
JAYASUNDERA
VS
TILAKERATNE AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
BASNAYAKE, J.
CALA 276/2004
D. C. MT. LAVINIA 1168/99/L
NOVEMBER 1, AND
DECEMBER 14, 2004.

Civil Procedure Code, section 757(1) — Leave to appeal — Petition to be supported by an affidavit — Affidavit deposed to by the instructing attorney - at-law — Validity ?

When the plaintiff-petitioner sought leave to appeal preliminary objection was taken by the defendant-respondent that, there is no proper affidavit filed as required by law as the affidavit tendered was deposed to by one of the instruct attorneys at law, and hence the application should be dismissed *in limine*.

It was contended by the plaintiff-petitioner that the material on which the plaintiff relies on, are all events that transpired in court and the best evidence that one could place is that of the registered attorney-at-law, as what transpired in court was best known to him than to any one else and that the registered attorney is the best witness.

Held:

Per Basnayake, J.

“When an attorney at law gives an affidavit on facts which are false where would he or she be placed ? Could the attorney say that the affidavit was prepared on instructions ? There is no doubt that even the attorney-at-law is a fit and proper person to depose to the facts in an affidavit, provided those facts are within the knowledge of the attorney at law. It can't be said that it is within anybody's personal knowledge when facts are gathered through instructions.”

In the present case some facts deposed to in the affidavit would have been related to the registered attorney by the plaintiff — as regards the relationship and how the plaintiff became the owner of the corpus.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia on a preliminary objection raised.

Cases referred to :

1. *Kumarasinghe vs Ratnakumara* – (1983) 2 Sri LR 39 and at 394 and 397
2. *Chandrasiri vs Abeywickrema* – (1998) 3 Sri LR 225
3. *Hakeem Mohideen vs Mohamadu Caseem* – 4 NLR 299

Sanath Jayatilake for plaintiff petitioner.

Ranjan Suwandaradne with *Ranjit Ranadeera* for intervenient respondents.

Cur.adv.vult.

April 26, 2005

ERIC BASNAYAKE, J.

The plaintiff petitioner (Plaintiff) filed this petition seeking leave to appeal to have the order of the learned District Judge of Mt. Lavinia dated 13.07.2004 set aside. When this case was called after notice, the learned counsel for the defendants/respondents (defendants) raised a preliminary objection to wit, that there is no proper affidavit filed in this case as required by law, as the affidavit tendered was deposed to by one of the instructing attorneys-at law, and hence moved court to dismiss this application *in limine*. Written submissions have been tendered by both parties with regard to the preliminary objection taken.

In terms of section 757(1) of the Civil Procedure Code, applications for leave to appeal proceedings shall be made by petition supported by an affidavit. In this case the plaintiff had filed along with the petition, an affidavit, deposed to by one of the attorneys-at law. The learned counsel for the plaintiff submits that the material on which the plaintiff relies on, are all events that transpired in court and the best evidence that one could place is that of the registered attorney-at-law. He states that what transpired in court was best known to him than to any one else and that the instructing attorney-at law is the best witness that is available. The learned counsel appears to rely on the judgment of *Kumarasinghe vs. Ratnakumara*¹⁾ 394,397 where Sharvananda J. (as he then was) states thus :

“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” 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.

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.

In *Chandrasiri vs. Abeywickrema*⁽²⁾ the court held that "in terms of section 757(1) of the Civil Procedure Code the affidavit which is required to support a petition made by a party for application for Leave to Appeal cannot be subscribed to by the registered attorney of such party". An affidavit sworn by the defendant before his own proctor is not according to the practice of English Courts, admissible in evidence *Hakeem Mohideen vs. Mohamadu Caseem*⁽³⁾.

Under any circumstance, it is only persons who to their personal knowledge depose to those facts who are qualified to affirm an affidavit. In the present case some facts deposed to in the affidavit are that the 1st defendant is the younger brother of the plaintiff and the 2nd defendant is the wife of the 1st defendant, the plaintiff was the owner of Lot 4 in Plan 1210. This Lot 4 was sub divided in to two Lots by the plaintiff in the Plan 5075 and Lot 1 gifted to the 1st defendant. In addition to that, the facts leading up to the time the dispute arose were averred by the registered attorney-at-law in the affidavit in question. Can she state that she averred all those facts from her personal knowledge ? All these facts would have been related to her by the plaintiff, and the consequential preparation of the petition. The affidavit almost in line with the petition was prepared thereafter.

Could the registered attorney at law say that she knew all the facts deposed to in the affidavit ? In that case she should be an eligible witness who could give evidence from the witness box. When she comes to the witness box she cannot be heard to say that she learnt those facts from the plaintiff. In that case that evidence becomes hearsay and inadmissible.

Sometimes a client may not speak the truth and the affidavit could be prepared on falsehood. An attorney-at-law could prepare an affidavit on

the basis that the instructions given are truthful. This is not always the case. When an attorney-at-law gives an affidavit on facts which are false where would he or she be placed ? Could the attorney say then that the affidavit was prepared on instructions ? There is no doubt that even an attorney-at-law is a fit and proper person to depose to the facts in an affidavit, provided those facts are within the knowledge of the attorney-at-law. It cannot be said that it is within anyone's personal knowledge when facts are gathered through instructions.

Therefore I hold that this affidavit is bad in law. Hence I uphold the objection. Therefore leave is refused with costs fixed at Rs. 5,000.

SOMAWANSA, J. — I agree.

Application refused.
