

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/03/2003

CORAM

THE HON'BLE MR.JUSTICE P.SHANMUGAM

C.R.P.PD.NO.488 OF 2003

AND

CMP.NO.3213 OF 2003

Subbammal ...Petitioner

-Vs-

Paramasivam Asari ..Respondent

The Revision is filed under Section 115 of the Code of Civil Procedure against the fair and decretal order of the learned Additional District Munsif, Ambasamudram dated 2.12.2002 in I.A.No.301/2002 in O. S.No.457/1995.

!For Petitioner: Mr.P.M.Hariharan

^For Respondent : ---

:O R D E R

Petitioner is the plaintiff in the suit. O.S.NO.457 of 1995 is filed by him for declaration and for permanent injunction restraining the second defendant from interfering with his possession of the suit properties.

2. At the stage of trial, after the examination of plaintiff's side was completed, the defendant wanted to examine himself. The defendant chose to file an affidavit under Order XVIII Rule 4 CPC(inserted by Act 22 of 2002 with effect from 1.7.2002),by virtue of which, the examination-in-chief of a witness shall be on affidavit .

3.The petitioner objecting to the said course filed a petition under Order XVIII Rule 5 CPC to delete the proof affidavit and to direct the chief examination of the defendant to be taken in the Court. The said application was dismissed by the learned District Munsif, Ambasamudram. . The present Revision is filed against the said order.

4.According to the learned counsel for the petitioner, the amended provision under Order XVIII Rule 4 CPC is a general provision providing for the examination-in- chief of the witness on affidavit. It must give way to the special provision viz. Order XVIII Rule 5 CPC providing that evidence of each witness should be taken down in the presence and under the

personal direction of the Judge . Therefore according to him,the order of the learned Judge is unsustainable.

5. By adopting the affidavit procedure, he would not be able to find out the demeanour of the witness and for these reasons, he seeks for setting aside the order and for a direction directing the defendant to be examined in the Open Court.

6.I have heard the learned counsel appearing for the petitioner at length and considered the matter carefully.

7.The unamended provision of Rule 4 of Order XVIII is as follows :

"R.4 Witnesses to be examined in open court.

The evidence of the witnesses in attendance shall be taken orally in the open court in the presence and under the personal direction and superintendence of the judge."

Order XVIII Rule 4 CPC is now substituted and has been made for the purpose of shortening the period of litigation. One of the mode adopted for that purpose is to dispense with the examination-in-chief and in the place of examination, an affidavit is required to be filed, a copy of which shall be given to the opposite party. The provision further says that in any case, where documents are filed and the parties rely upon the documents, proof and admissibility of such documents shall be subject to the orders of the Court. The provision also enables cross examination by the Commissioner appointed by it. The said provision has been introduced in substitution of the then available provision dealing with the taking of evidence. An exception to examination in open court is provided.

8.Order XVIII Rule 5 speaks as to how evidence shall be taken in appealable cases. As per this rule, the evidence of each witness shall be taken in appealable cases in the language of the court in writing, by or in the presence and under the personal direction and superintendence of the Judge. Rule 5 was substituted by the Amendment Act 1 04 of 1976. Under the old rule, the evidence could be taken down in the language of the court by the judge or in the presence and under the personal direction and superintendence of the judge. It was further provided that the evidence was to be recorded in the form of narrative and after completion, was to be read over in the presence of the judge and the witness and was to be signed by the judge. Under the amended provision, it can also be taken down from the dictation of the judge directly on a typewriter and there is no provision for reading over the evidence and for signing by the judge.

9.Insofar as the amended Rule 4 is concerned, it is seen that after considering the feasibility of dispensing with the chief examination, the Parliament thought it fit to substitute the provision for recording of evidence by affidavit in so far as the examination in chief is concerned. The trial court normally takes evidence and the procedure as to how evidence is to be taken is stated in Rule 5. Therefore, the counsel is not right in saying

that Order XVIII Rule 4 is a general provision and the existing provision under Order XVIII Rule 5 is a special provision.

10. One of the terms of reference to the First National

Judicial Pay Commission required the examination of the work method and work environment in courts to promote efficiency in judicial administration. The Commission engaged the services of the Indian Institute of Management, Bangalore. The said Institute, after an in-depth study, had submitted a report, the summary of which formed part of the First national Judicial Pay Commission Report. The IIMB, after referring to the C.P.C. Amendment Bill 1997, was of the view that the provision was a useful means of fighting delay in disposal of cases. One of the recommendations was as follows :-

"Time taken to record oral evidence of witnesses must be reduced by filing affidavits of examination-in-chief and filing the statements recorded before a Commissioner, if need be, in cases of cross-examination and re-examination."

11. The Statement of Objects and Reasons of the Code of Civil

Procedure (Amendment) Act, 2002 (Act 22 of 2002) says that the C.P.C. Amendment Act, 1999 was enacted by the Parliament with a view to cutting short the delay on various levels. After its enactment, a large number of representations were received, both for and against its enforcement. The Law Commission of India, in its 163rd Report, also dealt with the Code of Civil Procedure (Amendment) Bill, 1997 which was enacted later on as the C.P.C. Amendment Act, 1999. Before action could be initiated for enforcement of the said Act, the Bar Council of India and certain local Bar Associations, asked the Government to re-look into some of the provisions which cause hardship to litigants. Accordingly, the C.P.C. Amendment Act, 1999 and other proposals to reduce delays in disposal of civil cases were discussed with legal luminaries. The Government has further considered the matter in all its aspects after consulting the Bar Council of India and other concerned and based on the outcome of the deliberation, it had now proposed to further amend the Code of Civil Procedure, 1908 consistent with the demands of fair play and justice. The proposed Amendment, inter alia, seeks to provide that :

(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."

Section 12 of the Amendment of Order XVIII is 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."

12.The Supreme Court, in a recent judgment, approved the taking of evidence by Video-Conferencing. In the report of "The Hindu" dated 3 rd 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 videoconferencing 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 Commission 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 Vs.Union of India ((2003) 1 Supreme Court Cases 49) 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 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 XVIII Rule 4 CPC 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 XVIII Rule 4 CPC 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 XVIII, Rule 5 of the Code of Civil Procedure is a special enactment cannot be the correct way of understanding. The question of general versus 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.

16.In this case, it is seen that the defendant has to be examined himself and that he has already filed a proof of affidavit for his chief examination. The petitioner/plaintiff has to cross examine him. It is needless to state that the petitioner has no role in so far as the chief examination is concerned and what he is going to say in the chief examination has already been stated in the form of affidavit and a copy of which has already been given to the petitioner herein and the petitioner shall have full opportunity of cross-examining him in the Court.

17.Therefore the apprehension of the petitioner that he will not be able to find out the demeanour of the witness cannot be accepted. The learned Judge has considered the point raised and dismissed the application. I do not find any irregularity or illegality in the order. Hence the Revision fails and the same is dismissed. No costs. Consequently, CMP.No.3213 of 2003 is also dismissed.

VJY/ab

Index : Yes

Internet : Yes

To

The District Munsif
Ambasamudram.

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