

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

C.R.P.Nos.1381, 1601, 1361 and 1572 of 2015

COMMON ORDER:

C.R.P.No.1381 of 2015 is filed by defendants 1 to 5 in the suit seeking recall of P.W.1; C.R.P.No.1601 of 2015 is filed by defendants 10 and 11 in the suit to recall P.W.1; C.R.P.No.1361 of 2015 is filed by defendants 1 to 5 to recall P.W.2; and C.R.P.No.1572 of 2015 is filed by defendants 10 and 11 to recall P.W.2. It would suffice, for the disposal of all the four C.R.Ps, if the contents of order passed by the Court below, which is under challenge in C.R.P.No.1381 of 2015, is noted.

C.R.P.No.1381 of 2015 is filed by defendants 1 to 5 in O.S.No.421 of 2010 questioning the order passed by the XIII Additional District & Sessions Judge Court, Visakhapatnam at Gajuwaka in I.A.No.644 of 2014 in O.S.No.421 of 2010 dated 02.02.2015. The application in I.A.No.644 of 2014, was filed to recall P.W.1. The Court below held that the petition and affidavit were filed by the counsel for defendants 1 to 5; it was settled law that the Advocate could not file affidavits in court proceedings; in ***P.Subbarao vs. N.Anjaneyulu*** it was held that, when a counsel is appearing for one of the parties in the proceedings, he could not file an affidavit; it is the party to the proceedings who is required to file an affidavit; and, since the affidavit was filed by the counsel, the I.A. was liable to be dismissed.

Sri G.Tuhin Kumar, learned counsel for the petitioners, would draw attention of this Court to the affidavit, filed in support of the I.A. wherein the deponent (Advocate appearing on behalf of defendants 1 to 5) stated that no notice was issued to him before filing the affidavit of the plaintiff nor was a copy thereof served on him; this resulted in his inability to cross examine P.W.1; it was mandatory for a notice to be issued to the contesting defendants before marking the documents; but, for the reasons best known to the plaintiff, no notice was served on the defendants or on him; as P.W.1 was not cross examined by him, the Court was pleased to post the matter for further evidence of the plaintiff by closing the evidence of P.W.1 on 07.08.2014; the contesting defendants had a strong case; and, unless P.W.1 was cross examined, the defendants may not be able to put forth their case before the Court.

Sri M.Radha Krishna, learned counsel for the respondent-plaintiffs would draw attention of this Court to the counter filed by them to submit that the matter was repeatedly adjourned; on the day P.W.1 entered the box, there was no representation on behalf of the

defendants in Court; and that the defendants did not pursue the suit diligently.

It is useful to note what the respondent-plaintiffs have stated in paragraph 4 of their counter filed in the I.A. They specifically asserted therein that they need not serve the affidavit copy; the plaintiff cannot search for the defendants or their counsel and serve the affidavit copy; and the plaintiff could not find any representative on behalf of defendants.

Order XVIII Rule 4 C.P.C. requires copies of the affidavit, filed in lieu of examination in chief, to be supplied to the opposite party by the party who calls him for evidence. The said Rule obligated the plaintiffs to serve a copy of the affidavit in lieu of chief examination either on the defendants or on their counsel. Not only have the respondent-plaintiffs not served a copy on the defendants or their counsel, it is their stand before the Court below that they were not obligated to do so. The Court below has dismissed the I.A. solely on the ground that an Advocate could not file an affidavit. This Court, in **G.Satyanarayana vs. M.Shankar**, held :-

*“..... Apropos the other contention that the affidavit in this case was given by the clerk of the counsel in support of the petition but not by the party himself, certain Civil Rules of Practice are to be noticed. Rule 59 under Civil Rules of Practice obligates that every interlocutory application shall be supported by an affidavit and copies of the application, affidavit, and the documents annexed to the affidavit, if any, which are intended to be used by the deponent, shall be furnished to the opposite side. As per Rule 54, the interlocutory application shall state the provision of law under which it is made and the relief sought for in clear and precise terms and it shall be signed either by the applicant or by his counsel. As per Rule 48, every affidavit should contain the statements made on information or belief of the deponent and shall further contain the source or ground of information or belief. **A combined reading of these Rules of Practice prescribed by the High Court with the previous approval of the Governor of Andhra Pradesh, shows that the interlocutory application need not necessarily be signed by the party himself. It can either be signed by the party himself or his counsel. Every interlocutory application shall be accompanied by an affidavit, which affidavit should contain the statement of facts made on information or belief of the deponent and the source or ground of such information or belief. Nowhere, it has been mentioned that the affidavit filed in support of the petition shall be given by the party himself. Anybody, who is conversant with the statement of facts, which are necessary to be furnished for maintaining an interlocutory application, can, therefore, give the affidavit. I am reinforced in any above view by a judgment of this Court in Hussaini Begum v. B.Ramachandraiah.***

Here, in the instant case, the defendant put in his appearance on 03.09.1998 through his counsel, who filed his vadakath. On the same day, he filed an application seeking leave to defend, after issuing notice to the counsel of the plaintiff, who endorsed on the overleaf of the petition itself. The party legitimately expects an order from the Court on his application. Return of the application on some office objections, and compliance of the objections taken by the office, might not be known to the party. In ordinary course, the counsel appearing for the party would attend to such things. That application seeking leave to defend was admittedly returned by the office on 22.09.1998 and admittedly ex parte decree was passed on 05.10.1998. For the laches on the part of the counsel in taking return of the application and representing the same

*after complying with the office objections, the party cannot be blamed and, in the interest of justice, he shall not be put to loss. **One of the objections taken by the office was as to how that application was maintainable, which is expected to be answered by the counsel. The other objection, of course, is not a major objection, as the necessary Memo of Appearance should be filed. Had this objection been complied with, the defendant would not have been ex parte and the suit would not have been decreed ex parte. It, therefore, necessitated the clerk of the counsel for the defendant to file his affidavit mentioning the statement of facts in support of the petition to set aside the ex parte decree. He can legitimately give the source and grounds of information as he was attending to the file, being the clerk of the counsel. The clerk of the counsel will be in a better position than the party himself to furnish such information. If the party were to state such facts, again he should get the information from his counsel or the clerk of his counsel.....**" (emphasis supplied)*

In the present case, as a copy of the affidavit was required to be served on the Advocate and, as it was not, he filed an affidavit in support of the I.A. The Court below ought not to have dismissed the I.A. on the ground that the Advocate for the applicant could not have filed the affidavit, as the question whether an Advocate is justified in filing an affidavit would depend on the facts and circumstances of each case. In view of the judgment of this Court in **G.Satyanarayana²** the Court below erred in not accepting such an affidavit, and the action of the petitioner-defendants 1 to 5, in filing the affidavit, cannot be faulted.

Even otherwise the jurisdiction of this Court, under Article 227 of the Constitution of India, must be exercised to prevent injustice being caused. Rule 4 of Order XVIII C.P.C. required the plaintiffs to serve a copy of the affidavit in lieu of chief examination either on the defendants or their counsel. Their failure to discharge this obligation is in violation of the requirements of Order XVIII Rule 4 C.P.C.

Sri M.Radha Krishna, learned counsel for respondent-plaintiffs, would submit that such an application could not, even otherwise, have been entertained, as the petitioners' counsel was not present for several days necessitating their application being dismissed. The fact, however, remains that the Court below has not dismissed the I.A. on this ground. I consider it appropriate, therefore, to set aside the orders under revision, and remand the matter back to the Court below to consider the I.As, and pass orders afresh in accordance with law.

All the four Civil Revision Petitions are disposed of accordingly. Needless to state that, since the I.As were filed nearly a year ago, it is but appropriate that the Court below decides the I.As with utmost expedition preferably within a period of two months from the date of receipt of a copy of this order. Miscellaneous Petitions pending, if any, shall also stand closed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

12th June 2015.

JSU

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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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Date: 12.06.2015

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