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

In the matter of an Appeal from a Judgment of the Provicial High Cout of the Western Province [excercising Civil Appellate Jurisdiction] holden at Awissawella dated 30th March 2017 in Application No. WP/HCCA/ AV/11/ 2017 [Revision] in terms of Section 5[C][1] of the High Court of the Provinces [Special Provisions] Act No. 54 of 2006 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 224/2017

SC/HCCA/LA 189/2017
WP/HCCA/AV 11/2017
D.C. Homagama Case No. 15884/15/MS

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLAINTIFF

-VS-

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT

AND

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT-PETITITONER

-VS-

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLANTIFF - RESPONDENT

AND BETWEEN

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT-PETITITONER-PETITITONER

-VS-

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLANTIFF-RESPONDENT RESPONDENT

AND NOW BETWEEN

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT-PETITITONER-PETITITONER- APPELLANT

VS-

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLANTIFF-RESPONDENT RESPONDENT- RESPONDENT

BEFORE : **MURDU N.B. FERNANDO, PC, J.**
S. THURAIRAJA, PC, J.
YASANTHA KODAGODA, PC, J.

COUNSEL : J.P. Gamage for the Defendant– Petitioner-Appellant - Appellant.
Isuru Somadasa for the Plaintiff – Respondent – Respondent-Respondent.

ARGUED ON : 22nd May 2020.

WRITTEN SUBMISSIONS : Plaintiff – Respondent – Respondent- Respondent on the 17th of January 2018.
Defendant– Petitioner-Appellant - Appellant on the 15th of December 2017.

DECIDED ON : 10th September 2020.

S. THURAIRAJA, PC, J.

This is an appeal filed against the judgment of the Provincial High Court dated 30.03.2017.

Yahampath Arachchilage Niroshanee Nadumali i.e. Plaintiff – Respondent – Respondent- Respondent (hereinafter sometimes referred to as Plaintiff – Respondent) instituted the above action bearing No. 15884/15/MS under Chapter LIII of the Civil Procedure Code against the Defendant- Petitioner-Petitioner- Appellant (hereinafter sometimes referred to as Defendant – Appellant) praying for a judgment and decree in favour of the Plaintiff –Respondent to recover a sum of Rs. 3,000,000/- (Rs. Three Million) together with the interest as prayed for in the prayer to the Plaint dated 09th November 2015.

Plaintiff-Respondent contended that the Defendant- Appellant borrowed the sum of Rs. 3,000,000/- from the Plaintiff-Respondent and had given her a promissory note which was marked as "P1" in the Plaint as proof of the transaction. The Defendant- Appellant failed to settle the said Rs. 3,000,000/- as agreed upon. Therefore, this action was instituted in the District Court based on the said promissory note under chapter LIII of the Civil Procedure Code to recover the same, with interest as prayed for in the prayer to the Plaint.

The Plaintiff – Respondent supported the case before the learned District Judge on 17/11/2015 and having been satisfied the Learned District Judge directed that summons be issued on the Defendant- Appellant as per form 19 in the 1st Schedule to the Civil Procedure Code. The Defendant- Appellant having received summons appeared in Court and filed objections on 29/03/2016 supported by an Affidavit together with the annexures marked as "V1","V1(A)", V1(AA), "V2", "V3" and "V4" seeking permission from court to appear and defend the action.

The Defendant-Appellant in his statement of objections stated inter alia that, the plaint of the Plaintiff-Respondent is not supported by an accompanying affidavit as required by law in terms of Section 705(1) of the Civil Procedure Code. Further, the Defendant-Appellant stated that, the date of the Plaint is 09/11/2015 but the date of the affidavit of the Plaintiff-Respondent, available in the case record and served on the Defendant-Appellant is dated 20/11/2015, and therefore the affidavit has been tendered to Court after filing and supporting the Plaint. In response to the claim of the Plaintiff – Respondent, the Defendant-Appellant alleged that on three separate occasions he had paid back a total of Rs. One Million (Rs. 1,000,000/-) to the Plaintiff – Respondent and the Plaintiff – Respondent had acknowledged these payments by signing on photocopies of the promissory note (marked as "V2", "V3" and "V4"). The contention of the Defendant-Appellant is that, the Plaintiff – Respondent has suppressed these material facts relevant to the transaction between the Plaintiff –

Respondent and the Defendant-Appellant, and claimed the full amount namely Rs. 3,000,000/- from the Defendant-Appellant.

The Defendant-Appellant pleaded and moved Court to allow him to file answer to the Plaint of the Plaintiff – Respondent unconditionally in terms of the provisions of sections 704 and 706 of the Civil Procedure Code, since the Plaint is contrary to mandatory provisions of Section 705(1) of the Civil Procedure Code and the Defendant-Appellant has already paid Rs. 1,000,000/- to the Plaintiff – Respondent which has been acknowledged by the Plaintiff – Respondent and as such the Plaintiff – Respondent is not entitled to file action under Chapter LIII of the Civil Procedure Code. Further, the Defendant-Appellant stated that he had obtained the sum of Rs. 3,000,000/- from the Plaintiff-Respondent's husband's friend who is a money lender, and placed as security a property belonging to the Plaintiff-Respondent hence the said promissory note was given as security to the Plaintiff-Respondent.

After hearing both parties, the learned Judge of the District Court by his order dated 13/01/2017 directed the Defendant-Appellant to deposit the sum of Rs. 3,000,000/- before filing answer. The reasons for the order of the learned District Judge are as follows.

> *"රුපියල් ලක්ෂ 30 ක මුදලක් විත්තිකරු විසින් පැමිනිලිකාරියගෙන් ණයට ලබාගත් බව ඔහු විසින්ම සිය දිවුරුම් ප්‍රකාශයෙන් මෙන්ම පැ. 1 ලේඛනයෙන් ද පිලිගෙන ඇති හෙයින් විත්තිකරු ඉහත කී රුපියල් ලක්ෂ 30 ක මුදල පිලිබඳ මෙම නඩුවේදී අවස්ථා දෙකකදී ඉදිරිපත් කරන ස්ථාවර එකිනෙකට පරස්පරය. එබැවින්, හබගත රුපියල් ලක්ෂ 30 ක මුදල පැමිනිලිකාරිය විසින් විත්තිකරුට ණයට දී ඇති බව තහවුරු වී ඇත....*
>
> *එබැවින්, විත්තිකරු විසින් මෙම නඩුවේදී එකිනෙකට වෙනස් අන්දමට ඉදිරිපත් කරනු ලැබූ මෙකී විත්ති වාචකය පැමිනිල්ලේ නඩුව ප්‍රතික්ෂේප කිරීමට හෝ නිෂ්ප්‍රභ කිරීමට තරම් ප්‍රමාණවත් විත්ති වාචකයක් නොවූ බව මෙම අධිකරණයේ නිරීක්ෂණයි.*

එහෙයින්, මෙම නඩුවට චිත්තිකරු විසින් විශ්වාස කරන චිත්ති වාචකයක් ඉදිරිපත් කිරීමට හා උත්තරයක් ගොනු කිරීමට අවශ්‍ය නම් චිත්තිකරු ඊට ප්‍රථම රුපියල් ලක්ෂ 30 ක මුදල් ඇපයක් අධිකරණයෙහි තැන්පත් කළයුතු බවට නියෝග කරමි."

The English translation of the aforementioned reasoning of the District Court judgment is as follows;

"Since the Defendant himself has admitted in his affidavit and also in the document marked as 'P1' that he borrowed an amount of Rs.30 Lakhs from the Plaintiff, the position that the Defendant asserts on two occasions over the aforesaid amount of Rs.30 Lakhs seem to be contradictory. Therefore, it is confirmed that the said amount of Rs.30 Lakhs which is in dispute has been given to the Defendant by the Plaintiff as a debt……

Accordingly, it is the observation of this court that the contradictions of the aforesaid defence have not been sufficient to reject or dismiss the case filed by the plaintiff.

Therefore, I do hereby order that, if the defendant intends to submit a defence he believes and to file an answer, he should deposit a cash bail of Rs.30 Lakhs in the Court prior to that." (sic)

Being aggrieved by the said order of the learned Judge of the District Court, the Defendant- Appellant filed a Revision application in the Provincial High Court of the Western Province (exercising Civil Appellate jurisdiction) holden at Avissawella (hereinafter referred to as the "Provincial High Court") bearing No. WP/HCCA/AV/11/2017 (Revision) to revise the order of the District Court.

When the matter was taken up for support, the Plaintiff – Respondent raised preliminary objections as to the maintainability of the application, as follows.

1. Since the Defendant-Appellant failed to explain the reason as to why he could not exercise the right to appeal, the application in revision cannot be maintained.

2. The delay to make the instant application in revision has not been explained in the petition.

The learned Counsel for the Plaintiff-Respondent and the Defendant-Appellant made submissions pertaining to the aforesaid preliminary legal objections. Provincial High Court held that,

"*under section 754(2) and 757 of the Civil Procedure Code, the Defendant-Appellant must come to the Provincial High Court against the impugned order, upon a leave to appeal application, whereas the Defendant-Appellant has not availed himself of these provisions of law. In such a situation, there is a duty cast upon the Defendant- Appellant to explain the reasons as to why he did not invoke the Appellate jurisdiction of the Court.*

In this case, there is a right of appeal against the impugned order of the District Court, with the leave of the Provincial High Court. The Defendant-Appellant, however, has not exercised this right and failed to explain the reason as to why he could not exercise the right of appeal. Hence, in the light of the forgoing decisions of apex courts, Provincial High Court hold that the instant application in revision cannot be maintained.

Besides, since there is no material prejudice caused to the defendant due to the fact that the affidavit was executed on a subsequent date of the plaint, I hold that there is no any impediment for plaintiff to proceed with this case as it is instituted.

In the circumstances, it appears to this court that the order of the learned District Judge allowing the defendant to file an answer after depositing the entire amount in suit is not wrong."

The learned Judges of the Provincial High Court delivered the judgment dated 30.03.2017 and dismissed the said application of the Defendant- Appellant based on the first preliminary objection raised by the Plaintiff – Respondent.

Being aggrieved by the judgment of the learned Judges of the Provincial High Court, the Defendant- Appellant filed an application before this Court seeking leave to appeal. This matter was supported and leave to appeal was granted on 16/11/2017 on the questions of law raised in Paragraph 20(a) to (c) of the Petition dated 06/04/2017. They are as follows.

(a) Did the Learned Provincial High Court Judges err in law by not considering that a plaint presented under chapter LIII of the Civil Procedure Code must accompany an Affidavit of the Plaintiff-Respondent at the time of presenting the Plaint?

(b) Did the Learned Provincial High Court Judges err in law by not considering that the Court has no jurisdiction to issue summons in terms of Section 705 of the Civil Procedure Code if there is no proper affidavit filed by the Plaintiff-Respondent?

(c) Did the Learned Provincial High Court Judges err in law in coming to a conclusion that irrespective of the imperative provisions of the Section 705(1) of the Civil Procedure Code an Affidavit can be executed before or after the Plaint?

This matter was argued before this Court and Plaintiff – Respondent submitted that she filed her affidavit along with the petition on 09th of November 2015.

The Defendant-Appellant stated that the jurat of the Plaintiff – Respondent's Affidavit filed before the District Court depicts the date of affirmation as "වර්ෂ **2015** ක් වූ නොවැම්බර් මස **20** වන දින..." [on the date of 20th November 2015]. It was the position of the Defendant-Appellant that the 1st journal entry of the District Court case record does not reveal that the Affidavit was tendered when the Plaintiff – Respondent filed this action under Chapter LIII of the Civil Procedure Code on 09/11/2015.

In this context, I have perused the original brief of the District Court, and I observed that the impugned affidavit was filed in record on 9/11/2015. Further, I found that the same dated Rubber Stamp was placed on the Plaint, Affidavit and documents marked "ඇ 1", "ඇ 2", "ඇ 2(අ) ".

As I observed, in terms of Section 705(1) of the Civil Procedure Code, when a person (plaintiff) claims under Chapter LIII, he/she should file an affidavit along with the petition stating the sum which he/she claims is justly due to him from the other party (defendant). At this stage it will be useful to refer to the relevant section of the Civil Procedure Code. Section 705(1) reads as follows;

> "*The plaintiff who so sues and obtains such summons as aforesaid must on presenting the plaint produce to the Court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon*."

According to Section 705(1) of the Civil Procedure Code, the condition precedent to the issue of summons is that the documents on which the action is based must along with the presenting the plaint, be produced to the court and that the Plaintiff must make an affidavit that the sum which he/she claims is justly due to him/her from the Defendant. When this section is carefully analyzed, it becomes evident that the averments contained in the affidavit should only be supportive of the contents of the petition.

In **Kobbekaduwa vs. Jayewardene and others** [1983 1 SLR 419], in the Supreme Court, the Respondents have taken several preliminary objections to the petition and have moved that the petition be rejected or dismissed. The petitioner has not filed affidavits in support of his allegation of the illegal practice set out in paragraph 7 of the petition and that the /petition accordingly does not comply with the requirements of section 96(d) of the Presidential Elections Act, No.15 of 1981. Justice Sharvananda observed that,

"The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. In an affidavit a person can depose only to facts to which he is able to testify of his knowledge and observation."

In **Kumarasinghe vs. Ratnakumara and Others** [1983 SLR - Vol 2 ,Page 393] at the commencement of the hearing of that application before the Supreme Court, a preliminary objection had been raised by the Addl. Solicitor-General that the petitioner's application does not conform to the requirements of Rule 65(1) of the Supreme Court Rules of 1978; in that, the petition of the petitioner has not been supported by an affidavit of the petitioner. He had pointed out that though the affidavits of petitioner's brother Rajasinghe Bandara and his mother Manoli Dharmadasa had been appended to the petition, the petitioner had failed to file his own affidavit verifying the facts pleaded by him in his petition. He had contended that it is an imperative requirement of the Rule 65(1) (a) and (c), that the petitioner should support his petition with his own affidavit. In that backdrop, Justice Sharvananda, A.C.J.,held as follows;

"An Affidavit in support of the application 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. While a stranger cannot make an affidavit, it need not be made by the party individually, but may be made by any person personally aware of the facts."

In **Distilleries Company Ltd vs. Kariyawasam and others (**2001 SLR - Vol 3, Page 119), the matter had been taken up for hearing on the 25th June 2001 before the Court of Appeal and counsel for the plaintiff respondent (respondent) had raised two preliminary objections. His first objection had been based on the provision of section 757(1) of the Civil Procedure Code. Counsel had submitted that the affidavit filed by the 16th Defendant-petitioner (petitioner) does not support the petition as

contemplated by section 757(1) of the Civil Procedure Code, as the affidavit had been affirmed to on a date anterior to the date the petition had been subscribed to. It had been argued on behalf of the respondent, that as the date of the affidavit submitted by the petitioner precedes the date of the petition, the petitioner could not have possibly supported the contents of the petition by his affidavit, as contemplated by section 757(1) of the Civil Procedure Code. Justice Nanayakkara held as follows;

> *"In terms of S. 757(1), the Petition need not precede in point of time to that of the affidavit so as to enable a party to support the contents of the Petition. The object of the Civil Procedure Code is to prevent civil proceedings from being frustrated by any kind of technical irregularity or lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a court from dispensing justice." The court should not approach the task of interpretation of a provision of law with excessive formalities and technicality. A provision of law has to be interpreted contextually giving consideration to the spirit of the law*".

In the case of **Mohamed Facy Mohamed vs. Mohamed Azath Sanoon Sally and others** [SC Appeal 4/2004 –BASL Law Journal 2006 page 58] his Lordship Justice Marsoof in considering the impact of defects of technical nature of an affidavit, has observed in reference to Section 9 of the Oaths Ordinance, that the said section is a salutary provision which was intended to remedy such maladies.

In conclusion, it must be said that the infirmities and irregularities in the affidavit of the Plaintiff- Respondent referred to by the Defendant- Appellant are technical in nature, and that they can be cured by application of section 9 of the Oaths Ordinance and therefore do not impact on the validity of the affidavit.

I am of the opinion that the object of the Civil Procedure Code is to regulate the conduct of civil proceedings and prevent civil procedure from being frustrated by any kind of technical irregularity or lapse which has not caused no prejudice or harm to a party. Hence, all that is expected of a person under section 705(1) of the Civil

Procedure Code is to evidentially support matters contained in the petition by way of an affidavit. A rigid adherence to technicalities should not prevent a Court from dispensing justice. In the instant case, the learned District Judge has given his reasons for not allowing the Defendant- Appellant to defend the action unconditionally. On a perusal of the provisions of the Civil Procedure Code, it is clear that the legislature had intended to give the Judge in every such case the discretion as to imposing terms with which the Appeal Court should not unnecessarily interfere.

In the aforesaid circumstances, I hold that the cited irregularity is not sufficiently grave to have an effect on the validity of the impugned affidavit. Hence, I answer the first question of law in the negative.

On a careful consideration of Sections 704(2) and 706 of the Civil Procedure Code, it appears that when the Defendant who swears to a fact which, if true, constitutes a good defence, he/she must be allowed to defend unconditionally unless there is something on the face of the proceedings which lead the Court to doubt the *bona fides* of the Defendant. It should be mentioned here that the provision contained in section 704(2) of the Civil Procedure Code should not be made use of as a punishment for not honouring one's obligation and the words "unless the court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to his good faith" mean that the learned trial Judge has the discretion to decide the question whether the Defendant should be allowed to appear and defend without security. When one considers the above facts, it is clear that the defence has not raised a triable issue and in such an event leave must not be given unconditionally.

In the instant case, the Defendant-Appellant had presented different defences and statements during the course of the trial. Hence, the learned District Judge has exercised his discretion on sound judicial grounds, and on a perusal of the reasons given by the learned District Judge, one cannot say that he has exercised his discretion arbitrarily or perversely. In terms of Section 706 of the Civil Procedure

Code, having deposited the amount stipulated in the order of the learned District Judge, the Defendant- Appellant has a legal right and opportunity to present all his defences by way of an answer for final adjudication. He has failed to do so.

The power of revision vested in the Appellate Court are very wide; such powers would only be exercised in exceptional circumstances. When there is an alternative remedy available to the Defendant- Appellant or if the law provides opportunities for the Defendant- Appellant to put forward his grievances, ordinarily the Court will not interfere by way of revision.

In **Rasheed Ali V. Mohamed Ali and Others** (1981 SLR Vol 1 ,Page 262) the Supreme Court observed that, *"ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an. aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm.'*

It *was* submitted by the learned Counsel for the Plaintiff- Respondent that the date that appears in the jurat is due to a typographical error. It is pertinent at this stage to consider Section 9 of the Oaths and Affirmations Ordinance, No. 9 of 1985, which provides as follows:

> *"Proceedings and evidence not to be invalidated by omission of oath or irregularity.*
>
> *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."*
>
> (Emphasis added)

Section 13 of the Oaths and Affirmation Ordinance furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false evidence. In an affidavit a person can depose only to facts which he is able of his own knowledge and observation to testify.

Taking the abovementioned law into consideration, I find that Section 9 makes provision for an omission due to inadvertence, evasion or irregularity which took place on the part of a declarant to be cured. This contention was upheld in **K.H.S. Pushpadeva vs. Senok Trade Combine Ltd** [SC/HC/LA 02/2014 decided on 04/09/2014- Bar Association Law Journal 2015 Vol. XXI page 40]. When this case was taken up for support, counsel for the Applicant-Appellant- Respondent had raised preliminary objections and stated that the affidavit of Jerome Anil Rathnayake, is not an 'affidavit' known to law, as there was no affirmation. It had also been formulated as a mere statement and the affirmant has not specified his religion and had not taken an oath or affirmation. Justice Aluwihare, PC held that,

> "*In conclusion it must be said that the infirmities and irregularities in the affidavit of the Petitioner referred to by the Respondent are technical in nature that can be cured by application of Section 9 of the Oaths Ordinance and therefore do not impact on the validity of the affidavit*."

I find that it is not disputed that the aforementioned decision has referred to technicalities and had held that merely on the footing of a 'technical objection' a party should not be deprived of his case being heard by Court. I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Justice Dr. Amarasinghe in **Fernando v. Sybil Fernando and Others** - (1997) 3 Sri L.R. 1) in which he held that;

> "*Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicality*".

(Emphasis added)

Hence, I answer the second and third questions of law also in the negative.

Additionally, since there is no material prejudice caused to the Defendant-Appellant due to the fact that the affidavit was executed on a subsequent date of the plaint, I hold that there is no impediment for the Plaintiff-Respondent to proceed with this case in the manner it has been instituted. For the aforesaid reasons, I answer all the questions of law raised before this Court by the Respondent- Appellant in the negative, and I dismiss the appeal of the Respondent- Appellant. Accordingly, I affirm the Order of the learned Judges of the Provincial High Court dated 30.03.2017 and the learned Judge of the District Court dated 13.01.2017. I dismiss the appeal with costs fixed at Rs.50, 000/-.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT