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

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

SC / HCCA / LA / 02 / 2024

EP / HCCA / BC / FA / 21 / 2022

DC / Batticaloa / D / 6342 / 2017

Thevasahayam Ranjith Anthony,

123/1, 2nd Cross,

Gnanasooriyam Square,

Batticaloa.

PLAINTIFF

-Vs-

Rishendra Daniya Christina,

21/17, New Dutch Bar Road,

Batticaloa.

DEFENDANT

AND THEN BETWEEN

Rishendra Daniya Christina,

21/17, New Dutch Bar Road,

Batticaloa.

DEFENDANT – APPELLANT

-Vs-

Thevasahayam Ranjith Anthony,

123/1, 2nd Cross,

Gnanasooriyam Square,

Batticaloa.

PLAINTIFF – RESPONDENT

AND NOW BETWEEN

Thevasahayam Ranjith Anthony,

123/1, 2nd Cross,

Gnanasooriyam Square,

Batticaloa.

PLAINTIFF – RESPONDENT – APPELLANT

-Vs-

Rishendra Daniya Christina,

21/17, New Dutch Bar Road,

Batticaloa.

DEFENDANT – APPELLANT – RESPONDENT

Before: Yasantha Kodagoda, PC, J.
A.H.M.D. Nawaz, J. &
Arjuna Obeyesekere, J.

Counsel: Kuvera de Zoysa, PC with Medha de Alwis and Kevin Dias for the Plaintiff – Respondent – Appellant.

S.N.Vijithsingh for the Defendant – Appellant – Respondent.

Argued &
decided on: 03.09.2025

Yasantha Kodagoda, PC, J.

This matter was taken up for consideration of the grant of Leave to Appeal. This Court has heard the benefit of the submissions by learned President's Counsel for the Petitioner and the learned Counsel for the Respondent.

Following a consideration of the submissions in the light of the material placed before this Court, this Court is inclined to grant Leave to Appeal in respect of the question stated in paragraph (g), (h) and (i) of the primary paragraph 12 of the Petition. At this stage, particularly in view of the nature of the dispute between the parties, Court inquired from the learned counsel as to whether they would consent to the hearing being taken up forthwith. Learned Counsel submitted that they wish to cooperate with the Court and consent to the hearing.

The Court has now heard Counsel. Hon. Justice A.H.M.D. Nawaz will now deliver the judgment in this matter.

A.H.M.D. Nawaz, J.

Since both the learned President's Counsel for the Plaintiff - Respondent - Appellant ("the Plaintiff") and the learned Counsel for the Defendant - Appellant - Respondent ("the Defendant) have agreed to the disposal of the appeal on the aforesaid grounds of the question of law, the Court proceeds to hear and determine the appeal under the *proviso* to Rule 16(1) of the Supreme Court rules.

By a judgment dated 23 November 2023, the learned Civil Appellate High Court Judges of the Eastern Province holden in Batticaloa dismissed the action of the Plaintiff holding that the affidavit tendered by the Plaintiff was defective and invalid in law. The reason for this finding was that while the commencement of the affidavit of the Plaintiff used the words "*make oath and declare"*, the jurat stated that the contents of the affidavit were *affirmed to and signed.*

Thus, the learned Civil Appellate High Court Judges principally focused their attention on the said discrepancy between the commencement of the affidavit and the jurat and observed that an affidavit with such a discrepancy renders the evidence proffered by the Plaintiff inadmissible and for that reason they concluded that there was no evidence in the case at all for evaluation. As such, the Civil Appellate High Court of Batticaloa took the view that the Plaintiff failed to establish his case for a divorce and accordingly, they set aside the judgment and *order nisi* dated 21 June 2022.

In the end, the appeal of the Defendant in this case was allowed, and the action of the Plaintiff was dismissed by the Civil Appellate High Court.

We have heard both respective counsel and the submissions were made to the effect that the learned Civil Appellate High Court Judges erred in law by treating the omission of the words "*make oath and declare"* in the jurat as fatal. Mr. Kuvera de Zoysa, PC adverted to two Judgments of the Court of Appeal and the Supreme Court respectively and these two judgments have comprehensively analyzed the effect of a defective jurat in affidavits.

Mr. S.N. Vijith Singh the learned Counsel for the Defendant drew attention to the case of ***Mark Rajendran v. First Capital Limited*** (formally Commercial Capital Limited).[1] Upon a close scrutiny of this case, we find that the curative provisions we would examine forthwith in this judgment namely, Section 9 of the Oaths and Affirmation Ordinance has not been fully considered and the effect analyzed in that case. As such, we find that case to be inappropriate to the consideration of the facts in this case.

One such judgment of the Court of Appeal cited to this Court is ***Billion Bay Apparels (Pvt) Ltd v. the Chief Minister and Others[2],*** where the Court of Appeal looked at Sections 12 (3) and 9 of the Oaths and Affirmation Ordinance and took the view that a defective jurat will not render an affidavit tendered by a party null and void. The Court held that a defective jurat is only an irregularity and not an illegality.

[1] (2010) 1 Sri.L.R 60
[2] (2016) 1 Sri.L.R 36

The Court specifically addressed the formulation of a proper jurat in terms of Section 12 (3) of the Oaths and Affirmation Ordinance but referred to Section 9 of the Oaths and Affirmation Ordinance as a curative provision. The Court of Appeal observed that Section 9 protects the admissibility of evidence despite irregularities in the administration of oath or affirmations.

The Court also invoked the principle of *substance over form* in the case and stated that no illegality should taint an affidavit merely because the affidavit is defective because of a discrepancy found in two places. The Court observed in ***Billion Bay Apparels (Pvt) Ltd v. the Chief Minister and Others*** *(supra)* that the liberality shown by the Supreme Court in regard to defective affidavits is a tendency to look at *substance rather than form*. The Court of Appeal in ***Billion Bay Apparels (Pvt) Ltd v. the Chief Minister and Others*** *(supra)* cited the Supreme Court judgement of ***Facy v. Sanoon***[3] as a manifestation of the triumph of *substance over form*.

What confronted the learned Judges of the Civil Appellate High Court in the instant appeal was, in material respects, the very issue that had confronted the Supreme Court in ***Facy v. Sanoon*** *(supra).* The Civil Appellate High Court invalidated the Plaintiff's affidavit in this case and proceeded to hold the divorce proceedings null and void on the footing that, although the Plaintiff, being a Christian, had commenced the affidavit with the solemn words "*make oath and declare*," the jurat merely reflected that the Plaintiff had *affirmed and subscribed* to the affidavit. The learned Judges of the Civil Appellate High Court viewed this discrepancy as rendering the affidavit incurably defective and legally infirm. In their view, a Christian deponent could not validly affirm an affidavit in lieu of swearing an oath and declaring to the truth of the matters deposed to therein.

This erroneous position articulated by the learned Civil Appellate High Court Judges had long been set right by the Supreme Court in ***Facy v. Sanoon*** *(supra).* Just as much the Civil Appellate High Court Judges in the instant appeal fell into an error by rejecting the

[3] (2006) BLR 58

affidavit of the Plaintiff in this case, the Court of Appeal in ***Facy v. Sanoon***[4] did just the same by rejecting the affidavit of a party who had stated at the beginning *"being a Muslim do hereby make oath and swear as follows"*, but in the jurat clause he had stated that he "affirmed" to the contents. The contention that was advanced before the Court of Appeal was that a party who signed the affidavit ***"having opted to take oath, cannot later, 'affirm' to the affidavit*** *before the Justice of the Peace or the Commissioner for Oaths"*. Udalagama J. (with two other judges agreeing with him) accepted this contention and rejected the affidavit stating that it was fatally defective. It was in those circumstances of his holding that Udalagama J. opined as follows in that case;

> *"...I would also hold as held repeatedly by this Court that a faulty Affidavit could not be considered a mere technicality but in fact fatal to the entire application and as also held by the Court on numerous occasions a defective Affidavit is bad in law and warrants rejection."*

I hasten to point out that this all-embracing dictum was jettisoned by the Supreme Court when it heard the appeal in ***Facy v. Sanoon*** *(supra)*. The contention that if a party signed the affidavit "having opted to take oath", it was not open for him to affirm to the affidavit before the Justice of the Peace or the Commissioner for Oaths" was rejected by the Supreme Court which drew in aid the curative provisions of Section 9 of the Oaths and Affirmation Ordinance for its conclusions. The said provision is the panacea for the illness that unfortunately afflicted the affidavit of the Plaintiff in this appeal. The provision repays attention;

> *"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*

[4] (2003) 3 Sri.L.R 8

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."

I must say that the learned Civil Appellate High Court Judges were innocent of the existence of ***Facy v. Sanoon***, where the Supreme Court had already settled the law. No evidence proffered by an affidavit can be rejected by Court on the basis of any defect or irregularity therein in the administration of oath by the Justice of the Peace or the Commissioner for oaths. The affiant cannot be penalized and shut out of the sacred citadels of justice.

In the circumstances, the learned Civil Appellate High Court Judges could not have cocked a snook at the affidavit of the Plaintiff and defenestrated him out of Courts. The affidavit remained admissible in the proceedings that had been conducted in the District Court of Batticaloa but however, the learned Civil Appellate High Court Judges fell into an error by not taking cognizance of the true legal position.

Moreover, the amendment to the Civil Procedure Code brought about by way of Section 151A specifies that any objection to the affidavit which is tendered in substitution of examination in chief must be taken at the very early stage on the date of the trial – see Section 151A (3) of the Civil Procedure Code. Such an objection was not taken to the affidavit tendered by the Plaintiff in the District Court. In any event, if when an enactment specifies that an objection has to be taken at the commencement of proceedings and such objection is not taken, it must be treated as a waiver of such an objection. The learned Civil Appellate High Court Judges could not have overlooked the failure on the part of the Defendant to object to the admissibility of the affidavit and later seek to characterize the evidence as no evidence. It is worth observing that the Plaintiff has been extensively cross examined even on facts adduced in his affidavit.

Facy v. Sanoon which was followed by ***Billion Bay Apparels (Pvt) Ltd. Ltd v. the Chief Minister and Others*** *(supra)* renders a defective affidavit valid and effective and the

unobjectionable affidavit of the Plaintiff could not have been struck down by the Civil Appellate High Court Judges as objectionable.

The Plaintiff was tendered for cross-examination and there was no prejudice caused to the Defendant's case. However, it was the Plaintiff who has been deprived of due process at the appellate tier.

In the circumstances, we take the view that the District Court proceedings were duly conducted and there was no irregularity or illegality that tainted the proceedings and the learned Civil Appellate High Court Judges, instead of having dismissed this case, must have proceeded to hear the substantive merits of the appeal and decided the case. We therefore set aside the judgement of the Civil Appellate High Court dated 23 November 2023 and allow the appeal of the Plaintiff by answering the questions of law in his favour.

Accordingly, this Court remits this case back to the Civil Appellate High Court of Batticaloa for a full hearing on the merits and further disposal.

Judge of the Supreme Court

Yasantha Kodagoda, PC, J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court