

1945

*Present: Wijewardene J.*

WILLIAM, Appellant, and NAGOOR ADUMAI,  
Respondent.

216—C. R. Matale, 7,631.

*Decisory oath—Oath to be taken in Mosque by defendant—Defendant a Buddhist—Agreement to settle action according as oath was taken or not—Validity of such agreement—Oaths Ordinance (Cap. 14), s. 7—Civil Procedure Code, s. 408.*

The defendant, a Buddhist, accepted the challenge of the plaintiff, a Muslim, to take the following oath in a Mohammedan Mosque:—"I did not make a payment of Rs. 10 on July 31, 1938, or a payment of Rs. 5 on January 17, 1943, on account of interest due on the promissory note sued upon". It was agreed by the parties that if the defendant took the oath the plaintiff's action was to be dismissed with costs.

*Held*, that such an agreement would come within the provisions of section 408 of the Civil Procedure Code and the Court would give effect to it so long as it was not illegal or *contra bonos mores*.

*Held, further*, that the proposed oath was not obnoxious to the provisions of section 7 of the Oaths Ordinance (Cap. 14).

**A** PPEAL from a judgment of the Commissioner of Requests,  
Matale.

*H. W. Thambiah* for the defendant, appellant.

*S. R. Wijayatilake* for the plaintiff, respondent.

*Cur. adv. vult.*

September 4, 1945. WIJEYWARDENE J.—

The plaintiff, a Muslim trader, filed this action on February 16, 1943, on a promissory note made by the defendant on February 16, 1937, promising to pay Rs. 292 with interest at 9 per cent. per annum. He pleaded in the plaint a payment of Rs. 20 by the defendant on account of interest and stated that a sum of Rs. 428.24 was due on the note but restricted his claim to Rs. 300.

The defendant denied that he received any consideration on the note, or that he paid any sum to the plaintiff as interest. He pleaded that the action was prescribed.

The case came up for trial on August 24, 1943, and the parties were present with their Proctors. The record shows the following entry on that date signed by the plaintiff and the defendant:—

" Plaintiff challenges the defendant to take the following oath at Warakamure Mosque:—"I did not make a payment of Rs. 10 on 31st July, 1938, a payment of Rs. 5 on 17th January, 1943, on account of interest due on the promissory note sued upon". Defendant accepts the challenge. Oath to be administered by the Interpreter of this Court. Oath fees paid. If defendant takes the oath plaintiff's action to be dismissed with costs. If defendant fails to take the oath then judgment for plaintiff as prayed for with costs. Parties agree to these terms. Call case on 7. 9. 43 "

On August 26, 1943, the plaintiff's Proctor filed an affidavit from the plaintiff and moved "that he be permitted to withdraw his undertaking recorded on August 24, 1943". The defendant objected to the application of the plaintiff. At the inquiry held by the Commissioner the plaintiff stated—

"I understood that unless I proved those payments (amounting to Rs. 20) I would lose the action, as there was a suggestion that the note was prescribed. The note is not as a matter of fact prescribed. The defendant is a Sinhalese and a Buddhist."

The Commissioner allowed the application of the plaintiff and fixed the case for trial in ordinary course. After hearing evidence the Commissioner entered judgment for plaintiff.

The only point I have to decide on this appeal is whether the Commissioner was right in allowing the plaintiff to resile from the agreement reached on August 24, 1943. The Counsel for the respondent contended that under section 8 of the Oaths Ordinance the plaintiff could have offered to be bound only by "any such oath or solemn affirmation" as is mentioned in section 7 and made by the defendant and that section 7 did not contemplate an oath or affirmation by a Buddhist in a Mohammedan Mosque. He argued, therefore, that there was no legal basis for the challenge made and accepted on August 24, 1943, and that it could not have been acted upon in a Court of Law. I am unable to accept this contention.

Section 7 of the Oaths Ordinance refers to an oath or solemn affirmation "common amongst, or held binding by, persons of the race or persuasion to which he (*i.e.*, the person making the oath or affirmation) belongs and not repugnant to justice or decency and not purporting to affect any third person". Clearly the suggested oath is not repugnant to justice or decency and does not purport to affect any third person. It is, therefore, an oath that could have been taken by the defendant if it is in any form "common amongst" or "held binding" by persons of the race or persuasion to which he belongs. There is no direct evidence on the point. But the fact remains that the defendant who is said to be a Buddhist is willing to take the oath and the plaintiff who is a Muslim challenged the defendant to take the oath though he was well aware that the defendant claimed to be a Buddhist. I could understand a Buddhist refusing to make an oath or affirmation in any place of worship including a Buddhist Vihara. But these matters are not to be determined by immutable religious doctrines but by customs that have been followed by certain classes of people. Cases are not unknown of non-Muslims making their oath in Davatagaha Mosque, Colombo, non-Christians in St. Anthony's Church, Colombo, and non-Buddhists in Kande Vihara, Alutgama. On the material before me I am unable to say that the proposed oath is obnoxious to the provisions of section 7. It will be noted that the oath does not contain any reference to any deity or any saint recognized by the Moslem faith nor is it necessary for the person making the oath to go through a religious ceremony at the Mosque.

I do not think, however, that this is a case falling under the Oaths Ordinance. Here the parties have agreed to settle their dispute in a

certain way and that settlement has been recorded fully by the Court. The parties have carried out a part of the agreement by depositing in Court the fees of the Commissioner. Such an agreement would come within the provisions of section 408 of the Civil Procedure Code (vide *Suppiah v. Abdulla* <sup>1</sup> and *Tirugasambanthapillai v. Namasivayampillai* <sup>2</sup>) and a Court of Law would give effect to such an agreement so long as it is not illegal or *contra bonos mores*.

I set aside the decree appealed against and remit the proceedings to the lower Court directing the Commissioner after notice to the parties to fix a date for the defendant to make the oath as agreed upon and to enter decree in terms of that agreement.

The appellant is entitled to the costs of this appeal.

*Decree set aside.*

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