**(1996) 02 AP CK 0045**

**Andhra Pradesh High Court**

**Case No:** Civil Revision Petition No. 2816 of 1995

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| Manduva Srinivasa Rao | | APPELLANT |
| | Vs | |
| Sajana Granites, Madras and others | | RESPONDENT |

**Date of Decision:** Feb. 28, 1996

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 6, Order 9 Rule 6(1), Order 9 Rule 7

**Citation:** AIR 1997 AP 49 : (1996) 1 ALT 648

**Hon'ble Judges:** S.R. Nayak, J

**Bench:** Single Bench

**Advocate:** T. Veerabhadraiah, for the Appellant; Manohar, for V. Sudhakar Reddy, for the Respondent

**Judgement**

@JUDGMENTTAG-ORDER

1. The revision petitioner is the first defendant in O.S. No. 158 of 1992 on the file of Additional .Subordinate Judge, Ongole. The suit was posted before the trial Court on 8-3-1995 for filing the written statement of the defendanls. At the time of hearing, Sri Veerabhadraiah, learned Senior Counsel appearing for the revision petitioner placed a memo extracting the order made by the trial Court on 8-3-1995. It reads as under :--

"Written statement of D-1, D-3, D-4 and D-10 to D-14 not filed. D-2 called absent as seen from the R.P. it was returned that the D-2 left. Plaintiffs'' counsel requested for steps. Hence it is ordered summon to D-2 by Publication in Hindu Daily Publication circulating in Madras. D-l, D-3, D-4 and D-10 to D-14 called absent and set ex parte. For publication and summons to D-2 call on 6-6-1995."

As could be seen from this order, the first defendant, along with certain other defendants, was called and since they were absent the learned trial Judge set them

ex parte.

2. There afterwards, the present I.A. No. 573 of 1995 was filed by the first defendant under Order 9, Rule 7, C.P.C. praying the Court to set aside the order made on 8-3-1995 against him. This application was filed before the trial Court on 14-3-1995. In support of this application, the first defendant filed two affidavits. In the affidavit of the first defendant it is stated that the suit stood posted to 8-3-1995 and on that day the first defendant was not present in the Court-and his brother by name Mr. Vcnkat Rao also was not present. The first defendant proceeded to aver in the affidavit that the written statement was already prepared before 8-3-1995 and that was also signed by him. However, the written statement was kept in another big bundle. In para-5 of the affidavit, the first defendant has stated that when the suit was called on 8-3-1995, the Junior Counsel Sri K. Nageswara Rao, appeared and he made a request to the Court for grant of time. It is further averred that the Junior Counsel was under the impression that the time sought by him was g''ranled by the Court for filing the written statement and the case was adjourned to 6-6-1995. In addition to this affidavit, the affidavit of the Senior Counsel appearing for the first defendant in the suit is also filed. Sri K. Venkateswarlu. the Senior Counsel has also stated in the affidavit that, when the suit was called on 8-3-1995 the Junior Counsel appeared and made a request for grant of time and the Junior Counsel was under the impression that the time was granted for filing written statement and on the basis of information passed on by the Junior Counsel, the clerk made a docket entry "W.S.T.E. call on 6-6-95".
3. The learned trial Judge has rejected the application. Hence this revision.

4. Heard Sri T. Veerabhadraiah and Sri E. Manohar (appearing for respondents I to. 3) for a quite considerable time.

5. It is hardly necessary to state that the learned trial Judge made the order on 8-3-95 by virtue of the power available to him under Order 9, Rule 6, C.P.C. Rule 6 of Order 9, C.P.C. provides that "where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then among other things, if it is proved that the summons was duly served on the defendant, the Court may make an order that the suit shall be heard ex parte". In this case, summons was already served on the first defendant and in fact, he had appointed a counsel also before 8-3-1995, Therefore, the order, dated 8-3-1995 was obviously made under Rule 6(1) of Order 9 of C.P.C.

6. I.A. No. 573 of 1995 was filed under Order 9, Rule 7, C.P.C. Under Order 9, Rule?, the Court can allow the application and set aside the ex parte order earlier made, provided the applicant assigns good cause for his previous non-appearance. Therefore, the question to be considered is whether the first defendant has assigned good cause for his non-appearance on 8-3-1995.

7. In order to show good cause, the first defendant has filed two affidavits before the ,Court below. 1 have already referred to the material averments in the two affidavits regarding what had happened before the Court on 8-3-1995. In my considered opinion, if the statements made in the two affidavits are taken to be true and correct, then the observations made by the learned trial Judge in the docket order dated 8-3-1995 should necessarily be false and incorrect. It is highly incredible that if the Junior Counsel appearing for the first defendant, as claimed by the affidavits, was present before the Court on 8-3-1995 and requested the Court to grant some more time to file written statement on behalf of the first defendant and despite such request of the learned Counsel, the learned trial Judge would make the docket order to the following effect:

"D-l. D-3, D-4 and D-10 to D-14 called absent and set ex parte."

8. Therefore, the question to be considered is whether the party or his counsel can be permitted to question the correctness of the statement made by the Presiding Officer of a Court in leg.i) proceedings in respect of what had happened in the Court. There is a direct decision, on this question, of the Apex Court in State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, . In that case, when Sri A. K. Sen, former Attorney General of India made certain factual submissions as to what actually happened before the Bombay High Court the Supreme Court did not permit him to contest the correctness of the statement made by the learned Judges of the Bombay High Court regarding what actually transpired or happened in that Court. In that connection, the Supreme Court observed as fellowship. 1251 of AIR):

"We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". [Per Lord Atkinson in Soma-sundaran v. Subramanian AIR 1926 PC 136. We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error Per Lord Buckmaster in Madhusudan v. Chan-drabati AIR 1917 PC 30. That is the only way to have the record corrected."

Therefore, this decision is an authority to hold that neither the counsel nor his party will be permitted to question the correctness of the statement made by the learned trial Judge in his docket order, dated 8-3-1995. However, Sri Veerabhadraiah, learned senior counsel would submit that the first defendant docs not contest the correctness of the statement made in the docket order, dated 8-3-1995. That submission is not acceptable to the Court. As already pointed out supra, if the submissions contained in the two affidavits are accepted as correct, the logic and reason will conclude that the statement contained in the docket order, dated 8-3-1995 is factually incorrrect. Added to this, it was highly incredible to believe that when a counsel appears on behalf of a party and requests the Court to grant some more time, that would escape the attention of the Court and the Court would proceed to call the parties and place them ex parte, without noting the presence of the counsel and his request in the order.

9. In the light of what is stated supra, if the two affidavits are eschewed, there is nothing on record to show good cause under Rule 7 of Order 9, C.P.C. The Court can allow the application only in the event of a party showing good cause for his non-appearance on the previous occasion. Since there is no good cause shown by the applicant, the learned trial Judge is fully justified in rejecting the application.

10. However, Sri T. Veerabhadraiah, the learned senior counsel appearing for the petitioner would contend that the first defendant should not b,e punished for the lapse of the counsel to appear before the Court on 8-3-1995. In support of this submission the learned senior counsel placed reliance on certain decisions of the Apex Court, I do not find any necessity to refer to those decisions because I am in full agreement with the submission of the learned counsel. It is true that in civil litigations when a party appoints an advocate to prosecute the case on behalf of him, it is not expected that such a party should appear before the Court at every stage of the hearing. Such a party reposes confidence in his counsel that the counsel would prosecute his case diligently and responsibly and attend to the hearings of the case. I would have appreciated the submission of the learned senior counsel if it is the case of the first defendant that on 8-3-95 his counsel did not appear and did not file the written statement which was already prepared and signed by the first defendant The specific case of the first defendant is that the junior counsel appeared before the Court when the case was called on 8-3-1995 and he made a request to the Court to grant him time for filing the written statement and the Court granted time till 6-6-1995. This specific case of the first defendant cannot be accepted for the reasons already stated supra. The first defendant should stand or sink on the basis of the case putforth by him in his application. Quite curiously, in this case, the affidavit of the. junior counsel who is stated to have appeared before the Court on 8-3-1995 is not filed. There is inconsistency in the stand of the first defendant. In the pleading he has asserted that the junior counsel appeared before the Court when the case was called on 8-3-1995 and sought for time for filing written statement and the Court also granted the time till 6-6-1995 and his senior

counsel at the time of argument submitted that the first defendant should n6t be punished for the lapse of the advocate. The first defendant in his affidavit has not stated that his counsel did not appear before the Court. On the other hand the first defendant has fully reiterated the stand taken by his senior counsel appearing in the trial Court that the junior counsel appeared for the first defendant on 8-3-1995 when the case \\\\as called. The first defendant cannot be permitted to contradict the statement made by the trial Judge in the docket order. Equally, the first defendant cannot be permitted to] contend that he should not be punished for the lapse of his advocate, which plea advanced by his advocate in this revision is not supported by the pleading of the first defendant filed before the Court below.

In the result and for the foregoing reasons there is no merit in the C.R.P. and it is accordingly dismissed. No costs.

11. Petition dismissed.