

Karnataka High Court V.R. Kamath vs Divisional Controller, . . . on 19 February, 1997 Equivalent citations: AIR 1997 Kant 275, ILR 1997 KAR 1856 Bench: R Raveendran ORDER 1. When the matter came up for consideration on 14-2-1997 during arguments, the Learned Counsel for the Respondent pointed out that while the Petitioner is 'V. R. Kamath', the vakalath and the affidavit verifying the writ petition are signed 'Kaviraja'. He pointed out that neither the petition, nor the affidavit or vakalath indicated that Petitioner was represented by any Attorney Holder. The Counsel for Petitioner admitted that the affidavit and vakalath were signed by a different person, due to oversight. In the circumstances, a notice was issued to the Oath Commissioner who had administered the oath, to produce the register maintained by her to show whether such an affidavit was sworn to before her and to offer her explanation. The Oath Commissioner has filed her explanation by way of an affidavit dated 17-2-1997. At the request of the Petitioner's counsel, this case which was directed to be listed on 28-2-1997, is taken up today. 2. The Oath Commissioner has admitted that she had administered the oath regard to the affidavit verifying the petition on 30-1-1997; that due to oversight, the signature of some one other than the Petitioner was obtained to the affidavit of petitioner; and that though the normally insists that the persons making the affidavits should appear before her and sign the affidavits, in this case the mistake has occurred unintentionally and accidentally. Though she was required to produce the Oath Register maintained by her, she has not produced it. She stated in answer to a query that she has not recorded this transaction in the Oath Register nor issued a receipt for the fee received. She has assured that she will ensure in future that no such errors occurred. 3. Notaries and Oath Commissioners are required to follow the Rules carefully in administering oath/affirmation. The act should not be done in a casual or incomplete manner giving room for an impression that the affidavit has been attested in the absence of the deponent or that the affidavit has been attested on a day other than the day on which it was signed by the deponent or that the transaction has not been entered in the Oath Register. The possibility of a mix up in regard to the persons signing the affidavits or possibility of an oath or affirmation being administered to a wrong person, is a matter of grave concern. The Rules have been framed precisely to safeguard against such contingencies and to ensure that such mistakes do not occur. On account of the Rules not being followed sincerely, such mistakes and mix-ups continue to occur. 4. It is unfortunate that the importance of affidavits and the seriousness attached to due and proper execution thereof is constantly ignored or missed by the persons concerned. An affidavit is not a mere typed format, to be signed and attested as an empty formality. An affidavit is a solemn and voluntary declaration or statement of facts in writing, relating to matters in question or at issue, and sworn or affirmed and signed by the deponent before a person or officer duly authorised to administer such oath or affirmation. An affidavit constitutes evidence, where so provided or agreed. Ordinarily evidence has to be recorded viva voce and matters should be decided on such oral evidence. But in several types of cases, in particular summary proceedings, facts are permitted to be proved by affidavits; and affidavits are treated as a substitute for oral evidence.

The Courts are required to determine disputes or causes and make orders or give judgments, acting on such affidavits. In the absence of due ‘affirmation’ or ‘swearing’, an affidavit has no value and in fact is not valid. 4.1. Order 19, Rule 1 of C.P.C. provides that any Court may order that particular fact may be proved by affidavit. Order 37A, Rule 3 of CPC provides that every interlocutory application shall be supported by an affidavit. Chapter X, Rule 2 of the High Court of Karnataka Rules, 1959 provides that every interlocutory application shall be supported by an affidavit. 4.2. Writ Petitions being summary proceedings, are decided on the basis of affidavits. Rule 3 of the Writ Proceedings Rules, 1977 provides that every petition under Articles 226 and 227 of the Constitution of India shall be supported by an affidavit in the prescribed form verifying the facts set out in the petition, specifically indicating which facts are verified from knowledge of the deponent and which facts from information and his belief and also contain a statement that the copies of documents produced are true copies. Rules 5 and 21 of the said Writ Rules provide that objections to a writ petition and a reply to objections in a writ petition shall also be supported by affidavits. Unless the subject-matter involves complicated questions of facts requiring oral evidence, the writ petitions are decided on the averments contained in the writ petition and the statement of objections, truth of which is affirmed in the affidavits verifying such writ petition and statement of objections. 4.3. Thus, when an affidavit is tendered in Court, it is intended to be acted upon as evidence in such proceedings. Evidence, unless given on oath or solemn affirmation, is of no value. Normally administering oath before recording evidence is the function of persons authorised to receive evidence. This important and solemn function is assigned and entrusted to Notaries, Oath Commissioners and Designated Officers, under Code of Civil Procedure, Code of Criminal Procedure and High Court Rules. Persons entrusted with the duty and power of administering oath or affirmation should always bear in mind, the solemnity and sanctity attached to the act of administering oath/affirmation; they should not forget that affidavits are intended to be acted upon as evidence for rendering decisions determining rights and obligations of parties. Decisions on Writ Petition, Civil Petitions, Interlocutory Petitions wholly depend on averments affirmed by affidavit, replacing the requirement of oral evidence. Administering oath/affirmation to a wrong deponent is nothing but permitting impersonation of a witness giving evidence. Making an endorsement relating to administration of oath or affirmation in the absence of a party, is similar to recording evidence in the absence of the witness. Such things should not happen; these things cannot be permitted to happen; and that these matters are required to be reminded to the persons concerned, is an indication of the sad state of affairs. 5. Section 3(1) of the Oath Act, 1969, empowers Courts and persons having by law or consent of parties, authority “to receive evidence, to administer oaths and affirmation in discharge of the duties imposed or in exercise of the powers conferred upon them by law. Sub-section (2) of Sec. 3 of Oaths Act provides that the High Court may empower any person to administer oaths and affirmation in respect of affidavits for the purpose of judicial proceedings. Section 139 of Code of Civil Procedure provides that in the case of any affidavit under the

Code, oath or affirmation may be administered to the deponent by any Court or Magistrate, any Notary appointed under the Notaries Act, 1952 or any officer or other person appointed by the High Court in that behalf or any officer appointed by any other Court which the State Government has generally or specially empowered in that behalf. Section 297 of Code of Criminal Procedure provides that affidavits to be used before any Court under that Code may be sworn or affirmed before any Judge or any Judicial or Executive Magistrate, any Commissioner of Oaths appointed by a High Court or Courts of Session or any Notary appointed under the Notaries Act, 1952. 5.1 Rule 5A of Chapter XI of the High Court of Karnataka Rules, 1959 provides for appointment of Advocates as Oath Commissioners by the High Court for the purpose of administering Oath or affirmation in case of affidavits intended to be used in the High Court. Sub-rule (2) of Rule 5A requires the Oath Commissioner to maintain a register in the form prescribed, in which particulars of all affidavits shall be entered; and the Oath Commissioner is required to pass a written receipt to the deponent for the fee received in the form prescribed. Note 2 to the said Rule provides that, with a view to ensure that particulars of all the affidavits which are attested are duly entered in the Register and receipts for the fee received are given, the Oath Commissioner should send a report within 15 days at the end of every three months, about the total number of affidavits attested and the amount of fee collected during the previous quarters to the Registrar or any other authorised officer of the High Court; and the Registrar or the Authorised Officer is empowered to make periodical inspection of their Registers and receipt books. 5.2 Rule 5A(2) requires the Oath Commissioner to maintain a Register in the form prescribed and to enter the serial number, name and address of the person tendering the affidavit, date of administering oath or affirmation in columns (1), (2) and (3) of the register maintained by him, in regard to each oath/affirmation administered by him. The Oath Commissioner is required to take the signature or thumb impression of the deponent in column (4). He is required to enter the name of the Court in which the affidavit is intended to be filed in column (5). He has to obtain the name, address and signature of the person identifying the deponent who is personally known to the Oath Commissioner in column (6). The Oath Commissioner is required to sign in column (7) for having performed the act of administering the oath/affirmation. The form prescribed for the receipt requires the serial number of the affidavit in the register of affidavits and the amount received towards fee for administering the oath/affirmation to be mentioned in the receipt. 5.3 Rule 28A of the Karnataka Civil Rules of Practice, 1967, contains provisions identical to Rule 5A of High Court of Karnataka Rules, for appointment of Advocates as Oath Commissioners by High Courts for the purpose of administering oath or affirmation in case of affidavits intended to be used in the Civil Courts. 5.4 Rule 5 of Chapter XI of the High Court of Karnataka Rules, 1959, provides that affidavits intended for use in the High Courts may be made before and attested by any judicial officer, Magistrate or other presiding officer of civil, criminal or revenue Court; any Registrar or Sub-Registrar of Assurances; the Registrar, Additional Registrar, Joint Registrar, Deputy Registrar or Assistance Registrar of any High Court the

Chief Ministerial Officer of any Civil Court; and any Notary appointed under the Notaries Act, 1952. 5.5 Section 8(e) of the Notaries Act, 1952 empowers a Notary to administer oath to, or take affidavit from any person. Rule 11(2) of the Notaries Rules, 1956, requires a Notary to maintain a Notarial Registrar showing serial number, date, nature of notarial act, name of the executant or person concerned with full address, contents of document, notarial fee-stamp affixed, fee prescribed and fee charged, serial number of receipt book. The Notary is also required to obtain the signature of person who is executing the document, in the Register. 5.6 Rules 6 to 9 of Chapter XI of High Court Rules provide how the deponent should sign or put his mark and how the Attesting officer (including a Notary of Oath Commissioner) shall attest and certify such affidavits. The Attesting Officer is required to authenticate every correction, alteration or interlineation by placing his initials near it and also enter at the foot of every page the number of such authenticated corrections, alterations or interlineations and enter the words 'nil' if there are none; and initial such entry and sign his name and enter his designation at the end of the affidavit and affix thereto the official seal. If the deponent is not personally known to the Attesting Officer, he should be identified by a person known to the Attesting Officer and the fact of such identification together with the name and description of the person making the identification is required to be recorded at the end of the affidavit. If the deponent is not known to the Attesting Officer, and is not identified by and other person, the left hand thumb impression of the person making the affidavit is required to be affixed at the end of the affidavit and be certified to be such impression by the Attesting Officer. If the deponent appears to be an illiterate or blind or is unacquainted with the language in which the affidavit is made or written, the affidavit has to be read out and explained to the deponent in a language known to him in the presence of the Attesting Officer, who should certify that it was so explained in his presence and that the deponent appeared to understand the same and signed his name or made his mark in the presence of the Attesting Officer. If any document is referred to in the affidavit and is produced with it, the Attesting Officer is required to make an endorsement in such document stating that it was the document referred to as an exhibit (with assigned exhibit number) in the affidavit of the deponent. The Attesting Officer is required to make an endorsement about the administration of oath or affirmation to the deponent by an endorsement at the end of the affidavit that it was sworn to or solemnly affirmed before him, specifying the date and then sign such endorsement. 6. Thus when a Notary/Oath Commissioner administers an oath/affirmation, he is mandatorily required to enter the name and particulars as prescribed and obtain the signature of the deponent in their registers. Such entries are required to be made serialiation by assigning a separate serial number for each transaction. The prescribed procedure for attesting affidavits makes it clear that making of endorsements on the affidavit and recording the particulars and obtaining the signature in the Register, is an integral part of the act of attestation or act of administering oath/ affirmation. It, therefore, follows that while making necessary endorsements in the affidavit, the Attesting Officer will have to mention the reference number of the transaction (as

entered in the Register) in the endorsement made at the end of the affidavit. It is also necessary that the Attesting Officer should mention his address to show the place where the affidavit is attested. Judicial notice can be taken of the fact that only some of the Notaries and Oath Commissioners note the serial number (reference number) of the attestation as entered in their Register in the affidavit/document and state their address while making the endorsement. In most of the affidavits, it is seen that merely the official seal of the Notary is affixed and the endorsement that "the affidavit is sworn to or solemnly affirmed in his presence" is made, giving only the date of attestation and the name of the Notary Public. The serial number of the transaction and the place of attestation (address) is not mentioned. Having regard to the requirement of the relevant Rules, this is insufficient. For attestation or administration of oath/affirmation to be complete, necessary particulars have to be entered and signatures affixed in the Register and the endorsement made on the affidavit should contain the serial number of the transaction as entered in the Register and also contain the place of attestation (address of the Notary/Oath Commissioner). Mentioning the serial number of the transaction (as entered in the Register) in the affidavit while making the endorsement of attestation is the only way of ensuring that a record of attestation is maintained by the Oath Commissioner/Notary. This requirement is also evident from a combined reading of the relevant provisions governing the matter. Unless the transaction particulars are entered, and the signatures are affixed in the Register as required, and the serial number of the transaction in the Register and the place of attestation (address) are mentioned in the endorsement made, the act of administration of oath/affirmation will be incomplete, and it cannot be said that in such circumstances the affidavit is duly attested. It will be a defective affidavit. 7. It is mentioned at the Bar that many litigants are in far away places and it is difficult to secure their presence for attestation and in view of the urgency, some times the endorsement regarding administration of oath/affirmation might be obtained in the absence of parties and consequently the transactions may not be entered in the Register. Unfortunately, whenever exceptions are frequently made to the Rule, by relaxing the application of the Rule, the exceptions tend to replace the Rule, apart from the fact that no such exception can be made. There is no point in providing a Rule, if it is to be observed only in breach and the breach is to be justified by pleading practical difficulties and hardship. Observance of any Rule involves discipline and effort. So long as the Rules require that the transactions will have to be entered in the manner provided, they will have to be complied with. 8. It was next submitted that there are several types of instruments/documents which require to be attested; and in the case of some, maintaining a record may be necessary, while in the case of others, it may not be necessary. It is stated that where the document is a power of attorney or a Declaration, entering the particulars of transactions and obtaining of signatures in the Notarial Register may be absolutely necessary; having regard to the nature, purpose and intent of the document; and that if on the other hand, the document is an affidavit to be used in Court proceedings or a true copy of original document, which is attested as such, there is no need to maintain an elaborate record. It is con-

tended that if a Chief Ministerial Officer or a Registrar of a Court administers oath/ affirmation, he is not required to enter the particulars and obtain signatures in a Register. It is pointed out that in neighbouring States, affidavits to be used in judicial proceedings can be attested by Advocates without the need for Registers and entries. But, there are arguments in support of an attempt to make out a case for abolishing or modifying the Rule and are not answers for breach of the Rule. 9. The Courts will not act on defective affidavits, which are not attested in the manner required by law. Let a copy of this order be made available to the Registry of this Court and the Secretary, Law Department Government of Karnataka, so that they may take steps to bring to the notice of the Oath Commissioner/Notaries in the State, the requirement relating to proper form of attestation of affidavits (recording of the transaction in the Register and noting the reference number of the Register and place of attestation in the affidavits). The concerned authorities shall also ensure due observance of the Rules relating to Oath Commissioner/Notaries, which require the submission of quarterly reports by the Oath Commissioner and returns in Form XIV by Notaries and inspection of their registers by the person authorised. To avoid invalidation of acts already done, the directions contained herein shall be effective prospectively. 10. In this case, having regard to the explanation furnished by the Oath Commissioner, admitting her mistake and assuring to act properly in future, I do not find it necessary to direct initiation of any action against the Oath Commissioner, in pursuance of the notice, and treat it as closed. 11. As the affidavit verifying the writ petition is signed by some one other than the petitioner it has to be held that the petition filed is defective. One week for rectification. 12. Order accordingly.