

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 22ND DAY OF JANUARY 2015/2ND MAGHA, 1936

Mat.Appeal.No. 325 of 2014 ()

AGAINST THE ORDER DATED 19/02/2014 IN I.A.NO.4078/2013 IN OP
1145/2011 of FAMILY COURT,THRISSUR DATED 19-02-2014

APPELLANT(S)/PETITIONER:-:

BALAKRISHNAN, AGED 53 YEARS
S/O.SANKARAN, WADAKKEMEPPULLY HOUSE, PERINCHERY P.O.
THRISSUR DISTRICT.

BY ADVS.SRI.P.SANTHOSH (PODUVAL)
SMT.R.RAJITHA
SRI.K.D.SREEVISAKH

RESPONDENT(S)/RESPONDENT:-:

GEETHA N.G., AGED 49 YEARS
D/O.GANGADHARAN, SREECHITHIRA, 7/858
HOUSE NO.45, MUSEUM CROSS LANE, CHEMBUKKAVU
THRISSUR - 680 001.

R1 BY ADV. SRI.A.N.KUTTAN
R1 BY ADV. SRI.C.CHANDRASEKHARAN

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
22-01-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

acd

'C.R.'

V.K. MOHANAN & P.D. RAJAN, JJ.

Mat.Appeal No. 325 of 2014

Dated this the 22nd day of January, 2015

JUDGMENT

P.D.Rajan, J.

This appeal is directed against the order in I.A.No.4078/2013 in O.P.No.1145/2011 of the Family Court, Thrissur. Appellant/petitioner filed the above O.P. for declaration of title over the plaint schedule property and other incidental reliefs against his wife, the respondent herein. The appellant filed another O.P.No.1162/2011 seeking return of gold ornaments and other articles. The wife also filed three other petitions, namely, O.P.Nos.1239/2011, 1126/2012 and 78/2013 against her husband. While so, the appellant filed I.A.No.2421/2013 for joint trial of all the above five cases and accordingly, on

9.12.2013, the senior counsel entrusted the file to junior counsel, who failed to represent the case. Therefore, O.P.No.1145/2011 and O.P.No.1162/2011 were dismissed on the ground that there was no representation. In the circumstances, an application for restoration of the case under Order IX Rule 9 of the Code was filed by the petitioner's Advocate for and on behalf of the petitioner/appellant. That application was dismissed stating that the petition and the affidavit were signed by the Advocate and not by the party. In the above circumstances, the appellant/husband approached this Court with this Mat. Appeal.

2. Now the question in dispute is that whether the petition under Order IX Rule 9 of the Code was presented in the Court below as per law? A close scrutiny of the argument shows that this point is purely technical in nature

since the application was not signed by the petitioner but by the petitioner's Advocate. According to O.III R.4 of the Code, no pleader shall act for any person in any Court unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment. In this case the petitioner appointed an Advocate to act on his behalf in the suit and proceedings arising therefrom within the meaning of O.III R.4. In accordance with such authority, his Advocate acted in the proceeding by signing and presenting the petition for restoration. He did it for the benefit of his client in order to protect the interest of the petitioner, which shows an implied consent.

3. The learned counsel appearing for the appellant

contended that five cases were pending before the Family Court, Thrissur and on the date of filing the joint trial petition, the appellant's two cases were dismissed stating that there was no representation. According to the learned counsel for the appellant, it is not necessary that invariably in all cases the petition has to be supported by the affidavit of the petitioner himself. The petition filed with a supporting affidavit of the advocate was found to be perfectly legal, since the facts stated in the affidavit were found to be within the exclusive knowledge of the counsel. He relied on the decision reported in Abdu Karrem v. State of Kerala [2006(2) KLT 408]. The learned counsel appearing for the respondent contended that the party has to sign the petition and the affidavit and the counsel has to verify it.

4. In a suit/petition where the defendant appears

and the plaintiff does not appear, when the suit is called for hearing, the Court shall make an order that the suit be dismissed. The plaintiff may then file an application to restore the suit against the dismissal. Here, the petition was filed by the counsel and the learned Judge of the Family Court observed that the "Petition filed under Order IX Rule 9 of C.P.C. was not signed by the petitioner, but it was signed by the counsel." The verification was made by the counsel for obtaining the original vakalath in the above case, there being no technical defects noticed in the above petition by the Court below. Now, the objection raised in the restoration application was that it is for the petitioner to do the same not by the petitioner's Advocate.

5. Apex Court had occasion to consider the same legal question in Ananta Pandu Porobo Desai and others v. Lalita Poi [(1978) 2 SCC 681(1)], in which it is held as

follows:

"Mr. Vineet Kumar, who appears on behalf of the respondent has not been able to contest the position that the very same advocate who appeared in the suit on behalf of the plaintiff could file an application for restoration of the suit on the authority of the original vakalatnama executed by the plaintiff in his favour.

2. On the merits, it is in the interests of justice that the order dismissing the suit for default be set aside and the suit restored to file. We accordingly direct that the trial Court will restore the suit and dispose it of in accordance with law. The appellants shall pay the costs of this appeal to the respondent, which we quantify at Rs.1000, as a condition precedent to the restoration of the suit. The costs of the suit, from its institution until its disposal hereafter, shall be paid by the appellants to the respondent in any event. The appeal is disposed of accordingly."

Therefore, the above decision of the Apex Court shows that a suit, which was dismissed for default, can be restored to file under Order IX Rule 9 of the Code on the basis of an application made by the Advocate on the strength of vakalatnama executed by the plaintiff in his favour in the interest of justice. The order of dismissing

the suit for default can be set aside and the suit restored to the original file. Accordingly, the Apex Court directed the trial Court to restore the suit and dispose of it accordingly to law. Therefore, a lawyer could file a petition, on behalf of the party he represents, under Order IX Rule 9 of Code of Civil Procedure duly signed by him on behalf of the party he represents, even though the vakalatnama did not expressly authorise an Advocate to file an application for restoration. If the Court is satisfied that there was no express prohibition in doing so, it has to assume that the counsel had implied authority to file such application.

6. A similar view was taken by the Orissa High Court in **Smt. Bishnupriya Rath v. President of Bhanjanagar College, Chatrapur and others** [AIR 1985 Orissa 108]. It was held as follows:

"6. The petition under O.9 R.9 was signed by the petitioner's Advocate Mr. B. Das, Mr. L. Rath, learned counsel appearing for the petitioner, contended that in the facts and circumstances of the case the petition signed by the petitioner's Advocate Mr. B. Das was presented in Court according to law. There being no technical defect as pointed out by the Courts below, the petition for restoration could not be thrown out on the ground of mere technicality. If there be any defect in presentation of the petition, it was a mere irregularity, but not totally illegal.

According to O.4, R.1, a suit is instituted by presenting a plaint to the Court. Every plaint shall comply with the rules contained in Orders 6 and 7. According to O.6 R.14 a plaint is required to be signed by the party and his pleader. There is no such equivalent provision in O.9 R.9. In other words, a petition for restoration under O.9 R.9 is not required to be signed by the petitioner. It is also not required to be verified by the party as a plaint is required to be verified under O.6 R.15.

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7. In view of the above and in disagreement with the Courts below, I hold that Mr. B. Das, Advocate for the petitioner was authorised to act on her behalf in the suit and the proceedings arising therefrom. Therefore, the petition under O.9 R.9 signed and presented by him

cannot be said as being not in accordance with law."

7. While interpreting Order III Rule 4 of C.P.C., this Court considered as to whether the legal practitioner has got any implied authority to compromise a suit. Order III Rule 4 demands the appointment of a lawyer by a document in writing to act in court of law. A Full Bench of this Court in Chengan Souri nayakam v. A.N.Menon [AIR 1968 Kerala 213] held as follows:

"Here, there is no case that the implied power of counsel to compromise the case or confess judgment was limited or taken away by the client expressly and therefore, we have to assume that counsel had implied authority to compromise the action or confess judgment. Although the vakalat in the case did not expressly authorise counsel to compromise the suit or confess judgment, we are not satisfied, there was express prohibition in his doing so. If that be so, the decision of the House of Lords referred to above has no application here."

Therefore, by virtue of vakalatnama, without having any special authority, it is presumed that counsel had an

implied authority to present a petition under Order IX Rule 9 of the Code, duly signed by him for the party he represents. From the facts and circumstances of the case, we find that there was sufficient cause for the petitioner's counsel for presenting the above petition in the Family Court and we cannot say that the petition, filed by a lawyer is not in accordance with law. Therefore, the order passed by the Family Court is liable to be set aside.

In the result, the order in I.A.No.4078/2013 in O.P.No.1145/2001 before the Family Court, Thrissur is set aside. The matter is remitted to the Family Court, Thrissur for fresh consideration as per law.

V.K. MOHANAN, JUDGE.

P.D. RAJAN, JUDGE.

The aforesaid view is supported by

authorities. In a Full Bench decision reported in AIR 1968 Ker 213, Chengan Souri Nayakam v. A.N. Menon, it was held that an Advocate in India has inherent authority to enter into a compromise on behalf of his client and the compromise so entered into would be binding on him. The implied authority is an actual authority and not an appendage to his office or dignity added by the Court to the status of the Advocate. Therefore, even though the vakalatnama did not expressly authorise a counsel to compromise the suit or confess judgment, if the Court was satisfied that there was no express prohibition in doing so, it had to assume that counsel had implied authority to compromise an action or confess judgment. This was the view taken in extreme case. An identical view appears to have been taken in two decisions of the Supreme Court reported in AIR 1975 SC 1632, Employers in relation to Monoharbahal Colliery Calcutta v. K.N. Mishra and AIR 1975 SC 2202, Smt. Jamilabai Abdul Kadar v. Shankarlal Gulabchand. If by virtue of a vakalatnama has been duly executed in accordance with rules prescribed by the High Court cannot act and present a petition under O.9 R.9 of the Code duly signed by him on behalf of the party he represents.

