ANDHRA PRADESH HIGH COURT

Nadella Satyanarayana

Vs.

Yamanoori Venkata Subbiah

A.A.O. No. 103 of 1951

(Subba Rao, C.J., Satyanarayana Raju and Mohd. Ahmed Ansari, JJ.)

16.01.1951. 08.02.1957

JUDGMENT

Ramaswami, J.

1. (of the Madras High Court.) This appeal raises a point of importance daily arising in our Courts in the mofussil.

2. The facts are : Mr. P. Viswanatha Rao, Pleader of the Markapur Bar, filed E. P. No. 15 of 1950 in O. S. No. 464 of 1935. It is common ground that this E. P. by itself is in proper form and has also been signed by the party as well as by the pleader. It has been presented by Mr. P. Visvanatha Rao and it is undisputed that at the time when he filed the E. P. he had no vakalat. In fact he has subsequently attempted to rectify this error by getting a vakalat from his client and filing it. The opponent naturally pointed out that this petition had no legal effect not having been made in accordance with law and is a nullity and relied upon the Bench decision of this Court in *Nandamani Ananga Bhima Deo v. Madana Mohana Deo*[1], The learned District Munsiff upheld the plea of the respondent and dismissed the E. P. There was an appeal therefrom to the learned District Judge of Kurnool and he set aside the order of dismissal and remanded the petition for fresh disposal in the light of the following observations :

> "The decision of his Lordship Justice Krishnaswami Nayudu in *Narappa v. Subbarayudu*[2], had not been published in the reports when the learned District Munsif, pronounced the judgment under appeal. Under that decision, two questions of fact have to be considered by the District Munsif. The first is whether Sri P. Viswanatha Rao was authorised to represent the decree-holder on the date on which the execution petition was presented. The second is, whether, if he was so authorised, his failure or neglect to obtain a vakalat from the decree-holder and present the vakalat along with the execution petition was due to a *bona fide* mistake. If both these questions are answered in the affirmative, the defect of initial want of vakalat could be cured at the discretion of the District Munsif. The learned District Munsif will, if necessary, take evidence on those points and decide, the execution afresh in

[1] ILR (1937) Mad 320
[2]1950-2 Mad LJ 256

> the light of his Lordship's decision."

The present appeal has been filed against the order of the learned District Judge of Kurnool.

3. In ILR (1937) Mad 320 , the facts were identical. There also the execution petition, otherwise in accordance with law and signed by the decree-holder, was presented by a vakil who had no vakalat authorising him to present it. The point arose for determination was whether that was an application in accordance with law and the Bench held that this question admitted of a very simple answer.

> "Under Order 21, Rule 10, Civil Procedure Code, the decree-holder shall apply for execution....."
> By Order 3, Rule 1, 'Any application to any Court, required or authorised by law to be made by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting on his behalf.

It is not alleged in this case that the party made these applications to the Court in person. It is not alleged that he made them by a recognized agent. The only case is that he made them by his pleader Mr. Thumbanadham. Order 3, Rule 4, says :

> '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 recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment'.

This means, according to the contentions of the judgment-debtor, that the act of the pleader in presenting these execution petitions was a mere nullity. According to the contentions of the learned advocate for the appellants, Mr. Jagannadha Das, the want of a vakalat was a mere irregularity which may be cured or condoned. We have had a very large number of cases cited but none of them is exactly applicable; many, we think, are quite irrelevant. It is not to the point to discuss cases in which there have been defects, whether grave or trivial, in the applications, plaints or petitions, nor cases in which there have been defects or omissions in vakalats filed in Court. This is not a case of any defects in particulars in any document. It is a case simply of want of authority on the part of the pleader to act. Order 3, Rule 4, says that no pleader shall act unless he has been appointed by a document in writing. This means in our opinion that if the pleader has not been appointed by a document in writing, he is wanting in capacity or competence to act. It is not a question of a defect in the pleader's authority; it is not a question of an irregularity or even of an illegality in anything that he does; it is simply a question of want of capacity to act. If a pleader purports to do something which he has no power or capacity to do, we think it must be clear that what he purports to do can have no legal effect."

4. In 1950-2 Mad LJ 256 , the facts were E. P. 366 of 1944 filed just a day previous to the expiry

of the 12 years period from the date of the final decree was signed and verified by the deceased decree-holder Lingasubbayya's sons and also counter-signed by one Mr. C. S. Narasimhachariar as vakil for the decree-holder. Mr. Narasimhachariar had no vakalat for Lingasubbayya's sons, the legal representatives of the decree-holder. Objection was taken to the validity of the said execution petition on the ground that the execution petition was presented by a counsel who had no vakalat and that therefore it was a nullity. It may be mentioned that subsequent to the filing of the petition a vakalat was filed by Mr. Narasimhachariar and also by another counsel. But that was done subsequently after the expiry of 12 years from the date of the final decree. It was contended that the subsequent filing of the vakalat in any event could not cure the defect, if any, in the presentation of the E. P. Both the Courts below held that the presentation of the E. P. without a vakalat was only an irregularity and not an illegality which invalidated the proceedings and that the irregularity having been subsequently set aright by the filing of the vakalat, the E. P. must be deemed to have been presented properly on the date on which it was presented. There was a Civil Miscellaneous Appeal in the High Court and it was contended there that the lower Court should have followed the Bench decision cited above and held that execution could not issue. Before Krishnaswami Nayudu, J., the respondent relied upon decisions in a contra sense by the Allahabad High Court in the Full Bench case *Kanhaiyalal v. Panchayati Akhara*[3], the Special Bench decision of the Allahabad High Court in *Wali Mohamed Khan v. Ishak Ali*[4], and the Bench decision of the Bombay High Court in *Hirabai v. Bhagirath Ramachandra and Co*[5]., The learned Judge expressing his agreement with these decisions and holding that ILR (1947) Mad 320 , would not apply to the present case, dismissed the C. M. A.

5. Inasmuch as the facts in ILR (1937) Mad 320 and in 1950-2 Mad LJ 256 , are practically ad idem as can be seen from the facts set out above, it is clear that the distinction sought to be drawn by Krishnaswami Nayudu, J., with great respect to him seems to be one without a difference. In substance and effect Krishnaswami Nayudu, J., has preferred to follow the reasoning of the decisions of the other High Courts which has commended itself to him and was not prepared to subscribe to the reasoning in the Bench decision of this Court in ILR (1937) Mad 320 .

6. That powerful reasons existed to invite one to came to a conclusion in a sense of opposite to the abovesaid Bench decision of this Court, will be evident from an examination of the cases referred to by Krishnaswami Nayudu, J., and other cases.

7. In the Full Bench decision ILR 54 All 57 : AIR 1931 Allahabad 507, the learned Judges had to decide whether the absence of the presentation of the plaint by the plaintiff or by some person duly authorized by him would altogether oust the jurisdiction of the Court and they held as follows :

> "As there is no specific rule either requiring or expressly authorizing the plaintiff to present the plaint, it is doubtful whether Order 3, Rule 1 of the Code would apply to such a case. If it does not apply, the presentation by a person orally authorized to do so would be valid. But even, if it does were

[3] ILR (1949) All 973 : AIR 1949 All 367 [5] ILR (1945) Bom 819 : (AIR 1946 Bom 174)

[4] ILR 54 All 57 : AIR 1931 All 507 (FB)

> clearly of opinion that the omission to comply with this provision would be a mere irregularity and not an absence of jurisdiction. The Court receiving a plaint which has not

been properly presented would have jurisdiction to dismiss it and pass orders on it. It would not be acting without jurisdiction if it did so. We do not mean to imply that a plaintiff has the right to get his plaint presented by a man in the street. If the person presenting it was not properly authorized, the presentation would be irregular. The Court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence and it is fair and just to allow the defect to be cured, the Court would undoubtedly do so. It is not absolutely helpless in the matter."

8. In *Jagadeesh Chandra Dhabal Deb v. Satya Kinkar Shahana*[6], where an application for execution was filed within three years of the decree by a pleader who did not file a vakalatnama till after more than three years had elapsed from the date of the decree but the application was duly signed and verified by the decree-holder himself and it was duly accepted by the Court which proceeded to act upon it by issuing notices, it was held by the Calcutta High Court that the application was in accordance with law and the execution case was not barred by limitation.

9. In the Full Bench decision of the Allahabad High Court in ILR (1949) All 973 : AIR 1949 Allahabad 367, the facts were that an application for execution which was in all respects in order was handed over to the office by a pleader who had not got a vakalat from the decree-holder and the questions referred to the Full Bench was whether in such a case the application would be one made in accordance with law within the meaning of Article 182 (5) of the Limitation Act or not. The Full Bench has reviewed the entire case law on the subject including ILR (1937) Mad 320 and came to the following conclusion :

"Per Malik, C.J., and Bhargava, J., Seth, J., contra - The physical act of filing or presentation of an application for execution of a decree is an 'act' within the meaning of O. 3, Rules 1 and 4. It is not a mere mechanical act.

(Per Full Bench).- The improper presentation of such an application is, however, not an illegality but a mere irregularity which does not make the application not 'made' in accordance with law.

Hence an application for execution which in all other respects is in order and which has been admitted and registered by the executing Court is not to be considered to have not been 'made in accordance with law' merely because it has been handed over to the officer of the Court by a pleader who has not got a vakalatnama from the decree-holder."

10. Therefore, at present, we have two conflicting decisions of this Court on the point in controversy, viz., a Bench decision and the decision of Krishnaswami Nayudu, J. The latter decision being that of a single Judge, the Bench decision has got to be followed until the matter is further considered by another Bench or a Full Bench.

[6] ILR 63 Cal 733

11. The subsequent decisions of other High Courts preferred by Krishnaswami Nayudu, J., make it desirable that the Bench decision of this Court should be reconsidered.

12. In any event, the conflict between the Bench decision and the decision of Krishnaswami

Nayudu, J. should be resolved.

13. The question that has to be decided is whether an application for execution which is in all other respects in order is not to be considered to be valid act, merely because it was presented by a pleader who had not got a vakalatnama from the decree-holder.

14. These papers are directed to be placed before the learned Chief Justice for the matter being posted before a Bench or a Full Bench as my Lord the Chief Justice deems fit.

(The appeal then came on for hearing before Mr. K. Subba Rao, C.J., and Mr. Justice Bhimasankaram and the order of reference to a Full Bench was made by)

ORDER OF REFERENCE.

Subba Rao, C.J.

15. Ramaswami, J., of the Madras High Court has referred this case to a Bench as in his view the appeal raises a point of importance daily arising in the Courts in the mofussil.

16. The facts are simple and they are, Mr. P. Viswanatha Rao, a pleader of the Markapur Bar, filed E. P. No. 15 of 1950 in O. S. No. 464 of 1935. That E. P. was duly signed by the party as well as the pleader. The pleader presented it in Court but at that time had had no vakalat. Subsequently the pleader got the vakalat from his client and filed it in Court. The District Munsif holding that the presentation of the application was a nullity, dismissed the execution petition. On appeal, the learned District Judge of Kurnool held that the presentation by the pleader without a vakalat was only an irregularity. He set aside the order of the District Munsif and remanded the case for fresh disposal in accordance with law.

17. The judgment-debtor preferred C. M. A. No. 103 of 1951 to the High Court of Madras. Ramaswami, J., referred the appeal to a Bench in view of the conflict between the decision of a Divisional Bench of the Madras High Court in ILR (1937) Mad 320 , and that of Krishnaswami Nayudu, J., in 1950-2 Mad LJ 256 : (AIR 1951) Mad 340), and also because of the conflict between the view of the Divisional Bench of the Madras High Court and that of the other High Courts in India.

18. In ILR (1937) Mad 320 , it was held that the presentation of an execution application by a vakil who had no vakalat authorizing him to present it was no presentation at all in the eye of the law and was merely a nullity and therefore such an application was not one made in accordance with law. The other High Courts held that the presentation of the application without a vakalat was only an irregularity and that it could be cured by the pleader filing vakalat duly authorised in the manner prescribed by the Civil Procedure Code. See *Chhayemannessa Bibi v. Basirar Rahman*[7]*, (D);*

19. The question raised turns upon an interpretation of the following provisions of the Civil Procedure Code :

"Order 3, Rule 1- 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 recognised agent or by a pleader appearing, applying or acting, as the case may be, on his behalf.

Rule 4 (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 subscribed with his signature in his own hand by such person or by his recognised agent or by some other person duly authorized by or under a power-of-attorney to make such appointment."

20. A comparative study of these two provisions shows that while in R. 1 a pleader can appear, apply or act on behalf of his client, in R. 4 he is precluded from acting unless he is authorized by a document in writing signed by such person. It can be argued that the use of the words 'applying or acting' in R. 1 indicate that applying is taken away out of the comprehensive meaning attributable to the word "acting" and therefore a pleader can apply even though he is, not authorised in the manner prescribed by R. 4 if he is otherwise expressly or impliedly authorised to do so. It may also be contended that even otherwise, the non-compliance with the provisions of R. 4 does not make the act of the pleader a nullity provided he is authorised in some other manner and such acting is only irregular which could be rectified subsequently by compliance with the provisions.

21. As there is a conflict between the decisions of the Madras High Court and between the Bench decision of the Madras High Court and those of the High Courts of other States, and this question is one of procedure that arises very often in Courts, we think it is necessary to get an authoritative decision on the following question by a Full Bench of this Court.

"Whether the presentation of an application by a pleader to whom the authority in the prescribed manner under Rule 4 of O. 3, Civil Procedure Code, was not given is a nullity or only an irregularity which could be cured at a subsequent stage?"

OPINION OF THE FULL BENCH.

Subba Rao, C.J.

I have had the advantage of perusing the judgment prepared by Satyanarayana Raju. I [7] ILR 37 Cal 399; ILR 63 Cal 733; ILR 54 All 57 : AIR 1931 All 507 (FB) ILR (1945) Bom 819 and ILR (1949) All 973 : AIR 1949 All 367 (FB)
agree with him.

Satyanarayana Raju, J. :- The question that has been referred to us for decision runs thus :

"Whether the presentation of an application by a pleader to whom the authority in the prescribed manner under Rule 4 of O. 3, Civil Procedure Code, was not given, is a nullity or only an irregularity which could be cured at a subsequent stage?"

24. The facts giving rise to this reference may be stated: On the 24th of April, 1939, the

respondent obtained a decree for money against the appellant, in O. S. No. 464 of 1935, on the file of the District Munsif's Court, Markapur. On the 15th August, 1940, this decree was substantially confirmed in A. S. No. 114 of 1939 on the file of the District Court, Kurnool. On the 14th August, 1943, the respondent applied for execution of the said decree. This execution petition was dismissed on the 15th November, 1943. He again applied for execution in E. P. No. 171 of 1946 on the 6th of July, 1946, which was eventually struck off on the 10th December, 1946. On the 7th December, 1949, he filed the present execution petition. The application for execution was written, signed and verified as prescribed by Rule 11(2) of Order 21, Civil Procedure Code by the decree-holder and as such it was an application in accordance with law so far as the form of the application was concerned. It was presented in Court by Mr. P. Viswanatha Rao, a pleader but at that time he had no vakalat from the decree-holder. On the 3rd January, 1950, the execution petition was returned by Court for rectification of certain defects. No objection was, however, taken by Court that the execution petition was filed by a pleader who had no vakalat from the decree-holder. It was represented on the 10th January, 1950. Thereafter it was admitted and numbered as E. P. No. 15 of 1950; and on the 16th January, 1950, the Court directed notice of the application to the judgment-debtor. On the 3rd March, 1950, the judgment-debtor filed a counter wherein he raised the objection that there was no proper presentation of the execution petition inasmuch as the pleader who filed the petition had no vakalat on the date on which it was filed in Court. On the 6th March, 1950, the respondent gave a vakalat in favor of the pleader and it was filed in Court on the 8th March, 1950. The execution petition was dismissed by the District Munsif, Markapur, on the ground that it was presented by a pleader who had no vakalat from the decree-holder and therefore it was a nullity. On appeal, however, the District Judge of Kurnool, held that the presentation of the execution petition without a vakalat was only an irregularity. He set aside the order of the District Munsif and remanded the case for fresh disposal according to law. The judgment-debtor preferred the present Civil Miscellaneous Appeal to the High Court of Judicature at Madras.

25. In view of the divergence of opinion between the decision of a Division Bench of the Madras High Court in ILR (1937) Mad 320 , and that of Krishnaswami Nayudu, J., in 1950-2 Mad LJ 256 and also because of the conflict between the view taken by the Division Bench of the Madras High Court, and that of the other High Courts in India on the question as to whether the presentation of an execution petition by a pleader who had no vakalat authorizing him to present it, was not a presentation at all in the eye of law and was a mere nullity or whether it was only an irregularity which could be cured by the pleader filing the vakalat subsequently, the appeal was placed before a Division Bench, which has formulated the above question for decision by a Full Bench.

26. Now, the provisions of the Civil Procedure Code which govern the filing of execution petitions are O. 21, Rules 10 and 11. The former rule provides that where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf. The manner in which he has to apply is laid down in R. 11 of the same order. If the decree is for payment of money, the decree-holder may apply by means of an oral application at the time of the passing of the decree, and every other application for execution of a decree has to be written, signed and verified in the manner provided in Clause (2) of R. 11, and it has to be made to the Court which passed the decree. The particulars which the written application for execution should contain are specified in Order 21, Rule 11(2).

27. From a reading of these provisions, it is clear that a decree-holder should 'apply' in order to

get the aid of the Court for the enforcement of his rights under the decree. The very use of the word 'apply' connotes that the mere drawing up of an application in proper form is not sufficient and something more has to be done. The application has to be presented to the Court or to the officer appointed in this behalf by the party or his authorized agent. It can also be presented by a pleader appearing, applying or acting on his behalf. This is provided by Order 3, Rule 1, which is in these terms :

> "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, 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."

28. It is to be noted that the words 'appearing, applying, acting', as the case may be, in R. 1 were substituted for the words 'duly appointed to act' which occurred in the original rule by the Code of Civil Procedure (Second Amendment) Act, 1926. The other relevant rule is Rule 4 of Order 3 and it is in the following words :

> "(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose 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-atorney to make such appointment.
> * * *
> (5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating -
> (a) the names of the parties to the suit;
> (b) the name of the party for whom he appears; and
> (c) the name of the person by whom he is authorised to appear :
> Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party."

29. This rule was substituted for the old R. 4 by the Code of Civil Procedure (Second Amendment) Act, 1926. The old rule ran thus :

> "(1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorised by power-of-attorney to act in this behalf.
> (2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing

signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court and no advocate of any other High Court who is a Barrister shall be required to present any document empowering him to act."

30. Under the rule as amended in 1926, a distinction is drawn between a pleader appointed to act in Court and a pleader engaged for the purpose of pending only. As regards a pleader appointed to act in Court, it is provided by sub-rule (1) that he cannot act for any person in any Court unless he is appointed by such person by a document in writing signed by such person or by his recognised agent, while a pleader engaged for the purpose of pleading only has to file a memorandum of appearance signed by himself, as provided by Sub-Rule (5).

31. Basing his argument on the provisions contained in O. 3, the learned counsel for the appellant has contended that inasmuch as the pleader who made the application for execution had not been appointed by means of a vakalat, there was want of authority on the part of the pleader to 'act' within the meaning of Order 3, Rule 4 and hence the presentation of the execution application, dated the 7th December, 1949, was no presentation at all in the eye of law and was a mere nullity and therefore such an application was not one 'made in accordance with law'.

32. The contentions urged on behalf of the respondent may be summarized thus. An application for execution is not required by law to be presented by a party in person. Hence the mere fact that it was presented by a pleader who had not been duly appointed by a vakalat, could not render it invalid. The use of the words 'appearing, applying, acting', in R. 1 indicates that 'applying' is taken out of the comprehensive meaning attributable to the word 'acting' and therefore a pleader can apply even though he is not authorized by R. 4, if he is otherwise expressly or impliedly authorized to do so. Even otherwise, non-compliance with the provisions of R. 4, does not make the 'act' of the pleader a nullity and such 'acting is only an irregularity which could be rectified subsequently by compliance with the relevant provisions.

33. On the above contentions, the first of the questions that falls for consideration is whether the presentation of an application for execution is not an 'act' required or authorised by law to be made or done by a party in Court; and it turns upon an interpretation of the word 'act' used in O. 3 of the Code. At the outset it has to be noted that the word 'act' has not been defined in the Code. The Concise Oxford Dictionary gives it the following meaning : "doing a thing". The true intent and meaning of the word was considered by a Bench of the Calcutta High Court *In re Fuzzle Ali*[8], with reference to Section 5, Pleaders and Mukhtears Act (XX of 1865). Phear, J., there observed : "I think that the word 'act' means the doing something as the agent of the principal party which shall be recognised or taken notice of by the Court as the act of that principal; such for instance as filing a document."

34. In ***Kali Kumar Roy v. Robin Chunder Chuckerbutty, ILR 6 Cal 585***, its meaning was elucidated with reference to Section 13 of the same Act and it was observed by White, J., at page 590, thus :

"To act for a client in Court is to take on his behalf in the Court or in the offices of the

> Court the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court."

These two cases arose in connection with persons alleged to be practising as mukhtears, but they are both valuable in considering what is the meaning of 'acting' for a client in legal proceedings.

35. Very soon after the enactment of the Code of Civil Procedure (Second Amendment) Act, 1926, the question arose in the Rangoon High Court under the newly amended Order 3, Rule 4 (1) of the Code, as to whether an advocate 'acts' when he files a memorandum of appeal or cross-objections or any other document in a case (other than a memorandum of appearance under Rule 4(5) and a power of attorney is necessary in such cases. A Division Bench consisting of Rutledge, C.J., and Carr, J., answered the question in the affirmative in Filing Powers, In the matter of, ILR 4 Rang 249 : AIR 1926 Rangoon 215. The learned Judges pointed out that amendment was the result of the Bar Committee's Reports which contained the following remarks:

> "We therefore propose that all practitioners shall be required to file vakalatnama, when they act, but that when they merely appear and plead they shall be allowed the option of filing a memorandum of appearance, signed by them, giving the names of the parties in the case, the name of the party for whom they appear, and the name of the person who authorised them to appear. We would not however, apply this rule, but would maintain the existing practice in the case of an advocate who under the rules in force can only appear on the Original Side of the Calcutta, Bombay and Madras High Courts on the instructions of an Attorney."

36. The decision was distinguished in a later ruling of the Rangoon High Court in *Sawarmal v. Kunjilal*[9],. At page 6 it was observed thus :

[8]19 Suth WR Cri 8 [9] AIR 1939 Rang 1

> ".....when a plaint or memorandum of appeal has been drawn up and signed by a pleader duly authorized under Order 3, Rule 4, there is nothing contrary to the provisions, or the intention, or the spirit of that rule in the mechanical act of handing over the papers to the Court, or the officer appointed, being performed by a clerk or another pleader, to whom the duty of performing that act has been delegated by the duly authorized pleader."

37. The meaning of the word 'act' was elaborately discussed by a Full Bench of the Allahabad High Court in AIR 1949 Allahabad 367 : ILR (1949) All 973 (C). After considering the decisions which have interpreted the meaning of the word 'act' occurring in O. 3, Civil Procedure Code, Seth, J., concluded at page 375, that the presentation of a plaint, a memorandum of an appeal or an application was not an 'act' required by law to be done and that it was not even an act authorised by law to be done, and that Order 3, Rule 1 did not apply to the presentation of applications for execution. Malik, C.J., and Bhargava, J., who together with Seth, J., constituted the Full Bench, however, expressed the view that the physical act of filing or presenting an application for execution of a decree was an 'act' within the meaning of O. 3, Rules 1 and 4.

38. Rule 1 of O. 3 of the Code relates to appearance, application or an act by a party and it provides the manner of their being made or done, i.e., by a party in person by his recognized agent or by a pleader. It is the clear intendment of this provision that an appearance, application or act cannot be made or done by any person other than the party himself or by his recognized agent or pleader. The Code of Civil Procedure authorizes a party to set the machinery of the Court in motion by instituting a suit, preferring an appeal or making an application. These are the 'acts' authorized by the Code and may therefore be performed only by a party himself or through his recognized agent or his duly appointed pleader.

39. It is suggested that the presentation of a plaint, a memorandum of appeal or an application for execution is not an 'act' and for that reason there is no specific provision in the Code with regard to these matters while under Order 33, Rule 1 and Order 44, Rule 1 of the Code there are specific provisions with reference to the filing of applications for leave to sue or appeal in forma pauperis, that they have to be presented by the party in person.

40. Under Section 26 of the Code, every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed; and Order 4, Rule 1, provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in that behalf. It is no doubt true that there is no mention in Section 26 or Order 4, Rule 1 as to who is to present the plaint; but when it is remembered that the presentation of the plaint is necessary for the institution of a suit, it is necessarily implied that it must be presented by the plaintiff personally or by some person duly authorized by him. It could not have been intended by the Code that the proceeding by way of suit should be initiated by a stranger. If the provisions contained in Section 26 of the Code and Order 4, Rule 1, necessarily imply that the plaintiff should present the plaint personally or through some person duly authorized by him, it is incomprehensible how it can be said that the plaint is a document not required by law to be presented by a party. The same is the case with the preferring of an appeal. Order 41, Rule 1, Civil Procedure Code, provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The law contemplates the presentation of an appeal which is an 'act' that must be performed by the party concerned in the manner provided by Rule 1 of Order 3 of the Code. From the fact that Order 41, Rule 1, does not make mention of the person who has to present a memorandum of appeal, it cannot be inferred that it can be presented by anybody.
The provision of O. 3, also applies to the preferring of appeals and it must be done by the appellant personally or by some person duly authorized by him. So too, in the case of an application for execution, it must be made by the applicant personally or by some person duly authorized by him. It is difficult to accept the contention urged on behalf of the respondent that there being no specific provision in the Code, the Legislature did not attach any importance to the presentation of a plaint, memorandum of appeal or an application for execution. The presentation of a plaint, a memorandum of appeal or an application for execution is an 'act' for, it constitutes the necessary step that must be taken in the course of the litigation in order that the case of a party may be properly laid before a Court.

41. The provisions contained in Order 3, Rule 1 of the Code are of general application while the provisions contained in Order 33, Rule 3 and Order 44, Rule 1 of the Code constitute the exceptions which are 'otherwise expressly provided by any law for the time being in force' within the meaning of that expression used in Order 3, Rule 1. As pointed out by Seth, J., in AIR 1949

Allahabad 367 : ILR (1949) All 973 (FB), the primary object of Order 3, Rule 1, is to afford greater facility to a party and to enable him to perform certain acts which he could have been otherwise required to perform in person, through his recognized agents or pleaders, and the other object is to prevent the perpetration of fraud by an unauthorized person taking steps without the knowledge or consent of the person concerned. These objects cannot be achieved if plaints, appeals or applications can be filed by a person other than the party concerned or his recognized agent or pleader. It must therefore be held that an application for execution of a decree is required by law to be made by a party. The next question that arises for determination is whether a pleader who puts in an application on behalf of a litigant 'acts' for him and cannot therefore do so unless he is authorized in writing as provided by R. 4. A comparative study of R. 1, and R. 4, shows that while in R. 1 a pleader can appear, apply or act on behalf of his client, he is precluded under Rule 4 from 'acting' unless he is authorized by a document in writing signed by such person. It has been argued that while in R. 1 a clear distinction has been made between appearance, application and act, in R. 4 it is with regard to 'acting' alone that a document in writing is made obligatory. To 'act' for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. Thus 'acting' includes 'applying' so that a pleader who makes an application on behalf of a litigant acts for him and cannot do so unless he is authorised in writing under Rule 4, of O. 3. This is the view taken by a Division Bench of the Lahore High Court consisting of Addison and Din Mohammad, JJ., in *Bashir Ahmed v. Mary Minck*[10], at p. 700 it was observed :

[10] AIR 1938 Lah 698

> "It is true that, while Rule 1 of Order 3 mentions three functions of a pleader, viz., 'appearing', 'applying' or 'acting', Sub-Rule (1) and Sub-Rule (5) of R. 4 merely deal with 'acting' and 'pleading' respectively but that does not indicate that 'applying' is not covered by 'acting'. To 'apply' is to do something more than 'to appear' or 'to plead'. It is to take some active step on behalf of a person and thus to act for him. 'Applying' therefore is included in 'acting' and this is why no separate provision has been made by the Legislature in relation to this function of a pleader. To hold otherwise would lead to absurd results. Rule 4 of O. 3 being silent on the point of applying any pleader without any authority from a litigant and without putting in any memorandum of appearance would be in a position to present any application on his behalf. This obviously could not be the intention of the Legislature."

42. The word 'apply' according to the Concise Oxford Dictionary means 'the making of a request' while the word 'act' has been held to mean 'doing something'. It is possible to argue that the word 'apply' refers to the initiation of a proceeding by means of an application, in other words, making a request to the Court to do something and the word 'act' refers to all the necessary steps that must subsequently be taken in the course of the litigation on behalf of a party. The difficulty in so construing the words 'applying' and 'acting' is that while R. 1 mentions the three-fold functions of a pleader, viz., appearing, applying or acting, Rule 4 merely deals with 'acting' and 'pleading' and no separate provision has been made by the Legislature in relation to the function of a pleader with regard to 'applying'. Could it be that this was the result of an oversight on the part of the Legislature? As a result of the recommendations made by the Bar Committee, the Legislature undertook the amendment of O. 3, Rules 1 and 4.

In R. 1 the Legislature substituted the words 'applying, appearing, acting' for the words 'duly appointed to act'. In R. 4 the Legislature provided only for 'acting' and 'pleading' respectively and did not make any specific provision for the function of a pleader with regard to 'applying', with the result that R. 4 is silent on the point of 'applying'. It is therefore not unreasonable to assume that the Legislature thought that 'applying' was included in 'acting', and that is the reason why it made no separate provision with regard to 'applying'. It may therefore be held that 'applying' is included in the meaning of the word 'acting' and a pleader who files an application on behalf of a party 'acts' for him and cannot therefore do so unless he is duly authorised in that behalf. It follows that unless a pleader is duly authorised in that behalf, he cannot 'act' for a party in Court, in the sense that he cannot present an application on his behalf.

43. But the question still remains as to whether the non-compliance with the provisions of R. 4 makes the 'act' of a pleader in presenting the application without being duly authorized in that behalf, a nullity or whether it is only an irregularity which could be subsequently rectified. Where a pleader is duly authorised by a vakalat but does not file the vakalat along with the application for execution, there is no question of non-compliance with the provisions of R. 4, for R. 4 does not provide that the vakalat should be filed along with the application eo instanti. But from the facts narrated at the outset, it is clear that the pleader who presented the application for execution had no vakalat in his favour on the date when the application was presented in Court. Here it may be noted that there is no suggestion that the decree-holder fifed his application in person or that he being present in Court, requested the pleader to file it on his behalf. The real question therefore is whether the filing of the execution petition by a pleader who had no vakalat on the date when he filed the petition into Court is a nullity or is a mere irregularity which could be cured by subsequent compliance, i.e., by the pleader subsequently filing a vakalat.

44. The decisions which have considered this aspect broadly fall into three categories (1) relating to the presentation of an application for execution; (2) relating to the filing of a plaint; and (3) relating to the preferring of an appeal.

45. With regard to the presentation of an application for execution, there is a marked difference of opinion between the various High Courts. In *Official Receiver, Aligarh v. Hira Lal*[11], a decision of the Allahabad High Court, an application for substitution of names in the place of the deceased decree-holder and for execution of the decree was made by a pleader, in the vakalat in whose favour, the place meant for the name of the pleader was left blank and did not bear any singature of the pleader showing that he had accepted it. The question arose as to whether the application was made in accordance with law and was such as could save limitation. It was held that the execution application was filed by an unauthorized person and was therefore not in accordance with law.

46. In AIR 1949 Allahabad 367 (FB), while the majority of the Judges held that the physical act of filing or presentation of an application for execution of a decree was an 'act' within the meaning of O. 3, Rules 1 and 4, all the Judges concurred in holding that the improper presentation of such an application was, however, not an illegality but a mere irregularity which did not make the application 'not made in accordance with law'. The Full Bench held that an application for execution which in all other respects was in order and which had been admitted and registered by the executing Court was not to be considered to have not been made in accordance with law merely because it had been handed over to the officer of the Court by a pleader who had not got a vakalatnama from the decree-holder.

47. The first of the decisions of the Madras High Court which considered this question is *Modono Mahono v. Kunja Behari*[12], where King, J., took the view that such an application was a mere nullity and was not made in accordance with law. This decision was taken in a Letters Patent Appeal and in ILR (1937) Mad 320 , a Division Bench of the Madras High Court consisting of Burn and Menon, JJ., held that an execution application presented by a pleader not duly authorised in writing in that behalf could not be said to be valid presentation inasmuch as the 'act' of the pleader in presenting the execution application was a mere nullity and therefore no order could be passed on the execution application which was not validly presented. The same view was taken by Horwill, J., in *Appaji Chetti v. Govinda Sami Reddi*[14],

48. In (1950) 2 Mad LJ 256 , Krishnaswami Nayudu, J., had to consider the same question. The facts in that case were : An execution petition was presented by an advocate who was not duly authorised in writing as required by O. 3. Objection was taken to the validity of the said execution petition on the ground that it was presented by a counsel who had no Vakalat and therefore it was a nullity.

[11] AIR 1935 All 727 [13] AIR 1937 Mad 760

[12] AIR 1935 Mad 786

Subsequent to the filing of the petition, a vakalat was filed by the advocate but that was done after the expiry of twelve years from the date of the final decree. It was contended that the subsequent filing of the vakalat in any event could not cure the defect in the presentation of the execution petition. On these facts, the learned Judge held that once it was shown that an advocate was authorised to represent a party, though such authority was not reduced to writing in the shape of vakalat at the time of filing the execution petition, the filing of the vakalat by the advocate subsequently cured the defect. The learned Judge followed the decisions of the Allahabad High Court in AIR 1949 Allahabad 367 (FB), and the observations of Sulaiman Ag., C.J., in ILR 54 All 57 : AIR 1931 Allahabad 507 (FB) .

49. In the Calcutta High Court, ILR 37 Cal 399, is a case where a mukhtiar filed an application for execution along with which he presented a power of attorney with his name inadvertently omitted from it. There was no doubt as to the fact the mukhtiar had in fact authority from the decree-holder to do so. The question was as to whether an application made by an attorney, whose name had by mistake been omitted from the power, could be validated by a subsequent amendment and it was held that the Court had inherent power to allow such amendment to be made and that the amended power took effect from the date when it was originally filed.

50. Then there is the decision of the same High Court in ILR 63 Cal 733, where an execution application was filed within three years of the decree by a pleader who did not file vakalatnama till after more than three years had elapsed from the date of the decree. The application was duly signed and verified by the decree-holder himself and it was duly accepted by the Court which proceeded to act upon it by issuing notices. It was held that the application was in accordance with law and that the execution case was not barred by limitation.

51. Dealing with the presentation of plaints, there are two decisions of the Allahabad High Court. In ILR 54 All 57 : AIR 1931 Allahabad 50 (FB), the plaint was filed through the next friend of the plaintiff who was shown as a minor. It was eventually discovered that the plaintiff was not a minor but had been prosecuting the suit himself, and an objection raised as to the framing of the

suit was overruled by the trial Court. The High Court held that the plaintiff's suit should not necessarily be thrown out on the technical ground that the plaint as originally filed described him as a minor under the guardianship of his mother and that the defect could and should be cured as it was due to a *bona fide* mistake. The learned Judges observed :

> "The Court receiving a plaint which has not been properly presented would have jurisdiction to dismiss it and pass orders on it. It would not be acting without jurisdiction if it did so. We do not mean to imply that that a plaintiff has the right to get his plaint presented by a man in the street. If the person presenting it was not properly authorized, the presentation would be irregular, the Court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence, and it is fair and just to allow the defect to be cured, the Court would undoubtedly do so; it is not absolutely helpless in the matter."

52. In *Chhita v. Mt. Faffo*[14], the plaint was presented by a pleader with a defective vakalatnama and it was held that the defect was a fatal one.

53. It may be mentioned here that in ILR (1945) Bom 819 , a Bench of the Bombay High Court had to consider the question as to whether the failure to comply with the provisions regarding presentation of a plaint was a mere irre gularity. The learned Judges held that if the person presenting it was not properly authorised to do so, the presentation would be irregular but did not oust the jurisdiction of the Court and that in such a case the Court would have a discretion to permit the irregularity to be cured, and that if the plaintiff had acted in good faith and without gross negligence, the Court would allow it to be cured. With regard to the third category dealing with the preferring of appeals, there are a large number of decisions but it is not necessary to notice all of them. A decision of the Lahore High Court which contains a somewhat elaborate consideration of the question is *Mt. Barkata v. Feroze Khan*[15], where the facts were these : The appellant engaged a vakil and signed a power of attorney in his favour, who prepared a memorandum of appeal and signed it as also the power of attorney in token of his acceptance. But being busy in one of the Courts on that date he asked another advocate to file the appeal on his behalf, which was done. The former advocate subsequently appeared on several dates but when it came up for final hearing, a preliminary objection was raised by the respondent that the appeal had not been properly presented. It was held that the appeal could have been presented by the later advocate at the instance of the former although the latter had no power of attorney in his favor, or in other words, the power to present the appeal could have been verbally delegated by the former in favour of the latter. It was further held that in any view it would be a mere irregularity which must be deemed to have been cured or condoned.

54. In *Kodi Lal v. Ahmed Hasan*[16], the question for determination was whether the absence of authority could be cured by a duly executed power filed after the expiry of the limitation provided by law for appeals. It was found that the appeal was filed by the advocate with the knowledge and on instructions from his client but it suffered from a procedural defect under a *bona fide* though mistaken, belief that the necessary power already existed, and the defect was remedied as soon as the mistake had been brought to the notice of the advocate concerned. It was held that it was a mere procedural irregularity arising from a *bona fide* mistake on the part of the pleader and was not so vital as to render the appeal incompetent.

55. In *All India Barai Mahasabha v. Fangi Lal Chaurasia*[17], an application was filed under para. 20 of Schedule II, Civil Procedure Code, for the award of an arbitrator being made a rule of the Court. Along with the application was filed a vakalatnama executed by the plaintiff-appellant in favour of seven legal practitioners one of whom was Mr. Yusuf Husain. The application and the vakalatnama were presented by the said Mr. Husain. The respondent filed objections to the application of the appellant, and one of the objections taken was that the application was not properly presented as the certificate of practice granted to Mr. Yusuf Husain had expired before the 4th December 1936, and was not renewed till

[14] AIR 1931 All 76 [16] AIR 1945 Oudh 200
[15] AIR 1944 Lah 131 [17] AIR 1941 Oudh 169

sometime after that date so that on the 4th December 1936, he was not a pleader authorized to act or appear in Court. The learned Judges, while holding that it was an irregularity which would be cured in the trial Court, held that it was too late to rectify it at the appellate stage especially when the application had become barred by time. They further held that the fact that the Court which was unaware of the irregularity allowed the counsel to appear in the case on several dates did not amount to a condonation of the defect in the presentation of the application.

56. The preponderance of judicial opinion establishes that failure to comply with the provisions regarding presentation of an application for execution is a mere irregularity so that if the person pre-presenting it is not properly authorized to do so, the presentation would be irregular but it would not be a nullity. In such a case the Court would have a discretion to have the irregularity cured and if the applicant had acted in good faith and without gross negligence the Court would allow it to be cured.

57. In ILR (1937) Mad 320 , the Madras High Court took the view that the presentation of an application for execution without a vakalat in favour of the pleader acting for the appellant, was an irregularity which could not be cured. This view may be justified on a strict interpretation of the relevant provisions. The other High Courts, viz., Allahabad, Bombay and Calcutta have taken a more liberal view and have held that such a presentation was a mere irregularity and could in appropriate case be cured or condoned. This view found favour also with the High Courts of Lahore, Rangoon and latterly by the Chief Court of Oudh, though in an earlier case that Court had taken a contrary view.

58. In a matter of procedure it is desirable that there should be a certain amount of uniformity in all the High Courts.

59. ****

60. Apart from the desirability of achieving uniformity in a matter relating to procedure, there is a well-known distinction between a case where the directions of the Legislature are imperative and a case where they are directory. The general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment is obeyed or fulfilled substantially. It has always been held that where no public policy is involved, the provisions of a Statute should be held to be directory only and not mandatory. Here it cannot be suggested that there is any public policy involved. Applying this canon of interpretation it must be held that the provisions of Order 3, Rule 4, are directory only.

61. It may also be noted that while the body of the Code is unalterable except by the Legislature and is expressed in more general terms it is to be read in conjunction with the rules which are more readily alterable and which are concerned with details and machinery indicating the mode in which the jurisdiction created by the body of the Code is to be exercised. As Mahmood, J., observed in *Narsingh Das v. Mangal Dubey*[18],

[18] ILR 5 All 163 (FB)

> "Courts are not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law."

This, of course, is subject to the qualification that in the exercise of its inherent power the Court must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature.

62. The test to distinguish an illegality from an irregularity is stated in the following words by Coleridge, J., in *Homes v. Russel*[19],

> "It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

63. An objection with regard to the presentation of an application by a pleader who is not duly authorized may be waived by a judgment-debtor and hence it is only an irregularity. In the instant case, the Court also received the application without objection and not only admitted and registered the application but also proceeded to issue notice to the judgment-debtor. The improper presentation of the application, which was otherwise in accordance with law, must therefore be held to be a mere irregularity and not an illegality.

64. The conclusions which I have reached as a result of the above discussion are: (1) the presentation of an application for execution is an act required or authorised by law to be done by a party in person, by his recognised agent or by a pleader duly appointed by him in that behalf, (2) Acting includes applying and a pleader who makes an application on behalf of litigant acts for him and cannot do so unless he is duly authorised in that behalf. (3) The presentation of an application by a pleader to whom the authority in the prescribed manner under Rule 4 of O. 3, Civil Procedure Code, was not given is only an irregularity which could be cured at a subsequent stage.

65. The question referred for the decision of the Full Bench is therefore answered as follows :- The presentation of an application by a pleader to whom the authority in the prescribed manner under Rule 4 of O. 3, Civil Procedure Code, was not given, is not a nullity but only an irregularity which could be cured at a subsequent stage.

Mohd. Ahmed Ansari, J.

66. I have had the advantage of going through the judgment of my learned brother

Satyanarayana Raju, J., and I agree with him.

(This appeal came for final hearing after the expression of the opinion of the Full Bench, before Subba Rao, C.J., and Bhimasankaram, J.)

[19]9 Dowe 28

Judgment

67. Following the opinion expressed by the Full Bench, the appeal is dismissed with costs.

Appeal dismissed.