SOORIYA ENTERPRISES (INTERNATIONAL) LIMITED
v.
MICHAEL WHITE & COMPANY LIMITED

SUPREME COURT
FERNANDO, J.
PERERA, J. AND WIJETUNGA, J.
SC (SPECIAL) LA NO. 235/94
CA (REV.) NO. 399/94
DC COLOMBO NO. 4036/Spl
JULY 27, 1994

Affidavit – Oaths Ordinance, sections 4 and 5 – Is it mandatory for non-Christians to make an affirmation in an affidavit? – Effect of non-Christians submitting an affidavit under oath.

Held:

It is not imperative for non-Christians referred to in section 5 of the Oaths Ordinance to make an affirmation in an affidavit.

Per Fernando, J.

> "The use of the word "may" in section 5 of the Oaths Ordinance of 1895, instead of "shall" must be regarded as deliberate; with the consequence . . . that non-Christians who believed in God would have the option to swear or to affirm."

Case referred to :

1. *Rustomjee v. Khan* – (1914) 18 NLR 120, 123.

PETITION for leave to appeal from the judgment of the Court of Appeal.

S. Sivarsa, PC with *S. Mahenthiran*, *A. A. M. Illiyas* and *Sampath Welgampaya* for petitioner.

H. L. de Silva, PC with *Romesh de Silva*, PC, *Gomin Dayasiri*, *G. G. Arulpragasam* and *Dinal Phillips* for respondent.

Cur. adv. vult.

Editor's note:

Vide Roshana Michael v. Saleh, OIC (Crimes), Police Station, Narahenpita and Others – (2002) 1 Sri LR 345 at 355 for the same view.

July 27, 1994

FERNANDO, J.

The petitioner seeks special leave to appeal upon the question whether in making an affidavit a Muslim is imperatively required by law to make an affirmation, with the consequence that if he makes an oath instead his affidavit must be rejected. Mr. S. Sivarasa, PC, submits that the matter is governed by the provisions of the Oaths Ordinance, No. 9 of 1895 (Cap. 17). Section 4 of that Ordinace requires all persons to make an oath, and then provides in section 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."

Mr. Sivarasa contends that notwithstanding the use of the word "may", a Muslim, being a person covered by section 5 (*a*), must make an affirmation. (He says, however, that section 5 (*b*) confers an option to make an affirmation, on anyone having a conscientious objection to making an oath.) He submits that the invariable practice of Muslims is to affirm, and draws our attention to the Muslim Marriage and Divorce Act, No. 13 of 1952 (cap. 115) – sections 49 and 57 require an "oath", but the prescribed forms contain the usual form of affirmation.

I cannot accept this argument that section 5 (*a*) should be restrictively interpreted in the light of later provisions and practice; rather, the meaning of that section when originally enacted has to be ascertained.

That was done by Pereira, J. (de Sampayo, J. agreeing) in *Rustomjee v. Khan*[1]:

"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) . . . "

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,*[1] 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.

Because "much inconvenience arises from peculiar forms of oath being required to be administered to persons professing other than

the Christian Religion", Ordinance No. 6 of 1841 required that such persons shall make an affirmation in the prescribed form. This provision was not considered satisfactory, and by Ordinance No. 3 of 1842 it was provided that:

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

The use of the word "may" in the Oaths Ordinance of 1895, instead of "shall", must be regarded as deliberate; with the consequence, as Pereira, J. held, that non-Christians who believed in God would have the option to swear or to affirm.

Mr. Sivarasa also submitted that the words "according to which oaths are not of binding force" qualified not only "of some other religion", but also "a Buddhist, Hindu, or Muslim"; and that the legislature thereby recognized that Muslims do not accept the binding force of an oath, and therefore cannot swear. As a matter of grammar, that clause cannot be read as qualifying the phrase "a Buddhist, Hindu, or Muslim". Even assuming that the legislature considered Muslims as not accepting the *binding* force of an oath, yet the legislative history of section 5 is consistent with a legislative intention (as held by Pereira, J.) to make an affirmation optional, and not mandatory.

The question raised has been authoritatively determined 80 years ago, and never doubted since, so that there is now no question of law or other matter fit for review. Special leave to appeal is refused, without costs.

PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

Special leave to appeal refused.