

Karunakaran Vs. Rajasekaran

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Court : Chennai

Decided On : Jul-31-2003

Reported in : (2003)3MLJ273

Judge : S. Ashok Kumar, J.

Acts : Code of Civil Procedure (CPC) - Sections 115

Appeal No. : Civil Revision Petition (PD) No. 2270 of 2002 and C.M.P. No. 18907 of 2002

Appellant : Karunakaran

Respondent : Rajasekaran

Advocate for Def. : K.M. Kudaiarasu, Adv.

Advocate for Pet/Ap. : T. Dhanyakumar, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

S. Ashok Kumar, J.

1. The revision petitioner is the defendant. The respondent/plaintiff, who is none other than the brother of the defendant, filed the suit in O.S. No. 277 of 1999 on

the file of the Subordinate Judge, Gudiyatham, for an injunction against the defendant to restrain him from interfering with the business of the plaintiff. The trial commenced on 21.10.2002. The plaintiff filed an affidavit of proof with certain documents, for which the defendant ought to have cross examined the plaintiff. At that stage, the defendant filed a memo stating that as the amended Code of Civil Procedure is prospective and not retrospective, the plaintiff should have been examined in Court rather than the Court directs him to file an affidavit as evidence in chief examination on the ground that the defendant will lose his chance of opposing marking of document and copies thereof has also not been furnished as per the C.P.C. Amendment Act 22 of 2002. The learned Subordinate Judge dismissed the memo on the ground that under Order 18 Rule 4 (1), in all cases, chief examination of all the witnesses will be by way of an affidavit along with the documents to be filed and such witnesses shall be cross-examined by the opposite party either in the Court or by a Commissioner appointed by the Court. Aggrieved over the said order, this revision petition has been filed by the defendant.

2. The learned Counsel appearing for the revision petitioner/defendant would contend that the amended Code of Civil Procedure came into force only on 01.07.2002 and therefore, it is only prospective and the amended Code of Civil Procedure is applicable only to the cases filed after 01.07.2002 and not to the cases filed earlier.

3. The learned Counsel appearing for the respondent/plaintiff would contend that the procedure laid down under amended Code of Civil Procedure is applicable to all the pending cases irrespective of the fact that whether the suits were filed earlier than 01.07.2002 or later.

4. The very purpose for which the C.P.C. Amendment Act 22 of 2002 has been enacted is for a laudable object, i.e., early disposal of the cases which are pending disposal for several years. Order XVIII of CPC deals with the hearing of suit and examination of witnesses. The relevant provisions of Order XVIII Rule 4 as substituted by Act No. 22 of 2002 read as follows:-

'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.'

This provision clearly shows that in every case the examination-in-chief of a witness shall be on affidavit and cross-examination can be at the discretion of the Court either by the Court or by the commissioner appointed by it.

However, Order XVIII Rule 5 which has been retained by the legislature reads thus:

'5. How evidence shall be taken in appealable cases

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 dictation 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.'

5. On one hand, the provision under Order 18, Rule 4 as substituted by Act 22 of 2002 mandates the examination-in-chief of witness in every case by affidavit and the cross-examination and re-examination at the discretion of the Court either by the Court itself or by a Commissioner appointed by it, whereas the provisions of Order 18, Rule 5 provide for recording of evidence in all the cases in which an

appeal lies to be in writing by or in the presence and under the personal dictation and superintendence of, the judge, etc. It is pertinent to note that the word every case connotes both appealable as well as nonappealable cases. Thus, it appears as if the provisions of both Order 18, Rule 4 and Order 18, Rule 5 CPC are in direct contradiction of each other and if the said anomaly is not removed, the object of Amendments in the C.P.C., i.e., early disposal, will be defeated.

6. In Subbammal v. Paramasivam Asari : 2003(2)CTC419 , this Court has held that it is not correct to contend that Order 18 Rule 4 is a general provision and existing provision under Order 18 Rule 5 is a special provision. Paragraphs 12, 13, 14 and 15 of the judgment run thus:-

'12. The Supreme Court, in a recent judgment, approved the taking of evidence by Video-Conferencing. In the report of 'The Hindu' dated 3rd April 2003, it is stated that the Supreme Court has held that video-conferencing satisfied the object of Section 273 of the Code of Criminal Procedure that evidence be recorded in the presence of the accused. The Supreme Court set aside the judgment of the Bombay High Court which quashed the trial Court's order allowing video-conferencing of evidence of a Doctor in the United States. Their Lordships have observed:

'Normally, a commission would involve recording of evidence at the place where the witness is. However, advancement in science and technology has now made it possible to record such evidence by way of video-conferencing in the town/city where the court is.' From the above, it could be seen that wherever it is possible to shorten the delay in proceedings, expert bodies like the Pay Commissioner and the Law Commission have approved such procedure. The Parliament, after consulting all concerned, has made the law which, in my view, is the least that could be done in this regard insofar as the chief-examination is concerned. The petitioner and the counsel should try to give effect to it and give a helping hand for the expeditious disposal of litigation instead of trying to stall the proceedings.

13. Apart from the above, the said position has been considered by the Hon'ble Supreme Court in Salem Advocate Bar Association v. Union of India, : AIR 2003 SC189 wherein their Lordships after considering the objection in reference to this

provision have laid down the following principle:

'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 of 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 Code of Civil Procedure can be waived. Whether the witness shall be directed to file an affidavit or to 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.' Here, it is not a case of summoned witnesses. Even in the case of summoned witnesses, the court has a discretion to decide having regard to the facts of the case.

14. Therefore, the question raised by the learned counsel is no longer res integra, since the Supreme Court has already laid down the law upholding the provisions of Order 18, Rule 4 Code of Civil Procedure giving discretion to the court in reference to this matter.

15. It is an accepted principle of interpretation that when there is a general enactment as well as special enactment in respect of the same head in a statute, the particular enactment over-rides the general enactment. The contention of the learned counsel for the petitioner that the amended provision is a general enactment and that Order 18, Rule 5 of the Code of Civil Procedure is a special enactment cannot be the correct way of understanding. The question of general special generally arises in the case of interpretation of two statutory provisions. Here, it is a case of provisions of the same statute placed side by side and both the provisions can function in their own parallel channels. If the words of the provisions are clear, they must be followed and more so, they must be given effect to the intendment of the enactment.'

7. As far as the Order 18, Rule 4 and Order 18, Rule 5 C.P.C. are concerned, both of the provisions are of same statute placing side by side and both the provisions can function in their parallel channels. In a case in which a party to the proceedings files his examination-in-chief in the form of an affidavit and a copy of

which has already been given to the other side, the other side has no role insofar as the examination-in-chief is concerned and the said other side will have an opportunity of cross-examining him in Court. Therefore, the apprehension of the petitioner/defendant that he will lose the opportunity of opposing the documents filed along with affidavit of proof has no basis. The petitioner can question the documents when opportunity comes to him by way of cross-examination by him the witnesses. Therefore, this civil revision petition is dismissed. Consequently, C.M.P. No. 18907 of 2002 is also dismissed. No costs.

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