

complied with and after a prolonged fight the matter appears to be disposed of.

A vacate-injunction order must be disposed of expeditiously (please see 1980 (2) ALT 472)

It is suggested, these provisions are to

be complied with in order to set at rest the controversy and let me conclude by an appeal to the Bench and Bar, it is time the enlightened sections of the Bar and Bench ponder over the matter and everyone concerned with law cannot be oblivious with these well settled principles of law.

PROCEDURE TO BE FOLLOWED WHEN THE COURT HELD AFFIDAVIT OF CHIEF EXAMINATION FILED UNDER ORDER 18 RULE 4(1) OF CPC CONTAINS INADMISSIBLE AND IRRELEVANT MATTER

By

—MANDAVA VENKATESWARA RAO,

Advocate, "Panchavati"

Avanigadda-521121,

Krishna District, A.P.

1. Evidence Act does not apply to "affidavits". Section 1 of Evidence Act positively mentions; It applies to all judicial proceedings. *But not to "affidavits" presented to any Court of officer etc.*

2. Section 3 of Evidence Act defines the word "Evidence". It also does not include "affidavit" in the definition of "Evidence".

3. The Court on merits held that the document is inadmissible in evidence. As per *Section 91 of the Evidence Act*, no evidence shall be given in proof the inadmissible document.

4. Prior to the substitution of Order 18 Rule 4 of C.P.C., by amendment Act 22 of 2002 which came into force on 1.7.2002, Order 18 Rule 4 reads "*Witnesses to be examined in open Court*". The evidence of witnesses shall be taken orally in open Court in the presence and under the personal direction and Superintendence of the Judge".

So then, when an objection is raised with regard to proof and admissibility of document, the Court could decide the matter then and there itself and proceed with further

recording of evidence after the objection is decided either way in accordance with that decision.

5. But, the new Order 18 Rule 4(1) reads "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 alongwith affidavit shall be *subject to the orders of the Court*."

Under the present provision the examination-in-chief of a witness shall be on affidavit and copy thereof shall be supplied to the opposite party.

As per the proviso under Rule 4(1) of Order 18 when objection is raised by opposite party with regard to proof and admissibility of document the Court has to pass orders on those aspects.

6. Our High Court in a decision reported in *AIR 2005 AP 253 (F.B) Para 24 at P.260* held that "An affidavit is merely an affidavit

when it is filed in Court. But when a witness appears for cross-examination, it is necessary either to *confirm or differ* the contents of the affidavit. *After his confirmation or denial* of the contents of affidavit, *whatever recorded is the evidence* and *if the witness confirms to the affidavit*, would become part of the statement made by the deponent before the Court. Therefore, what is *finally taken as evidence* by the Court is *not the affidavit*, but what is contained in the affidavit.

7. Our High Court of Bombay in a decision reported in *AIR 2008 Bombay 81 (Para 19 & 20)* held that (*AIR 2003 Bombay 371* approved by *AIR 2004 SC 355* followed)

Affidavit of examination in chief *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 under Rules.

8. Our High Court held in a decision reported in *2013 (1) ALD 137 (Para 7)* that “It is evident that an affidavit becomes *part of evidence only* on its being *confirmed* by the person who filed it.

It is also held in *Paras 9 and 10* of that judgment that once the affidavit becomes *part of record* the party who filed it *loses the right and prerogative to change or alter it or substitute it*.

So when the party has right to alter it or substitute it, *before it became part of the record*, certainly the *Court has got the right and authority* to reject it or return it, directing the party to file fresh affidavit excluding inadmissible evidence under Section 151 of C.P.C.

9. High Court of Gauhati held in a decision reported in *AIR 2004 Gauhati 119* as follows:-

The affidavit of witness *without being sworn* before the Court *would lack in credibility and probative value*. The witness though may be competent to adduce evidence; *the contents of unsworn affidavit would not constitute evidence* in support of the relatable facts. Unsworn affidavit on record of the suit *carries no credibility or probative value* in the support of the case of deponent of affidavit (Para 8).

Hence, permission may be granted *to file fresh affidavit*, as no prejudice would be caused to the other side (Para 13).

10. It is held in a decision given by High Court of Bombay and reported in *AIR 2015 (NOC) 1132* that “*evidence affidavit cannot contain matter that is irrelevant, inadmissible or both This is not the evidence as required by law. Were it to be attempted from the witness box, it would not be permitted; and hence, it cannot be allowed to creep in merely because it happens to be placed on affidavit*.”

11. Procedure is a hand maid of Justice. Unless, the said procedure is prohibited by any law, the Court has got ample power and right under Section 151 of C.P.C., to follow the procedure which leads to do justice. As our Supreme Court observed in a decision reported in *AIR 1978 SC 484* “Procedural law is intended to facilitate and not to obstruct the course of substantive justice”.

As observed by Gauhati High Court no prejudice will be caused to the deponent if the original affidavit of examination-in-chief containing inadmissible and irrelevant matter is rejected and returned and deponent is directed to file fresh affidavit of examination-in-chief excluding inadmissible and irrelevant matter.