Present : Jayewardene A.J. 1923.

RANKIRA *v.* SETUWA.

130—C. R. Gampola, 5,633.

Decisory oath—Oath to be administered in the very terms agreed upon—Party agreeing to take the oath may refuse to take oath if the form is varied—Party challenging cannot back out of challenge if failure to take oath was due to variation in form of oath.

Where a person agrees to take a specified oath, the oath must be administered in the very terms in which the oath is worded.

Where the failure to take the oath on the day specified was due to the person administering the oath asking him to take the oath in a slightly altered form, he is entitled to insist upon his being allowed to take the oath, and the party challenging is not entitled to withdraw from it.

THE facts appear from the judgment.

Navaratnam, for plaintiff, appellant.—The oath that the appellant was called upon to take was not precisely the same as the oath he had agreed to take. The omission of the word *sampoorana* (full) from the former makes all the difference. The assertion that, in substance, the two oaths are the same does not solve the difficulty. A departure from the precise terms of the oath is opposed to both principle and authority. The appellant is entitled to insist on his right to take the oath in terms of the agreement. Counsel relied on *Palaniappa v. Sinnetamby.*[1]

Schokman, for defendant, respondent.—There is no substance in the appellant's contention that the two oaths materially differ for the word " full " in the expression " full discharge of the debt " is a mere redundancy. If the Court is not disposed under the

[1] *(1913) 16 N. L. R. 236.*

1923.

Rankira v. Setuwa.

circumstances to give defendant judgment at once, it must in view of the failure of the party challenged to take the oath on the date duly fixed, and the agreement being no longer binding on the party challenging, now proceed to try the case in the ordinary course. Counsel cited *Siman v. Silunduhamy*.[1]

Navaratnam, in reply.—A clear distinction has been drawn between the position of the party challenging and that of the party challenged. The party challenged may withdraw from his engagement, but not the party challenging. *Vide Muttusamy v. Muttukarpen*.[2]

July 16, 1923. JAYEWARDENE A.J.—

In this case the plaintiff sued the defendant to recover a sum of Rs. 300, being principal and interest due on a mortgage bond. The land mortgaged had, during the subsistence of the bond, become the property of the added defendant, intervenient. The added defendant filed answer and pleaded his title to the land, and added that there was nothing due to the plaintiff in respect of the said bond. On January 27, 1923, when the case came on for trial, the intervenient defendant challenged the plaintiff to take an oath at the Maligawa, before the tooth relic, on January 31, at 11 A.M., that " the full amount claimed by the plaintiff is due to him, and that the receipt annexed, D 1, was not given by the plaintiff to intervenient defendant in full discharge of Kirisaduwa's share of the debt." If the plaintiff took the oath, judgment was to be entered in his favour as prayed for, with costs ; if he failed to take the oath, his action was to be dismissed, with costs. In terms of the agreement, the plaintiff went to the Maligawa on January 31, but refused to take the oath which was sought to be administered to him. He now seeks to justify his refusal on the ground that the oath so sought to be administered differed from the oath which he had undertaken to take. It is conceded that the two oaths are different, the oath which he agreed to take having reference to a full discharge of Kirisaduwa's share of the debt, while the oath which the priest wanted him to take had the words " in discharge of Kirisaduwa's share of the debt," the word " full " being omitted from the latter oath. The learned Commissioner says that the two oaths are " substantially the same," and that the plaintiff should have taken the oath which the priest asked him to take. I am unable to agree with the learned Commissioner. I think where a person agrees to take a specified oath, the oath must be administered in the very terms in which the oath is worded. It is not possible for us to say that the oath which he was asked to take was substantially the same as the oath which he undertook to take, and that there was therefore no justification for his refusing

[1] *(1911) 14 N. L. R. 410.*

[2] *(1911) 14 N.L.R. 397.*

to take the oath. The omission of the word " full " makes the oath which the priest wanted him to take different from the oath which he had agreed to take. In the circumstances, I think his refusal was justified, that he is now prepared to take the oath in the terms in which he agreed to take it. The defendant says that plaintiff should not be given an opportunity of taking the oath again. He says that the plaintiff on the first occasion lost courage and failed to swear before the tooth relic at the Maligawa, and that now he has evidently mustered up sufficient courage to take what he says is a false oath. The failure to take the oath was not due to any design or act on the part of the plaintiff, it was due to circumstances over which the plaintiff had no control. In such cases it has been laid down by this Court (see the case of *Palaniappa v. Sinnatamby* (*supra*)) that a party is entitled to insist upon his being allowed to take the oath, and the party challenging is not entitled to withdraw from the agreement. I would, therefore, set aside the judgment of the learned Commissioner, and direct that the plaintiff be given an opportunity of taking the oath which he had agreed to take in the very terms of that oath as given in the record. The appellant is entitled to his costs in appeal, all other costs to be costs in the cause.

Set aside.