

**(2007) 08 AP CK 0025**

**Andhra Pradesh High Court**

**Case No:** C.M.A. No. 414 of 2007

P. Venkatram Reddy

APPELLANT

Vs

Senior Divisional Manager, LIC of  
India and Another

RESPONDENT

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**Date of Decision:** Aug. 2, 2007

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 19, Order 43 Rule 1, Order 9 Rule 13, Order 9 Rule 9, 151

**Citation:** (2007) 6 ALD 553 : (2007) 3 APLJ 93

**Hon'ble Judges:** P.S. Narayana, J

**Bench:** Single Bench

**Advocate:** C.V. Suryanarayana and Rajamalla Reddy, for the Appellant; A.P. Venugopal, for M. Seshagiri Mangipudi, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

P.S. Narayana, J.

Heard Sri C.V. Suryanarayana, learned Counsel representing the appellant and Sri A.P. Venngopal, representing Sri Seshagiri Mangipudi, learned Counsel representing the respondents.

2. The order impugned in the present civil miscellaneous appeal reads as hereunder:

Both sides present. This petition shows that the affidavit is filed by Junior Counsel and the respondents filed rulings laid down by the Hon"ble High Court vide [Pasupuleti Subba Rao Vs. Nandavarapu Anjaneyulu](#), along with the counter and the said Ruling laid down says that affidavit of party to proceedings should alone file the affidavit and not Counsel.

Hence, in view of the said Ruling, this petition is dismissed.

3. The learned Counsel representing the appellant submitted that the appeal was dismissed for default during call work for want of representation and the junior Counsel on record was attending the Court of Chief Judge during the call work and after attending the said Court, immediately he came to the concerned Court, but by that time the appeal was dismissed for default and these facts had been well narrated in the affidavit filed in support of the application for restoration of the appeal. The Counsel also would maintain that the learned Judge dismissed the application on the ground that the appellant did not file the affidavit in support of the application. The Counsel also would maintain that it is true that initially the application was filed with an affidavit by the Counsel on record, but subsequent thereto the affidavit of the party also was filed and inasmuch as the defect, if any, had been duly rectified, instead of dismissing the application on such a technical ground, the learned Judge could have allowed the application while exercising the discretion. The Counsel also relied on the decision of this Court in [B. Mallikarjuna Reddy Vs. G.V. Subba Reddy](#) .

4. Per contra, Sri A.P. Venugopal, learned Counsel representing the respondents would point out that this application filed under Order 9 Rule 9 read with Section 151 of the CPC itself is not maintainable since when the appeal was dismissed for default, an application could have been filed under Order 41 Rule 19 of the Code of Civil Procedure. Further the Counsel would explain that the subsequent rectification of the defect, if any, would not enure to the benefit of the party. The learned Counsel placed strong reliance on the decision of this Court in [Pasupuleti Subba Rao Vs. Nandavarapu Anjaneyulu](#) .

5. The order impugned in the civil miscellaneous appeal already had been specified supra.

6. The civil miscellaneous appeal is filed under Order 43 Rule 1 of the Code of Civil Procedure, hereinafter in short would be referred to as Code for the purpose of convenience, being aggrieved of the order dated 5.10.2005 made in IA No. 380 of 2004 in AS No. 231 of 2002 on the file of Court of the XII Additional Chief Judge, City Civil Court at Hyderabad (Fast Track Court). The said application was filed explaining certain reasons at paragraphs 2 to 5 of the affidavit filed in support of the application under what circumstances the default order was made. This affidavit was sworn to by the junior Counsel on record.

7. It is no doubt true that the application was filed under Order 9 Rule 9 read with Section 151 of the Code. It is also true that for restoration of appeal, the application could have been moved under Order 41 Rule 19 of the Code, but it is needless to say that the mere quoting of wrong provision of law always need not end in the dismissal of application if otherwise the application be allowed in the light of the facts and circumstances of a particular given case.

8. It is also not in serious controversy that the affidavit of the appellant also was filed. It is stated that the said affidavit of the appellant was filed just one day prior to the passing of the said order. The learned Judge could have taken the said affidavit also into consideration and inasmuch as the initial defect, if any, having been duly rectified, the learned Judge could have exercised the discretion of allowing the application instead of dismissing the application.

9. Be that as it may, the grounds averred in these affidavits filed in support of the application are not being seriously controverted. It is true that this Court in Pasupuleti Subba Rao's case (supra), observed that the practice of Advocate filing his affidavit in a petition under Order 9 Rule 9 of the Code is totally wrong and illegal and such practice to be deprecated and Order 9 Rule 9 or Order 9 Rule 13 of the Code contemplate filing of applications only by the parties concerned and not by the Counsel and the Counsel is permitted only to represent his case and he cannot step into the shoes of his client.

10. In B. Mallikarjuna Reddy's case (supra), this Court at Paragraphs 9 and 10 observed as hereunder:

It is no doubt true that normally an application should be supported by an affidavit of the party preferably or the deponent should be a person who has knowledge about the facts sworn to in the affidavit. Quite often the Courts do come across this situation where the learned advocates or the advocate clerks would be filing affidavits in Courts along with the applications. Unless and until the facts specified are within their knowledge and domain only, normally this practice not to be permitted. However, in the peculiar facts and circumstances, especially taking into consideration the stand taken in the written statement filed by the respondent-defendant, this Court is of the considered opinion that dismissal of the application by the learned Judge cannot be justified. Equally, the blameworthy conduct of the appellant

Taking the peculiar facts and circumstances into consideration this Court is of the considered opinion that the impugned order be set aside on condition of the appellant-plaintiff depositing costs of Rs. 1,000/- (Rupees one thousand only) or paying Rs. 1,000/- (Rupees one thousand only) to the Counsel representing the respondent-defendant before this Court on obtaining receipt from the said Counsel within a period of two weeks from today.

11. It is no doubt true that this practice of filing affidavits by the Counsel supporting the applications normally to be deprecated, but this is a case concerned with the appeal and it is needless to say that at the appellate stage normally the parties are not expected to be present on every date of hearing and the concerned Counsel will be looking after such matters. Even otherwise the facts which had been narrated in the respective affidavits would go to show that these facts are very much within the domain and knowledge of the Counsel, who had sworn to the affidavit. Hence, in the

light of the same, this Court is of the considered opinion that the learned Judge had not exercised the discretion properly and an opportunity to be given to the appellant by setting aside the default order made, dismissing the appeal for default.

12. In view of the above, the civil miscellaneous appeal is hereby allowed and the appeal AS No. 231 of 2002 on the file of XII Additional Chief Judge, City Civil Court, at Hyderabad (Fast Track Court) be restored to file. There shall be no order as to costs.