

WP(C) 531/2005

BEFORE

THE HON'BLE MR. JUSTICE R. B. MISRA

( 1 ) Heard Mr. K. C. Jaiswal, learned counsel for the petitioner and Mr. B. L. Singh, learned senior Government Advocate, Arunachal Pradesh.

( 2 ) The present writ petition has been filed with prayer to admit the petition, issue notice to the respondents and upon hearing may pass orders in favour of the petitioner or such other orders which this Court may deem fit and proper in the interest of justice.

( 3 ) The brief facts narrated in the writ petition are that the petitioner was deployed as contingent worker at Yingkiong, vide order dated 6. 3. 2001 (Annexure-A) in the office of the District Agriculture Officer (DAO) at upper Subansiri District, who proceeded on leave for 65 days in connection with his marriage and on his arrival on 20. 1. 2005 he was not allowed to join duty. For and on behalf of the petitioner Shri K. C. Jaiswal, learned advocate, submitted an application dated 24. 1. 2005 to the Deputy Commissioner, upper Subansiri, to allow the petitioner to join duty. Thereupon the Deputy Commissioner vide letter dated 2. 2. 2005 (Annexure-C) desired comments from the DAO. Thereafter, Shri K. C. Jaiswal presented the case of the petitioner on 4. 7. 2005 again to the Deputy Commissioner as well as DAO referring several persons indicating therein that two persons out of them have left their work, therefore, the work for contingent labourer is available. Since the petitioner is entitled for some leave and if no such leave is available in his credit extra ordinary leave without pay could have been granted to him and entitled to resume duty.

( 4 ) During course of hearing on 13. 9. 2005 it was noticed that the writ petition has not been supported by an affidavit of the petitioner or any agent or Pairkar rather the learned counsel for the petitioner himself as deponent has sworn the affidavit on 12. 9. 2005, therefore, learned counsel for the state has raised a preliminary objection about the maintainability of the present writ petition with assertions that Shri K. C. Jaiswal after having been engaged on Vakalatnama by petitioner/party is not legally entitled to swear the affidavit preferred in support of the writ petitioner. Without going into merits of the writ petition the following aspects are being noted revealing from the writ petition.

(i) The prayer made in the writ petition is vague as no specific Writ namely Mandamus has been prayed seeking direction to the respondents. (ii) The Advocate, Shri K. C. Jaiswal engaged by the petitioner as an Advocate on 'vakalatnama', has sworn the affidavit. (iii) The contents of the 'vakalatnama' do not indicate that the advocate was authorized by the petitioner to swear the affidavit. (iv) Shri K. C. Jaiswal has not indicated his age, address and the capacity to swear the affidavit. (v) The affidavit is not in proper form. (vi) No verification has been made in the affidavit dated 12. 9. 2005. (vii) It has not been indicated whether Shri K. C. Jaiswal has sworn this affidavit as the holder of Power of Attorney of the petitioner or agent or Pairkar or authorized person.

( 5 ) Without dealing with the merits of the petition, the maintainability of the writ petition in reference to an affidavit by an Advocate as deponent (engaged by the petitioner/party), is the main question for consideration.

( 6 ) In order to deal with the issue it is necessary to indicate Section 16 (1) of the Advocates Act, 1961, (in short the 'act 1961') which acknowledges two classes of Advocates, i. e. , senior Advocates and other Advocates. Section 17 (1) provides that every State Bar Council shall prepare and maintain a roll of advocates in which shall be entered, the names and addresses of (a) all persons who were entered as Advocates on the roll of any high Court under the Indian Bar Councils Act, 1926 and who at any time express an intention in the prescribed manner to practice within the jurisdiction of the Bar Council and (b) all other persons who are

e admitted to be advocates on the roll of the State Bar Council under the 'Act 1961' on or before the appointed day. Section 24 deals with persons who may be admitted as Advocates on a state Roll. Section 24 (a) deals with disqualification for enrolment as an Advocate. Section 29 deals with Advocates to be the only recognized class of persons entitled to practice law. Section 30 deals with the right of the advocates to practice. Section 33 deals with that Advocates alone entitled to practice. Section 49 deals with the general power of the Bar Council of India to make rules. Section 49 (1) (c) deals with the standards of professional conduct and etiquette to be observed by advocates. Section 49a deals with the power of the Central Government to make rules. Part VI, Chapter II of the Bar Council of India Rules framed under Section 41 (C) of the 'Act 1961' deals about the standard of professional conduct and etiquette. Section I deals with the duty to the Court. Section II deals with the duty to the client, Section III deals with the duty to the opponent. Section IV deals with duty to the colleagues. Clause (9) of Section I provides an Advocate should not act or plead in any matter in which he is himself pecuniarily interested. Clause (18) of section II provides an Advocate shall not at any time be a party to fomenting of litigation (emphasis supplied). Clause (19) of Section II provides an Advocate shall not act on the instruction of any person other than his client or his authorized agent.

( 7 ) In support of his argument Mr. K. C. Jaiswal, learned counsel, has asserted that any person may swear the affidavit. An Advocate of the petitioner/party/client is entitled to swear the affidavit as deponent in support to the writ petition (erstwhile Civil Rule) and affidavit in question has been filed by him on the basis of the information derived from the original records of the petitioner. For this purpose Mr. Jaiswal has Rule 25 of Chapter-IV of the Gauhati High Court Rules which provides as below:

Every person, other than a plaintiff or defendant in a suit in which the application is made, making any affidavit, shall be described in such a manner as will serve to identify him clearly, that is to say by the statement of his full name, the name of his father, his profession or trade and the place of his residence.

The learned counsel has invited the attention of this Court to Order 6, Rule 15, CPC, which provides as below: Verification of Pleadings- (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. (3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. Order 12, Rule 7, CPC, provides as follows: Affidavit of signature-An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

Referring to the decision of the Supreme Court reported in AIR 1959 Cal. 642, Mr. Jaiswal has submitted that a defect in verification is irregularity only in the procedure and will not be a ground for rejection of the plaint. In view of the decision in AIR 1914 SC192 (at 193), verification being made under sanction of solemn declaration, a false verification will render the party verifying liable to a prosecution for an offence under Sections 191 and 193, IPC. It has further been submitted that a false verification will not, entail the dismissal of the suit, especially when the defendant takes no objection thereto at the proper time.

( 8 ) On the other hand, Mr. B. L. Singh, learned Senior GA, AP, has invited attention of this Court to Rule 1 (A) of Chapter-V-A of the Gauhati High Court Rules. For convenience Rule 1 (A) is provided below. In all Civil Rules, one additi

onal set of authenticated petition with annexures and affidavits, if any, shall be filed by the party concerned. \ (emphasis supplied)'/ in view of above, the learned counsel for the state has further submitted that it is the party concern who has to file and swear affidavit. According to the learned counsel for the State Mr. K. C. Jaiswal being an Advocate is not to stand and walk through shoes of the petitioner and is not expected to act in fomenting, the litigation and to personify himself as the; petitioner or client herein. Order 3, Rule 1, CPC, provides: \appearances, etc. may be in person, recognized agent or by pleader-Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be] on his behalf. Provided that any such appearance shall, if the Court so directs, be made by the party in person. \ order 3, Rule 2, CPC, provides: \recognised agents-The recognised agents of parties by whom such appearance, applications and acts may be made or done are- (a) Persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties. (b) Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and act. \ order 3, Rule 4, CPC, provides:

\appointment of pleader- (1) 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 authorized by or under a power-of-attorney to make such appointment. \ order 6, Rule 14, CPC, provides: \pleading to be signed-Every pleading shall be signed by the party and his pleader (if any): provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. \

Order 6, Rule 15, CPC, provides:\verification of Pleading- (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. \ order 19, Rule 1, CPC, provides: \power to order any point to be proved by affidavit-Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable. Provided that where it appears to the Court that either party bonafide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit. \ Order 19, Rule 3, CPC, provides: \matters to which affidavits shall be confined-

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted. Provided that grounds thereof are stated. Order 19, Rule 6, provides: \every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade and the true place of his residence. \

Order 19, Rule 7, CPC, provides:\unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his knowledge; and such facts shall be stated in separate paragraphs

phs. \

In order 19, Rules 4 to 15, CPC, the Allahabad High Court has added certain portion which prescribes the pleadings, form of affidavit is to be filed.

( 9 ) The word 'pleading' in this sense, generally includes the right of audience in Court, the right to address the Court and right to examine or cross-examine the witnesses (Aswin S. P. Patel Vs. National Rayon, AIR 1955 Bom 262; D. Sornam Vs. State, (1969) 1 Mad LJ 207 at 209 ).

( 10 ) A third person who is not an advocate having power of attorney has no right of audience but can with the leave of the Court may address the Court (B. Yaswant Vs. Regional Director, 1978 Mahlj 589 ).

( 11 ) Order 3, Rule 1, CPC, makes it clear that the Court can direct party/parties to appear in person and does not violate Article 21 of the Constitution of India in view of the decision of the Supreme Court in (Sarala Rani Gupta Vs. Bhushan Lai, AIR 1976 J and K12 ).

( 12 ) A statement that is made by an advocate across the Bar with reference to matter that are within the personal knowledge on issues that are before Court, can be accepted, there is no legal bar acceptance of such an affidavit (T. Krishnaswamy Vs. Maniyamma, AIR 2001 AP 37 ).

( 13 ) Right of pleading and practising of law is conferred only on registered advocate. Petitioner who was chartered accountant was a recognized agent holding power of attorney, could file application on behalf of party as such recognized agent, But he is not validly eligible to plead and practice as an advocate.

( 14 ) Under Order III, Rule 1 of CPC recognized agents and those holding power of attorney from party authorizing them to make such appearance and filing such application under or do prescribed acts. The law distinguishes recognized agent from pleader (Jaymol Thokone Vs. Chanty Commissioners, Ahmedabad, AIR 2001 Guj. 279 ).

( 15 ) An advocate who is personally interested in a case, should retire from the case and should not accept brief (S. S. Reddy Vs. Chief Secretary, AIR 1987 SC 1550 ).

( 16 ) In the absence of Rules framed an application or petition under Article 226, must be drawn in conformity with the provisions of the Civil Procedure Code relating to pleadings, as far as possible (Kishorilal Kanoo vs. Deputy Commissioner, Kamrup, AIR 7955 Assam 183 ). The application should contain, in a concise form, the material facts on which the party relies for his claim (ITO vs. Damodar Bhat, M. , AIR 1969 SC 408 (414) and must not be vague (Municipal Bd. Maunath Bhanjan Vs. Swadeshi Cotton mills Co. Ltd. 1977 SC 1055 : (1977) 2 SCC 875 ).

( 17 ) In A. K. K. Nambiar, Appellant Vs. Union of India and Anr. AIR 1970 SC 652 (V 57 C 125), the Supreme Court has observed as follows:

\the reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties.

Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In absence of proper verification, affidavits cannot be admitted in evidence. \

( 18 ) The allegations in the application must be supported by affidavit and sho

uld be similarly answered by an affidavit in opposition by the respondent. A copy of the affidavit in opposition should be furnished to the applicant in good time before the date fixed for hearing and applicant will also be at liberty to use a reply, also furnishing copies to the respondent (Khudiprasad Bhakat Vs. State of West Bengal, AIR 1952 Cal. 798).

( 19 ) The affidavit must be that of the applicant himself. An affidavit of an agent or employee is not in order (Tropicalins. Co. Vs. Union of India, (1955) 2 SCR 517 (519) : air 1955 SC 789 ).

( 20 ) The affidavit should be confined to statements of facts and should not be used as vehicle of argument (Dwarka Nath Vs. IT0, air 1966 SC 81 (88) ).

( 21 ) An affidavit which is not in conformity with O. 19, R. 3 (Barium Chemicals Vs. Company Law Bd. , AIR 1967 SC 295 (319): 1966 Supp. SCR 311) of the CPC is liable to be rejected, unless the defect can be cured by giving the petitioner an opportunity to swear a fresh affidavit, clarifying the defect {dwarka Nath (supra)}. If any averment is not based on personal knowledge, the source of information must be disclosed (Barium chemicals Vs. Company Law Bd. , AIR 1967 SC 295 (319):

( 22 ) The affidavit must be sworn by the person in whose knowledge the facts are {dwarka Nath (supra)}, thus, where there is an allegation of malafides against a minister personally, it must be sworn by himself (Kapur, R. P. Vs. Pratap Singh Kairon, sardar, AIR 1961 SC 1117 (1125), Pratap singh S. Vs. State of Punjab, AIR 1964 SC 72 (85), Rowjee, CS Vs. State of AP, AIR 1964 SC 962 (970) but that would not be necessary where there is no such personal allegation (Lakhanpal, P. L. Vs. Union of india, AIR 1967 SC 908 (915) ).

( 23 ) Any person acquainted with the facts of the case may give affidavit (AIR 1955 trav-Co. 97 (102) (DB), AIR 1954 Cal. 159 (163) (DB), AIR 1953 Nag. 169 (171) (DB), air 1951 Cal. 239 (241) ).

( 24 ) The affidavit should be verified so that the reason for verifying affidavit is to enable the Court to find out what facts can be said to be proved on the affidavit evidence. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence (AIR 1970 sc 652 (653, 654) : A. A. K Nambiar Vs. Union of India and Anr. (Absence of such verification is fatal to the affidavits and the evidence obtained therein should not be admitted or relied on ).

( 25 ) Legal practitioners are officers of the court and when called upon to speak to facts relating to the case in which they are engaged should not be asked to file affidavits. Their statements should be accepted (AIR 1928 mad 690 (692) (DB) ).

( 26 ) Even where allegations in an affidavit are stated to be correct to the best of the knowledge the nature and source of the knowledge must be disclosed. If the nature and source of knowledge is not disclosed the affidavit would not be as per law (AIR 1982 sc 65 (69, 70) ).

( 27 ) Writ petitions under Article 226 of the constitution are entirely decided upon affidavits and to a certain extent take on the characteristics of interlocutory applications and it is not necessary that everything in the affidavit must be true to the personal knowledge of the deponent (AIR 1954 Assam 161 (164) (DB) ), (1954) 58 Cal. WN 1066 (1076) ).

( 28 ) Under R. 1 (2) of Chap. XXII. Vol. 1 of Rules of Court, 1952 of the High Court of Allahabad, an affidavit accompanying a writ petition must be restricted to facts which are within the deponent's own knowledge (AIR 1962 AH 70 (71), 19

56 All LJ 198 (200 ).

( 29 ) Where a person swears an affidavit in a case which does not concern him it is not enough to make a formal verification that he is personally acquainted with the facts deposed to in his affidavit; he must explain how he became acquainted with the events and happenings which did not ordinarily appear to concern him (AIR 1962 All 70 (71), (M/s sukhwinder Pal Bipan Kumar and Ors. etc. Vs. State of Punjab and Ors.) 1982 All LJ 586 (590 ).

( 30 ) An affidavit in support of the writ petition or the counter affidavit must conform to the provisions of O 19, r 3, cpc or the provisions analogous thereto (1990) 2 Pat LJR 206 (212 ).

( 31 ) Affidavit in support of writ petition or counter affidavit must be in terms of or analogous to provisions of O 19, R 3 (1988 Pat ljr (HC) 414 (417 ).

( 32 ) Bombay High Court Criminal Manual, chapter-VII, page 141, Para 5-Verification of affidavit-affidavits are meant for stating facts and are not meant for submitting arguments affidavits once made cannot be allowed to be changed by amending the same affidavits not properly verified cannot be admitted in evidence (1989 Cri LJ 715 (716, 717) (Bom. ).

( 33 ) Unless the affidavits are properly verified and are in conformity with the rule, they will be rejected by the Court (AIR 1962 Pat 101 (105) (FB), AIR 1968 Cal 388 (389, 390), AIR 1964 Bom. 38 (39,40), AIR 1964 punj 198 (202 ).

( 34 ) Where the matter deposed to is not based on personal knowledge, but on information, the source of information should be clearly disclosed (AIR 1952 SC317 (319), air 1956 Cal. 496 (497 ).

( 35 ) The swearing to a false affidavit is an offence of perjury under S. 191 of the Penal code. It is a grave and serious matter and the Court will not take a lenient view of the matter (AIR 1963 Punj. 185 (186) : 1963 (1) Cri LJ 478.

( 36 ) In T. K. Krishnaswamy Vs. Smt, maniyamma, AIR 2001 Andhra Pradesh 37, the Supreme has observed as follows :

\in fact, as held in the case of Sutharsana vs. Samarapuri, AIR 1928 Mad 690, a Division bench of Madras High Court observed that though vakils and other practitioners of the court, when they are called upon to speak to facts known to them by way of evidence in any litigation, are not different from other witnesses and would have to depose like all other witnesses, still a well recognized practice has grown up in all Courts of accepting the statements from the Bar of practitioners with regard to matters in connection with the very litigation in which they are engaged as practitioners. It is further observed that for that purpose, they were really regarded as officers of Court owing a duty to the Court and it was expected that such statements would be truly made with a full realization of the sense of responsibility and that it was not necessary to insist upon their making an affidavit. \ (Para 9)\thus, a statement made by an advocate across the bar in respect of the matters which are in his personal knowledge on the question before the Court can be accepted. There is no reason why an affidavit sworn to by him could not be accepted. \ (Para 10)

( 37 ) There is no doubt that any person acquainted with the facts of the case may give an affidavit as a deponent. A statement made by an advocate (in a matter before the Court)verifiable from records or statement across the Bar in respect of matter which are in his personal knowledge, could be accepted by the Court and such advocate may not be insisted upon to support such statement by affidavit, however, there is no reason why an affidavit sworn by him could not be accepted.

( 38 ) The advocate on being engaged by a party on Vakalatnama is entitled to plead, argue and assist the Court as an officer of the court, fairly, honestly without identifying himself with the cause or party. The advocate is not to personify the party/client and is not expected to involve himself stepping into and moving through the shoes of party/client becoming a party interested, fomenting the litigation, to achieve the end as cherished by the party. The advocate as officer of the Court when called upon to address on the facts relating to the case in which he is engaged should not be asked to file affidavit and his statements should be accepted but the advocate of Bar Council whose name is entered on state roll by virtue of becoming a different class, alone is entitled to practice subject to the restrictions, norms and provisions of the advocates Act as well as the rules framed by the High Court and/or by the Bar Council of India and/or by Bar Council of States; however, the Court/authority at its pleasure and in the interest of justice may permit any person (not even as an advocate) to appear in a particular case. Though not specifically provided in advocate Act, or rules of Bar Council of India, or rules of State Bar Council, the advocate however, has to maintain the status and role and dignity of profession of advocate. Judicial propriety requires that advocate should not file an affidavit himself for a party as deponent in support of the averments of a petition in which he is engaged as an advocate as the affidavits are stated to be correct on facts, records, to the best of the knowledge, the nature and source of knowledge and information are to be disclosed. If the nature or knowledge of information are not disclosed the affidavit would not be as per law. The affidavit has to be made by a person or party or agent or pairokar or authorized person or power of attorney holder having cognizance of facts deposed to an affidavit disclosing clearly the status of deponent and the manner and capacity how he is authorized to swear the affidavit besides that affidavit must be in proper proforma giving details, statements of facts, information, records, knowledge, declaration, legal advice, verification and identification. One such proforma is provided in amendment of Allahabad made in Order 19, rules 4 to 15, CPC.

( 39 ) An affidavit in support of writ petition must be in consonance to the provisions of order 19, Rule 3, CPC and unless the affidavit is properly verified and is not in conformity with the rule, it may be rejected by the court and when the matter deposed to is not based on personal knowledge, but on information, the source of information should clearly be disclosed.

( 40 ) In view of the above observations and in the facts and circumstances, the affidavit in support of the present writ petition is neither in proper form nor Shri Jaiswal as an advocate is entitled to swear the same. This court is not inclined to invoke its extra ordinary discretionary jurisdiction to entertain the writ petition under Article 226 of the Constitution, therefore, without commenting anything on merits, it is dismissed, however, the petitioner is at liberty to file a fresh writ petition if so advised, in consonance to the rules and law with the support of proper affidavit of relevant person.

( 41 ) In view of the above order, the Misc. Case No. 139 (AP) 05 is also dismissed.