

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

CIVIL REVISION PETITION NOS.1754 AND 1772 OF 2017

C.R.P.No.1754 & 1772 OF 2017

- # 1. Mohd. Nayeem
2. Mohd. Nadeem

Both R/o H.No.14-1-287
Mangalhat, Hyderabad
Petitioners

.....

Vs.

- \$ 1. Sri Sale Sayeed
R/o H.No.6-3-580/17,
Anandnagar Colony,
Khairatabad,
Hyderabad and 8 others
Respondents

....

JUDGMENT PRONOUNCED ON: 04.08.2017

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reporters/Journals
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NOs. 1754 AND 1772 OF 2017

COMMON ORDER:

These two revisions petitions are filed under Article 227 of the Constitution of India, aggrieved by the order passed by the III Additional Chief Judge, City Civil Court, Hyderabad in I.A.No.1582 of 2016 in I.A.No.781 of 2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in O.S.No.306 of 2016 dated 06.01.2017, dismissing the applications filed under Order VI Rule 17 CPC r/w Section 151 C.P.C seeking leave of the court to amend the affidavit by incorporating paragraph no.23 in the affidavit.

The question involved in both the cases is one and the same and hence, I find that it is expedient to decide both the petitions by common order.

The petitioners filed O.S.No.306 of 2016 for various reliefs. Along with the suit, the petitioners filed I.A.Nos.781 & 780 of 2016 for grant of interim injunction during pendency of the suit, for grant of interim injunction restraining the respondents from alienating the suit schedule property and also retraining them from making further constructions in the suit schedule property. The petitioners filed a memo before the II Additional Chief Judge, City Civil Court, Hyderabad seeking withdrawal of O.S.No.501 of 2015 before filing O.S.No.306 of 2016. The petitioners filed their affidavit raising several contentions. But the respondents raised a contention that the petitioner did not disclose the earlier suit O.S.No.501 of 2015 against the respondents and other interlocutory applications filed therein,

including C.M.As and consequently I.A.Nos.781 & 780 of 2016 were heard. Thereupon, the petitioners filed I.A.No.1582 of 2016 in I.A.No.781 of 2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in O.S.No.306 of 2016 for amendment of two affidavits, on the ground that the petitioners filed a memo on the file of II Additional Chief judge, City Civil Court, Hyderabad for withdrawal of O.S.No.501 of 2015. It is submitted that the memo is still pending and no order has been passed on the memo, granting permission to withdraw the suit and no suit is pending as such. Further, the petitioners did not seek any permission from the Court for filing fresh on from the same cause of action. Therefore, the memo itself would constitute withdrawal of the suit and no further order is required. When the petitions came up for hearing, the Trial Court posted both the interlocutory applications for orders, in view of the directions issued by this Court in C.M.A.No.845 of 2016. Since the petitioners filed memo to withdraw O.S.No.501 of 2015, the petitioner is not required to disclose the proceedings in earlier suit O.S.No.501 of 2015 and incidental proceedings therein. But, in view of the objections, the petitioner sought for amendment of the affidavit, seeking leave of the Court to add paragraph 23 in the affidavit in I.A.No.1582 of 2016 in I.A.No.781 of 2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in O.S.No.306 of 2016. The respondents did not file any counter but advanced arguments during hearing.

Upon hearing argument of both the counsel, the Trial Court dismissed I.A.No.1582 of 2016 in I.A.No.781 of 2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in O.S.No.306 of 2016.

Aggrieved the said orders passed by the Trial Court in 06.01.2017, these two revisions are filed, raising identical contentions in both the revisions and challenging the order, mainly on the ground that the reason assigned by the Trial Court is fallacious and the Court failed to see that no prejudice would be caused in the event of allowing the applications for amendment, since it would not change the nature of the petitions. It is also contended that, the Trial Court did not consider the plea of the petitioner in proper perspective and committed a serious error.

During hearing, Sri E. Venugopal learned senior counsel appearing for Sri Ch. Siddhartha Sarma mainly contended that, when the petitioners filed memo in the Court in O.S.No.501 of 2015, the petitioners need not disclose the details of the proceedings in earlier suit and incidental proceedings therein and those facts are not material aspects even to decide the real controversy. However, the petitioner intended to bring those facts on record by amending affidavit, since the suit is at pre-trial stage. Therefore, amendment can be permitted but the Trial Court did not appreciate this contention in proper perspective and committed a serious error in dismissing the petitions.

Per contra, learned counsel for the respondents argued totally in support of the order passed by the Trial Court, without raising any specific contention.

Considering rival contentions and perusing the material available on record, the sole point that arises for consideration is:
“Whether the petitioners in I.A.No.1582 of 2016 in I.A.No.781 of 2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in

O.S.No.306 of 2016 be permitted to amend the affidavit by adding paragraph 23.”

P O I N T:

These two strange applications are filed by the petitioners seeking leave of the Court to amend the affidavit by exercising power under Order VI Rule 17 r/w Section 151 C.P.C. According to Order VI Rule 17 C.P.C the Court may at any stage of the proceedings allow either party to alter or amend his '**pleadings**' in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The term 'pleading' is defined as plaint or written statement under Order VI Rule 1 C.P.C. If, such restricted meaning is accepted, it is difficult for the Courts to exercise its power under Order VI Rule 17 C.P.C, granting leave to amend the original petitions and other incidental proceedings therefore, a wider meaning has to be given to the word 'pleading' as defined under Order VI Rule 1 C.P.C. But, affidavit is not a part of pleadings and it is not defined anywhere in the Code of Civil Procedure. However, According to Section 3(3) of The General Clauses Act, 1897, the term 'affidavit' means:

“affidavit” shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing”

Similarly, according to Rule 34 (new) of The Andhra Pradesh Civil Rules of Practice and Circular Orders, 1980, the word 'affidavit' is interpreted as follows:

The word 'affidavit' in this Chapter shall include any

document required to be sworn; and the words 'swear' and 'sworn' shall include 'affirm' and 'affirmed'.

Rules 35 to 52 deals with various aspects like Form of an affidavit, description, title of affidavits and before whom the affidavit may be sworn. But, those Rules are not necessary for deciding the present controversy.

Order XIX C.P.C deals with what the affidavit should contain. Therefore, in the absence of any definition in the Civil Procedure Code, the definition in The General Clauses Act and interpretation in Civil Rules of Practice and Circular Orders is to be taken into consideration and applied for deciding the real controversy in this revision petition.

In **M. Veerabhadra Rao vs Tek Chand**¹ the Supreme Court held that, Affidavit is sworn statement in writing made especially under oath or on affirmation before an authorized magistrate or officer. According to Section 3(3) of the General Clauses Act, affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing. The expression 'affidavit' has been commonly understood to mean a sworn statement in writing made especially under oath or on affirmation before an authorised Magistrate or officer. Affidavit has been defined in sub-clause (3) of Sec. 3 of the General Clauses Act, 1897 to include 'affirmation and declaration in the case of person by law allowed to affirm or declare instead of swearing.' The essential ingredients of an affidavit are that the statements or declarations are made by the deponent relevant to the subject matter and in order to add sanctity

¹ 1985 AIR 28

to it, he swears or affirms the truth of the statements made in the presence of a person who in law is authorised either to administer oath or to accept the affirmation. The responsibility for making precise and accurate statements in affidavit were emphasized by the Apex Court in **Krishan Chander Nayar v. The Chairman, Central Tractor Organisation and Ors**². The part or the role assigned to the person entitled to administer oath is no less sacrosanct. Section 3 of the Oaths Act, 1969 specifies persons on whom the power to administer oath or record affirmation is conferred. It *inter alia* includes 'any Court, Judge, Magistrate or person who may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf-(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or (b) by the State Government, in respect of other affidavits.' The Schedule to the Act prescribes forms of oaths or affirmation that is required to be administered to the party seeking to make his own affidavit. Rule 40 of the Civil Rules of Practice framed by the Andhra Pradesh High Court provides that 'the officer before whom an affidavit is taken shall state the date on which, and the place where, the same is taken, and sign his name and description at the end, as in Form No. 14, otherwise the same shall not be filed or read in any matter without the leave of the Court.' 'Form No. 14' prescribes the form of affidavit on solemn affirmation. It requires a solemn affirmation or oath before the person authorised to administer the same and then at the foot of which the signature of the deponent must appear and below that the officer entitled to administer oath must put his signature in token of both that he administered the oath and that deponent signed in his

² (1963) ILLJ 661 SC

presence and by his attestation he has subscribed to both the aspects. Rule 34 of the aforementioned rules sets out officers authorised to administer oath for the purpose of affidavits and an Advocate or Pleader other than the Advocate or Pleader who has been engaged in such a proceeding have been included in the list of officers authorised to administer oath.

According to Order XXXIX Rule 1 C.P.C, where in any suit it is proved by affidavit or otherwise_

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to disposes the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit until the disposal of the suit or until further orders.

It is clear from the definition and form of affidavit and persons authorised to administer oath etc, as discussed in the judgment, the affidavit is only a statement and affirmation or a declaration by the parties, as to the facts of a particular case filed before the Trial Court. But, such statement sought to be on affirmation or oath is sought to be amended by the petitioners in I.A.No.1582 of 2016 in I.A.No.781 of

2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in O.S.No.306 of 2016 before the Trial Court.

Thus, by virtue of Order XXXIX Rule 1 C.P.C, which permits the Court to dispose of interlocutory applications by an affidavit or otherwise, the petitioners filed affidavit along with petitions in compliance of Order XXXIX Rule 1 C.P.C. That apart, Rule 60 of Civil Rules of Practice (new) deals with proof of facts by affidavit, and fact required to be proved upon an interlocutory proceeding shall unless otherwise provided by these rules, or ordered by the Court, be provided by affidavit but the Judge may, in any case, direct evidence to be given orally, and thereupon the evidence shall be recorded, and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibits shall be prepared and annexed to the judgment.

Thus, Order XXXIX Rule 1 C.P.C permits filing of an affidavit in proof of certain facts in an interlocutory application, the Courts allowing the parties to file affidavits along with application for interim reliefs by virtue of power conferred on Court.

Section 94(3) C.P.C deals with supplemental proceedings and in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold.

On a cogent reading of Section 94 C.P.C and Order XXXIX Rule 1 C.P.C, coupled with Rule 60 of Civil Rules of Practice and Circular Orders, an application under Order XXXIX Rule 1 C.P.C can be decided basing on an affidavit filed by the party who is seeking an

interlocutory order.

Thus, viewed from any angle, the affidavit is only a solemn affirmation or a declaration made before a person who is competent to administer oath, which is only a substitute to the oral statement. Such statement on affirmation would not fall within the definition of pleadings under Order VI Rule 1 C.P.C

It is an elementary principle that leave can be granted to amend the pleadings under Order VI Rule 17 C.P.C and the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The heading of the rule and the word used 'his pleadings' in such manner must be read in conjunction with Rule 1 of Order VI C.P.C. In such case, Order VI Rule 17 C.P.C shall be confined to the pleadings.

In the present facts of the case, pleading is only a petition, but not an affidavit, since the affidavit is a solemn statement affirmed before the competent officer or a declaration. Leave cannot be granted to amend solemn affirmation made before a competent officer, who is authorised to administer the oath, as discussed above.

An affidavit is statement of facts in writing made voluntarily before an officer authorised to administer oaths. An affidavit is different from a plaint. As already stated, in the writ petition, evidence in support of facts in the petition is accepted in the form of affidavit. But the allegations in the plaint are to be proved by producing evidence, unless they are admitted by the defendant. An

affidavit which is not properly verified cannot be treated as an affidavit in the eyes of the law. When there is no original affidavit in the eyes of the law, the question of amending it does not arise because amendment is referable to an existing one. In **Dwaraka Nath v. Income Tax Officer**³, the Supreme Court held that, if an affidavit is defective in any manner, instead of rejecting it a reasonable opportunity is to be given to the party concerned to file better affidavit complying with the requirements of law. The above decisions indicates that, if an affidavit is defective for lack of proper verification, an opportunity must be given to the party concerned to file a properly verified affidavit. This shows impliedly that amendment of verification of affidavit cannot be allowed but the party concerned must be given an opportunity to file a properly verified affidavit. For these reasons, the verification of affidavit cannot be amended. In the facts and circumstances of the case and keeping in view the decision in **Dwaraka Nath**³ case, the Supreme Court afforded an opportunity to the respondents to file properly verified affidavits complying with the relevant provisions of the rules without changing the contents of the original affidavits except the relevant paragraphs relating to verification.

In **Pannalal Ganguly v. State of Tripura**⁴, the Gauhati High Court held that 'amendment' means, to alter by addition, substitution, or omission. If re-verification in the manner sought is allowed, and it alters the original affidavits, either by addition or by substitution, it would amount to amendment of the original affidavit, so far as it concerns the verification. An affidavit which is not

³ AIR 1966 SC 81⁴ (1991) 2 Gau LR 231

property verified, cannot be treated as an affidavit in the eyes of the law. When there is no original affidavit in the eyes of the law, the question of ‘amending’ it does not arise, because ‘amendment’ is referable, only to an existing one.

In **Nandakumar Shabnkar Mhatre v. Dayanand Mahadev Mhatre**⁵, the Bombay High Court held that, the affidavit once made cannot be allowed to be changed by amending the same. The affidavits without verification and the affidavits with defective verification cannot be admitted in evidence. In paragraph 6 of the same judgment, the Court observed as follows:

“6. The learned Counsel for the petitioner orally applies for amendment of the petition and thereby wants to correct the verification of the petition. I am unable to see how a party can be allowed to amend the affidavit which has been already made by him. The affidavit once made cannot be allowed to be changed by amending the same. Consequently, the prayer of the learned Counsel for the petitioner for permission to amend the petition cannot be granted.”

Thus, the consistent views taken by the Gauhati and Bombay High Courts is that an affidavit cannot be permitted to be amended, since it is a statement of fact, made on affirmation before an officer authorised to administer oath. Even, ignoring the judgments of Gauhati and Bombay High Courts, it is clear from the definition of ‘affidavit’ under Section 3(3) of General Clauses Act and Rule 34 of Civil Rules of Practice and the judgment of the Apex Court in **M. Veerabhadra Rao**¹ case, that the affidavit is only a statement by affirmation or a sworn statement before an officer competent to administer oath, it is not a pleading within the definition of Order VI

⁵ 1989 Cri LJ 715 (Bom)

Rule 1 C.P.C, even if wider meaning is given to such pleading. Therefore, the power under Order VI Rule 17 C.P.C. cannot be exercised to grant leave to the petitioners to amend the affidavit, which is a statement on solemn affirmation and at best, the petitioners are entitled to file an appropriate affidavit or additional affidavit after obtaining leave of the Court. It is also clear that the proceedings in a civil court are governed by Civil Procedure Code and A.P. Civil Rules of Practice and Circular Orders, 1980. The Writ Rules in the High Court and Appellate Side Rules, have no application to proceedings in Civil Court. Consequently, the question of exercising power under Order VI Rule 17 C.P.C to grant leave to the petitioners to amend the affidavit does not arise.

The other contentions raised by the learned Senior Counsel Sri E. Venugopal are not relevant for deciding the present issue, in view of my foregoing discussion. Hence, I find no ground to allow the civil revision petitions and set-aside the order passed by the Trial Court, though on different grounds. Consequently, the civil revision petitions are devoid of merits.

In the result, both the civil revision petitions are dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Dated:04.08.2017

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