

(2007) 01 MAD CK 0238
In the Madras High Court
Case No : C.M.A. No. 3047 of 2005

R.M. Bedi

APPELLANT

Vs

Vijayeswari Textiles Ltd. and Federated Mercandising Group

RESPONDENT

Date of Decision : 29-01-2007

Acts Referred:

Advocates Act, 1961 — Section 49

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 8

Citation : (2007) 2 CTC 231 : (2007) 3 LW 1044 : (2007) 2 MLJ 1162

Hon'ble Judges : S. Manikumar, J

Bench : Single Bench

Advocate : Pushpa Sathyanarayanan, for T.R. Rajaraman, SC, for the Appellant;
M.S. Krishnan, for Sarvabhauman Associates, for the Respondent

Final Decision : Allowed

Judgement

S. Manikumar, J.—This appeal arises out of the order and decree dated 04.08.2004 made in O.S. No. 105 of 2003 on the file of Additional District and Sessions Judge (Fast Track Court No. III), Coimbatore.

2. The brief facts leading to the filing of this appeal are as follows:

(i) The suit is for recovery of money directing the first defendant to pay Rs. 19,25,000/- with subsequent interest at the rate of 18% per annum and for proper account of all the goods sold and shipped to the second defendant after 05.12.1997 till the date of the suit and to direct the first defendant, namely, M/s. Vijayeswari Textiles Ltd., Coimbatore, represented by its Director to pay a commission of 5% thereon with interest at the rate of 18% per annum.

(ii) When the suit was posted on 15.10.2003, the plaintiff and his counsel were not present and hence the suit was dismissed for default. The Counsel for the plaintiff filed I.A. No. 223 of 2004 and prayed for restoration of the suit, which was dismissed for default. He has stated that the plaintiff is an old man living in Germany. He has travelled to India on many occasions to attend the Courts. The

Trial could not be commenced. On the day when the matter was listed, he could not appear in the Court in time and the matter was dismissed for default. In support of the petition, learned Counsel on record filed an affidavit.

(iii) The first respondent, namely, M/s. Vijayeswari Textiles Ltd., filed a detailed counter affidavit and contended that the affidavit filed in support of the application has been filed by the Counsel and not by the plaintiff. He submitted that the provisions of Order 9 Rule 9 C.P.C. is mandatory and that the plaintiff should apply for restoration of the suit only on furnishing sufficient cause for non-appearance. Inasmuch as the plaintiff has not chosen to file an affidavit or give any valid reasons for his non-appearance on 15.10.2003, the application is not maintainable in law.

The first respondent further submitted that as per the provisions of Order 9 Rule 9 C.P.C., unless the plaintiff satisfies the Court that he was prevented from appearing in Court by a sufficient cause, no order of restoration can be passed. The application was also resisted on merits.

(iv) The Lower Court considered the issue as to whether the application under Order 9 Rule 9 C.P.C. can be filed with the supporting affidavit of the counsel appearing for the plaintiff. Learned Trial Judge found that when an affidavit is filed on behalf of the plaintiff, the Counsel who is appearing for him assumes the role of a witness and is liable to be cross-examined by the Counsel appearing on the other side. When the Counsel appears as a witness, nobody will be there to represent the case of the plaintiff and regulate the mode of examination of the witness in accordance with the Evidence Act. In view of the specific provision u/s 49(c) of the Advocates Act, the Lower Court observed that the learned Counsel is permitted only to appear for and on behalf of the plaintiff by filing a Vakalat or a power, but, does not authorise a Counsel to appear as a witness in the very same proceeding.

(v) The Lower Court held that Order 9 Rule 9 C.P.C. mandates that the plaintiff should satisfy the Court, when there is sufficient cause for his non-appearance. The Court finally held that Order 9 Rule 9 does not authorise a counsel on record to file an affidavit stating sufficient cause for non-appearance of the plaintiff before the Court on a particular hearing. In such circumstances, the Trial Court held that the affidavit filed by the Counsel on record for non-appearance of the plaintiff as impermissible in law and consequently dismissed the application filed for restoration.

Aggrieved by the said decision, the plaintiff has preferred this appeal.

3. Heard Mrs.Pushpa Sathyanarayanan, learned Counsel for the appellant and Mr. M.S. Krishnan, learned Counsel appearing for respondents.

4. Learned Counsel for the appellant submitted that the learned Trial Judge ought to have held that it is always open to the Counsel who appears for the party concerned to file affidavit with reference to what has happened in the Court on a

particular date and that the learned Judge ought to have accepted the affidavit filed by the Counsel and allowed the petition.

She submitted that in the affidavit filed in support of the restoration petition, the Counsel on record has narrated what has transpired between the Counsel and the plaintiff. She further submitted that there was a talk of compromise in the previous hearing of the suit, which was confirmed in the counter affidavit filed by the defendant and that the same should also be taken into consideration, while deciding the application for restoration.

Learned Counsel for the appellant further submitted that the application for restoration was filed immediately and for the fault of the advocate in not representing the matter on the said date, the plaintiff should not suffer. She also submitted that the relief sought for in the suit is for direction to the first defendant to pay a sum of Rs. 19,25,000/- with subsequent interest at the rate of 18% per annum from the date of institution of the suit. Therefore, in the interest of justice, the suit should be restored on file and that an opportunity should be given to the parties to let in evidence.

5. Placing reliance on a decision reported in 2004 (2) MLJ 701 (The Airport Director, Airport Authority of India, Chennai Airport, Chennai v. Gnanasekaran), learned Counsel for the appellant submitted that in the interest of justice, this Court allowed an application, where the Counsel, who was conversant with the facts of this case, filed the affidavit.

6. Per contra, learned Counsel for respondents placing reliance on decisions reported in 1989 (1) L.W. 543 (V.P. Nagarajan v. Prabhavathi) and Antony Devaraj and Another Vs. Aralvaimozhi (Kurusadi) Devasahayam Mount Oor and Thuya Viagula and Others, submitted that this Court has deprecated the filing of an affidavit by the Counsel.

7. Before advertng to the facts of this case, the relevant provisions dealing with Order 9 Rule 8 C.P.C. is extracted herein .

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an Order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

8. (i) In a decision reported in 1989 (1) L.W. 543 (V.P. Nagarajan v. Prabhavathi), this Court in paragraphs 2 and 3 has held as follows:

2. In support of the application I.A. No. 858 of 1986, an affidavit was filed by the learned Counsel for the petitioners. It is very distressing to note that counsel not only filed the affidavit in support of the application but also signed the application as advocate for petitioners. In recent times, an unhealthy practice has grown up among the members of the Bar to come out with affidavits in support of their

clients even without the clients themselves filing affidavits setting out the facts. Unfortunately the implications and consequences thereof have not been realised by them. Under Order 31 Rule 2, C.P.C. affidavit will be evidence in an application and the court could order cross-examination of the deponent. Thus the advocate who files an affidavit in support of an application is liable to be cross-examined and by filing the affidavit, he takes the role of a witness. The Bar Council of India has framed rules u/s 49(c) of the Advocates Act, 1961. Rule 13 in Chapter V in Part III of the rules reads thus -

An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an advocate if he retires without jeopardising his client's interests....

3. Even assuming that the circumstances of the case force counsel on record to file affidavits in support of the applications, they should take immediate steps to protect the interests of the client by not only requesting some other competent advocate to appear as counsel in that particular matter but also place the necessary materials before the Court to substantiate the averments made by them in their affidavits. The advocate who files an affidavit in court has no right to assume that his ipse dixit will be accepted by the court automatically without any scrutiny. Particularly, when the opposite party challenges the correctness or truth of the averments in the affidavit, it is the paramount duty of the advocate who is the deponent of the affidavit to produce the best evidence to prove the contents of the affidavit. It will be nothing but vain glory if the deponent thinks that, as members of the legal profession occupy a very high status, his affidavit is to be accepted on its own weight without any corroboration. No doubt the elevated position of the Bar is indicated by the term "la noblesse de la robe" (the aristocracy of the gown) but it should not be forgotten that rank imposes obligations (nobles oblige). Of late, cases of negligence and dereliction from duty on the part of advocates are so rampant that the members of the noble profession should resort to introspection and bring about measures to restore the dignity and honour of the profession. This case is itself an eloquent example of gross negligence on the part of counsel on record. I would not have ventured to sermonise like this but for the argument of learned Counsel for the petitioner that he expected the court below to accept his affidavit as the gospel truth.

(ii) In a decision reported in Antony Devaraj and Another Vs. Aralvaimozhi (Kurusadi) Devasahayam Mount Oor and Thuya Viagula and Others, Devasahayam Mount Dor and Thuya Viagula, Annai Church, represented by the Trustee and Ors.), the petitioner sought impleading in a suit and in an injunction application, instead of the party filing the counter affidavit, the advocate concerned on behalf of the client filed a counter. In such circumstances, the filing of an affidavit on behalf of the clients was deprecated by this Court. The Court took into consideration the peculiar circumstances prevailing in Kanyakumari

District, that advocates followed a regular practice of filing affidavits or counter affidavits or petitions on behalf of the parties, without the affidavit being sworn by the respective party to the case.

(iii) In a decision reported in 2000 (1) L.W. 130 (L.C.Saptharishi v. E.D. Balasubramaniam), this Court had an occasion to deal with the affidavit filed to restore the application, which was dismissed for default. An application was filed by the Counsel supported by the affidavit of his Clerk, who was conversant with the facts of this case. In paragraphs 6 and 7 of the judgment, it is held as follows:

6. ...the affidavit is sworn to by a person who is acquainted with the facts of the case and who is acquainted with the proceedings of the Court. He narrated what transpired before the Court on that date. Application is filed by the counsel, who is competent to file the same, and he has taken the statement of the clerk stating reasons why the application shall not be restored. The clerk by himself has not filed the petition. It is well settled that any person who is conversant with the facts of the case and who is witness as to what transpired before the Court is competent to file affidavit.

7. Lower Court was too technical in dismissing the application as not maintainable. In certain urgent matters, if parties could not be present, counsel got power to move Court and Vakalat authorises him to do so. Court is only concerned about the administration of justice and such technicalities should not stand in the way of considering the same. What transpired before the Court is not the matter in dispute. In the counter affidavit filed by respondent before the Lower Court, he is not disputing the statement made in the affidavit. He only gave history of the litigation....

(iv) In a decision reported in 2004 (2) MLJ 701 (The Airport Director, Airport Authority of India, Chennai Airport, Chennai v. Gnanasekaran), the defendant was set *ex parte* and hence an application was filed by the Advocate on record for the defendant to set aside the *ex parte* decree and also to condone the delay. The application came to be dismissed on the ground that the party has not filed an affidavit and that the advocate is not entitled to file an affidavit on behalf of the client. In paragraph 5 of the judgment, this Court has held as follows:

5. No doubt, it is true that each and every affidavit has got to be filed by the concerned party or by their authorised person, agent or attorney or person who knows the facts of the case also. Here, the advocate on record filed the affidavit wherein he has specifically stated that he was well aware of the facts of the case and only in the said circumstances, he has filed an affidavit to set aside the *ex parte* decree and also an application to condone the delay. The circumstances under which the defendant was set *ex parte*, explained by the deponent and it was only within the knowledge of the advocate on record and he knows the facts of the case and only in the said circumstances, he had filed the affidavit. That apart, the concerned advocate holds vakalat for the defendant and hence, he is

entitled to represent his party. The petitions have been filed only to safeguard the right and interest of the party and it is not prejudicial to the interest of the party and hence, it cannot be said that the advocate on record is not entitled to file the affidavit and petition on behalf of this party, when especially the said petitions have been filed to safeguard the interest of that party.

The decision reported in 2001 (1) L.W. 130 (L.C. Saptharishi v. E.D. Balasubramaniam) has been applied in the above said decision.

9. Rule 13 of Section 49(c) of the Advocates Act, 1961, states that "An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an advocate if he retires without jeopardising his client's interests...."

10. Order 19 Rule 2, deals with the power to order attendance of deponent for cross-examination and it reads as follows:

(i) Upon any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(ii) Such attendance shall be in court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

11. In Harishankar v. Rukmani Devi reported in 1996 AIHC 5263 the Rajasthan High Court has held as follows:

When both parties have filed affidavit and counter-affidavit, the power must be exercised when the Court is convinced that in the interest of justice, such a course is necessary.

12. In 1990 2 BLJ 332 a Division Bench of Bombay High Court held that, "the appearance of the Counsel in a case in which he is a witness for the plaintiff is not in accordance with the interests and traditions of the Bar. If the advocate is called upon to be a witness in that very case, then it should be left to the good sense of the Advocate. It may cause even embarrassment to the Counsel himself nor he can address the Court as to the credibility of his own testimony.

13. The duties of the Advocate are three fold (i) to the client (ii) to the Court and (iii) to the public. In Sitabai v. Vidhyawati reported in AIR 1972 M.P. 8 it is held that, "A Counsel has no right just to absent himself from Court, when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make such other arrangement for the proper representation of his client in the Court concerned. Mere fact that the Counsel was busy in some other Court cannot be a good and sufficient reason for his non-appearance in Court, when the case is called."

14. In Fatesang Gimba Vasava and Others Vs. State of Gujarat and Others, , it is held that when the party had done everything required to be done, he should not

be penalised for the absence, or default or carelessness or negligence of his lawyer.

15. The power under Order 19 Rule (2) C.P.C. is discretionary. If there are bonafides in the application, the Court need not order cross-examination of the deponent. This Court in V.P. Nagarajan v. Prabhavati reported in 1989 (1) L.W. 543 held that "even assuming that the circumstances of the case force the counsel on record to file affidavits in support of the applications, they must take immediate steps to protect the interest of the client by not only requesting some other competent advocate to appear as Counsel in that particular matter, but also place the necessary materials before the Court to substantiate the averments made by them in their affidavits. The Court further held that, "it is the paramount duty of the advocate, who is the deponent of the affidavit to produce best evidence to prove the contents of the affidavit."

16. Rule 13 of Section 49(c) of the Advocate Act does not altogether bar an advocate from filing an affidavit in the interest of the client. Whenever an affidavit is filed on behalf of his party, he assumes the role of a witness. The Court has got a discretionary power to cross-examine the witness, at the instance of either party and that he has to produce the best evidence to prove the contents of the affidavit. Before exercising the discretionary power, the Court should be convinced "that such a course is necessary, in the interest of justice.

17. Order 9 Rule 8 C.P.C. applies when a suit is dismissed for default for non-appearance of the counsel and the party, the suit can be restored on the plaintiff establishing a good cause for his non-appearance. When a suit is dismissed for non-prosecution and absence of plaintiff's Counsel, the remedy open to him is to file an application for restoration. In a given case, where the plaintiff instructs his lawyer to seek for an adjournment for some reasons, such as sickness, bereavement in his family or he is unable to attend the Court for some bonafide reason, the party should not suffer for non-appearance of his counsel. If a Counsel files an affidavit, he takes the risk of exposing himself as a witness to the case. The legal practitioners are certainly the agents of the parties in a case and for the fault of the agents, the clients should not suffer. It is the duty of the counsel engaged for conducting a case on behalf of the party to appear on that day, when the matter is listed for hearing. Once the Counsel is engaged as a pleader by his client, the authority to represent his client continues to remain in force.

18. In the instant case, the Lower Court has dismissed the interlocutory application merely on the ground that the application itself is not maintainable in law, since the advocate on record has filed the affidavit. In my opinion, the application cannot be disposed of as not maintainable, but the Counsel can be called upon to explain or he can recuse himself from the case.

19. In the instant case, the affidavit filed by the advocate discloses the fact that the plaintiff is an old man living in Germany. It is further stated in the affidavit

that he has travelled to India to attend the Court on many occasions, but the suit was not taken up for trial. The Counsel on record has stated in her affidavit that before she could step in to the Court, the matter was called and dismissed for default, for non-appearance of the plaintiff and the Counsel. This fact has not been specifically denied by the respondents.

20. Facts of the present case disclose that the Counsel could not represent the matter. Therefore, as a person who is conversant with the facts of the case, it is open to her to explain to the Court for her non-appearance, by filing an affidavit.

21. As stated supra, Order 9 Rule 8 C.P.C. is applicable to the case, where there is dismissal for default both for non-appearance of the Counsel as well as for the party. In view of the above discussion, the order of the Lower Court is set aside and the Additional District and Sessions Judge, Fast Track Court III, Coimbatore is directed to take up the matter for trial and provide sufficient opportunity to the parties to let in evidence.

In the result, the Civil Miscellaneous Appeal is allowed. No costs.