

Roshan General Store Vs. Vivek Gupta

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Court : Madhya Pradesh

Decided On : Jul-29-2003

Reported in : AIR2004MP42; 2003(4)MPLJ342

Judge : S.S. Jha and ;Chandresh Bhushan, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rule 4; Code of Civil Procedure (CPC) (Amended) Act, 1976; Code of Civil Procedure (CPC) (Amended) Act, 2002 - Order 18, Rule 5

Appeal No. : W.P. Nos. 19 and 30, 140 etc. etc. of 2003

Appellant : Roshan General Store

Respondent : Vivek Gupta

Advocate for Pet/Ap. : A.M. Naik and ;N.K. Mody, Sr. Advs. and ;H.D. Gupta, ;V.K. Bharadwaj, ;P.C. Chandil and ;Vijay Sundaram, Advs.

Judgement :

S.S. Jha, J.

1. This order shall govern all the aforesaid petitions.
2. A question has been referred by the Single Bench regarding provisions applicable for recording evidence in a Civil Suit, which is subject matter of appeal,

whether provisions of Rule 4 of Order XVIII of the Code of Civil Procedure will apply or the provisions as envisaged under Rule 5 will apply to a suit, whose decree is appealable.

3. Counsel appearing for the parties have argued in one voice that Rule 4 of Order XVIII is not applicable to suits where the judgment of the suit is appealable and submitted that in such cases evidence should be recorded as provided under Rule 5 of Order XVIII CPC.

4. Rule 4 of Order XVIII has been amended by Act No. 22 of 2002, whereby CPC has been amended and the amended Code is in force w.e.f. 1st July 2002. It is contended by the counsel for parties that Rule 4 of Order XVIII is independent from Rule 5 Order XVIII of the Code of Civil Procedure. It is contended by the counsel appearing for the parties that both the provisions are independent of each other.

5. Counsel for petitioners submitted that the question has come up for consideration in the case of Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2003 SC 189. Provisions of Order 18 are considered in Para 18 of the judgment. In Para 18 it is held as under.

'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.'

6. In Para 18 the discretion is conferred upon the Courts to decide as to whether evidence of witness shall be taken either by the Court or by the Commissioner. The apprehension of misuse of provisions of Rule 4 was raised and the Apex

Court has held that such apprehension is not correct.

7. In support of their contention counsel for petitioner have referred Single Bench judgment of the Rajasthan High Court in the case of Laxman Das v. Deoji Mal, AIR 2003 Rajasthan 74, wherein it is held that recording of examination-in-chief by way of affidavit cannot be allowed in case where ultimate order is appealable. Single Bench has further held that the expression 'in every case' contained in Rule 4 has to be understood in limited sense and does not take in its ambit cases under Rule 5 which provides for recording of evidence by Court.

8. Reference has been made to Single Bench judgment of Karnataka High Court in the case of Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd., AIR 2003 Kar 148 : 2003 AIR Kant HCR 418. In this case the Court has considered the scope of Order 18 Rule 4 CPC regarding recording of evidence and use of audio-video link and has laid down the safeguards to be used for examining a witness in terms of audio-vidio link. Reference is made to Single Bench judgment of this Court, which is prior to amendment in CPC in the case of Lakme Ltd. v. Plethico Pharma Ltd., 2001 (1) JUT 387. In this case Court while considering the unamended Rule 4 had deprecated the practice of recording evidence by way of affidavit. It is held that affidavits are generally drafted by the lawyers and they suffer from infirmity of stereotype version. We may mention that this case is prior to amendment in the Code.

9. Counsel for petitioner submitted that the rules should be interpreted in a harmonious manner and in support of their contention they referred a judgment in the case of Grasim Industries Ltd. v. Collector of Customs, Bombay, (2002) 4 SCC 297 : AIR 2002 SC 1706. In this case it is held in Para 10 of the judgment as under at Page 1709 of AIR:

No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of

interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or alternating the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in *Crawford v. Spooner* 'we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there'. In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice.'

10. It is clearly made out that where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or alternating the statutory provisions.

11. Counsel for petitioner therefore submitted that the language of Rules 4 and 5 is plain and simple, therefore no direction can be given in case where final order is appealable to record evidence under the provisions of sub-Rule 4.

12. In the case of *Jagdish Singh v. Lt. Governor, Delhi*, AIR 1997 SC 2239 in Para 7 of the judgment the Apex Court has held that it is a cardinal principle of construction of a statute or the statutory rule that efforts should be made in construing the different provisions, so that, each provision will have its play and in the event of any conflict a harmonious construction should be given.

13. Regarding applicability of non obstante clause, Shri A.M. Naik, Senior Advocate appearing for the petitioner referred to a judgment in the case of *Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani*, AIR 2000 SC 2747, wherein it is held that by non obstante clause the Legislature devises means which

are usually applied to give overriding effect to certain provisions over some contrary provisions that may be found either in a same enactment or some other statute. In other words such a clause is used to avoid the operation and effect of all contrary provisions. The Phrase is equivalent to showing that the Act shall be no impediment to measure intended.

14. It is contended that in absence of non obstante clause in Rule 4 or Rule 5 both the rules should be read independently and shall apply to the cases in the plain and simple language of Rule 4 and Rule 5. For the same principle judgments in the case of A.G. Varadarajulu v. State of Tamil Nadu, AIR 1998 SC 1388 and B.P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmick, AIR 1987 SC 1010 are referred. It was further argued by the counsel that Court has no power to legislate, it can only interpret and for that purpose the following judgments have been referred :--

(i) N.T. Veluswami Thevar v. G. Raja Nainar, AIR 1959 SC 422

(ii) Arjan Singh v. The State of Punjab, AIR 1970 SC 703

(iii) J.K. Bharati v. State of Maharashtra, AIR 1984 SC 1542

(iv) Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2003 SC 1891

(v) Chandra Prakash Tiwari v. Shakuntala Shukla, 2002 (6) SCC 127 : AIR 2002 SC 2322

(vi) Shashikant Singh v. Tarkeshwar Singh and Anr. 2002 (5) SCC 738 : AIR 2002 SC 2031.

15. In the last case the ratio is that while interpreting the suit legislative intent must be seen. All the counsel appearing for the petitioner stated that in appealable cases Rule 4 is not applicable and Rule 4 will be applicable in the cases where no appeal lies against the final order. Lastly, the judgment in the case of Cantonment Board, Mhow v. M.P. State Road Transport Corporation, 1997 (2) J.L.J. 70 : AIR 1997 SC 2013 is referred. Here the question was that the Courts were considering the repugnancy between the two Acts, therefore this judgment is not applicable in

the present case. ,

16. Therefore answering the controversy it will be appropriate to consider provisions of Order 18 Rule 4 as it stood earlier. Rule 4 of Order XVIII before amendment is reproduced below :--

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

The provisions after amendment is as under :--

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

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court. (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 either by the Court or by the Commissioner appointed by it :

Provided that the Court may while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit : (3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination :

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. (5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions, of Rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable; shall apply to the Issue, execution and return of such commission under this rule.

17. Rule 5 of the Code was amended vide Amending Act No. 104 of 1976 w.e.f. 1-2-1977, whereas the scheme prior to amendment was that witness shall be examined in open Court. Evidence shall be taken orally in open Court in presence and under personal direction and superintendence of Judge, whereas Rule 5 provides that in cases in which an appeal is allowed, the evidence of each witness shall be recorded in the language of the Court in writing by, or in the presence and under personal direction and superintendence of a Judge or from the dictation of a Judge directly on a typewriter or if the Judge, for the reasons to be recorded so directs, recorded mechanically in the language of the Court in the presence of Judge.

18. On going through the unamended provisions it is apparent that the provisions are supplement to each other. Rule 4 earlier provided that the witnesses are to be examined in open Court in presence and under personal directions and superintendence of the Judge and Rule 5 provides how the evidence shall be recorded in the Court. Rule 4 as substituted by Code of Civil Procedure (Amendment) Act, 2002 (No. 20 of 2002) provides for the manner in which evidence is to be recorded. Now it provides the manner in which evidence shall be

recorded. Discretion has been given to the Presiding Officer of the Court to record the evidence personally or through Commission. It is for him to examine some witnesses in Court and some through Commission as the Court may think fit. The intention for bringing the said amendment is to reduce the delay in the disposal of the cases. The Courts are overburdened and if the Courts record evidence every day, then there is every likelihood of delay in trial. Therefore, Malimath committee recommended as under :--

Recommendations of Malimath Committee -- We endorse the recommendation that the witnesses summoned should, as far as possible, be examined on the very same day by the Judge and that, if that is not possible, by the Commissioner or officer of the Court appointed or attached to the High Court, as this has the advantage of not only saving the time of the Court, but also avoiding inconvenience to the witnesses who are summoned for the day. We are, however, not in favour of the suggestion that evidence should be recorded by Commissioners appointed from amongst lawyers. We are of the opinion that such functions should be entrusted to judicial Officers of the Cadre of District Judges and they should form part of the regular staff of the High Court with appropriate designation such as commissioner for recording evidence in the High Court. Services of retired District Judges who have considerable experience could also be utilised for this purpose with advantage. However, decisions of such Commissioners in regard to admissibility of evidence, etc. should be subject to the final decision by the Court only at the time of the final hearing of the case not at the interlocutory stage.

19. Objects and reasons for the amending Act, 2002 also throw light for bringing the amendment. Para 3 (h) of Statement of Objects and Reasons is reproduced below:-

3 (h) the examination-in-chief of a witness shall be recorded on affidavit. The cross-examination and re-examination of a witness in the High Courts having original jurisdiction shall be recorded ordinarily by the Commissioner and in Courts subordinate to the High Court, such evidence shall be recorded either by the Court or by the Commissioner appointed by it. The Commissioner shall also have the

power to record the demeanour of a witness and any objection made in regard to such matter shall be decided by the Court at the time of arguments of the case. A Commissioner is required to submit his report within six months from the date of issue of the commission. Rule 4 of Order XVIII as amended in the year 1999 which provided for recording of evidence (cross-examination and re-examination) of the witnesses by the Commissioners in all cases is proposed to be substituted in this regard.

20. Rule 4 has been substituted by the amending Act. This amendment in the Order XVIII is by Section 12 of the Amending Act. From the Repeal and savings of the Act it is clear that the said provision is applicable to all pending proceedings. Since there is an amendment in the procedural law, therefore it shall come into force forthwith and will be applicable to all pending cases.

21. On bare reading of Rule 4 and Rule 5 we are of the view that Rules 4 and 5 are to be read together. Rule 4 relates to recording of evidence and Rule 5 provides for manner of recording evidence in appealable cases. Thus, there is no ambiguity between the two provisions.

22. This question has already been settled by the Apex Court in the case of Salem Advocate Bar Association (supra) considering the scope of amendment from Paras 17 to 19 of the judgment. In Para 17 of the judgment Court has referred to the amendment in Rule 4 of Order XVIII. Contention of the counsel for the parties that it may not be possible for the party calling the witness to compel the witness to file an affidavit has been considered and Apex Court has held that Order XVI Rule 1 provides for list of witnesses being filed and summons being Issued to them for being present in Court for recording their evidence. 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. It is held as under :--

Order 18 Rule 4(1) will necessarily apply to a case contemplated by Order 16, Rule 1A 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.'

23. In Para 18 of the judgment it is further clarified that where the summons have to be issued under Order 16, Rule 1, the stringent provision of Order 18, Rule 4 may not apply. It is further held that when summons are issued, the Court can give 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 summoned witness to file an affidavit by way of examination-in-chief. Therefore, it is held that in regard to 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 facts of, each case. While interpreting Order XVIII, Rule 4 (2) Apex Court has held that the discretion is conferred upon the Court to decide as to whether evidence of a witness shall be taken either by the Court or by the Commissioner. While considering the apprehension of the counsel that the Court has no discretion and once it decides that the evidence shall be recorded by the Commissioner then evidence of other witnesses cannot be recorded in Court. This proposition was rejected by the Apex Court and it was held that the Court has the power to direct either all the evidence being recorded in Court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by Commissioner and partly by the Court. Then referring to Rule 4 (3) where it is provided that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The word 'mechanically' has been explained which provides that the evidence can be recorded with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage.

24. In view of the interpretation of Rule 4 by the Apex Court the answer to the reference is that Rule 4 and Rule 5 are supplement to each other. Rule 5 has to be read with Rule 4. After amendment in Rule 4 powers have been conferred upon the Court for the manner of recording examination-in-chief as has been laid down

in Salem Advocate Bar Association case (supra). When a list of witnesses is given and witnesses are summoned, then party will not be asked to produce their affidavit, but when witnesses appear in the Court, then it will be the discretion of the Court to either record their examination-in-chief or direct witnesses to file the affidavit. The discretion is that the evidence (cross-examination and re-examination) of the witness in attendance shall be either taken by the Court or by the Commissioner appointed by it. The contention of the counsel for petitioners that the phraseology in Rule 5 that the evidence shall be under the personal direction and superintendence of the Judge or from the dictation of the Judge, this Rule 5 will apply to the cases, where Court decides to record the evidence of witness present before it. However, the word 'Judge' here should not be construed in a narrow sense, legislative intention must be seen. Legislative intention earlier was that the affidavit was not a proof of evidence but now legislature has thought it fit to accept affidavit as an evidence of the parties as examination-in-chief. Even otherwise, before amendment there was provision for recording evidence on Commission. Under Order XXVI Rule 4 Court was empowered to issue Commission for recording evidence of the witness or witnesses. This recording of evidence on Commission was applicable to all cases irrespective of fact whether the ultimate order is appealable or not. Rule 16 relates to powers of the Commissioner and therefore Order XVIII Rule 4 read with Order XXVI makes the intention of the legislature clear that Court has power to direct cross-examination and re-examination of witness through Commissioner in all the cases including appealable cases. It was also argued that Rule 13 relates to manner of recording evidence in non appealable cases. In such cases specific provision has been laid down in Rule 13 and it is provided that where no appeal is permitted against the final order, it will not be necessary to take down or dictate or record the evidence of the witnesses at length; but the Judge, as the examination of each witness proceeds, shall make in writing, or dictate directly on the typewriter, or cause to be mechanically recorded, a memorandum of substance of what the witness deposes, and such memorandum shall be signed by the Judge or otherwise authenticated, and shall form part of the record. Therefore reading the language of Rule 13 of Order XVIII it can safely be held that the manner of recording evidence referred in Rule 5 of Order XVIII shall be as per discretion of Court under Rule 4 of

Order XVIII to record evidence before it. In view of the aforesaid discussion and judgment of Salem Advocate Bar Association (supra) with due respect we are unable to agree with the view of Rajasthan High Court in the case of Laxman Das (supra).

25. In the result we hold as under :--

That in appealable cases Court shall follow the provisions for recording evidence as laid down under Order XVIII Rule (4) CPC and 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, cross-examination and re-examination. In appropriate cases, the Court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, the Court may waive the principle incorporated under Order XVIII Rule 4. However, 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 facts of each case. However, the Court shall ensure that as and when the evidence is recorded by the Commissioner, it will be proper that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage. If there is any objection as to the recording of evidence by the Commissioner, it may be raised before the Court where case is pending and Court shall decide the case as per rules.

26. Reference is answered accordingly. Petition be now placed before the Single Bench.