learned President's Counsel for the reason that as explicitly stated in Section 9 of the Oaths Ordinance… This is a salutary provision which was intended to remedy the very malady that has occurred

in this case, and clearly covers a situation in which there is a substitution in the jurat of an affirmation for an oath. This is not a case like ***Clifford Ratwatte v. Thilanga Sumathipala*** *(2001) 2 SLR 55 or* ***Jeganathan v. Safyath*** *(2003) 3 SLR 372 in which there was material to show that neither an oath nor an affirmation was in fact administered by the Justice of the Peace when the affidavit was signed by the deponent, and the clear provisions of Section 9 of the Oaths Ordinance cannot be overlooked in a case where the deponent has affirmed the truth of the contents of the affidavit having taken an oath in the commencement of the affidavit."*

17. In ***Clifford Ratwatte v. Thilanga Sumathipala*** *and* ***Jeganathan v. Safyath***, referred to above, the Court found that there is an absolute absence of a valid affidavit on the basis that the said purported affidavits were found to have not been signed by the affirmant before the Justice of the Peace or Commissioner for Oaths. This is not a defect or irregularity contemplated by section 9 but, if at all, a non-compliance with the requirement prescribed by section 438 of the Civil Procedure Code, which provides as follows:

> *"Every affidavit shall be entitled as in the court and action in which it is to be used, and shall be signed by the declarant in the presence of the court, Justice of the Peace, or Commissioner before whom it is sworn or affirmed."*

The complete dismissal of the applications in the cases of ***Clifford Ratwatte v. Thilanga Sumathipala*** or ***Jeganathan v. Safyath***, referred to in ***Facy v. Sanoon*** (supra), was warranted, as the said documents were found to not have been signed and executed in the presence of a Commissioner or a Justice of the Peace.

18. Then section 12(3) of the Oaths and Affirmations Ordinance also provides as follows:

> *"**12 (3).** 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).

This provision is couched in the mandatory form. Thus, where there be a failure to adhere to this mandatory requirement governing the due attestation of an affidavit, including stating the place and date of attestation and the authentication of alterations, such non-compliance will have a direct bearing upon the validity and authenticity of the affidavit itself and will lead to the necessary conclusion of there being no valid affidavit. It is especially so if it is found that the deponent has failed or not signed in the presence of the Commissioner or Justice of the Peace. Therefore, it is a specific statutory requirement that the declarant is required to sign the affidavit in the presence of the Commissioner or the Justice of the Peace, before whom it is claimed to have been sworn to or affirmed. A finding that it was not so signed will render such purported affidavit invalid, and such document would not be an affidavit. It is in this context that persons were non-suited and actions were dismissed in the aforesaid cases of ***Clifford Ratwatte v. Thilanga Sumathipala, Jeganathan v. Safyath*** and ***Facy v. Sanoon*** (supra).

19. In contrast, a defect or irregularity within the scope of section 9 will not invalidate the proceeding, as the law expressly prevents and prohibits the invalidation and thereby preserves and saves the validity of the relevant proceedings and the admissibility of the evidence. Thus, such defect or irregularity in a supporting affidavit cannot constitute the basis for the invalidation of proceedings or the dismissal of an application or suit. To my mind, when the law unambiguously provides so, no court can dismiss *any action or application* due to a defect or irregularity in an affidavit as specified in section 9. Marsoof, J., in ***Facy v. Sanoon*** (supra) at page 65, considering the effect of a defective affidavit, also cited the following exposition of M. D. H. Fernando, J., in the case of ***Kiriwanthe and Another v. Navaratne and Another*** (1990) 2 SLR 393:

> *"It is not to be mechanically applied… The Court should first have determined whether the default had been satisfactorily explained,*

or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction; dismissal was not the only sanction."

20. When considering the impugned affidavit in the present application, the commencement and the jurat do not specifically say that the deponent, though a Catholic, has made an oath and/or sworn. However, the place and the date of execution and the fact that it was signed before a Justice of the Peace are clearly stated. No doubt, the absence of taking the oath or swearing is expressly not stated; this is a defect that is contemplated and covered by section 9. That being so, by virtue of the provisions of section 9, a defect which comes within section 9 will not and cannot invalidate such proceeding. The learned High Court Judge has not appreciated this vital and relevant provision of section 9.

21. As I see, on a plain reading of section 9, one cannot take up an objection based on a defect or irregularity contemplated by section 9 and seek the invalidation and dismissal of the action or application. The basic principle that a party should not be non-suited on such a defect is incorporated in section 9. The learned High Court Judge's finding that the affidavit is defective may be correct; however, the invalidation and dismissal of the application *in limine* on that score alone is erroneous and not lawful in this context.

22. According to the proceedings, I find that the petitioner has subsequently tendered an amended affidavit. This is substantially in the correct form. However, the jurat reads as follows:

"Read over and explained and after having understood the contents herein and having admitted the same to be corrected, sworn to declared to and signed at Colombo, on this 4th day of July, 2016."

The Learned High Court Judge has considered this and construed the word "corrected" above to mean that this affidavit requires a prospective correction and appears to have found the said affidavit also to be

defective. This construction is erroneous. What the jurat is required to contain, in accordance with section 12(3) of the Oaths and Affirmations Ordinance read with section 438 and Form No. 75 of the Civil Procedure Code are the place of signing, date of signing, and the identity of Commissioner for Oaths, Justice of the Peace, or Notary Public. The jurat in the corrected affidavit contains all the above as well as more. The use of the word "corrected" is either a mistake and should read as "correct" or, if it is taken in the form it appears, it is no more than an assertion that the said affidavit is true and corrected, if at all, meaning that the defects have been rectified. Whatever it may be, the second amended affidavit was filed of record. The High Court Judge, upon holding that the original affidavit was defective, should have necessarily allowed the rectification and ought to have accepted the amended affidavit.

23. Accordingly, the questions of law *(a)* and *(b)* are answered in the affirmative. Since this appeal can be decided on these two questions of law alone, the consideration of the third question of law is not necessary. In the above circumstances, the impugned order dated 12.05.2017 is hereby set aside and the dismissal of the application is vacated, and the matter is restored. The Commercial High Court Judge is hereby directed to accept the amended affidavit dated 04.07.2016 and to proceed with the application from there onwards.

24. Appeal is accordingly allowed, and the appellant is entitled to costs of litigation in this Court.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT

DR. SOBHITHA RAJAKARUNA, J.

I agree.

JUDGE OF THE SUPREME COURT