
(2012) 08 BOM CK 0093

In the Bombay High Court

Case No : Suit No. 550 of 2003 with Chamber Order (Lodging) No. 337 of 2003
in Suit No. 550 of 2003

Ayushakti Ayurved Pvt. Ltd.

APPELLANT

Vs

Hindustan Uniliver Limited

RESPONDENT

Date of Decision : 13-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 3, Order 13 Rule 4, Order 18 Rule 4(1)

Citation : (2013) 1 BomCR 599

Hon'ble Judges : R.D. Dhanuka, J; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Priyanka C. Kothari with Ms. Usha Chandrasekhar instructed by and Bhagwati and Co, for the Appellant; Sandeep Parikh instructed by y and Crawford Bailey and Co., for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—This reference before the Division Bench arises from an order dated 4 July 2012 of a learned Single Judge, Hon"ble Mr. Justice B.R. Gavai. On 16 September 2011, an order was passed by Shri Justice S.J. Vazifdar in the suit, in the following terms :

2. The evidence shall be recorded on commission. Mr.Vikram Sathye, an Advocate of this Court is appointed as Commissioner for recording evidence. The parties shall tender their documents before the Commissioner. The parties shall be entitled to raise their objections, oral and documentary before the commissioner. The parties are at liberty to cross-examine the witnesses without prejudice to their objections which shall be decided at the final hearing. The costs of the Commissioner shall, in the first instance, be shared by the parties equally and the same shall be subject to the final orders in the suit.

Orders similar to this order were passed by the learned Single Judge in various other suits.

Mr. Justice S.C. Dharmadhikari recalled the orders passed by the earlier learned

Single Judge. One of them was an order dated 7 May 2012 in Suit No. 2064 of 2005, which reads as follows :

2. As far as main matter is concerned, it is stated that the Court has framed issues and proceeded to appoint commissioner for recording evidence. The order in that behalf is of 8th November, 2011.

3. Repeatedly I have observed that such orders have been, if passed, by consent of parties are contrary to law and cannot be sustained. They are per incuriam .

4. In these circumstances, the order appointing the Commissioner is recalled and set aside. If the plaintiff does not proceed to file affidavit of evidence and documents within six weeks from today, the suit shall stand dismissed for want of prosecution without any further reference to Court.

The subsequent order dated 7 May 2012 and similar other orders to that effect appear to have been passed on the basis of a judgment of a Full Bench of this Court in Hemendra Rasiklal Ghia and others Vs. Subodh Modi and others 2008 (6)-Bom. C.R.-519

2. Mr. Justice S.J. Vazifdar, while appointing a Commissioner to record the evidence, allowed the parties to tender documents before the Commissioner and to raise their objections to the admissibility of the documents before the Commissioner. The learned Judge kept the objections of the parties to the admissibility of the documents open till the final hearing of the suit and permitted the parties to cross-examine the witnesses without prejudice to those objections. Mr. Justice S.C. Dharmadhikari while recalling those orders, appears to have taken the view that objections as to admissibility of the documents must be decided in the first instance by the learned Trial Judge before referring the suit to a Commissioner for recording evidence. When the present suit came up before Mr. Justice B.R. Gavai, the learned Judge was of the view that the observations of Mr. Justice S.C. Dharmadhikari in the order dated 7 May 2012 in Suit No. 2064 of 2005 and in similar orders recalling the earlier orders of Mr. Justice S.J. Vazifdar on the ground that those orders were per incuriam, were not correct. In the circumstances, the learned Single Judge directed that the papers be placed before the Hon"ble Chief Justice for referring the matter to the Division Bench or to a Larger Bench.

3. Essentially the issues which fall for consideration are based on the interpretation of the law as enunciated in the judgment of the Full Bench in Hemendra Rasiklal Ghia (supra). To clarify the issues which arise in this reference, we have formulated the following questions :

(i) When a Trial Judge directs that recording of evidence should take place before a Commissioner, should objections as regards admissibility of documents be decided by the Court before referring the suit to the Commissioner?

(ii) Does a Trial Judge have an element of discretion in determining that in a particular case, the admissibility of a document would be decided only at the final

hearing of the suit though before judgment; leaving it open to a party objecting to the admissibility of a document, to record its objection before the Commissioner and allowing the parties concerned to cross-examine the witness without prejudice to the objection as to admissibility of the document?

4. In deciding this reference it is not necessary for the Division Bench to reinvent the wheel. A considerable amount of judicial precedent has dealt with the issues which we have framed for determination. But above all, there is an authoritative statement of the law in the judgment of the Full Bench in Hemendra Rasiklal Ghia (supra). The judgment of the Full Bench has been rendered after considering the amendments which were brought about to the Code of Civil Procedure, 1908 ('CPC'), particularly by the Amending Act of 2002. Broadly speaking, the following principles emerge from the decision of the Full Bench :

(I) Objections as to the admissibility of a document in evidence fall into three categories :

(a) An objection on the ground that the document is insufficiently stamped;

(b) An objection which is directed towards the mode of proof adduced for proving the document;

(c) An objection that the document is ab-initio inadmissible in evidence;

(II) An objection on the ground that a document is not duly stamped and, therefore, is inadmissible, has to be judicially determined, since the document is tendered in evidence and before it is marked as an exhibit. Such an objection cannot be deferred for decision to a later stage of the suit;

(III) An objection to a document being admitted in evidence on the ground that the mode adopted for proving the document is irregular, cannot be permitted to be raised at a stage subsequent to the stage of marking of the document as an exhibit. If the objection is upheld, a party against whom the objection is allowed, has an opportunity to prove the document by adopting appropriate means. An omission to object to the mode of proof becomes fatal because a party which is entitled to object to the admissibility of a document being tendered, allows by the omission the party tendering the document to act on the assumption that his opponent is not serious about the mode of proof. Consequently, a failure to raise a timely objection in regard to the mode of proof, would amount to a waiver on the part of an objector of an entitlement to insist upon formal proof of the document;

(IV) An objection to the admissibility of a document on the ground that it is ab-initio inadmissible in evidence is available to be raised even at a later stage, including in appeal or by way of a revision. For instance, in the case of an unregistered sale deed or an unregistered lease deed, which requires registration, no evidence of the terms thereof can be adduced;

(V) An objection to the admissibility of a document in the first and second

categories has to be taken before the document is exhibited, which postulates a decision on the objection "then and there", before the document is marked as an exhibit;

(VI) The mandate of Order XIII, Rules 3 and 4 read with Order XVIII, Rule 4(1) and the weight of judicial authority suggests that an objection to the admissibility of a document should be raised by an objector and should be decided by the Court at the earliest opportunity;

(VII) However, by way of exception, an objection relating to the admissibility of a document requiring a resolution of complex issues or when the admissibility of the document is dependent on further evidence, can be deferred by the Trial Judge in an appropriate case until and after the evidence is recorded, but before the judgment is pronounced. In such an event, a document may be tentatively exhibited subject to the objection, clearly indicating that the objection has not been judicially determined. This procedure is only an exception to the ordinary rule under which admissibility of a document should be decided as and when it is raised without deferring the question of admissibility until the final judgment of the case (Paras 87, 88 and 89);

(VIII) These principles must also govern when the Court appoints a Commissioner for recording evidence.

5. The judgment of the Full Bench makes it abundantly clear that an objection in regard to admissibility of those documents which form part of the examination-in-chief, must be decided by the Trial Judge immediately and before the parties proceed to cross-examination. When the evidence is to be recorded on Commission, objections as to admissibility should be decided before a reference is made to the Commissioner. This subserves the object of expedition, which lies at the foundation of the amendments made to the CPC in 2002. If in every case or, as a matter of practice, a decision on the admissibility of documents is deferred to the final hearing of the suit, that would result in unduly enlarging the time taken to record the evidence before the Commissioner and would not subserve the statutory object of promoting expeditious disposal of suits. A Commissioner has no power to decide an objection as to admissibility and has to merely record the objection. If the document is only tentatively marked before the Commissioner while recording an objection as to admissibility, an objector would have to cross-examine the witnesses on the basis of the document, without prejudice to the objection as to admissibility. That as judicial experience of proceedings before Commissioners appointed by Trial Judges of this Court on the Original Side shows, only results in enlarging the scope of cross-examination before the Commissioner. Commissions drag on ad nauseam. Litigative costs only increase, posing a huge burden to litigants. If, on the other hand, the ordinary rule of determining the admissibility of the documents before a reference to the Commissioner is made is followed, that would restrict the ambit of the cross-examination since those documents, which have been ruled to be inadmissible, would be excluded from the purview of cross-examination. Undoubtedly, some

judicial time is required to be devoted at that stage because ruling on an objection as to admissibility involves a judicial determination. But this is necessary to ensure that proceedings to record evidence before the Commissioners are not dilatory instruments or a means adopted in abuse of process. The judicial experience on the Original Side shows that Commissions drag on, many times endlessly. Commissioners charge fees by the hearing. Personal disputes in a large number of cases involve parties which have moderate or limited resources. They can ill afford the luxury of endless proceedings. Cross examinations before Commissioners become exercises to draw out the last ounce of patience of a party deprived of a rightful claim. Hence, the ambit of cross examination can be structured by dealing with objections to admissibility straight away before the recording of evidence before the Commission begins. That apart, if a decision on admissibility is deferred to the final hearing of the suit and evidence is recorded with reference to a document of which admissibility is in dispute, segregation of that part of the evidence which relates to the document in question becomes a serious bone of contention at the final hearing of the suit. Cross-examinations are rarely compartmentalized. Segregation of the evidence may not in every case be simple enough to resolve and would result in a considerable amount of uncertainty. If a party were not to cross-examine a witness with reference to a document in relation to which an objection as to admissibility has been raised, it would run the risk of not having conducted the cross-examination at all with reference to the document, should it eventually be held to be admissible in evidence. It is, therefore, necessary that the ordinary rule which has been prescribed by the Full Bench must be followed in the generality of the cases. The exception to the rule must be treated as an exception. Judicial practice on the Original Side should not make the exception into a rule.

6. A discretion is conferred upon a Trial Judge to defer a ruling on the admissibility of a document till the final hearing of a suit. However, the reasons on the basis of which that discretion has been exercised, should be briefly indicated in the order of the Court. Consequently, objections in regard to the admissibility of documents, which form part of the examination-in-chief, should, ordinarily, be decided by the Trial Judge before a reference is made to a Commissioner for recording of evidence. This would not, however, apply to objections in regard to the admissibility of documents that are sought to be tendered in the course of cross-examination before the Commissioner. Objections of that nature should be recorded, to be decided by the Trial Judge, at the final hearing.

7. In the present case, the learned Single Judge recalled the earlier orders in several suits on the basis that those orders were per incuriam. As we have noted earlier, the judgment of the Full Bench does not rule out the exercise of discretion by the Trial Judge in an appropriate case though by way of an exception, to defer a ruling on the admissibility of a document until after the evidence is recorded before the Commissioner, but before judgment. Both on

grounds of judicial discipline and on principles of comity, it is necessary that benches of the court, whether judges sit singly or in division, show due regard and deference to the views expressed by coordinate Benches. If in a particular case, a coordinate bench disagrees with a judgment or order of another bench, the proper course of action and well established practice is to direct the Registry to place the papers before the Hon'ble the Chief Justice in order that His Lordship can consider whether the proceedings should be placed before a larger Bench. Reliance on precedent and a respect for orders of coordinate benches maintains not only an orderly functioning of the business of a Court as a judicial institution but also imparts a degree of certainty for litigating parties. A party which is aggrieved by an order is not without remedy. Since we have now answered the reference on the merits of the issue, we would have to direct in consequence that the learned Single Judge before whom the suit is to come up for directions will now pass suitable orders having regard to the judgment of the Full Bench which we have respectfully followed.

8. In the circumstances, we dispose of the reference as follows :

A) Before a Trial Judge directs that evidence be recorded by a Commissioner, objections in regard to the admissibility of documents relied upon in the examination-in-chief, should be decided by the Trial Judge. A determination in regard to the admissibility of a document involves an act of judicial consideration and an application of mind by the Trial Judge to the admissibility of the document. Objections as to admissibility in regard to the first and second categories of cases noted earlier, must, in any event, be decided before a reference is made to the Commissioner for recording evidence.

(B) The Trial Judge does have an element of discretion in determining as to whether an objection to the admissibility of a particular document should be deferred to the final hearing, before the judgment is delivered in the suit. The exercise of this discretion must be based on the principles which have been enunciated in paragraphs 87, 88 and 89 of the judgment of the Full Bench in Hemendra Rasiklal Ghia (supra). Brief reasons should be indicated by the learned Single Judge for not following the ordinary rule and for deferring an objection in regard to the admissibility of a document to the final hearing of the suit;

The suit will now be placed by the registry before the learned Single Judge.