

Keith Allams and others Vs. IrwIn D'silva and others

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Court : Mumbai

Decided On : Aug-17-1999

Reported in : AIR2000Bom182; 1999(4)ALLMR209; 2000(1)BomCR788; 2000(1)MhLj409

Judge : Y.K. Sabharwal, C.J. and; S.H. Kapadia, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 191 - Order 18, Rule 15 - Order 20, Rules 4 and 5 - Order 28, Rules 1 and 4 - Order 41, Rule 35 - Order 49, Rule 3; Bombay High Court (Appellate Side) Rules, 1960 - Rules 273 and 274; [Constitution of India](#) - Article 215

Appeal No. : Suit No. 1281 of 1984 with Suit No. 1101 of 1989 with Summary Suit No. 2444, 2445, 2446, 2447, 2448

Appellant : Keith Allams and others

Respondent : IrwIn D'silva and others

Advocate for Def. : P. Sancheti i/by ;Federal & ;Rashmikan, ;I.M. Chagla, ;J.P. Sen and ;Pereira, Advs.;R.C. Sequira, ;S.H. Doctor, ;Mrs. G.M. Kotwal i/by ;Tyabji Dayabhai & Co., ;Rajiv Kumar, ;Mrs. Asha Mahant

Advocate for Pet/Ap. : D.Y. Chandrachud A.S.G., ;C.J. Sawant, ;A.G., ;Shekhar Naphade, ;Ms. Geeta Shastri i/by ;Clive D'Souza, ;Mihir Desai i/by ;Satpute, & Co., ;Jayesh Bhatt, ;R.K. Kulkarni, ;S.V. Gaikwad, ;Hetal Pate

Judgement :

ORDER

Y.K. Sabharwal, C.J.

1. A learned Single Judge has referred for decision by a larger Bench the following question:

'Whether in the Chartered High Court a suit in which evidence is partly recorded by one Judge can be heard on change of assignment by another Judge from the stage at which the suit was at the time of change of assignment without being released by the Judge who has partly heard the evidence and without the consent of the parties?'

In the Order of Reference, it has been observed that all matters were taken up together, as a common procedure aspect had arisen in different and distinct suits. Number of suits, where evidence had been partly recorded by one Judge or the other, came up for trial before the learned Judge who made the reference. The Order of Reference states that the question cropped up whether, on change of assignment the learned Judge could proceed with the trial from the stage left by the earlier Judge. It further states that divergent views were expressed before the learned Judge, one, that, in the trial of the suit, where the evidence has been partly heard by a Judge of the Chartered High Court, the other Judge could only proceed with the trial from that stage only if the parties consent and the earlier Judge releases the matter from being part-heard and if the parties do not agree for reading the evidence by the other Judge, there has to be trial de-novo. It is because of exclusion of Order 18, Rule 15. Code of Civil Procedure (for short, 'the Code'), to the trials of suits by the Chartered High Courts. The other view-point expressed was that the Judge of the Chartered High Court, in the trial of the suit, is not precluded from reading the evidence partly recorded by other Judge and that the Judge can proceed with the trial of the suit from the stage left over by the earlier Judge, irrespective of the consent of the parties or release of the matter from being part-hard. The learned Single Judge has observed that, as a general rule, judgment must be given upon evidence taken by the Judge before himself and not upon evidence taken before another person, except where exceptions to

this general rule have been carved out in Order 18, Rule 15, Order 28, Rules 1 and 4, of the Code. It has also been observed that delay and expense in disposal of litigation is worse evil than that of having judgment pronounced by the Judge who has himself not taken the evidence.

2. We have also heard the learned Advocate-General and Mr. Iqbal Chagla on behalf of the Bombay Bar Association besides Dr. Chandrachud, learned Additional Solicitor General, apart from learned Counsel for the parties, Mr. Soli Doctor, Mr. Devitre and Mr. Naphade.

3. Order 18 deals with the hearing of the suit and examination of witnesses. It may be useful to reproduce Order 18, Rule 15, as under:-

' 15. Power to deal with evidence taken before another Judge-(1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.'

4. Rule 3 of Order 49 of the Code sets out those rules which do not apply to Chartered High Courts in the exercise of their Ordinary or Extra-ordinary Original Civil Jurisdiction, Order 18, Rule 15, is amongst such rules. This Court is a Chartered High Court. The question, therefore, is whether in view of exclusion of applicability of Order 18, Rule 16, to this Court, can the evidence recorded by one Judge be taken into consideration by another Judge on change of assignment or de-novo trial shall be held.

5. While considering the question involved, two aspects may have to be borne in mind. One, that we are dealing with a matter of procedure. Second, keeping in view the huge pendency and delay in disposal of cases, if otherwise permissible in law, the approach to be adopted in the matter of procedure should be such which

may advance the cause of justice and help in expeditious disposal rather than the one which may result in further delays. We may note what has stated about a century and quarter ago in *Combe v. Edwards*, reported in 1878(3) P.D. 103 by Lord Penzance:-

'The spirit of justice does not reside in formalities or words nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the hand-maid of justice; and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque.'

6. Bearing in view the aforesaid approach, we now proceed to examine the question which, in fact, is whether evidence heard by one Judge may be treated as evidence before another Judge before whom the suit comes on for hearing, with or without the consent of the parties.

7. It is clear that only Calcutta High Court has held that the trial before the second Judge must be heard de-novo and the evidence led before the first Judge is not admissible and cannot be relied upon. A learned Single Judge of Calcutta High Court (Ormond, J.) had opined that both as a matter of construction as also for historical reasons, the exclusion by Order 49, Rule 3, of the Rules mentioned therein were not in their totality but only 'so far as relates to the manner of taking evidence' in respect of each of the Rules, including Rule 15. According to Justice Ormond, a Judge of Chartered High Court could continue a trial from the stage at which another Judge had left it. The decision was, however, reversed in appeal in *Sarba Ranjan Bysaok v. Sm. Haripriya Dassi*, 53 Cal. W N. 569. The Division Bench held that Rule 15 of Order 18 stood altogether excluded from operation to a Chartered High Court. The Division Bench further held that, before the second Judge, trial must be held de-novo and evidence led before the first Judge is not admissible and cannot be relied upon.

8. We are in respectful agreement with the learned Division Bench insofar as it holds that Order 18, Rule 15, stood excluded from operation to a Chartered High Court. With utmost respect, we find it difficult to agree with the proposition that the trial before the second Judge has to be held de-novo and the evidence led before

the first Judge is not admissible before the second Judge. In our view, it is not necessary for a Judge of a Chartered High Court for acting or relying upon the evidence recorded by another Judge of that Court that there should be a special provision like Order 18, Rule 15, of the Code. The Calcutta High Court proceeds on the basis that there is a general and absolute rule that the witnesses shall be heard and seen by the Judge who decides the issue of fact. In our view, however, there is no such rule, let alone an absolute rule. It may be laudable to have such a practice but there is no such mandatory rule. The practice presently prevailing for last number of years is otherwise. It is merely a practice of convenience to advance the cause of justice if it is possible to adopt such a practice. There is, however, no rule that can denude a Judge of the jurisdiction or power to continue a trial where evidence has not been led before him but before some other Judge. It has to be borne in mind that, as a Court of Record, the evidence led before the Court becomes a permanent and immutable record. Unless there is any law or binding precedent, such evidence cannot be deleted, obliterated or disregarded. The evidence admitted and recorded by a Judge of a Court of Record forms part of a permanent testimony and cannot be described as inadmissible, except where it is so held by the Appellate Court. Except for the decision of the Calcutta High Court, no other precedent, holding that such evidence would be inadmissible, has been brought to our notice.

9. We may note, in brief, the history of establishment of the Bombay High Court. The Supreme Court of Judicature at Bombay was established by Letters Patent dated 8th December, 1823. It was provided, *inter alia*.

'that there shall be, within the Settlement of Bombay, a Court of Record, which shall be called the Supreme Court of Judicature at Bombay'.

It was further provided that:

'the said Supreme Court of Judicature at Bombay is hereby authorised and required to reduce the depositions of the witnesses to be examined, or cause the same to be reduced into writing, and subscribed by the several witnesses with their names or other mark and to file the same of record'.

The High Court of Judicature at Bombay was established by Letters Patent dated 26th June, 1862, which expressly provided 'and we do hereby constitute the said Court to be a Court of Record'. While abolishing the Supreme Court, it was expressly provided that the High Court 'should have and exercise all jurisdictions, and every power and authority whatsoever, in any manner vested in any of the courts in the same Presidency abolished under the said Act, at the time of abolition of such last mentioned courts'. The Letters Patent of 1865 revoked the earlier Letters Patent but, notwithstanding such revocation, the High Court of Judicature at Bombay was continued as a Court of Record.

10. Article 215 of the [Constitution of India](#) provides that every High Court shall be a Court of Record and shall have all the powers of such a Court.

11. In Supreme Court Bar Association v. Union of India, : [1998]2SCR795 , the significance and import of being a Court of Record has been noticed by citing with approval the definition of a Court of Record in Jowitt, Dictionary of English Law and Wharton's Law Lexicon as follows:-

'A Court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony and which has power to fine and imprison for contempt of its authority' (Jowitt).

'Record, courts of, those whose judicial acts and proceedings are enrolled on parchment, for a perpetual memorial and testimony; which rolls are called the records of the Court; and are of such high and super eminent authority that their truth is not to be called in question. Courts of Record are of two classes - Superior and Inferior. Superior Courts of Record include the House of Lords, the Judicial Committee, the Court of Appeal, the High Court, and a few others. The Mayor's Court of London, the County Courts Coroner's Courts, and other are Inferior Courts of Record, of which the County Courts are the most important' (Wharton).

12. The manner in which evidence is required to be taken has been provided for in the Rules framed under exercise of power vested in Clause 37 of the Letters Patent. Rules 273 of the High Court Rules and Forms of 1901 provided the manner in which the evidence was to be taken. The said rule provided as follows:-

'Upon the hearing of any suit the evidence of the witnesses shall be taken down in writing by, or in the presence and under the superintendence of the Judge or one of the Judges, not ordinarily in the form of question and answer, but in that of a narrative and the notes so taken shall be sufficient for all purposes and shall form part of the record.'

The present Rule 274, for all practical purposes, is identical in all particulars. There cannot be any doubts that the evidence recorded by a Judge forms part of the record and, that being so, it cannot be said that, upon change of assignment, the said evidence would become inadmissible, thus requiring a de-novo trial. In one of the old cases, *Naranbhai Vrijbhukandas v. Naroshankar Chandroshankar* and another, 1967 Bom HCR 1998, though in a different context, the question arose as to whether the evidence recorded by the earlier Judge would be a nullity. In that case, the evidence was led in the Court of Principal Sadar Amin and thereafter the suit was transferred to the Court of Magistrate. Further evidence was led and it was Munsiff who decreed the suit. It was contended in the Court of Appeal that the suit had not been legally decided. Chief Justice Couch, with whom three other learned Judges concurred and one dissented, held that the use of the evidence of the Munsiff was only an irregularity. According to the majority opinion, the trial was held not to be a nullity. It has to be borne in view that the evidence has been recorded by the Court, as required by the Letters Patent, and that being, Court of Record, the evidence forms part of the record. Thus, it would not be possible to subscribe to the view that such evidence, on change of assignment, will have to be disregarded and trial commenced de-novo. There is no rigid or mandatory rule of absolute application that the case shall be decided by a Judge who has heard and seen the witnesses. If at all it may be only a practice of convenience and not a rule which goes to the root of the matter affecting the jurisdiction of a Judge to decide the case where witnesses have been heard and seen by another Judge. As already noticed, though laudable to have the case decided by the Judge who has seen the witnesses and recorded the evidence, yet in practice ordinarily, it can be achieved only if no new suit is taken up once the recording of evidence in one suit begins till such time that the case is decided. For variety of reasons, for the last number of decades, it has not been possible in practice to strictly apply this procedure and not take up any other matter when the

recording of evidence in one suit has commenced. The result has been that at the time of change of assignment, there are number of suits where piecemeal evidence has been recorded by a Judge. All this evidence will not become redundant or inadmissible. The consent of both the parties is not necessary to make admissible the said evidence. In Naranbhai's case (supra), Couch, C.J., has observed that 'there is no rule of jurisprudence which requires that the evidence in the suit shall be taken by the Judge who pronounces the judgment'

13. The provisions of Order 18, Rule 15, of the Code are analogous to section 191 of the Code of Civil Procedure, 1882. It seems that this provision was enacted presumably to meet the difficulties pointed out in Naranbhai's case. The object was to specifically empower the successor Court to take up the matter of evidence from the stage at which the predecessor left it. The exclusion of applicability of Order 18, Rule 15, to the Chartered High Courts as provided in Order 49, Rule 3, of the Code, is understandable, since, in the High Courts the Judges are neither predecessors nor successors. The exclusion of applicability of Order 18, Rule 15, however, does not lead to the conclusion as reached by Calcutta High Court, and this we say with utmost respect and regard to the learned Judges of the said High Court.

14. In the case of Rao Shiva Bahadur v. State of Vindhya Pradesh, : [1955]2SCR206 , it has been observed that there is nothing in principle which requires that a case must be decided in its entirety by one Judge.

15.. The exclusion of applicability of Order 18, Rule 15, cannot be interpreted in a manner which puts fetters on the Chartered High Courts.

16. A similar question also arose before the Andhra Pradesh High Court in B.N. Chobe v. A Chaffar Khan, : AIR 1973 AP305 . Section 9 of the Hyderabad Small Causes Courts Act, read with Schedule thereto, excluded the provisions of Order 18, Rule 15, of the then Civil Procedure Code. The question that arose before the Andhra Pradesh High Court, under these circumstances, was whether a Judge exercising jurisdiction under provisions of the Hyderabad Small Causes Courts Act can act upon the memorandum of evidence already recorded by his predecessor who stood transferred. It was argued that the successor Judge had no power to

act on the evidence recorded by his predecessor, in view of exclusion of applicability of Order 18, Rule 15, and thus, Judge could not have acted upon the evidence recorded by his predecessor and he should have conducted the trial de nova. Rejecting the argument, it was held by the Full Bench that the power to act upon the evidence recorded by the predecessor is only an enabling provision, and the question is relating to mere procedure and not affecting one of jurisdiction and that a litigant has no right to demand any de novo trial. The identity of the Court is not altered by a new Judge being assigned to take up the suits in which evidence is required to be recorded.

17. Similar view has also been expressed by a Full Bench in the case of Smt. Veera Devi & others v. The State of J.& K. others, A.I.R. 1973 J&K; 1. That was a case of exclusion of Rules 1 to 8 of Order 20 of the Code by virtue of Order 49, Rule 3, of the Code. It was observed that the exclusion is only for the purpose of giving a free hand to the High Court to make its own rules in the matter of signing of a decree drawn up in pursuance of a judgment passed in Original Side matter and not to put fetters on the powers of a Judge to sign a decree passed by another Judge, who ceased to be a Judge. We are of the opinion that the main object has to be to advance the cause of justice, rather than to take a view which results in cause of justice becoming a casualty.

18. In view of the position of the Chartered High Courts in India, the English decisions may not be directly relevant but it would be useful to notice the approach adopted by the English Courts.

19. In *Coleshill v. Manchester Corporation*, 1928(1) K.B. 776 a case where Acton, J., had continued a jury action with the consent of parties on the death of Fraser, J., Scrutton, L.J., observed that although it was unnecessary to take objection to what had occurred, 'I think it is a precedent which should not be followed in future. I doubt whether a Judge has any jurisdiction to continue to hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another Judge.....'

20. Scrutton, L.J., has not been uniformly followed. Robert E. Megarry observes in his 'Second Miscellany at Law' at page 54 '.... the words of Scrutton, L.J., have

been distinguished with more zest than followed' See for example, *The Forest Lake*, 3 All.E.R. 833; (*Re. Application of British Reinforced Concrete Engineering Co, Ltd.*), 1929(45) T.L.R. 186, 187.

21. A functional and practical approach for rendering justice is required to be adopted, rather than to adopt a technical approach, which would defeat justice and further delay the matters which otherwise take long years before they are taken up for evidence. The de novo trial would result in undue and avoidable hardship to litigants. It would give an unnecessary handle to dishonest litigants to obliterate evidence already recorded, which may be adverse to them. If the reading of the evidence recorded by one Judge to become admissible before another Judge was made dependent upon the consent of the litigants, in the very nature of things, one party to the litigation may find it convenient to withhold such consent. As already observed, the approach of interpretation of the rules of procedure has to be the one which cuts down delays.

22. In *Marshall v. Taggart*, 1928(2) K.B. 447 Sherman, J., in the context of an objection on account of death of one of three Judges of the Peace, observed as follows :--

'Justices come and go, but justice itself should endure. I see no reason to uphold an objection which would result in justice coming to an end owing to the death of a Magistrate because section 2 of The Summary Jurisdiction Act, 1857 is worded as it is. This sort of objection ought to be as extinct as the thumbscrew.'

23. Reference may also be made to the decision of the Supreme Court in *Smt. Swaran Lata Ghosh v. Harendra Kumar Banerjee & another*, : [1969]3SCR976 . That was a case where the question about the effect of exclusion of Rules 4 and 5 of Order 20, of the Code by virtue of Order 49, Rule 3, came up for consideration. Order 49, Rule 3, besides others, also excludes Rules 1 to 8 of Order 20 in its applicability to any Chartered High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction. Rule 4(2) of Order 20 stipulates that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Rule 5 of Order 20 stipulates that, in suits in which issues have been framed, the Court shall

state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit. The Supreme Court held that it is true that the Judge of a Chartered High Court is not obliged to record a judgment strictly according to the provisions contained in Rules 4(2) and 5 of Order 20. The privilege of not recording a judgment is intended normally to apply where the action is undefended, where the parties are not at issue on any substantial matter, in a summary trial of an action where leave to defend is not granted, in making interlocutory orders or in disposing of formal proceedings and the like. The Supreme Court observed that Order 49, Rule 3, of the Code undoubtedly applies to the trial of suits; but the question is not one merely of power but of exercise of judicial discretion in the exercise of that power. It was held that the conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure.

24. In *(Shirin Vishnu Kirpalani v. Vishnu Hiranand Kirpalani, A.I.R. 1960 Bom 447*, Chief Justice Chagla, speaking for the Bench dealing with the applicability of Order 41, Rule 35, of the Code, noticing that the High Court exercising its Appellate Side Jurisdiction is not bound by the mandatory provisions of Order 41, Rule 35, and although the High Court has framed rules on the Original Side and there was no such rules framed on the Appellate Side, held that, in the absence of any such rules, it seems that the power of the High Court in its Appellate Side Jurisdiction is not fettered by the mandatory provisions. The learned Chief Justice observed that there is no reason why, if a Judge on the Original Side is armed with that power, the Judge sitting in appeal in the High Court should not have similar power, though it is a different matter that power is to be exercised sparingly and with caution.

25. There is an advantage if the same Judge hears the trial from beginning to end, i.e., recording the evidence and pronouncing judgment, as far as possible and practicable. Departure from this practice, however, cannot have the effect of nullifying or invalidating the entire trial. The exclusion of Order 18, Rule 15, of the Code, is intended with a view to give the High Court a free hand in the matter of regulating the procedure, including the procedure for recording of evidence, rather than to fetter the powers of the High Court. The object of exclusion was not to

fetter the power of the High Court is also clear from the observations made in the two Full Bench decisions, one of this Court and the other of Allahabad High Court. See *Prabhakarbhat v. Vishwambhar Pandit*, I.L.R. 8 Born. 313 and *Jadu Rai & another v. Kamizak Hussain & others*, I.L.R. 8 All. 576.

26. No rule or binding precedent has been brought to our notice for coming to the conclusion that consent of the parties is necessary for the evidence to be read by a Judge who has not recorded it and in absence thereof, we have no difficulty in holding that such a consent is not necessary. Further, by merely recording evidence, the suit, in the real and strict sense, does not become part-heard. The recording of evidence is one of the stages of the suit, which comes to an end when the recording of evidence for the day is concluded. Therefore a suit would strictly not become part-heard simply by recording of evidence by a Judge. It is, however, a different matter if there is an order by a Judge which shows that the suit is part-heard.

27. Submissions were also made and certain decisions cited, including the decision of the Apex Court in the case of *State of Rajasthan v. Prakash Chand & others*, : 1998 CriLJ2012 touching on the question of the administrative powers of the Chief Justice of making roster and transfer of cases, including part-heard cases. In the present reference, however, such question does not arise and therefore it is not necessary to go into it. We may, however observe that, if a suit is part-heard on being so ordered by a Judge, it would of course be dealt with in the same manner as any other part-heard matter.

28. Before recording our answer to the question, we wish to place on record our appreciation for the most able assistance rendered by the learned Advocate-General, Mr. Iqbal Chagla and team of young lawyers assisting him on behalf of the Bombay Bar Association, Dr. Chandrachud, Mr. Soli Doctor, Mr. Devitre and Mr. Naphade.

29. In the light of aforesaid discussion, we hold that the evidence heard and recorded by one Judge has mandatorily to be treated as evidence in the suit before another Judge, when the suit on account of change of assignment or any other reasons, comes up for hearing before some other Judge. For reading of

such evidence, neither consent of the parties nor a specific order of release of the suit as part-heard by the earlier Judge who has merely recorded evidence, is required. The suit would be part-heard only when so directed specifically by the learned Judge who has recorded evidence.

30. The reference is answered in the manner as aforestated.

31. Reference answered accordingly.

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