Ameer Trading Corporation Ltd vs Shapoorji Data Processing Ltd on 18 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 355, 2003 AIR SCW 6340, (2004) 1 SERVLR 649, (2004) 13 ALLINDCAS 728 (SC), (2003) 6 ANDHLD 473, 2004 (13) ALLINDCAS 728, 2004 SCFBRC 19, (2004) 2 ALLMR 425 (SC), 2004 (1) ALL CJ 670, 2004 (1) SCC 702, 2003 (7) SLT 791, (2003) 9 JT 109 (SC), 2003 (9) SCALE 713, 2003 (9) JT 109, 2004 (1) UJ (SC) 627, (2004) ILR (KANT) (1) 1, (2003) 6 ANDH LT 55, (2003) 9 SCALE 713, (2004) 2 PAT LJR 195, (2004) 101 FACLR 662, 2004 BLJR 1 485, (2004) 1 CIVILCOURTC 238, (2004) 2 LANDLR 251, (2004) 2 MAD LW 710, (2004) 96 REVDEC 386, (2004) 1 ANDHLD 34, (2003) 8 SUPREME 634, (2004) 1 RECCIVR 259, (2004) 1 ICC 668, (2004) 1 WLC(SC)CVL 131, (2004) 2 JLJR 171, (2003) 12 INDLD 608, (2004) 1 KCCR 267, (2004) 54 ALL LR 198, (2004) 1 ALL WC 673, (2004) 1 CAL HN 103, (2004) 1 CURCC 199, (2004) 97 CUT LT 417, (2004) 3 BOM CR 583

Author: S.B. Sinha

Bench: Chief Justice, S.B. Sinha, Ar. Lakshmanan

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           CASE NO.:
Appeal (civil)  9130 of 2003
Special Leave Petition (civil)  13858 of 2003

PETITIONER:
Ameer Trading Corporation Ltd.

RESPONDENT:
Shapoorji Data Processing Ltd.

DATE OF JUDGMENT: 18/11/2003

BENCH:
CJI, S.B. Sinha & AR. Lakshmanan.

JUDGMENT:
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JUDGMENT S.B. Sinha, J :

Leave granted.

Interpretation of Order 18 Rules 4 and 5 of the Code of Civil Procedure falls for consideration in this appeal which arises out of a judgment and order dated 3.7.2003

passed by the High Court of Judicature at Bombay in W.P. No. 2428/2003.

The said question arises in the following circumstances.

The respondent herein filed the suit No. 156/169 of 2001 in the Court of Small Cause Bombay against the appellant for eviction of the appellant inter alia on the ground that the provisions of Maharashtra Rent Control Act, 1999 had no application in relation to the premises in question. An affidavit was filed by the respondent herein purporting to be his examination-in-chief to be taken on evidence in the suit.

An application was filed by the appellant herein objecting to the said affidavit being accepted inter alia on the ground that the decree which may be passed in suit being an appealable one, Order 18 Rule 5 of the Code of Civil Procedure will be applicable. By reason of an order dated 17th February, 2003, the learned Trial Judge rejected the said application of the appellant holding:

"The Court had already acted upon as per the provisions of Order 18 Rule 4 of C.P.C. (amended) which authorizes the court to receive the evidence on affidavit in any matter which includes the appealable order. In the given circumstances the affidavit need not be returned back to plaintiffs and be asked to give oral evidence in the matter.

Besides the fact that aspect as above and the legal position observed by me. I have also come across one matter of this court only wherein on same facts the matter had been taken to the Hon'ble High Court and the Hon'ble High Court had directed this court to accept the evidence on affidavit. I have also come across certain observations made by the Small Causes Court supporting the view that it is legal to accept evidence on affidavit in any matter. Hence I do not think I should discuss all the authorities cited by defendants advocate. Hence I proceed to pass following order.

Order Application stands rejected. Matter is adjourned to 4.3.2002 at 10.30 a.m. for cross examination of Plaintiffs."

Being aggrieved the appellant preferred a writ petition thereagainst which was dismissed by reason of the impugned order holding :

"Heard. The only grievance made in this Petition is that the Court below has allowed the Plaintiff to receive evidence on affidavit. Learned Counsel contends that, that will not be permissible in view of the provisions contained in Order XVIII Rule 5 of the Code of Civil Procedure. I am not inclined to interfere with the discretionary order passed by the Court below. Besides, I find force in the objection taken on behalf of the Respondents that the issue is already concluded and answered by the decision of this Court dated 20th March, 2003 in Writ Petition No.708 of 2003. To my mind, no prejudice will be caused to the Petitioner, if the view as taken by the Trial Court was

> to be upheld because the Petitioner being Defendant would get opportunity to cross-examine the Plaintiff and Plaintiff's witnesses.
>
> Hence, no reason to interfere.
>
> Rejected."

The appellant is in appeal before us aggrieved thereby.

Mr. Rajan Narain, the learned counsel appearing on behalf of the appellant would submit that Order 18 Rule 4 and Order 18 Rule 5 of the Code of Civil Procedure should be read harmoniously and so read, it must be held that Order 18 Rule 4 will have no application in the appealable cases; and as logical corollary thereof the court must examine all the witnesses in court. In support of the said contention, strong reliance has been placed on Laxman Das Vs. Deoji Mal and Others [AIR 2003 Rajasthan 74].

Mr. Nariman, the learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that a bare perusal of the provisions contained in Order 18 Rule 4 of the Code of Civil Procedure would show that an affidavit incorporating examination-in-Chief of a witness has to be filed in every case and only in the event the said witness is required to be cross-examined, he would be produced in court.

The learned counsel would urge that the Code of Civil Procedure Amendment Act, 1976 was enacted with a view to do away with the unnecessary wastage of time which may be taken for examination of a witness.

Mr. Nariman would urge that Order 18 Rule 5 should be read with Order 18 Rule 13 so as to decipher the difference between the cases where an appeal is allowed and where appeal is not allowed. Order 18 Rule 5, the learned counsel would submit, merely lays down the procedure for taking the evidence of the witness. In support of the said contention, reliance has been placed on F.D.C. Ltd. Vs. Federation of Medical Representatives Association India (FMRAI) and Others [AIR 2003 Bombay 371].

Order 18 Rule 4 as it originally stood reads as under:

> "4 WITNESSES TO BE EXAMINED IN OPEN COURT. The Evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the judge."

Order 18 Rules 4 (1), (2), and (3) as they now stand read as under:

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

> Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the court.
>
> (2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it :
>
> Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit;
>
> (3) "The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit."

The other sub-rules of Rule 4 of Order 18 provide for other and further procedures as regard examination of witness.

Rule 5 refers to the evidence which is required to be taken in cases where the appeal is allowed in contra-distinction with the cases where appeal is not allowed as envisaged in Rule 13 of Order 18 of the Code of Civil Procedure. Rule 5, therefore, envisages a situation where the Court is required to take down an evidence in the manner laid down therein which would mean that where cross-examination or re-examination of the witness is to take place in the court.

The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which 'evidence' is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

The aforementioned provision has been made to curtail the time taken by the Court in examining a witness in chief. Sub-Rule (2) of Rule 4 of Order 18 of Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it.

We may notice that Rule 4 of Order 18 was amended with effect from 1.7.2002 specifically provided thereunder that the examination-in-chief in every case shall be on affidavit. Rule 5 of Order 18 had been incorporated even prior to the said amendment.

Rule 4 of Order 18 does not make any distinction between an appealable and non-appealable cases so far mode of recording evidence is concerned. Such a difference is to be found only in Rules 5 and 13 of Order 18 of the Code.

It, therefore, appears that whereas under the unamended rule, the entire evidence was required to be adduced in Court, now the examination in chief of a witness including the party to a suit is to be tendered on affidavit. The expressions "in every case" are significant. What, thus, remains, viz. cross-examination or re-examination in the appellable cases will have to be considered in the manner laid down in the Rules, subject to the other sub-rules of Rule 4.

Rule 5 of Order 18 speaks of the other formalities which are required to be complied with. In the cases, however, where an appeal is not allowed, the procedures laid down in Rule 5 are not required to be followed.

In a situation of this nature, the doctrine of suppression of mischief rule as adumbrated in Heydon's case [3 Co Rep 7a, 76 ER 637] shall apply. Such an amendment was made by the Parliament consciously and, thus, full effect thereto must be given.

In Halsbury's Laws of England, Volume 44(1), fourth reissue, para 1474, pp 906-07, it is stated :

> "Parliament intends that an enactment shall remedy a particular mischief and it is therefore presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief. The doctrine originates in Heydon's case where the Barons of the Exchequer resolved that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered :
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> (1) what was the common law before the making of the Act;
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> (2) what was the mischief and defect for which the common law did not provide;
>
> (3) what remedy Parliament has resolved and appointed to cure the disease of the commonwealth; and (4) the true reason of the remedy, and then the office of all the judges is always to make such construction as shall :
>
> (a) suppress the mischief and advance the remedy; and
>
> (b) suppress subtle inventions and evasions for the continuance of the mischief pro privato commodo (for private benefit); and
>
> (c) add force and life to the cure and remedy according to the true intent of the makers of the Act pro publico (for the public good)."

Heydon's Rule has been applied by this Court in a large number of cases in order to suppress the mischief which was intended to be remedied as against the literal rule which could have otherwise

covered the field. [See for example, Smt. PEK Kalliani Amma and Others vs. K. Devi and Others, [AIR 1996 SC 1963; Bengal Immunity Co. Ltd. vs. State of Bihar and Others, AIR 1955 SC 661; and Goodyear India Ltd. vs. State of Haryana and Another, AIR 1990 SC 781].

It is now well-settled that for the purpose of interpretation of statute the same has to be in its entirety.

Furthermore, in a case of this nature, principles of purposive construction must come into play. (See Indian Handicrafts Emporium Vs. Union of India (2003) 7 SCC 589).

In Chief Justice of A.P. Vs. L.V.A. Dikshitulu [(1979) 2 SCC 34], this Court observed:

> "The primary principle of interpretation is that a Constitutional or statutory provision should be construed "according to the intent of they that made it" (Coke). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light, on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation.
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> In Kehar Singh Vs. State (Delhi Admn.) [AIR 1988 SC 1883 : (1988) 3 SCC 609], this Court held:
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> "...But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences."

In District Mining Officer Vs. Tata Iron & Steel Co. [JT 2001 (6) SC 183 : (2001) 7 SCC 358], this Court stated:

> "The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully in the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

In East India Hotels Ltd. Vs. Union of India [(2001) 1 SCC 284] this Court observed:

> "an act has to be read as a whole, the different provisions have to be harmonized and the effect has to be given to all of them."

In Laxman Das (supra) the Rajasthan High Court held:

> "Therefore, in view of the above, the words "in every case", contained in R.4 of O.18 have to be understood in a limited sense that every case wherein the ultimate order is not appealable, and by no means, it can take in its ambit the orders which would be appealable. In view of above, the position which emerges is that in cases where the final orders to be passed by the Court would not be appealable, the discretion has been conferred upon the Court to accept the examination-in-chief in the form of affidavit as provided under O.18, R. 4; or to record the substance thereof by the Court itself as provided under O.18, R.13. But in cases where orders would be appealable, the evidence is to be recorded strictly as provided under O.18, R.5."

On the other hand, in F.D.C. Ltd. (supra) it has been held:

> "The harmonious reading of Rr. 4 and 5 of O.XVIII would reveal that while in each and every case of recording of evidence, the examination-in-chief is to be permitted in the form of affidavit and while such evidence in the form of affidavit being taken on record, the procedure described under R.5 is to be followed in the appealable cases. In non-appealable cases, the affidavit can be taken on record by taking resort to the provisions of law contained in R.13 of O.XVIII. In other words, mere production of the affidavit by the witness will empower the court to take such affidavit on record as forming part of the evidence by recording the memorandum in respect of production of such affidavit taking resort to R.13 of O.XVIII in all cases

> except in the appealable cases wherein it will be necessary for the Court to record evidence of production of the affidavit in respect of examination-in- chief by asking the deponent to produce such affidavit in accordance with R.5 of O.XVIII. Undoubtedly, in both the cases, for the purpose of cross-examination, the Court has to follow the procedure prescribed under sub-rule (2) of R. 4 read with R.13 in case of non-appealable cases and the procedure prescribed under sub- rule (2) of R. 4 read with R.5 in appealable cases.
>
> In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness-box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under R.5. In non-appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to R.13 of O.XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of R.5, where as in case of non-appealable cases the Court would be empowered to exercise its power under R.13"

We agree with the view of the Bombay High Court.

The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the Court in writing and in any event, the attention of the witness can always be drawn while cross-examination him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an affidavit and in the event, he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court.

Applying the aforementioned principles of interpretation of statute, we have no doubt in our mind that Order 18 Rules 4 and 5 are required to be harmoniously construed. Both the provisions are required to be given effect to and as Order 18, Rule 5 cannot be read as an exception to Order 18 Rule 4.

For the reasons aforementioned, there is no merit in this appeal, which is dismissed accordingly. However, there shall be no order as to costs.