

In Re: Srinivasalu Naicker

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Court : Chennai

Decided On : Aug-03-1954

Reported in : AIR1955Mad179

Judge : Ramaswami, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 26, Rules 4 and 15 - Order 18, Rule 12

Appeal No. : Civil Revn. Petn. No. 1078 of 1954

Appellant : In Re: Srinivasalu Naicker

Advocate for Pet/Ap. : T.R. Ramachandran and ;T.K. Subba Rao, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

Ramaswami, J.

1. This is a Civil Revision Petition which is sought to be filed against the order made by the learned Subordinate Judge of Coimbatore in I. A. 174 of 1954 in O. S. 167 of 1952.

2. The facts are: In O. S. 167 of 1952 the 1st defendant contended that the material document on which the suit was based has been sent privately to the Handwriting Expert and that he has given his opinion that the endorsement on the material document is a forgery and that therefore as his evidence would be unavailable to the Court unless he is subjected to cross-examination and re-examination, a commission may be issued to examine him at Nagpur. The learned Subordinate Judge rejected this application and hence this Revision Petition.

3. The point for consideration is whether- this order can be interfered with in revision?

4. First of all, the learned Subordinate Judge has held that it would be convenient and better to examine the witness in Court so that the Court may have an opportunity of hearing his evidence itself and seeing the demeanour of the witness. In my opinion, this is not at all an unreasonable ground for rejecting the application. It is quite true that parties should not be put to unnecessary expense and trouble and where commissions can be issued within the permissible limits laid down under O. 26, C. P. C., the Court would be exercising a proper discretion in assisting the parties to procure the evidence by issuing commissions. Otherwise much valuable evidence which would be of assistance in adjudicating the controversy would be lost.

That is why various statutes provide for the reception of the certificates issued by the Chemical Examiner, the Inspector of Explosives and the Analyst as evidence unless there are special circumstances where the Officer issuing the certificates has got to be examined. The principle is that in courts of law no testimony should normally be accepted as having any serious probative value unless it is subjected to cross-examination and the Court itself has an opportunity of observing the demeanour of the witnesses.

5. In a plain case of forgery where the evidence of the Expert would naturally be supplementary; Courts probably would and should exercise their discretion in favour of the Handwriting Expert being examined on Commission. But in a case where the Court thinks, owing to the nature of the forgery and the testimony which would be forthcoming, that the Expert should appear before it and it should be able

to intelligently follow the testimony and subject it to further test in the light of the evidence given before Court, and it should also incidentally watch the demeanour of the witness to satisfy itself that the testimony was being given by a competent and qualified person who knows what he is speaking about, I cannot say that it is an unreasonable exercise of its jurisdiction to refuse a commission. '

Quite different, for instance, would be the case of a thumb impression Expert where the evidence has to be assessed mechanically by evaluating the points of resemblance and the points of difference and come to a conclusion. Therefore, a hard and fast rule cannot be laid down in regard to the issue of commission for calligraphic Expert. It will depend upon the circumstances of each case and it will certainly be open to the trial Court to exercise its discretion about issuing a commission or insisting upon the examination of the Expert in Court.

6. The necessity for not interfering with this discretion unless it has been perversely exercised is due to the fact that so uncertain and inexact is the science of the study of calligraphy that it has been for some years past the tendency to regard evidence even of Experts as of somewhat inconclusive character. Expert evidence on handwriting is peculiarly fallacious where the dissimilarity relied upon is not that of general character, but merely of particular letters -- 'J. C. Glastaun v. Sonatan Pal : AIR 1925 Cal 485 . A comparison of signature is a mode of ascertaining the truth which ought to be used with great caution & care; -- 'Sreemutty Phooddee Bibee v. Gobind Chunder Roy', 22 Suth WR 272 (B). Expert opinions must always be received with great caution, especially the opinion of the handwriting Expert -- 'Kazim Husairi v. Shamboo Nath (C). An expert however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him: -- 'Mt. Sadiqa Begum v. Ata Ullah', AIR 1933 Lah 885 (D). Of all kinds of evidence admitted in a Court, this is the most unsatisfactory. It is very weak and decrepit. It is settled practice of Courts not to base their findings merely on expert opinion -- 'In re, Venkat Rao', 36 Mad 159 (E). The evidence of an expert in handwriting is of little value when contradicted by that of another AIR 1933 Lah 885 (D). Where the expert does not know the language in which the signature is made, his opinion is of little value though it can be used to corroborate other evidence -- 'Rama-sewak Sahu v. Emperor', : AIR 1933 Pat 559 (F).

7. In addition, the necessity to test the evidence of Experts in open Court and subject it to thorough cross-examination is well brought out In the following passages from Elliot's Advocate (P. 263) and Strahan's Bench and the Bar (P. 65):

ELLOT'S REMARKS:

'It is safe, as a general rule, to assume that a professional expert witness is a partisan, willing and eager to serve the party who requests his services. Indeed, all experts, whether professional or non-professional, are very apt to zealously espouse the cause of the party by whom they are called. ' There are, to be sure, exceptions to the general rule, but they are not numerous enough to more than prove the rule. The wise cross-examiner will assume that all the experts called by his adversary are prepared to do him all the harm they can, and that they will avail - themselves of every opportunity that is offered them to give his client's cause a thrust or a blow. A professional expert witness has been defined to be a man who is paid a retainer to make a sworn argument'.

Bitter as this definition is, it is not entirely inaccurate. Expert witnesses usually do with . swiftness and avidity, seize every opportunity offered them to put forth an argument in the form of an opinion, and such an argument is the more hurtful because of the guise it wears. As an argument and nothing more it would do little mischief, but as an apparent opinion it may do much. The statement of the danger to be apprehended suggests the course to be pursued. Do not give the witness an opportunity to formulate an argument and put it forth in the form of an opinion.

It is not by the artifices that sometimes confuse and deceive ordinary witnesses that the testimony of professional experts can be broken down, for they are almost always shrewd and cunning men, sometimes, indeed, learned and skilful ones, and they come prepared for a contest with the advocate upon cross-examination. A bungler will, in most cases, give the testimony of a professional expert ten times the weight it would have if the witness were dismissed without a single question. Better no cross-examination than one that intensifies the impression created by the testimony drawn out on the direct examination; and if the cross-examiner has not given the subject upon which the witness is called to testify close and determined study, he cannot hope to accomplish good, but may be quite sure of

doing serious mischief. Nothing is more mischievous than a cross-examination of an adroit expert witness by an examiner ignorant of the subject to which the testimony is addressed.

A successful method of cross-examining professional expert is to quietly' and gradually lead them- to an extreme position which can neither be fortified nor' defended. If this course can be carefully concealed, it is often -expedient to now and then wander from the direct path, and create a belief that the road the witness is to: be taken over is a very different one from that which the examiner has resolved he shall travel. The examiner must not, however, for an instant, lose his temper, nor suffer his attention to be drawn from the line he means to take. When the position is reached, then if the witness attempts to retreat or explain, it is well enough that the examiner's manner should become severe : and determined and the witness 'sternly kept to the questions asked him.

An expert, when he finds himself in an uncomfortable position, will resort to all sort of artifices and shifts to turn the line of examination, but turned it must not be. A keen eye kept upon the witness will often enable the examiner to detect his purpose and to check it. The same faculty which enables the swords man to detect and guard against a feint of his adversary very often enables the advocate to discover and prevent, the artifices of a witness.

Some witnesses who come upon the stand as experts are mere shams and pretenders. When the advocate is satisfied that he has to deal with a witness of that kind, his true course is to make known to the witness that he knows his real character and to boldly assume that he is a mere pretender. Of course, the advocate cannot make this assumption in direct words, but he can quite as effectually make it by his manner and the form of his questions. When a pretender is made to understand that the advocate knows his true character the work is easy, for the advocate has the witness entirely at his mercy.'

STRAHAN'S REMARKS:

'The witnesses now in worst repute are what are called expert witnesses --that is, witnesses, retained and paid to support by their evidence a certain view on a

scientific or technical question. We have all heard the old jeer about the three kind of liars--white liars, black liars, and expert witnesses. Yet the expert witness is often not really a witness at all. He is trained man who, like counsel, comes forward to maintain for a fee a certain view on an uncertain point, and to give his reasons for that view.

I have more than once, when listening to an expert's evidence, though it was a pity he was sworn at all. In fact, they regard themselves, and lawyers to a large extent regard them, as advocates. I remember once when a distinguished scientist was cross-examined as to a different view which had been maintained by him on the same point in another case, answering counsel indignantly, you seem to forget, . Sir, that I, like you, was then appearing on the other side. And the Judge seemed to think this reply was reasonable. And so it would have been better had the scientific 'witness' not been . sworn on both occasions to tell 'the truth, the whole truth, and nothing but the truth'.'

8. These deductions based upon the practical experience of these eminent writers of the well-known publications emphasise that the handwriting Expert should as far as possible be examined in Court and his demeanour carefully watched because as has been repeatedly pointed out the law provides (vide S. 138 (Order 18, Rule 123), C. P. C., . and Section 363, Or. P. C.) that the Courts do record a note of the demeanour of the witnesses while they are giving evidence in the witness-box because the eye and manner of giving evidence betrays a witness and a shrewd lawyer and Judge can always find out whether he is a truthful witness or a false witness. In fact appellate Courts are enjoined not to ordinarily interfere with the trial Court's opinion as to the credibility of a . witness, at the trial Judge alone knows the demeanour of the witness, -- 'Valarshak Seth Apcar v. Standard Coal Co., Ltd. . Therefore, demeanour becomes a most important test in the credibility of the witness; --'Mauladad Khan v. Abdul Sattar', : AIR1917 All35 (H); - 'Bombay Cotton Manufacturing Co. v. Motilal Shivilal', AIB 1915 PC 1 (I); -- 'Sitalakshmi v. Venkata Subrahmanian . When the question is whether the witness is . speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers questions and by how he seems to be affected by the questions that are put to him and so on; --

'Sankarareddi v. Mahalakshmmama', AIB 1922 PC 315 (K). In connection with demeanour, it is very important to consider the ability of the witness as 'well as his intellectual perfection, judgment memory and description (Bentham on Evidence p. 126; Wig-more S. 183; Powell 9th Edri. p. 506-507; Starke, page 824 Field's Law of Evidence in British India, 8th Edn., page XXXV; Sirkar, page 1146; Monir 1109).

9. Then, assuming that even a commission can be issued, Courts must once again exercise a wise discretion under Order 26, Rule 15, C.P. C.

'Before issuing any commission under this order, the Court may, order such sum (if any) as it thinks reasonable for the expenses of the commission, to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission Is Issued.'

This Rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent for issuing of a commission; -- 'Nripendra Bhusan v. Pramatha Bhusan : AIR1927 Cal907 . The. 'expenses of the commission' have been construed to include the expenses of the other parties to the litigation. In Madras the expression 'expenses of the Commission' had been differently interpreted. In -- 'Saboora Bivi Ammal v. Julaika Bivi Animal', : AIR1950 Mad144 (M), the expression 'expenses of the commission' was held by Govinda Menon J. to mean only what the commissioner had to spend for summoning witnesses and other incidental expenses relating to the examination of the witness before him. The expression was held by Mack KJ. in -- 'Abdurahiman settu v. Muhammad Kasani AIR 1949 Mad 490 (N) to include the expenses of the other party to the litigation.

I agree with the interpretation of Mack J. which flows from the wording of rule 15 and is in consonance with the principles of justice equity and good conscience. To hold otherwise would mean that a rich party would be able to, defeat the poor party in the suit by the mere expedient of obtaining a commission for examining an Expert in a far away place and making it impossible for the other party to test that evidence by employing a lawyer in that far off place. In fact such commission would result practically in ex-parte untested-reports being accepted as evidence. This is not a state of things which we can contemplate with equanimity because as

pointed out by Lord Sanky-in the cross-currents of-shifting sands of public life, the law is like a great rock upon which a man may set his foot and be safe while the inevitable inequities of private life are not so dangerous in a country where every citizen knows that in the law courts, at any rate, he can get justice.

It is quite true that even now the proverbial. Law's delays, troubles and expenses make it impossible for the poorer and weaker party to get justice and courts of law are open to all only in the sense that great hotels like Conhemara are open to all. The endeavour of the state and the courts has always been to minimise . these inequities shutting out the courts of justice to aggrieved persons and there is no reason why we should add by an interpretation which does not flow from the plain language of Order 26, Rule 15, O. P. C., to these inequities. It seems to me therefore that the expression 'expenses of the commission' can be construed to include the expenses of the other party to the litigation.

10. In the instant case the learned Subordinate Judge cannot be stated to have perversely exercised his discretion in insisting upon the handwriting Expert being examined in Court and secondly, after time taken the revision petitioner is not agreeable to bear in the first instance the expenses of the commission which will have to be incurred by the other party to the litigation.

11. This civil Revision petition is therefore dismissed.

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