

**KUMARASINGHE  
v.  
RATNAKUMARA AND OTHERS**

SUPREME COURT  
SHARVANANDA, A.C.J.  
COLIN THOME J. and  
ABDUL CADER J.  
S.C. APPLICATION 57/83  
NOVEMBER 17, 1983.

*Supreme Court Rules 1978, Rules 65(1)—Affidavit — Should petitioner himself file his own affidavit ?*

**Held —**

Rule 65(1) (a) of the Supreme Court Rules, says that a petitioner complaining of infringement of a fundamental right shall support his petition by an affidavit. It does not predicate that the person swearing the affidavit must be the petitioner himself.

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. The Court is entitled to have the best evidence before it ; where there exist evidence which is firsthand it will be most unsatisfactory to place before court evidence of any other description. Ordinarily a petitioner is the best person who can speak to the facts and verify the facts averred in the petition; then, it is he who should file affidavit in support of the said facts; but if there are other witnesses too who can, to their personal knowledge, depose to those facts there is no bar to their filing affidavits in support of the petition, in addition to or in substitution for the petitioner's affidavit. But if the petitioner does not file his own affidavit verifying the facts, which he is personally conversant with, then the Court would be extremely reluctant to grant relief. But the petitioner may be excused from filing an affidavit if for some good reason or ground, he is unable to do so.

**Cases referred to :**

1. *Samarawickrema v. The Attorney-General* 1983 Srikantha Law Reports 47
2. *Rasheed Ali v. Mohamed Ali* 1981 2 Sri L.R. 29, 32
3. *Nicholas v. O. L. M. Macan Markar Ltd.* 1981 2 Sri LR 1
4. *Re Cohen* 1950 2 all ER 36, 37

5. *Simeon Fernando v. Gunasekera* 47 NLR 512, 514

6. *In re Young Manufacturing Co. Ltd.* 1980 2 Ch. 753

**PRELIMINARY OBJECTION** to application complaining of infringement of fundamental rights.

*N. Senanayake, S.A. with Faiz Mustapha, M. L. M. Samarasinghe and Miss. A. D. Telespha*, instructed by *A. G. Raamuni* for petitioner

*G. D. C. Weerasinghe* with *Danny de Silva* for 1 to 4 respondents,

*S. W. B. Wadugodapitiya*, Additional Solicitor-General with *T. A. Kaluaratchchi*, S.C. for 5 to 7 respondents.

*Cur. adv. vult*

29 November, 1983.

**SHARVANANDA, A.C.J.,**

At the commencement of the hearing of the application a preliminary objection was 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 the affidavit of the petitioner. He pointed out that though there are appended to the petition the affidavits of petitioner's brother Rajasinghe Bandara and his mother Manoli Dharmadasa, the petitioner has failed to file his own affidavit verifying the facts pleaded by him in his petition. He has 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. He has referred us to the judgment in *Samarawickrema v. The Attorney-General* (1), *Rashied Ali v. Mohamed Ali* (2) and *Nicholas v. C. L. M. Macan Markar Ltd.*, (3) which held that the Supreme Court rules are mandatory in nature and that non-compliance with same will result in the application being rejected.

Rule 65(1) of the Supreme Court Rules (1978) states—

"(1) Where any person applies to the Supreme Court by petition in writing for relief or redress in respect of infringement

. . . of a fundamental right . . . by executive or administrative action, in terms of Article 126(2) of the Constitution, he shall—

- (a) in his petition set out all relevant facts to show what fundamental right he claims to have and all facts to show what infringement of such right has been made and details of executive or administrative action, which he alleges to have been taken in infringement of his fundamental rights.
- (b) . . .
- (c) *Support the petition by an affidavit and other documentary material available to him.*"

The Addl. Solicitor-General's preliminary objections involve the question whether under the above rules the petitioner is required to file in support of his petition, his own affidavit and it is not sufficient if the petition is supported by the affidavit of some person who is personally aware of the facts referred to in the petition.

"An affidavit is an oath in writing signed by the party deposing, sworn before and attested by him who had authority to administer the same." 1 Bacon's Abridgement 124.

An affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer an oath.

Any particular fact may be proved by an affidavit. The law provides for the admissibility, in certain circumstances, of evidence by affidavit. The evidence given by way of an affidavit is a substitute for testimony given by word of mouth. The affidavit can be used as evidence of facts stated therein. Any person acquainted with the facts may give the affidavit. An affidavit is only intended to satisfy the Court, *prima facie*, that the

allegations in the application are true so that the Court may take legal action such as issuing notice on the opposite party on the basis of the evidence, provided by the affidavit. If the allegation of fact made in an affidavit in support of the application is not refuted by counter affidavit by the opposite party, then the allegation in the application is treated as true. Affidavit in support of the application thus 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.

As relevantly stated by Evershed M.R., In *Re. Cohen* (4)—

“ Affidavit evidence can only be entitled to the same weight as oral evidence, when those who swear the affidavit realise that the obligation of the oath is as serious when making an affidavit as to when making statements in the witness box. ”

Section 179 of the Civil Procedure Code provides :

“ that the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit, instead of by the testimony of witnesses given *viva voce* before it. ”

Section 181 of the Civil Procedure Code further provides that

“ affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to except on interlocutory applications in which statement of his belief may be committed, provided that reasonable grounds for such belief is set forth in the affidavit. ”

An affidavit which does not comply with the requirements of section 181 does not furnish the necessary proof — vide *Simeon Fernando v. Gunasekera*,(5). An affidavit of information

and belief, not stating the source of the information or belief is irregular — *In Re. Young Manufacturing Co. Ltd.* (6).

While a stranger cannot make an affidavit it need not be made by the party individually, but may be made by any person who is personally aware of the facts. The court is entitled to have the best evidence before it; where there exists evidence which is first-hand it will be most unsatisfactory to place before court evidence of any other description. Ordinarily a petitioner is the best person who can speak to the facts and verify the facts averred in the petition; then, it is he who should file the affidavit in support of the said facts; but if there are other witnesses too who can, to their personal knowledge, depose to those facts there is no bar to their filing affidavits in support of the petition, in addition to or in substitution for the petitioner's affidavit. But if the petitioner does not file his own affidavit verifying the facts, which he is personally conversant with, then the court would be extremely reluctant to grant relief. But the petitioner may be excused from filing an affidavit, if for some good reason or ground, he is unable to do so.

The Addl. Solicitor-General's objection postulates our reading into rule 65(1) (a) words which are not there. The rule says that the petitioner shall support his petition by an affidavit. It does not predicate that the person swearing the affidavit must be the petitioner himself.

The petitioner in his petition refers to complaints of his having been assaulted on the 21st August 1983 and on 26th August 1983. The petitioner's brother and mother, in their affidavits, state they are eye-witnesses to the assault on the 21st August 1983. They do not claim to be witnesses to the alleged assault on the petitioner at the Vavuniya Police Station on the 26th August, 1983. But they state that they visited the petitioner at the Vavuniya Hospital on the 27th August 1983, and saw the petitioner, who according to them was "unconscious and in a critical condition, his face was swollen beyond recognition and lip damaged." They speak to the tell-tale marks on the

petitioner's body which they saw on that day. The petitioner in his petition by his attorney-at-law has stated in paragraph 24 that "a police guard consisting of two armed policemen has been posted at his bed at the Vavuniya hospital throughout the day and night and that he requested the said police guard to permit and/or obtain permission for a Justice of the Peace to be taken before the petitioner, for the purpose of signing an affidavit, but was refused."

The submission of the Addl. Solicitor-General that the application under Article 126(2) of the Constitution should always be supported by the petitioner's affidavit and failure to file such an affidavit entails the consequence of the application being rejected cannot be sustained and hence we overrule the preliminary objection.

**COLIN-THOME, J.** — I agree

**ABDUL CADER, J.** — I agree

*Preliminary objection overruled.*