[2023] 15 S.C.R. 866 : 2023 INSC 1075

MOHAMMED ABDUL WAHID
v.
NILOFER & ANR

(Civil Appeal No. 8146 of 2023)

DECEMBER 14, 2023

[B. R. GAVAI AND SANJAY KAROL*, JJ.]

Issue for consideration:

Whether under the Code of Civil Procedure, there is envisaged a difference between a party to a suit and a witness in a suit, does the phrase plaintiff's/ defendant's witness exclude the plaintiff or defendant themselves, when they appear as witnesses in their own cause; and whether Ord. VII r. 14, Ord VIII r. 1-A and Ord. XIII r. 1 CPC, enjoin the party under-taking cross examination of a party to a suit from producing documents, for the purposes thereof, by virtue of the use of the phrase(s) plaintiff/defendant's witness or witnesses of the other party, when cross examining the opposite party.

Code of Civil Procedure, 1908 – Party to a suit and a witness in a suit – Difference between – Phrase plaintiff's/ defendant's witness, if exclude the plaintiff or defendant themselves, when they appear as witnesses in their own cause:

Held: There is no difference between a party to a suit as a witness and a witness simpliciter – Witnesses and parties to a suit, for the purposes of adducing evidence, either documentary or oral are on the same footing – Function performed by either a witness or a party to a suit when in the witness box is the same – Phrase "so far as it is applicable" in Order XVI Rule 21 does not suggest a difference in the function performed – Provisions of the Code as also the Evidence Act do not differentiate between a party to the suit acting as a witness and a witness otherwise called by such a party to testify. [Paras 32, 14, 20, 17]

Code of Civil Procedure, 1908 – Ord. VII r. 14, Ord. VIII r. 1-A and Ord.r XIII r. 1 – Provisions if enjoins the party under-taking cross examination of a party to a suit from producing

* Author

documents, for the purposes thereof, by virtue of the use of the phrase plaintiff/defendant's witness or witnesses of the other party, when cross examining the opposite party:

Held: Production of documents for both a party to the suit and a witness as the case may be, at the stage of cross-examination, is permissible within law – Freedom to produce documents for either of the two purposes-cross examination of witnesses and/or refreshing the memory would serve its purposes for parties to the suit as well – Being precluded from effectively putting questions to and receiving answers from either party to a suit, with the aid of these documents would put the other at risk of not being able to put forth the complete veracity of their claim, thereby fatally compromising the said proceedings – Thus, in reference to the production of documents, so long as the document is produced for the limited purpose of effective cross-examination or to jog the memory of the witness at the stand is not completely divorced from or foreign to the pleadings made, the same cannot be said to fly in the face of the established proposition. [Paras, 32, 26, 30]

Code of Civil Procedure, 1908 – Ord. XVI r. 21, 14, Ord. XVIII r. 3A – Term 'witness' – Meaning of:

Held: Witness is a person, either on behalf of the plaintiff or the defendant, who appears before a court to substantiate a statement or claim made by either side – s. 120 of the Evidence Act states that parties to a civil suit shall be competent witnesses – Word used is witnesses which implies that a witness otherwise produced as also the defendant or the plaintiff themselves, would stand on the same footing when entering evidence for the consideration of the court – Code itself speaks to the effect that when a party to a suit is to testify in court – Term witness does not exclude the party to the suit-plaintiff or the defendant, themselves appearing before the court to enter evidence – Evidence Act, 1860 – s. 120. [Paras 10, 14, 20].

Code of Civil Procedure, 1908 – Interpretation of – Guiding objectives – Stated. [Para 2]

Practice and procedure – Pleadings – Requirement of pleading a particular argument:

Held: What is not pleaded cannot be argued – For the purposes of adjudication, it is necessary for the other party to know the contours of the case it is required to meet – Requirement of having to plead a particular argument does not include exhaustively doing so. [Para 28]

Vinayak M Dessai v. Ulhas N. Naik and Ors. **2017 SCCOnLine Bom 8515;** *Purushottam v. Gajanan* **2012 SCCOnLine Bom 1176;** *Upper India Couper Paper Mills Co. Ltd. v. M/s Mangaldas and Sons* **2004 SCC Online Bom 716;** *State of Bombay v. Kathi Kalu Oghad* **AIR 1961 SC 1808;** *S.P. Chengivaraya Naidu v. Jagannath* **[1993] 3 Suppl. SCR 422 : (1994) 1 SCC 1;** *Miss T.M. Mohana v. V. Kannan* **1984 SCC Online Mad 145;** *Amit M. Pathakji, Sr. Manager (Mech.) & Anr v. Bhavnaben Amitkumar Pathakji* **2007 SC OnLine Guj 78;** *Sadayappan v. State* **(2019) 9 SCC 257;** *Ram Sarup Gupta v. Bishun Narain Inter College* **[1987] 2 SCR 805 : (1987) 2 SCC 555;** *Udhav Singh v. Madhav Rao Scindia* **[1976] 2 SCR 246 : (1977) 1 SCC 511 – referred to.**

Jones v. National Coal Board **1957 2 QB 55 – referred to.**

P. Ramanatha Aiyar's Advanced Law Lexicon **– referred to.**

American Jurisprudence, Second Edition, 2007; Corpus Juris Secundum: A Contemporary Statement of American Law as Derived from Reported Cases and Legislation; Black, 7th Edn., 1999 **– referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8146 of 2023.

From the Judgment and Order dated 09.02.2021 of the High Court of Judicature at Bombay at Nagpur in WP No. 7717 of 2019.

Huzefa Ahmadi, Vinay Navare, Sr. Advs., Masood Shareef, Satyajit A Desai, Yougant Dhillon, Siddharth Gautam, Abhinav K. Mutyalwar, Gajanan N Tirthkar, Vijay Raj Singh Chouhan, Ms. Aishwariya Shinde, Ms. Anagha S. Desai, Sudhanshu S Choudhari, Vatsalya Vigya, Advs. for the Appellant.

Dr. R S Sundaram, P. N. Gupta, Ramaswamy Sundaram, Mrs. Bharti Gupta, Ms. Aashima Gupta, Naresh Kaushik, Manoj Joshi, Anand Singh, Shubham Dwivedi, Ms. Shikha John, Ms. Lalitha Kaushik, Ms. Akshata Singh, Rahul Sharma, Vardhman Kaushik, Somanatha Padhan, Advs. for the Respondents.

The Judgment of the Court was delivered by

SANJAY KAROL, J.

Leave Granted.

2. In adjudicating this appeal, the thought to be borne foremost in mind is that every trial is a search of truth. This purpose is succinctly captured in the following terms in American Jurisprudence, Second Edition, 2007:

"The purpose of trial is to determine the validity of the allegations. The objective is to secure a fair and impartial administration of justice between the parties to the litigation and not the achievement of a hearing wholly free from errors. Once a civil action has been instituted and issue is joined upon the pleadings, there must be a trial on the issue before a judgment may be rendered.

Trial is not a contest between lawyers but a presentation of facts to which the law may be applied to resolve the issues between the parties and to determine their rights. It is also not a sport; it is an inquiry into the truth, in which the general public has an interest."

It would be useful to also refer to the objectives in framing rules for conducting civil proceedings. The Halsbury's Law of England state the following overriding objectives of the Civil Procedure Rules:

(i) ensuring that the parties are on equal footing;

(ii) saving expense;

(iii) dealing with the case in ways which are proportionate:

  (a) to the amount of money involved;

  (b) to the importance of the case;

  (c) to the complexity of the issues; and

  (d) to the financial position of each party;

(iv) ensuring that it is dealt with expeditiously and fairly; and

(v) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(vi) enforcing compliance with rules, practice directions and orders.

The parties are required to help the court to further the overriding objective.

Undoubtedly, perhaps unquestionably, the same objectives guide the interpretation of the Code of Civil Procedure 1908.

3. In this search for truth, while placing these rules or in the case of our country, the Code, in highest regard, on the role of a judge, we may benefit from Lord Denning's observations in **Jones v. National Coal Board**[1] where his Lordship remarked:

"The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage reputation, to make sure by wise intervention that he follows, the points that the advocates are making and asses their oral, and at the end to make up his mind where the truth lies. If he goes beyond this he drops the mental of a judge and assumes the robe of an advocate, and the change does not become his well".

THE CONFLICT

4. This appeal takes exception to a judgment delivered by the High Court of Judicature at Bombay[2] (Nagpur Bench) by which the Division Bench had answered three questions framed by a Learned Single Judge of that Court in view of the two allegedly conflicting decisions, *viz.* **Vinayak M Dessai v. Ulhas N. Naik and Ors.**[3] and **Purushottam v. Gajanan**[4].

1 1957 2 QB 55
2 WP No. 7717/2019 & 6931/2019; (Hereinafter, the Impugned Judgment)
3 2017 SCCOnLine Bom 8515
4 2012 SCCOnLine Bom 1176

5. In **Purushottam** (supra) the Learned Single Judge had observed:

"8. Therefore, in my opinion, as long as, the judgment and order in Writ Petition No. 869 of 1997 is in force and admittedly not challenged by either of the parties, **it was not open for the trial Court to allow production of documents to confront the original defendant i.e. the petitioner herein. It is different matter if the production is allowed for confronting the witnesses of the party**. This Court is not inclined to express any opinion about the said aspects and it is left open for the parties to take appropriate proceeding in that respect. However, as concluded by this Court in Writ Petition No. 869 of 1997, the defendant i.e. petitioner herein cannot be confronted by the plaintiff by producing documents during the course of cross-examination…"

(Emphasis Supplied)

5.1 In **Vinayak M Dessai** (supra) the Learned Single Judge observed :

"17. Evidence in terms of section 3 of the Evidence Act, 1872 means and includes 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 being called oral evidence and all documents including electronic records produced for the inspection of the Courts being the documentary evidence. Section 118 of the said Act provides for the persons who may testify and reads that all persons must 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. Section 120 provides that parties to the civil suit and their wives or husbands or husband or wife of person under criminal trial shall be competent witnesses while section 137 deals with the examination in chief of a witness by the party who calls him for his examination, the cross- examination being by the adverse party and re-examination being subsequent to cross-examination by the party who called him. **However, a discussion of these relevant provisions of the Evidence Act no doubt substantiate the contention of Shri Pangam, learned Advocate for the Respondents, that if a party is not a witness, it would lead to**

a disastrous interpretation and even to the extent that section 137 of the Evidence Act may not apply to a party and which could defeat the purpose of examination and cross-examination. Nonetheless, the discussion on the point is purely academic looking to the law on the point namely Order VII, Rule 14, Order VIII, Rule 1 and Order XIII, Rule 1 of the Civil Procedure Code. Besides, if an interpretation as canvassed by Shri Pangam is accepted, the provisions of Order VII, Order VIII and Order XIII would be rendered nugatory and as observed in *Laxmikant Sinai Lotlekar* (supra). The learned trial Court therefore was in jurisdictional error to disallow the objections raised by the petitioner-plaintiff contrary to the mandate of Order VIII, Rule 1 and Order XIII, Rule 1(3)(a) of the Civil Procedure Code. The Respondents had to follow the mandate as contained in Order VIII, Rule 1 of the Civil Procedure Code and could not seek to produce such documents directly during the cross-examination of the plaintiff which it had to otherwise rely upon in a list of documents as required by law. The learned trial Court therefore committed a jurisdictional error and therefore the impugned Order calls for an interference."

(Emphasis Supplied)

5.2 Finding there to be an apparent conflict between the above-stated two judgments on the issue of the difference, if any, between the party to a suit and a witness in a suit on the one hand and, also with respect to when it may be permissible to produce documents directly at the stage of the cross-examination vis a vis another judgment of a co-ordinate bench in **Upper India Couper Paper Mills Co. Ltd. v. M/s Mangaldas and Sons**[5]**,** the Learned Single Judge observed as under:

"9. A perusal of the above quoted portion of the judgment in the case of Vinayak M. Dessai (supra) shows that observation was made to the effect that if a party was not to be a witness it would lead to a disastrous interpretation to the extent that even Section 137 of the Evidence Act, 1872, may not apply to a party, which could defeat the purpose of examination and cross-examination. This observation is

5 2004 SCC Online Bom 716

directly contrary to the observations made in the above quoted portion of the judgment of a learned single Judge of this Court in the case Purshottam s/o Shankar Ghodegaonkar (supra), wherein it has been categorically laid down that the party to a suit cannot be equated with a witness and cannot be confronted with documents by casting surprise upon him, particularly when the documents were not filed along with the list of documents. Thus, there is an obvious cleavage of views in the aforesaid two judgments of learned single Judges of this Court on the said issue i.e. whether a "party" is also a "witness".

…

17. As regards the other issue that arises for consideration, there appears to be direct conflict in the observations made in the above-quoted portions of the judgments of the learned single Judges in the cases of Purshottam s/o Shankar Ghodegaonkar (supra) and Vinayak M. Dessai (supra), on the one hand and those made by the learned single Judge in the case of Upper India Couper Paper Mills Co. Ltd. (supra). While in the judgments in the cases of Purshottam s/o Shankar Ghodegaonkar (supra) and Vinayak M. Dessai (supra), the learned single judges of this Court have laid down that documents cannot be produced directly at the stage of cross-examination for confronting a witness so as to spring a surprise upon him / her, in the case of Upper India Couper Paper Mills Co. Ltd. (supra), the learned single Judge has held that the words 'nothing in this rule' used in Order VIII Rule 1-A of the CPC demonstrate that a document can be produced directly at the stage of cross-examination and that there was no necessity of furnishing such document in advance to the witness, to ensure potency and effectiveness of cross-examination.

18. Having perused the above-quoted provision of Order VII Rule 14, Order VIII Rule 1-A(4) and Order XIII Rule 1(3) of the CPC, in my opinion, the use of the words nothing in this rule / sub-rule', indicates that documents can certainly be produced directly at the stage of cross-examination of a party or a witness so as to confront him/her and that this would be necessary for effective cross-examination of the party or witness. But, the observations made by learned single

Judges in the cases of Purshottam s/o Shankar Ghodegaonkar (supra) and Vinayak M. Dessai (supra), appear to be holding a contrary view and, therefore, there appears to be conflict of opinions with reference to the said issue also."

(Emphasis Supplied)

5.3 Thence, the judge framed three questions and referred the same to be answered. The questions and their respective conclusions arrived at by the learned Division Bench, subject matter of the present appeal are extracted as under:-

"40. We, therefore answer the questions under reference as under:—

1.	Whether a party to a suit i.e. plaintiff/or defendant is also a witness and the provisions of Order VII, Rule 14, Order VIII, Rule 1-A(4)(a) and Order XIII, Rule 1(3)(a) of the Civil Procedure Code need to be interpreted and applied by equating "party" with a "witness"	A party to a suit (plaintiff/defendant) cannot be equated with a witness. The provisions of Order VII, Rule 14(4), Order VIII, Rule 1-A(4) which includes Rule 1-A(4)(a) and Order XIII, Rule 1(3) which includes Rule 1(3)(a) of Civil Procedure Code are not applicable to a party, who enters the witness box to tender evidence in his own cause. The provisions are applicable to a witness alone.
2.	Whether documents can be directly produced at the stage of cross-examination of a party and/or a witness to confront him/her without seeking any prior leave of the Court under Order VII, Rule 14(4), Order VIII, Rules 1(A)(4)(a) and Order XIII, Rule 1(3)(a) of the Civil Procedure Code?	Documents can be directly produced at the stage of cross-examination of a witness, (who is not a party to the suit), to confront the witness for refreshing his memory, under Order VII, Rule 14(4); Order VIII, Rule 1-A(4) and Order XIII, Rule 3 of Civil Procedure Code without seeking prior leave of the Court.

3.	Whether the observations made in the judgment in the cases of Purushottam s/o Shankar Ghodgaonkar (supra) and Vinayak M. Dessai (supra), to the effect that permitting production of documents directly at the stage of cross-examination of a witness and/or a party to a suit would amount to springing a surprise and hence, it is impermissible, are correct in the light of the plain reading of the aforesaid provisions and if accepted it would lead to whittling down the effectiveness of cross-examination of a witness and/or a party?	Since we have held that a party cannot be equated with a witness in the matter of applying the provisions of VII, Rule 14(4); Order VIII, Rule 1-A(4) and Order XIII, Rule 3 of Civil Procedure Code, the observations made in Purushottam s/o Shankar Ghodgaonkar (supra) and Vinayak M. Dessai (supra), are correct and would not lead to whittling down the effect of cross-examination of a witness. Even if the witness was a party to the suit, what has been held in Purushottam s/o Shankar Ghodgaonkar (supra) and Vinayak M. Dessai (supra) would equally hold good.

SNAPSHOT OF THE HIGH COURT'S REASONING

6. The High Court delivered a detailed judgment running into more than sixty pages. To reach the above-stated conclusion, the reasoning adopted by the Court was:-

6.1. For Question 1- Differences between a party to a suit and a witness have been identified, to hold that the Civil Procedure Code[6] uses the expressions 'party' and 'witnesses' "in contradistinction to each other." Further, it was observed that the role of a witness is separate and distinct to a party to a suit. It was observed that merely because Order XVI Rule 21 states that the Rules relating to witnesses would also apply to parties summoned does not equate the two. Referring to Section 137 of the Indian Evidence Act, 1872, it is observed

6 Hereinafter, C.P.C

that the phrase 'by the party who calls him' clearly indicates that under this Section the person called is other than the party to the case. It is thereafter held that a plain reading of the statute certifies that a party cannot be equated to a witness as their characters are different.

6.2 For Question 2 – Specific use of the phrase 'defendant's witness' and 'plaintiff's witness' means persons other than those party to the suit, and therefore, no specific leave would be required from the Court to confront such person with a document during cross-examination as this would result in the element of surprise being extinguished. Considering the legislative intent of Order VII Rule 14 Sub-Rule (4), Order VIII Rule 1-A(4)(a) and Order XIII Rule 1(3) of C.P.C. as well as others, it was observed that the legislature has created an exception towards the documents being produced for cross-examination of witnesses of the other party to allow confrontation of witnesses by catching such person "unawares" in order to "bring out the truth on record". This distinction is "conscious, deliberate and intentional", more so evident from the fact that this exception appears thrice in the Code.

6.3 For Question 3 – In both **Vinayak M Dessai** and **Purushottam** (supra) a situation where a document was sought to be produced at the time of cross-examination of a party, who was a witness in his own case, was considered and not during the cross-examination of a witness either called or summoned by the parties. This is why the production of documents at this stage of cross-examination was held to be impermissible as that would amount to a surprise which is impermissible under the provisions of the Code. Therefore, both decisions lay down the correct view in law.

7. In the above backdrop, the questions we have been called upon to adjudicate on are:-

a) Whether under the Code of Civil Procedure, there is envisaged, a difference between a party to a suit and a witness in a suit? In other words, does the phrase plaintiff's/ defendant's witness exclude the plaintiff or defendant themselves, when they appear as witnesses in their own cause?

b) Whether, under law, and more specifically, Order VII Rule 14; Order VIII Rule 1-A; Order XIII Rule 1 etc, enjoin the party undertaking cross examination of a party to a suit from producing documents, for the purposes thereof, by virtue of the use of the phrase(s) plaintiff/defendant's witness or witnesses of the other party, when cross examining the opposite party?

SUBMISSIONS OF THE PARTIES

8. Mr. Huzefa Ahmadi, learned senior counsel appearing for the petitioner made the following submissions:-

(i) The conclusion reached by the High Court is in contravention of various provisions of the CPC such as Order VII Rule 14 (4), Order VI Rule 21, Order VIII Rule 1(A) (4) (a) (b), etc. per illustration it is submitted that sub-Rule of Rule 14 states that its provisions shall not apply to cross-examination of plaintiff's witnesses (documents produced therefor) or those produced to refresh a witnesses memory. The legislature has therefore carved out a deliberate exception.

(ii) The expression "plaintiff's witnesses" has not been used to exclude the plaintiff from this rule and is instead intended to apply to all witnesses introduced at the instance of the petitioner which may include himself.

(iii) The judgment impugned herein, it is submitted erroneously states that in teeth of sub-rule (1) to (3), all documents as opposed to only those relied on in the plaint, shall be prohibited from being used in the cross-examination unless filed earlier.

(iv) Further, reference is made to Order VIII Rule 1 which is the general rule of production of documents and the exception carved there under in sub rule 3 which states that the rule of prior production shall not apply to documents produced for the above two instances.

(v) Order VI Rule 21 negates the reasoning of the High Court under which it has adopted a distinction between a party and a witness.

(vi) Such a distinction also falls foul of substantive law i.e., Indian Evidence Act, 1872 which makes no distinction between a party taking on the role of a witness and a witness simpliciter. Reference is made to Sections 120, 137 and 155-160.

(vii) The consequence of the principle laid down by the High Court would be to extinguish the possibility of effective cross-examination as it takes away the ability to surprise or confront a witness in the stand and it instead amounts to forcing parties to disclose their arguments, defenses and evidence entirely in the pleadings which may, in turn, go against the fundamental rule of pleadings which is to stipulate only material facts therein.

In furtherance of the above submissions, reference is made to judgments passed by the High Courts of Madras, Gujarat, Kerala, Delhi and Bombay.

9. Learned counsel Dr. R.S. Sundaram, appearing for Respondent No.1 made the following submissions: -

(i) Orders I to XX of the CPC have defined a party in specific terms as plaintiff and defendant. A witness, in distinction, is for supporting and/or proving a particular plea set out by the parties.

(ii) The phrase "insofar as applicable" as it appears in Order XVI Rule 21 regulates the conduct of a party when he testifies as a witness. This phrase when construed in the light cast by other provisions of the Code sets out a clear distinction between the parties and a witness. Reference is made to Order VII Rule 14 (4), Order 8 Rule 1(A), (4) (a) and Order XIII Rule 1 (3).

(iii) It is submitted that Order XIII Rule 1(3) is clear and poses no ambiguity and does not require interpretation as argued by the appellant. The clause suggests that the document can be produced and put to a witness to test its veracity and the words can in no way be suggested to include the parties to the suit.

(iv) The element of surprise as against a party being cross-examined, is absent under the Code. Various provisions mandate that any documents on which the suit relies or the defense depends be filed at the first instance. Reference is made to Order VI Rule 9 which requires that contents of all documents produced be material and be stated in the pleadings, explicitly thereby negating the elements of surprise.

(v) The expressions "plaintiff's witness and defendant's witness" are unambiguous and therefore the literal meaning, as is apparent, must be given to them.

(vi) Having considered the various provisions mentioned above, the Division Bench of the High Court has correctly applied the principles of interpretation to answer the three questions framed by the referring court.

THE OPINION OF THE COURT

10. A party to the suit is one on whose behalf or against whom a proceeding in a court has been filed. A witness is a person, either on behalf of the Plaintiff or the defendant, who appears before a Court to substantiate a statement or claim made by either side. Neither the phrase 'party to the suit' nor 'witness' is defined under the CPC or any other statute on the books. However on this issue, a Constitution Bench of this Court in **State of Bombay v. Kathi Kalu Oghad**[7] held as under-

"…"To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy…"

A 'witness' as defined by P. Ramanatha Aiyar's Advanced Law Lexicon is as under:-

"One who sees, knows, or vouches for something (a witness to the accident). (1) in person, (2) by oral or written deposition, or (3) by affidavit (the prosecution called its next witness)". (Black, 7th Edn., 1999)

"The term 'witness'*, in its strict legal sense, means one who gives evidence in a cause before a Court; and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding, and so includes deponents and affiants as well as persons delivering oral testimony before a Court or jury."

7 AIR 1961 SC 1808

11. The High Court in its considered view stated that a party cannot be equated to a witness. It is recorded in the impugned judgment that various provisions of the CPC lend credence to the difference between a party to the suit and a witness in a suit.

12. In advancing its arguments before this court, the Respondents submitted that the phraseology of the Code, employing "the Plaintiff's witnesses" and "the Defendant's witnesses" suggests a clear difference between the parties to the suit and the witness produced at their instance - and would submit that the literal rule of interpretation, in the absence of any ambiguity, would be what is required to be followed.

13. This understanding, in our view, implies that the law places a party to a suit and a witness to a suit in watertight compartments and that a plaintiff/defendant, even when testifying to their own cause are not witnesses despite being in the witness box and being subject to the same practices and procedures as any other witness before the court on their behest.

14. This differentiation appears to be questionable. Reference may be made to Section 120 of the Indian Evidence Act, 1872 which states that parties to a civil suit shall be competent witnesses. It reads:-

"120. Parties to civil suit, and their wives or husbands.

Husband or wife of person under criminal trial. - In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

The word used is witnesses - which implies that a witness otherwise produced as also the defendant or the plaintiff themselves, will stand on the same footing when entering evidence for the consideration of the court. The Code itself speaks to the effect that when a party to a suit is to testify in court. Regard may be had to Order XVI Rule 21 which reads as under:-

"21. Rules as to witnesses to apply to parties summoned.-Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

Further, Order XVI Rule 14, as extracted hereunder is taken note of.

"14. Court may of its own accord summon as witnesses strangers to suit.—Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at **any time thinks it necessary [to examine any person, including a party to the suit] and not called as a witness by a party to the suit,** the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may **examine him as a witness** or require him to produce such document."

(Emphasis Supplied)

In respect of the above provision, it is essential to notice that prior to the amendment to the Code in the year 1976, this Section was applicable to "any person other than a party to suit"[8] the express exclusion has been amended, to turn it into an explicit inclusion within the term 'witness'.

We may also refer to Order XVIII Rule 3A which states that when a party to a suit wishes to appear as a witness, he is to do so prior to other witnesses. The section reads:-

3-A. Party to appear before other witnesses.—Where a party **himself wishes to appear as a witness,** he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.

The relevant principles as culled out by B.P Sinha, CJI (majority opinion) in the above referenced decision of the Constitution Bench may also be instructive in gaining an understanding of the ambit of a witness. In Para 16, it was observed:-

"

….

(*3*) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or

8 Code Of Civil Procedure (Amendment) Act, 1976

giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(*4*) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".

(*5*) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.

(*6*) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing."

It is clear from the above discussion, that witnesses and parties to a suit, for the purposes of adducing evidence, either documentary or oral are on the same footing. The discussion as aforesaid, emphasises the lack of differentiation between a party to suit acting as a witness and a witness simpliciter in the suit proceedings. The presence of these provisions also begs the question that if the legislature had the intent to differentiate between a party to a suit as a witness, and a witness simpliciter, it would have done so, explicitly.

On this we may only highlight what the High Court had to observe:

"Merely because Order XVI Rule 21 provides that the Rules as to witnesses are to apply to parties summoned, that would not mean that the party is being equated with a witness. The Rule only applies for regulating the conduct of a party when he enters the witness box in his own cause, otherwise in absence of such a provision, there would be a void and the conduct of a party entering the witness box in his own cause, would go unregulated. This is further substantiated from the use of the expression "in so far as they are applicable" occurring in Rule 21 of Order XVI."

A simple brushing off by saying that "merely because" one provision mentions them to be performing similar functions, they are not to be equated, cannot be allowed. No proper reason is forthcoming from a perusal of the extracted portion or otherwise for the differentiation which is between a witness in the witness box and the conduct of a

party appearing as a witness in the witness box. In our considered view, this distinction does not rest on firm ground. This is so because the function performed by either a witness or a party to a suit when in the witness box is the same. The phrase "so far as it is applicable" in Order XVI Rule 21 does not suggest a difference in the function performed.

15. We may next consider the reliance in the impugned judgment, on certain provisions of the Indian Evidence Act- particularly 137-138,139, 154 and 155. For ready reference, the provisions are extracted as under:

Section 137

Examination-in-chief. — The examination of witness by the party who calls him shall be called his examination-in-chief.

Cross-examination. — The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination. —The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Section 138

Order of examinations. — Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. — The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Section 139

Cross-examination of person called to produce a document. — A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Section 154

Question by party to his own witness. —

1 [(1)] The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

2 [(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.]

Section 155

Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) By proof that the witness has been bribed, or has 1 [accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

* * * * *

Explanation. — A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

16. The thrust of the reliance was that this Act by the use of the phrase 'by the parties who calls him' in the extracted provision, recognizes the difference between a party to a suit and a witness called on to testify by a party. This distinction again, on the face of it, appears misconceived. It is not doubted that such a phrase or other similar phrases have been employed in these provisions, however, if the holding of the High Court is given an imprimatur, it would cause an apparent conflict between provisions of the very same Act i.e., the

sections reproduced immediately hereinabove vis a vis Section 120, which, as hitherto reproduced states that, a party to a suit shall be, amongst others, a competent witness. It may also be observed that nowhere in the Evidence Act has the party been precluded from presenting himself as a witness, and therefore this differentiation based only on the meaning as it appears, cannot be countenanced. A perusal of Sections 137,138 and 139, in our considered view, does not favour the differences as pointed out in the impugned judgement. Examination in chief, cross-examination and re-examination are all facets of a trial which can be availed by a party or the adversary, for both the party to a suit as a witness and also for other witnesses called by the party. Therefore, this negates the interpretation that "the party who calls him" suggests a difference between the party as also the witness called by such party for the purposes of entering evidence before the court.

17. Having arrived at the conclusion as above, that the provisions of the Code as also the Evidence Act do not differentiate between a party to the suit acting as a witness and a witness otherwise called by such a party to testify, we may now consider the next question presented by this lis.

18. While considering the legislative intent of Order VII Rule 14(4), Order VIII Rule 1-A(4)(a) and Order XIII Rule 1(3), the High Court observed that the production of documents relied on and/or "in the possession and power of the parties" as being obligatory and noted that a failure to do so, may in some cases be tantamount to fraud. Reference was made to **S.P. Chengivaraya Naidu v. Jagannath**[9] to substantiate the same. It was observed that permitting a party to hold a document intentionally, for any purpose whatsoever would nullify the requirement of a level playing field in the litigation, but also undercut the said provisions because the language is clear-mandating for the parties to produce documents, and whereas, the exception- i.e., Order VIII Rule 1-A (4) and Order XIII Rule 1(3) applies only to witnesses and not to parties. Thus concluding that the legislative intent is clear and unambiguous, as evidenced by the same difference being present three times.

9 (1994) 1 SCC 1 (2-Judge Bench)

19. On this, it would be appropriate to extract the relevant provisions, for ready reference.

Order VII

[14. Production of document on which plaintiff sues or relies.—

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

[(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.]

(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiffs witnesses, or handed over to a witness merely to refresh his memory.]

Order VIII

1-A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.—(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

[(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.]

(4) Nothing in this rule shall apply to documents—

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory.]

Order XIII

1. Original documents to be produced at or before the settlement of issues.—(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.

(2) The Court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents—

(a) produced for the cross-examination of the witnesses of the other party; or

(b) handed over to a witness merely to refresh his memory.

20. The differentiation between the party to a suit and a witness, as is made clear by our earlier discussion, is not something that gels with the law. As has been hitherto observed, the term witness does not exclude the party to the suit i.e., the Plaintiff or the Defendant, themselves appearing before the court to enter evidence. As far as the non-production of documents amounting to fraud, it may be true that the non-production of documents on which the parties place reliance, may hinder the progression of the suit- and in a given case, perhaps may amount to fraud- but we do not comment on those possibilities, if any. However, the intentional withholding of a document, in these two situations- is completely different. One is the withholding of a document upon which the case depends, or is essential for the lis to be appropriately decided - and the other is solely for the purpose of effective cross-examination. The two cannot be held to be at the same pedestal, the latter most certainly not amounting to fraud.

21. A perusal of the CPC otherwise as well supports this view, as it does not, in any manner address a situation where a party to

a suit is to enter the witness box, and what the procedure may be, to be followed for such an occurrence, setting this testimony apart from those rendered by other witnesses.

22. The argument that the literal interpretation of "the Plaintiff's witnesses" and "the Defendant's witnesses" suggests a clear difference between the parties to the suit and the witness produced at their instance - has to be necessarily negated as a plaintiff or a defendant at their own behest may enter evidence in court- and so, to hold, as the judgement impugned before us does, that it is permissible as according to Order VIII Rule 1-A(3), to produce a document to confront or jog the memory of a witness, but the same would not be permissible as applied to a party to a suit, would create an artificial distinction, which otherwise does not serve any purpose of law.

23. We notice that the Madras High Court in **Miss T.M. Mohana v. V. Kannan**[10] had in as far back as 1984, held that the production of documents for the purpose of cross-examinations can be availed only for a witness of a party and not the party themselves, is an untenable argument. Also, that the "Plaintiff's witnesses" would not only be witnesses for the plaintiff, but also the plaintiff himself.

24. This proposition was referred to and agreed upon by the Gujarat High Court in **Amit M. Pathakji, Sr. Manager (Mech.) & Anr v. Bhavnaben Amitkumar Pathakji**[11] in the year 2007, which notably is after the Code of Civil Procedure (Amendment) Act, 2002. This fact acquires significance as the Division Bench in the Impugned Judgment differentiates the judgment in **T.M Mohana** (supra) with the present-day Code as the provision it speaks of is not to be found in the Code.

25. In fact, if the literal interpretation as posited by the respondent is accepted, the distinction created would lay waste to the law as framed- giving rise to a difference not envisaged by the Code, while also indirectly obliterating other well-recognized concepts of law such as that of an interested witness (which is a recognized concept in

10 1984 SCC Online Mad 145
11 2007 SC OnLine Guj 78.

civil suits as well[12]) for one of the differences culled out, between a party to a suit and a witness- is on the degree of interest in the outcome of the case, stating that a party is obviously interested, while a witness is not.[13]

26. To conclude the issue at hand- The freedom to produce documents for either of the two purposes i.e. cross examination of witnesses and/or refreshing the memory would serve its purposes for parties to the suit as well. Additionally, being precluded from effectively putting questions to and receiving answers from either party to a suit, with the aid of these documents will put the other at risk of not being able to put forth the complete veracity of their claim- thereby fatally compromising the said proceedings. Therefore, the proposition that the law differentiates between a party to a suit and a witness for the purposes of evidence is negated.

27. In **Purushottam (supra)** the Learned Single Judge had observed that it was not open for the trial court to allow the production of documents to confront the party to the suit and it would be a different course if the person being confronted was only a witness to the suit. While **Vinayak Dessai** (supra) essentially agrees on this point, the difference arises with the latter saying that a party and a witness can be equated for the purposes of the two being on the same pedestal while entering evidence. Both the above-stated judgments differ with **Upper India Couper Paper Mills Co. Ltd. (**supra) which says that it is not obligatory to produce advanced copies of documents sought to be introduced for the limited purpose of cross-examination.

28. It is settled law that what is not pleaded cannot be argued, as for the purposes of adjudication, it is necessary for the other party to know the contours of the case it is required to meet. It is equally well settled that the requirement of having to plead a particular argument does not include exhaustively doing so. We may refer to **Ram Sarup Gupta v. Bishun Narain Inter College**[14], wherein it was observed as follows:

"6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally

12 See Sadayappan v. State, (2019) 9 SCC 257 (2-Judge Bench)
13 Para 23 of the Impugned Judgment
14 (1987) 2 SCC 555 (2-Judge Bench)

settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. To have a fair trial it is imperative that the party should settle the essential material facts so that the other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words that may not expressly make out a case in accordance with a strict interpretation of the law. In such a case the court must ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead, the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead, the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal…."

29. We may also refer to **Udhav Singh v. Madhav Rao Scindia**[15], wherein a bench of two learned judges observed:

"25...If the plea or ground of defence "raises issues of fact not arising out of the plaint", such plea or ground is likely to take the plaintiff by surprise, and is therefore required to be pleaded. If the plea or ground of defence raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint, itself, no question of prejudice or surprise to the plaintiff arises. Nothing in the rule compels the defendant to plead such a ground, not debars him from setting it up at a later stage of the case, particularly when it does not depend on evidence but raises a pure question of law turning on a construction of the plaint."

30. A reading of the judgments above would imply that substance is what the courts need to look into, and therefore, in reference to the

15 (1977) 1 SCC 511

production of documents, in the considered view of this court, so long as the document is produced for the limited purpose of effective cross-examination or to jog the memory of the witness at the stand is not completely divorced from or foreign to the pleadings made, the same cannot be said to fly in the face of this established proposition.

31. Save and except the cross-examination part of a civil suit, at no other point shall such confrontation be allowed, without such document having accompanied the plaint or written statement filed before the court. For this purpose, reference be made to Order VII Rule 14(4) (This Rule speaks of the plaintiff necessarily listing in his plaint and, producing before the court, the documents upon which they seek to place reliance, in support of his claim. Sub-rule 4 exempts from this obligation documents produced for the limited purpose of cross-examination or to jog the memory of a witness), Order VIII Rule 1A(4)(a) (This Rule speaks of the defendant necessarily listing in his Written Statement and, producing before the court the documents upon which they seek to place reliance, in defense of his claim for set-off or counterclaim. Sub-rule 4 exempts from this obligation documents produced for the limited purpose of cross-examination or to jog the memory of a witness) and Order XIII Rule 1(3) (This Rule speaks of either party or their pleaders obligatorily producing, post the settlement of issues in a Suit, the documentary evidence upon which reliance is placed. Sub-rule 3 exempts from this obligation documents produced for the limited purpose of cross-examination or to jog the memory of a witness), all three of which, while dealing with the production of documents, by the plaintiff, defendant and in general, respectively, exempt documents to be produced for the limited purpose of cross-examination or jogging the memory of the witness.

32. In light of the above discussion, and the answer in the negative to the first question before this court, meaning thereby that there is no difference between a party to a suit as a witness and a witness simpliciter- the second issue in this appeal, in view of the provisions noticed above, production of documents for both a party to the suit and a witness as the case may be, at the stage of cross-examination, is permissible within law.

33. The questions raised in the instant *lis* are answered in the above terms. The appeal is allowed.

34. In view of the discussion hereinabove, the judgment of the Division Bench in WP No. 7717 of 2019 titled as Mohammed Abdul Wahid v. Smt. Nilofer with WP No. 6931 of 2019 titled as **Sau. Kantabai & Anr. v. Sudhir & Ors** dated 9th February 2021 by the Bombay High Court, is set aside.

35. The original petition stands restored to the file of the High Court for it to be decided on merits in accordance with the law as hereinabove discussed.

36. Interlocutory Applications, if any, stand disposed of. Parties to bear respective costs.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal allowed.