

Rita Pandit Vs. Atul Pandit

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Court : Andhra Pradesh

Decided On : Jan-27-2005

Reported in : AIR2005AP253; 2005(2)ALD230; 2005(2)ALT220

Judge : Bilal Nazki, ;D.S.R. Varma and ;S. Ananda Reddy, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rules 4 and 5 - Order 16, Rule 1; [Evidence Act, 1872](#) - Sections 1, 3, 5 and 118

Appeal No. : CMA No. 3584 of 2002 and CRP No. 928 of 2003

Appellant : Rita Pandit

Respondent : Atul Pandit

Advocate for Def. : R. Umender Kumar, ;P. Venugopal, ;S. Balchand, ;C.R. Pratap Reddy and ;K. Raghuveer Reddy, Advs.

Advocate for Pet/Ap. : Bankatlal Mandhani, ;D. Madhava Rao, ;P. Shiv Kumar, ;B. Bal Reddy and ;Tej Prakash Toshniwal, Advs.

Judgement :

Bilal Nazki, J.

1. This matter has come before us on a reference made by a Division Bench of this Court vide order dated 19-2-2004. By this order the Division Bench recorded

that the question involved in the batch of cases was of considerable importance. Prior to this order, an order was passed by the same Bench on 3-12-2003 expressing an opinion that there were different views expressed in two decisions of the Supreme Court with regard to interpretation of Order 18 Rule 5 of the Code of Civil Procedure (for short 'the Code'). Those two decisions of the Supreme Court are Salem Advocate Bar Association, Tamil Nadu v. Union of India, : AIR 2003 SC189 and Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited, 2004 (1) ALD 34 (SC) = 2003 (1) DT (SC) 1177. First judgment was delivered on 25-10-2002 and the subsequent judgment on 18.11.2003. We have heard the learned Counsel for the parties and also Mr. Vilas V. Afzulpurkar who was appointed as an amicus curiae to assist this Court. The learned Counsel appearing for the parties have argued the matter in detail. Although the Reference Court has stated that the real scope of Order 18 Rules 4, 5, 13 and 19 of the Code has to be gone into the matter, but the real question which has been argued before us is the supposed conflict between Rules 4 and 5 of Order 18 of the Code. Rule 4 of Order 18 of the code was substituted by Amendment Act, 1999 and after amending it reads as under:

'4. Recording of evidence by Commissioner :-(1) In every case, the evidence of a witness of his examination-in-chief shall be given by affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken orally by a Commissioner to be appointed by the Court from amongst the panel of Commissioners prepared for this purpose on the same:

Provided that, in the interest of justice and for reasons to be recorded in writing, the Court may direct that the evidence of any witness shall be recorded by the Court in the presence and under the personal direction and superintendence of the Judge.

(3).....

(4).....

(5).....

(6).....

(7).....'

Before the amendment, this rule read as under:

'4. Witnesses to be examined in open Court .-The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.'

2. Rule 5 was substituted by the Amendment Act, 1976 which reads as under:

'How evidence shall be taken in appealable cases.

5. In cases in which an appeal is allowed, the evidence of each witness shall be,-

(a) taken down in the language of the Court,-

(i) in writing by, or in the presence and under the personal direction and superintendence of the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

(b) If the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge.'

3. The contention of the learned Counsel is that if it is held that in every case examination-in-chief has to be done by an affidavit, then Rule 5 will be rendered redundant and useless, therefore it is evident that examination-in-chief can be given by affidavits only in those case in which an appeal is not allowed against the final judgment and in cases in which appeal is allowed, the evidence has to be recorded in terms of Rule 5. That means it has to be taken down in writing or in presence and under personal direction or superintendence of the Judge. It is further contended that there is no conflict between Rules 4 and 5. Rule 4 applies only to those cases where against the final judgment appeal is not allowed, whereas Rule 5 applies to those cases where an appeal is allowed against the

final order/judgment. Rule 4 cannot control Rule 5 and a meaning cannot be ascribed to Rules 4 and 5 to make one of the Rules redundant. It is further contended that Rule 13 lays down that in cases in which appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses at length, but the Judge, after examination of each of the witnesses, may make in writing a memorandum of the substance of what the witness has deposed. Therefore Rule 13 goes in accordance with the spirit of Rule 4. Rule 19 is enacted for altogether different purposes and the purposes are mentioned in Rule 4A of Order 26 and in case a Commissioner is appointed for examination of witnesses in terms of Rule 19, that will be for the purpose of examination-in-chief and cross-examination both. This question has already attracted the attention of various High Courts as well as the Supreme Court. Therefore we will deal with the judgments which have dealt with this question directly in the first instance.

4. The first judgment is from Kerala High Court decided on 10-9-2001 in CMP No. 4495 of 2002 in E.P. No. 3 of 2001 reported in Palode Ravi v. Mangode Radhakrishnan and Ors., 01 KLC 622. Three questions were considered for an answer by the Court. The first question was whether in view of the contents of Order 18 Rule 5 (unamended) it is possible to follow the new procedure in Order 18 Rule 4 of the CPC in the trial of a civil suit? The objections which were taken to the application of Rule 4 to all types of cases before the Kerala High Court were summerised by the Court in Para 9 of the judgment:

'9. The possible objections to the recourse to Rule 4 aforementioned appeared to be the following,

(i) Though it is provided that the examination-in-chief of a witness shall be on affidavit, there is no corresponding amendment brought to the Indian Evidence Act which enables collection of evidence through affidavit.

(ii) When a proof affidavit in substitution of chief-examination is prepared in the office of the Counsel at whose instance the party is summoned, there is possibility of the contents of the affidavit being elicited through leading questions which is a taboo under the Indian Evidence Act.

(iii) The witnesses, especially those of the rustic and illiterate categories might not actually know what is recorded in the proof affidavit and there is possibility of matters which are not within the contemplation of the witness getting into proof affidavit. The damage will be more where the witness gives his statement in the vernacular and the proof affidavit is prepared by the Counsel in English. In such cases there is possibility of the witness being exposed to the need to face cross-examination on matters not actually stated by him.

(iv) Witness on summons cannot be compelled to meet the Counsel for preparing proof affidavit.'

In Para 24 the Court held :

'24. What follows from the above discussion is that by virtue of the amendments aforementioned the Court has the power to direct examination of any witness subject to the safeguards aforementioned and the question whether in a particular case or with respect to a particular witness such a method should be adopted is a matter within the discretion of the Court. Likewise, the selection of the Commissioner to be engaged for the aforesaid service is also a matter of discretion to be used very carefully with reference to the nature of the case through Rule 4-A fully enables the Court to make such appointment. The choice is to be with reference to the need and not based merely on the numerical priority in the panel. It also follows that it will be open to the Court in an appropriate case to refuse appointment of commission to record evidence as well if it is of the view that the nature of the case or nature of evidence required of a particular witness is such that it can properly be done only by the Court and not by the Commission. Suffice it to say that proof affidavit cannot be insisted on with regard to witnesses coming on summons. The reason is that there is nothing in the amended provisions whereby a witness can be compelled to go over to any Advocate's office for preparing such an affidavit. With regard to official witnesses and those on summons the conventional method of recording chief-examination may be followed whether it be recorded by the Court or by the Commissioner. This is not to say that where a witness under summons (official or otherwise) is prepared to file proof affidavit it can be discarded. It will always be open to such witness also to

file proof affidavit if they are prepared to do so. Pending the framing of Rules the procedure mentioned in the preceding paras is to be followed in the matter of trial in pending cases.'

5. Thereafter a judgment of the Bombay High Court came in *FDC Limited v. Federation of Medical Representatives Association of India (FMRAI) and Ors.*, : AIR2003 Bom371 . The same question was considered in this judgment. In Para 8 it stated:

'8. In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5. In non-appealable cases however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of Rule 5, whereas in case of non-appealable cases the Court would be empowered to exercise its power under Rule 13.'

6. Then another judgment is from the High Court of Punjab and Harayana reported in *Karam Singh v. Dana Singh*, 2003 AIHC 2903. In Para 7 the Court held:

'7. Another reason for accepting the plea that in all cases the examination-in-chief of a witness has to be on affidavit is that because before amendment procedure of recording evidence by affidavit used to be followed in summary cases. It is presumed to be know to the Legislature. However, it has yet prescribed the procedure of recording examination-in-chief by affidavit under Rule 4. The expression 'every case' used in Sub-rule (1) of Rule 4 would be rendered illusory and otiose if the recording of examination-in-chief by affidavit is confined to only those cases which are not appealable because no such intention is discernible from Rules 4 and 5. The correct interpretation is that evidence other than

examination-in-chief may have to be recorded in accordance with the provisions of Rule 5, but examination-in-chief is required to be recorded under the provisions of Rule 4.'

7. Another judgment is from Rajasthan High Court reported in *Laxman Das v. Deoji Mal and Ors.*, . This is a judgment by the learned Single Judge of the Court. In Para 10 it stated:

'10. Order 18 Rule 4 provides for recording of examination-in-chief by affidavit in every case, but Rule 5 thereof remains unchanged which provides for recording of evidence by the Court in case the ultimate judgment and decree to be passed by the Court is appealable. To provide the harmonious construction of these provisions, Order 18 Rule 4 is to be read with Order 18 Rule 13, but as there is no change in Order 18 Rule 5, it is difficult to hold that even in cases where the ultimate order shall be appealable, the evidence can be recorded as provided either under Order 18 Rule 4 or Order 18 Rule 13. Giving any other interpretation would render Rule 5 thereof nugatory and such an interpretation is not permissible. What to talk of a provision, even a word in the Statute cannot be construed as a surplusages. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced as a 'dead letter' or 'useless lumber. An interpretation which renders a provision an exercise in futility, should be avoided, otherwise it would mean that enacting such a provision in subordinate legislation was 'an exercise in futility' and the product came as a 'purposeless piece' of legislation and provision had been enacted without any purpose and entire exercise to enact such a provision was 'most unwarranted besides being uncharitable.'

8. This judgment was considered by the Bombay High Court in the judgment reported in *F.D.C. Limited v. Federation of Medical Representatives Association of India (FMRAI) and Ors.* (supra).

9. Then coming to the two judgments of the Supreme Court reported in Salem Advocate Bar Association, Tamil Nadu v. Union of India, (supra) and Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited, (supra), the Division Bench of this Court which made the reference, felt that these judgments are conflicting with each other. The earlier judgment of the Supreme Court being Salem Advocate Bar Association, Tamil Nadu v. Union of India (supra) was given by a 3-Judge. Two writ petitions were filed directly challenging the amendments made to the Code by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002. There was challenge to the various provisions which had undergone amendments including Order 18 Rule 4. It was dealt by the Supreme Court in this judgment in Para 17. The contention before the Supreme Court was:

'it often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through Court. Order 16, Rule 1 provides for list of witnesses being filed and summons being issued to them for being present in Court for recording their evidence.'

The Supreme Court took note of it and held:

'Rule 1-A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 16 and Order 18 together, it appears to us that Order 18 Rule 4(1) will necessarily apply to a case contemplated by Order 16 Rule 1-A i.e. Where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in Court but shall be in the form of an affidavit.'

Then in Para 18 the Supreme Court held:

'18. In cases where the summons have to be issued under Order 16, Rule 1, the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the Court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in Court for his examination. In

appropriate cases, the Court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18 Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having regard to the facts of each case.'

10. The Supreme Court was considering the purported contradiction between Order 16 Rule 1 and Order 18 Rule 4 and it tried to resolve the conflict by adopting the interpretation which we have referred to hereinabove. The Supreme Court did not consider at all the import of Order 18 Rules 4 and 5. Therefore, in our view, this judgment is not at all of any help in order to decide the present controversy. This controversy directly came before the Supreme Court in Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited (supra). This judgment was delivered on 18.11.2003. The judgment starts with these words:

'Interpretation of Order 18 Rules 4 and 5 of the Code of Civil Procedure falls for consideration in this appeal which arises out of a judgment and order dated 3-7-2003 passed by the High Court of Judicature at Bombay in WP No. 2428/2003.'

11. The appellant before the Supreme Court submitted that Order 18, Rule 4 and Order 18 Rule 5 of the Code of Civil Procedure should be read harmoniously and so read, it must be held that Order 18 Rule 4 will have no application in the appealable cases and as logical corollary thereof the Court must examine all the witnesses in Court. The argument for respondent in this case was that Order 18 Rule 4 of the Code of Civil Procedure was clear in expression that an affidavit incorporating examination-in-chief of a witness has to be filed in every case and only in the event the said witness is required to be cross-examined, he would be produced in Court. Then the Supreme Court considered the import of Order 18 Rules 4, 5 and 13 and in Para 16 it held:

'The examination of a witness would include evidence in chief, cross-examination or re-examination. Rule 4 of the Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which 'evidence' is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.'

In Para-18 it held:

'We may notice that Rule 4 of Order 18 was amended with effect from 1-7-2002 specifically provided thereunder that the examination-in-chief in every case shall be on affidavit. Rule 5 of Order 18 had been incorporated even prior to the said amendment.'

In Para 19 it held:

'Rule 4 of Order 18 does not make any distinction between an appealable and non-appealable cases so far mode of recording evidence is concerned. Such a difference is to be found only in Rules 5 and 13 of Order 18 of the Code.'

In Para 20 it held:

'It, therefore, appears that whereas under the unamended rule, the entire evidence was required to be adduced in Court, now the examination-in-chief of a witness including the party to a suit is to be tendered on affidavit. The expressions 'in every case' are significant. What, thus, remains, viz., cross-examination or re-examination in the appealable cases will have to be considered in the manner laid down in the rules subject to the other Sub-rules of Rule 4.'

In Para 21 it held:

'Rule 5 of Order 18 speaks of the other formalities which are required to be complied with. In the cases, however, where an appeal is not allowed, the procedures laid down in Rule 5 are not required to be followed.'

12. Then the Supreme Court went into the rules of interpretation and examined the earlier judgments and finally quoted a passage from the judgment of the Bombay High Court in *FDC Limited v. Federation of Medical Representatives Association of India (FMRAI) and Ors.* (supra) and held in Para 33.

'We agree with the view of the Bombay High Court.'

In Para 35 it said:

'Applying the aforementioned principles of interpretation of statute, we have no doubt in our mind that Order 18 Rules 4 and 5 are required to be harmoniously construed. Both the provisions are required to be given effect to and as Order 18 Rule 5 cannot be read as an exception to Order 18 Rule 4.'

13. Therefore, in our view, the matter is concluded. In all cases whether appealable or non-appealable cases, examination-in-chief has to be taken on affidavits and where a witness is not under the control of the party who wants to examine him, he can take recourse to Order 16 Rule 1 of the Code as has been held by the Supreme Court in Salem Advocate Bar Association, Tamil Nadu v. Union of India, (supra). We also find that the two judgments of the Supreme Court reported Salem Advocate Bar Association, Tamil Nadu v. Union of India (supra) and Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited (supra) are not in conflict with each other. Both of them were dealing with two different subjects.

14. Certain judgments were pressed into service that the earlier judgment of the Supreme Court in Salem Advocate Bar Association, Tamil Nadu v. Union of India, (supra) was delivered by 3-Judge and later judgment in Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited (supra) was also delivered by 3-Judge, therefore earlier judgment has to be followed and the later judgment was per incuriam as the Supreme Court has not taken note of certain provisions of the Evidence Act. It is contended that Section 3 of the Evidence Act defines the evidence in the following terms:

'Evidence means and includes

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence.

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

Section 5 of the Evidence Act lays down:

'5. Evidence may be given of facts in issue and relevant facts :-Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others.'

Section 118 lays down:

'118. Who may testify :-All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.'

15. It is also contended by the learned Counsel for the petitioners that under Section 118 of the Evidence Act the Court has to see whether the witness produced was a competent witness or not. The argument is that since affidavits are not at all evidence in terms of the Evidence Act, therefore the examination-in-chief which is part of evidence cannot be tendered on the basis of affidavits. Our attention has also been drawn to Section 1 of the Evidence Act which states,

'It extends to the whole of India except.....and applies to all judicial proceedings....., but not to affidavits presented to any Court or Officer, nor to proceedings before an Arbitrator.'

16. The learned Counsel for the petitioners submits that affidavits presented to any Court are not all governed by the Evidence Act in terms of Section 1 and in terms of Section 3 it is not included in evidence, therefore interpretation cannot be placed on Order 18 Rule 5 that examination-in-chief can be filed by way of affidavits. It is further contended that such position of law was not brought to the notice of the Supreme Court, therefore the judgment in Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited, (supra) should be taken as per incuriam. This argument should also not detain us, because of the observations of the Supreme Court in Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited (supra). The observations make us believe that the difficulty in accepting the affidavits to be evidence was in the mind of Their Lordships, when they quoted a passage with approval from the judgment of the Bombay High Court

in FDC Limited v. Federation of Medical Representatives Association India (FMRAI) and Ors. (supra):

'In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness-box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5. In non-appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of Rule 5, whereas in case of non-appealable cases the Court would be empowered to exercise its power under Rule 13.'

17. An affidavit is merely an affidavit when it is filed in the Court. But when a witness appears for cross-examination, it is necessary for the witness either to confirm or differ the contents of the affidavit. After his confirmation or denial of the contents of affidavit, whatever recorded is the evidence and if the witness confirms to the affidavit, the affidavit would become part of the statement made by the deponent before the Court. Therefore what is finally taken as evidence by the Court is not the affidavit, but what is contained in the affidavit, if confirmed by the deponent when he appears before the Court for cross-examination. Going by the two judgments of the Supreme Court reported in Salem Advocate Bar Association, Tamil Nadu v. Union of India (supra) and Ameer Trading Corporation Limited v. Shapoorji Data Processing Limited (supra) we hold:

(1) that in all cases the examination-in-chief has to be conducted by way of affidavits;

(2) that in cases where the witness is not under the control of the party who wants to examine him as a witness, recourse can be taken to Order 16, Rule 1 of the Code of Civil Procedure and after taking recourse to Order 16 Rule 1 of CPC and

after he is summoned by the Court, the witness can be asked either to file an affidavit or can be examined in the Court itself.

18. The reference is accordingly answered. The matter be placed before the appropriate Bench.

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