

# V.P.Abdul Kareem vs Mehroof Manalody

**Author: K.Ramakrishnan**

**Bench: K.Ramakrishnan**

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 8TH DAY OF SEPTEMBER 2016/17TH BHADRA, 1938

OP(C).No. 2148 of 2016 (0)

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O.S.366/2012 OF SUB COURT, KOZHIKODE.  
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PETITIONER/DEFENDANT:

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V.P.ABDUL KAREEM, S/O ABOO,  
AGED 55 YEARS, RESIDING AT PLOT NO.4,  
TAMARIND NEST APARTMENT,  
CHEROOTY NAGAR, HOUSING COLONY,  
KALATHIKUNNU AMSOM AND DESOM,  
KOZHIKODE TALUK AND DISTRICT.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENT/PLAINTIFF:

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MEHROOF MANALODY,  
S/O.LATE ABOOBACKER HAJI,  
AGED 44 YEARS, SHAKEELA MANZIL,  
KINASSERY PO, POKKUNNU,  
VALAYANAD AMSOM AND DESOM,  
KOZHIKODE TALUK AND DISTRICT,  
CHAIRMAN AND M.D,  
M/S.GLOSOFT TECHNOLOGIES PRIVATE LIMITED,  
INDUS AVENUE, KALLAI- 673 003.

BY ADV. SRI.P.B.KRISHNAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD  
ON 30-08-2016, THE COURT ON 08-09-2016 DELIVERED  
THE FOLLOWING:

mbr/

OP(C).No. 2148 of 2016 (0)

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APPENDIX

PETITIONER(S)' EXHIBITS:

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EXHIBIT P1 : TRUE COPY OF THE PLAINT IN O.S 366/2012.

EXHIBIT P2 : TRUE COPY OF THE WRITTEN STATEMENT FILED IN  
O.S 366/2012.

EXHIBIT P3 : TRUE COPY OF THE AFFIDAVIT IN SUPPORT OF  
IA 1264/2015.

EXHIBIT P4 : TRUE COPY OF THE AFFIDAVIT IN SUPPORT OF THE  
IA 2896/2016 FILED BY THE RESPONDENT.

EXHIBIT P5 : TRUE COPY OF THE COUNTER STATEMENT FILED BY THE  
PETITIONER TO THE IA 2896/2016.

EXHIBIT P6 : TRUE COPY OF THE AFFIDAVIT IN SUPPORT OF  
IA 2897/2016 FILED BY THE RESPONDENT.

EXHIBIT P7 : TRUE COPY OF THE COUNTER STATEMENT FILED BY THE  
PETITIONER TO THE IA.2897/2016.

EXHIBIT P8 : TRUE COPY OF THE ORDER IN IA 2897/2016  
DATED 12-08-2016 IN O.S 366/2012.

RESPONDENT(S)' EXHIBITS: NIL

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//TRUE COPY//

P.S. TO JUDGE

mbr/

K.RAMAKRISHNAN, J.

[C.R.]

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Dated this the 8th day of September, 2016

JUDGMENT

The petitioner in this petition challenging the order passed by the 3rd Additional Sub Judge, Kozhikode in I.A.No.2897/2016 in O.S.No.366/12 under Article 227 of the Constitution of India.

2. It is alleged in the petition that the respondent herein filed Ext.P1 suit as O.S.366/2012 on the file of the 3rd Additional Sub Court, Kozhikode for realisation of 81,87,328/- with interest.

` The amount was claimed on the basis of a memorandum of understanding entered into between the parties. Along with the suit, he had filed an affidavit as contemplated under Section 26(2) read with Order 6 Rule 15(4) of the Code of Civil Procedure. According to the petitioner, in the suit as well as in the affidavit, the respondent had stated that he is filing the suit for and on behalf of the company as chairman and managing director of M/s.Glosoft Technology Pvt. Ltd. The petitioner filed Ext.P2 written statement denying the allegations and liability to pay the amount claimed in the plaint. Ext.P3 is an affidavit filed by the respondent along with an application to amend the plaint in which he had described him as chairman and managing director of the company and by virtue of this amendment, he wanted to delete the seal affixed at the bottom of each page of the plaint. Ext.P4 is the affidavit filed along with I.A.2896/2016 for re-open the case and receive the fresh affidavit in lieu of the defective affidavit filed along with the plaint under Order 6 Rule 15(4) of the Code of Civil Procedure. In the affidavit it was mentioned that the suit was filed in his individual capacity and not as the chairman and managing director of the company and it was an inadvertent typographical error which creates an impression that the suit was filed by the company M/s.Glosoft Technology Pvt. Ltd through its managing director and the seal of M/s.Glosoft Technology Pvt. Ltd. was happened to be affixed by mistake and this defect was noted and brought to his notice only on 30.7.2016. Ext.P5 is the counter statement filed by the petitioner to I.A.2896/2016. Ext.P6 is the affidavit filed by the respondent along with I.A.2897/2016 to permit him to file a fresh affidavit in lieu of the defective affidavit which happened to be filed along with the plaint under Order 6 Rule 15(4) of the Code of Civil Procedure. The petitioner filed Ext.P7 counter statement denying the allegations and it was contended that the affidavit filed under Order 6 Rule 15 (4) of the Code of Civil Procedure along with the plaint at the time of institution of the suit cannot be brushed aside and it cannot be substituted by a fresh affidavit, which will change the nature and character of the suit and hardship will be caused to the petitioner. Ext.P6 application was allowed by the court in part by the impugned Ext.P8 order, thereby the prayer to substitute the earlier affidavit by a fresh affidavit was declined, but the respondent has been permitted to file an additional affidavit in addition to the affidavit which has already been filed in in compliance of section 26(2) read with Order 6 Rule 15(4) of the Code of Civil Procedure. This order is being challenged by the petitioner by filing this petition.

3. Heard Sri.C.P.Mohammed Nias, counsel appearing for the petitioner and Sri.S.V.Balakrishna Iyer, senior counsel appearing for the respondent.

4. The counsel for the petitioner submitted that in the plaint, the plaintiff has been described him as chairman and managing director of M/s.Glosoft Technology Pvt. Ltd. and in the affidavit also he had sworn to the affidavit as though the suit was filed by the company through him as its chairman and managing director. Without amending the plaint and after the evidence was over, he had now filed an application to receive an affidavit in lieu of the affidavit filed along with the suit as contemplated in Order 26 Rule 2 read with Order 6 Rule 15(4) of the Code of Civil Procedure, which is contradictory in nature and by subsequent affidavit he wanted to mention that the seal of the company was by mistakenly used at the time of filing the suit and described him as the chairman and managing director of the company so as to make it appear that the suit was filed for and on behalf of the company is a typographical mistake, inadvertently crept in while preparing the affidavit and plaint. The petition for amendment to delete the seal affixed as I.A.1264/2015 was dismissed by the court below. Without amending the plaint, filing an additional affidavit, contradictory to the pleading is not contemplated and that will go to the root of the plaint. So the court below should not have allowed the application which has caused prejudice to the petitioner. According to learned counsel, the court below had not rightly understood the dictum laid down in the decision reported in *Umesh Challiyil v. K.P.Rajendran* (AIR 2008 SC 1577) and *Sardar Harcharan Singh Brar v. Suk Darshan Singh and Others* (AIR 2005 SC 22). He had also relied on the decision reported in *Anubhav Patnaik v. Soumya Ranjan Patnaik* (AIR 2015 Orissa 110) in support of his case.

5. On the other hand, the learned senior counsel appearing for the respondent submitted that a reading of the plaint will go to show that the suit was filed in the personal capacity and not for and on behalf of the company. Further there is no contradictions in the pleading and the affidavit filed, but what is sought to be clarified was only that the suit was filed only in his personal capacity and not as chairman and managing director of the company. Court below rightly permitted the petitioner to file an additional affidavit enabling him to explain as to how the mistake has been occurred in the earlier affidavit and no prejudice has been caused to the petitioner on account of the same. Section 26(2) and Order 6 Rule 15(4) are only directory in nature, any defect in the affidavit will not result in rejection of the plaint as such. It is curable defect and that was the dictum laid down in the decisions relied on by the court below for allowing the application, so there is no illegality or impropriety committed by the court below.

6. It is an admitted fact that the respondent herein filed Ext.P1 suit as O.S.366/12 on the file of the 3rd Additional Sub Court, Kozhikode for realisation of the amount due from the defendant on the basis of some memorandum of understanding entered into between them. It is true that in the original plaint in the cause title, the plaintiff was described as Meharoob Manalody son of Aboobacker Haji, chairman and managing director M/s.Glow Soft Technology Pvt. Ltd., Administrative Office Indus Avenue, Kallai Road, Kozhikode, Kasaba Amsom Desom, Kozhikode Taluk. In the body of the plaint also he had stated that he is the managing director and the chairman of the company and at the bottom of each page of the plaint, the seal of the company was also affixed. He had also filed an affidavit along with the plaint as contemplated under Order 26 Rule 2 read with Order 6 Rule 15(4) of the Code of Civil Procedure in which he had described him as managing director and chairman of M/s.Glosoft Technology Pvt. Ltd.,. But in the written statement the status of the respondent as chairman of M/s.Glosoft Technology Pvt. Ltd was disputed. It is also

an admitted fact that in some of the affidavits filed by him, he had described himself as chairman and managing director of the said company. It is also an admitted fact that evidence in this case was over. Earlier the petitioner filed a petition to amend the plaint to delete the words chairman and managing director of M/s.Glosoft Technology Pvt. Ltd. and add his residential address in the cause title of the plaint and that was allowed. After the evidence is over, he filed I.A.1264/2015 to amend the plaint under Order 6 Rule 17 of the Code of Civil Procedure read with Section 151 of Code of Civil Procedure, to strike off the seal 'for M/s.Glosoft Technology Pvt. Ltd. chairman and managing director' affixed in the plaint, but that petition was dismissed by the court below as per order dated 9.4.2015, enabling the petitioner to file an application to incorporate necessary averments in the plaint explaining the circumstances under which the impugned seal was happened to be affixed and he cannot seek striking of the seal affixed in the plaint by resorting to Order 6 Rule 17 and that order was not challenged. Thereafter he filed I.A.2896/2016 as Ext.P15 to re-open the matter and to receive fresh affidavit in lieu of defective affidavit filed along with the plaint under Order 6 Rule 15(4) of the Code of Civil Procedure and also filed I.A.2897/2016 to receive fresh affidavit in lieu of the defective affidavit which happened to be filed along with the plaint, in which he had mentioned that, the suit was filed in his individual capacity and not as chairman and managing director of the company and due to some inadvertent typographical error crept in the plaint and the affidavit which would give a wrong impression that the suit was filed by the company M/s.Glosoft Technology Pvt. Ltd. of which he was managing director and the seal of the company was happened to be affixed by mistake. This was opposed by the petitioner by filing a detailed counter and the court below by the impugned order declined to receive fresh affidavit in lieu of the earlier affidavit filed but permitted the petitioner to file an additional affidavit explaining the circumstances under which these things had happened while filing the earlier affidavit.

7. Section 26 of the Code of Civil Procedure Code reads as follows:

26. Institution of suits.- [(1)] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

[2] In every plaint, facts shall be proved by affidavit].

8. Order 6 Rule 15 of the Code of Civil Procedure reads as follows:

15. 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.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.

9. Section 26(2) and Order 6 Rule 15(4) were incorporated in the Code of Civil Procedure by Amendment Act, 2002. The purpose of incorporating these provisions of filing an affidavit along with the plaint is to give sanctity for the nature of pleadings made by the party and avoid parties making false allegations and averments in the pleadings, which the court feels later found to be false enable the court to proceed against them for filing false affidavit. Except for this purpose, there is nothing mentioned in the code about any consequence of filing any defective affidavit under the above provisions.

10. In the decision reported in *Sardar Harcharan Singh Brar v. Suk Darshan Singh and Others* (AIR 2005 SC 22), it has been held that, non compliance with requirement as to filing of an affidavit cannot be a ground for dismissal of the election petition in limine under Section 86. If it was found that there is defect in the affidavit, and it is a curable defect not a material defect going into the root of the matter, then an opportunity has to be given to the election petitioner for removing the defect by filing the proper affidavit. Same view has been reiterated in the decision reported in *Umesh Challiyil v. K.P. Rajendran* (AIR 2008 SC 1577).

11. It is true that in the decision reported in *Anubhav Patnaik v. Soumya Ranjan Patnaik* (AIR 2015 Orissa 110), it has been held that when an election petition was filed under the provisions of Representation of Peoples Act, alleging corrupt practice, non disclosure of source of information about corrupt practice in the affidavit is fatal and that will end in dismissal of the election petition at the threshold itself. It cannot be said to be a curable defect. Further in the same decision, it has been held that the copy of the affidavit supplied to the respondent without attestation by the prescribed authority, such defect is incurable and the election petition is not maintainable. It is also observed that, if two affidavits are wholly inconsistent and irreconcilable and not amenable to rectification or reconciliation, then the defect goes to the very root of the matter and hence incurable and not merely cosmetic or technical in nature and so the dictum laid down in the decisions reported in *V. Narayanaswamy v.*

*C.P.Thirunavukkarasu* (AIR 2000 SC 694) and *Ravinder Singh v. Janmeja Singh and Others* (AIR 2000 SC 3026) is applicable to the facts of that case and distinguished the dictum laid down in *Sardar Harcharan Singh Brar's* case and *Umesh Challiyil's* case (*supra*).

12. But that dictum is not applicable to the facts of this case as it is not a case where no affidavit has been filed or that it does not contain the necessary pleadings raised in the plaint as part of the pleadings to be filed as required under order 6 Rule 15(4) of the Code of Civil Procedure.

13. In the decision reported in *Vidyawati Gupta v. Bhakti Hari Nayak* (AIR 2006 SC 1194), it has been held that the amended provisions of Order 6 Rule 15 Code of Civil Procedure would be attracted to the proceedings of the High Court on the original side. However non compliance thereof would not render the suit non est. It has been further explained the purpose of introducing section 26(2) and Order 6 Rule 15(4) by Amendment Act, 2002 that they were aimed at eliminating the procedural delays in the disposal of civil matters but being procedural in nature, they are directory

in nature and non-compliance hereof would not automatically render the plaint non est. The Supreme Court by this judgment reversed the judgment of the High Court of Calcutta reported in *Bhakti Hari Nayak v. Vidyawati Gupta* (AIR 2005 Calcutta 145) wherein it has been observed that non compliance of Order 6 Rule 15 as amended by the Amendment Act of 2002 will render the plaint non est in the eye of law.

14. In the decision reported in *Kedar Shashikant Deshpande etc. v. Bhore Municipal Council* (AIR 2011 SC 463) it has been held that the defect in verification of pleadings is not mandatory but directory and it is curable in nature and it would not render the petition invalid or affect the jurisdiction of the Collector to entertain and decide disqualification petition.

15. In the decision reported in *P.A. Mohammed Riyas v. M.K. Raghavan* (2012 (5) SCC 511) it has been held that non compliance of section 83(1) proviso of Representation of People Act, 1951 is fatal and that will end in dismissal of election petition at the threshold itself. In that case, the election petition was not supported by requisite affidavit in Form 25 as prescribed in 1961 Rules and in such circumstances the Supreme Court has held that election petition on the ground of corrupt practice must be supported by affidavit in prescribed form in order to disclose the source of allegation. In the absence of proper allegation, election petition held is incomplete for want of complete cause of action. In the decision the effect of non compliance of Order 6 Rule 15 has been considered in para-45 of the judgment, which reads as follows:

"Of course, it has been submitted and accepted that the defect was curable and such a proposition has been upheld in the various cases cited by Mr. Venugopal, beginning with the decision in *Murarka Radeey Shyam Ram Kumar* case (AIR 1964 SC 1545) and subsequently followed in *F.A. Sapa* case (1991 (3) SCC 375), *Sardar Harcharan Singh Brar* case (2004 (11) SCC 196) and *K.K. Ramachandran Master* case (2010 (7) SCC 428), referred to herein before. In this context, we are unable to accept Mr. Venugopal's submission that despite the fact that the proviso to Section 83(1) of the 1951 Act provides that where corrupt practices are alleged, the election petition shall also be accompanied by an affidavit in the prescribed form, it could not have been the intention of the legislature that two affidavits would be required, one under Order 6 Rule 15(4) CPC and the other in Form 25. We are also unable to accept Mr. Venugopal's submission that even in a case where the proviso to Section 83(1) was attracted a single affidavit would be sufficient to satisfy the requirements of both the provisions".

16. In the decision reported in *Regu Mahesh alias Regu Maheswar Rao v. Rajendra Pratap Bhanj Dev* (AIR 2004 SC

38), it has been held that the defect in the verification is curable in nature but if in spite of opportunity given that was not cured then that will end in dismissal of the application and scope of this aspect has been considered by the Apex court in para-18 of the judgment, which reads as follows:

"The casual approach of the appellant is not only visible from the manner in which verification was done, but also from the fact that he has mentioned two different districts to which he claims to be belonging. The explanation that the same was given by mistake is too shallow when considered in the background that he is stated to be a practicing advocate. An advocate is supposed to know the importance of verification and the desirability of making statement of correct facts in any petition and more in case of an election petition. An election petition is intended to bring to focus any illegality attached to an election. It essentially and basically puts a question mark on the purity of election, casts doubt on fairness thereof and seeks a declaration that mandate of people has been obtained by questionable means. In a democracy the mandate has sacrossanctity. It is to be respected and not lightly interfered with. When it is contended that the purity of electoral process has been polluted, weighty reasons must be shown and established. The onus on the election petitioner is heavy as he has to substantiate his case by making out a clear case for interference both in the pleadings and in the trial. Any casual, negligent or cavalier approach in such serious and sensitive matter involving great public importance cannot be countenanced or glossed over too liberally as for fun".

17. In the decision reported in Salem Advocate Bar Association Tamil Nadu v. Union of India (AIR 2005 SC 3353) while considering the scope and impact of Amendment Act of 1999 which came into force in 2002 in respect of Section 26(2) and Order 6 Rule 15(4) held that "prior to insertion of the above provision, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided under section 26(2) and the person verifying the the pleadings to furnish an affidavit in support of the pleadings [Order 6 Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings, we are unable to agree. The affidavit required to be filed under amended Section 26(2) and Order 6 Rule 15(4) of the Code as the effect of fixing additional responsibility on the deponent as to the truth of the fact stated in the pleadings. It however made clear that such an affidavit would not be evidence for the purpose of trial. Further on amendment of pleadings a fresh affidavit have to be filed in consonance thereof".

18. So it is clear from the above decisions that filing of an affidavit along with the plaint by a person who verified the pleading as contemplated under section 26(2) and Order 15 Rule 4 is only directory in nature and only imposes an additional responsibility on the person who made the pleadings regarding the truth of the allegations made in the pleadings and non compliance of the same will not result in rejection of the plaint, but it is a curable defect and in spite of an opportunity given to cure the same, if that was not done, then that will end in rejection of the plaint or petition. So it is clear from the above that it is only a curable defect and any defect in the affidavit can be cured later by filing an additional affidavit explaining the circumstances under which any defect in the affidavit has been crept in and in such cases it cannot be said that it goes to the root of the matter. If there are inconsistent affidavits, then effect of such thing has to be considered by the court. Further it is also seen from the Salem Bar Association's case (supra) that the affidavit filed along with the plaint as part of the verification as contemplated under section 26(2) and Order 6 Rule 15(4) cannot be used for the purpose of evidence at the time of trial and party has to file a proof affidavit in support of his



pleadings in lieu of chief examination at the time of trial. So under such circumstances, the court below was perfectly justified in coming to the conclusion that any defect in the affidavit filed along with the plaint as contemplated under section 26(2) and Order 6 Rule 15 (4) of the Code is only a curable defect and an opportunity can be given to the plaintiff to cure the same by filing an additional affidavit explaining the defect in the affidavit but he is not entitled to brush aside that affidavit and rightly permitted the petitioner to file an additional affidavit stating the circumstances under which the defect mentioned in the affidavit filed along with the plaint had occurred. So under the circumstances the court below was perfectly justified in permitting the petitioner to cure the defect in the affidavit filed along with the plaint under section 26(2) and Order 6 Rule 15(4) of the Code and instead of substituting the same with fresh affidavit permitted him to file an additional affidavit stating the reason as to how the defect had crept in the earlier affidavit and no prejudice has been caused to the petitioner on account of the same as the petitioner had no case in the written statement that the verification or filing of the affidavit is defective so as to give an opportunity for the petitioner to cure the same at the earliest stage. When he came to know about the defect, he himself had made an application to the court to cure the defect and that has been rightly allowed by the court below. Since the pleading has not been amended, mere filing an additional affidavit stating that it was filed in his individual capacity and not in the capacity of the Chairman or Managing Director of the Company will not said to be an affidavit contrary to the pleadings. It is for the court to consider on the basis of the pleadings and evidence as to whether the suit was filed by the plaintiff in his individual capacity or in the capacity as the Chairman or Managing Director of the company taking into consideration the defence if any taken by the defendant in this regard in his written statement. So under such circumstances there is no illegality committed by the court below in passing the impugned order warranting interference of this court under Article 227 of the Constitution of India and the petition lacks merit and the same is liable to be dismissed.

In the result, the petition is hereby dismissed.

Sd/-

K. RAMAKRISHNAN, JUDGE cl