
(1981) 04 AP CK 0007
In the Andhra Pradesh High Court
Case No : C.R.P. No. 4261 of 1980

C. Srinivasa Rao and Another	Vs	APPELLANT
K. Manohar Rao and Others		RESPONDENT

Date of Decision : 07-04-1981

Acts Referred:

Andhra Pradesh Civil Rules of Practice and Circular Orders, 1990 — Rule 33, 46
Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, Order 19 Rule 1, Order 19 Rule 2, Order 39 Rule 1, 115
Evidence Act, 1872 — Section 3

Citation : AIR 1981 AP 406

Hon'ble Judges : Madhusudan Rao, J

Bench : Single Bench

Advocate : B.V. Prakash Rao, for the Appellant; P.V. Narayan Rao, for the Respondent

Final Decision : Allowed

Judgement

Madhusudan Rao, J.—This revision is directed against the order passed by the learned District Munsif, Karimnagar, in I. A. No. 1239 of 1979, in I. A. No. 929 of 1979, in O. S. No. 264 of 1979 on the file of this Court.

2. The petitioner is the plaintiff in O. S. No. 264 of 1979, which is a suit for permanent injunction. He filed I. A. No. 929 of 1979 under Order 39, Rule 1, C. P. C. for a temporary injunction pending suit. Along with the application for temporary injunction, he filed his own affidavit and the affidavits of third parties in proof of his possession. The respondent-defendant filed a counter along with his own affidavit and the affidavits of some others. The plaintiff thereupon filed I. A. No. 1239 of 1979 under Order 19, Rule 2, C. P. C. requesting the Court to order the attendance of the deponents on behalf of the defendant for his cross-examination. Relying on the decision of this Court in Sakalabhaktula Vykunta Rao and Others Vs. Made Appalaswamy, , the learned District Munsif dismissed the application holding that he has no jurisdiction to direct the attendance of the deponents, whose affidavits are filed in a proceeding under Order 39, Rule 1, C.

P. C. It is against this order of dismissal that the plaintiff has come up in revision to this Court.

3. Sri B. Prakash Rao, the learned counsel for the petitioners, contends that, even in the case of affidavits filed under Order 39, Rule 1, C. P. C., the Court has the power under Order 19, Rule 2, C. P. C. to summon the deponents for cross-examination and that the lower Court failed to exercise jurisdiction vested in it on an erroneous impression of the law. Sri P. V. Narayana Rao, the learned counsel for the respondents, on the other hand, contends that, in the case of affidavits filed under Order 39, Rule I, C. P. C., no Court has any power to summon the deponents for cross-examination.

4. The short question that arises for decision in this revision is whether, when affidavits are filed in a temporary injunction proceeding under Order 39, Rule 1, C. P. C., the Court has the jurisdiction, on the application of either party, to summon the deponents of the opposite party for cross-examination.

5. The facts in dispute in a judicial proceeding are decided by the judicial tribunals by reference to evidence adduced by the contending parties. As defined in Section 3 of the Indian Evidence Act, "evidence" means and includes-- (1) 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 are called oral evidence; and (2) all documents produced for the inspection of the Court; such documents are called documentary evidence. The media, through which the evidence of facts either disputed or required to be proved is conveyed to the mind of a judicial tribunal, consist of witnesses and documents. Affidavits of deponents are neither oral evidence nor documentary evidence within the meaning of Section 3 of the Indian Evidence Act. Proof or disproof of facts by affidavits is a departure from the normal rule and such departure is permissible only when the law specifically provides for the same.

Affidavit evidence is permitted in writ proceedings, contempt proceedings and certain proceedings under the Arbitration Act. Generally, affidavit evidence is not permitted in proceedings of a substantial nature in so far as it is repugnant to the principles of natural justice that a Court should act on the statement of a person who has not been examined before it or whose statement has not been tested by cross-examination. In proceedings regulated by the Code of Civil Procedure, as provided in Order 18, Rule 4, the ordinary rule is to record evidence in open Court in the presence and under personal supervision of the Judge. Order 19, Rule 1, C. P. C., however, provides that "any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable". It is further provided in this rule that, "where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit". Order 19, Rule 2 reads as follows :

"(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in "Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs."

Order 39. Rule 1 reads :

"Where in any suit it is proved by affidavit or otherwise --

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders."

Order 39, Rule 1, C. P. C. permits proof of the required circumstances for the grant of a temporary injunction by affidavits. The proof is not confined to affidavits only. The mere fact that affidavits can be filed in a temporary injunction proceeding under Order 39, Rule 1, C. P. C. does not require the Court to decide the controverted questions in that proceeding only by reference to affidavits. Order 39. Rule 1, C. P. C. merely enables the Court to decide the disputed questions in that proceeding on the basis of affidavits and the language of the provision does not incorporate any prohibition against the Court to summon the deponents for examination or cross-examination. The contention that, when affidavits are filed in a temporary injunction proceeding under Order 39, Rule 1, C. P. C., the Court has no power to summon the deponents, but that the Court has got to decide one way or the other by reference to the affidavits and affidavits alone does not commend itself to me as sound or correct.

No doubt, as contended by the learned counsel for the respondents, Sri Narayana Rao, Order 19, Rule 2, C. P. C. is applicable only in the case of affidavits filed by an order of the Court passed under Order 19, Rule 1 and that rule may not have any application to the affidavits filed under the statutory permission provided under Order 39. Rule 1, C. P. C., but it should be remembered that the extraordinary method of proof or disproof of facts in a judicial proceeding by affidavit evidence is permitted in an interlocutory matter only to save time in the disposal of the proceeding in which the Court does not decide the rights of the parties finally. It cannot however be construed that the statutory provision under Order 39, Rule 1. C. P. C. is intended to dispense with the very object for which a Court is constituted. The Courts are to dispose of the judicial proceedings only after they are satisfied with the proof or disproof of the facts required to be

proved under the law and not to pass orders without such satisfaction merely because they are orders in interlocutory matters.

When affidavits are filed by the parties, each set of affidavits affirming the case of each of the contending parties and the Court considers it necessary to examine one or some or all of the deponents to arrive at a proper decision of the requirements for the grant or refusal of a temporary injunction it would not be correct to say that the Court has no power to summon any of the deponents, but that the Court has to necessarily pass an order one way or the other even if there should be no judicial satisfaction in regard to the existence or otherwise of the facts constituting the requirements for the grant of a temporary injunction. The Court has always its inherent power to pass such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.

6. Rules 33 and 46 of the Civil Rules of Practice and Circular Orders provide as follows :

Rule 33 --

"Any fact required to be proved upon an interlocutory proceeding shall, unless otherwise provided by these rules, or ordered by the Court, be proved by affidavit; but the Judge may, in any case, direct evidence to be given orally; and thereupon the evidence shall be recorded, and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibits shall be prepared and annexed to the judgment."

Rule 46 --

"The Court may at any time direct that any person shall attend to be cross-examined of his affidavit."

Rules 33 and 46 apply not only to the affidavits filed under Order 19, Rule 1, C. P. C , but also to the affidavits filed under Order 39, Rule 1 of any other proceeding. When affidavits are filed in a proceeding under Order 39, Rule 1, C. P. C., it is just possible that the Court entertains a doubt with regard to the very authorship or identity of the person who gave a particular affidavit. To contend that the Court has no power to clear its doubt, but that the Court has to either submissively accept or arbitrarily reject the doubtful affidavit would tantamount to reducing the proceeding of the Court to a mere mockery.

There may be a case where each of the contending parties files the affidavit of the same person containing diametrically opposite affirmations and the Court would be anxious to find out as to which of the versions is true. To say that, even in such a situation, the Court has to accept one of the two affidavits and reject the other affidavit of the same person without any power to examine the deponent or to summon him for cross-examination would amount to reducing the proceedings of the Court to a mere gamble. It would be abhorrent to all notions of judicial administration if a Court is required to pass orders in any judicial

proceeding without the Court being satisfied with the existence or non-existence of the circumstance under which the orders have to be passed.

7. In Sakalabhaktula Vykunta Rao and Others Vs. Made Appalaswamy, , relying on which the learned District Munsif straightway dismissed the application and on which case strong reliance is placed by the respondents" learned counsel. Punneya, J., held as follows :

"The power given to the Court under Order 39, Rule 1 to decide the matters by affidavits is unfettered and is not subjected to the provisions of Order 19, Rr. 1 and 2." The learned Judge relied on a decision of the Gujarat High Court in Kanbi Mavji Khimji and Another Vs. Kanbi Manjibhai Abjibhai and Others, . In that case, the plaintiffs obtained an ad interim injunction. The defendants 3 and 7 filed affidavits in support of their plea of possession and requested the Court to vacate the injunction. The plaintiffs thereupon filed an application requesting the Court to direct the attendance of the defendants 3 and 7 who filed the affidavits, for cross-examination by the plaintiff. The Civil Judge dismissed the application. When the plaintiffs preferred a revision, the High Court dismissed the revision holding that the Court was empowered to decide the matter on affidavits.

8. In Sakalabhaktula Vykunta Rao and Others Vs. Made Appalaswamy, , the plaintiff filed an application for the grant of a temporary injunction and the application was supported by some affidavits including the affidavit of the village Karnam. The District Munsif granted an interim injunction against the defendants. The defendants thereupon filed an application for vacating the interim injunction. They also filed another application requesting the Court to summon the village Karnam for cross-examination by them. The Court dismissed the application for summoning the village Karnam observing that :

"it is, therefore, dear that the petitioners are, as of right, not entitled to any claim to call for the deponent for cross-examination with reference to the averments made in his affidavit,"

9. In both the cases, what all was held is that, in the case of affidavits filed under Order 39, Rule 1, C. P. C., neither party can insist on the attendance for cross-examination of the deponents of the opposite party. Both the cases dealt with the right of the parties for cross-examining the deponents of the opposite party and in neither case was it held that the Court has no power to direct the attendance of any deponent for examination or cross-examination.

10. In Abdul Hameed Khan Vs. Mujeed-UI-Hasan and Others, it was held that a Court cannot be deemed to have committed any illegality in summoning the deponents for cross-examination in a proceeding under Order 39, Rule 1, C. P. C., if the Court considered it necessary to so summon the deponents in view of the conflicting affidavits. Referring to Kanbi Mavji Khimji and Another Vs. Kanbi Manjibhai Abjibhai and Others, , Jagmohanlal, J., observed :

"According to the Gujarat High Court decision in Mavji Khimaji (supra) these

safeguards are not necessarily inbuilt in a proceeding relating to an interlocutory order under Order XXXIX, Rule I, Civil Procedure Code, but even in that proceeding there is no bar to the Court to summon a witness for cross-examination if it thinks it necessary to do so in the interests of justice."

11. In *Konda Reddy v. G. Venkata Swamy*, unreported judgment in C. R. P. No. 4 of 1971, D/- 17-9-1971 (Andh Pra) the plaintiff filed an application for the grant of a temporary injunction under Order 39, Rule 1, C. P. C. The application was supported by the affidavits of the plaintiff and others. The defendant filed a counter requesting that the application for the temporary injunction may be dismissed. Along with the counter, he filed his own affidavit and the affidavits of four others. The plaintiff filed an application under Order 19, Rule 1, C. P. C. read with Rule 46 of the Civil Rules of Practice requesting the Court to direct the attendance of the four persons, who gave affidavits in favour of the defendant, so that he could cross-examine them. The Sixth Additional Judge allowed the application. The defendant thereupon filed the C. R. P. No. 4 of 1971. Dismissing the revision, Muktadar, J., observed :

"The lower Court has given its reasons before passing the order and has found that the desire of the petitioner for production of the witnesses for cross-examination is bona fide."

Again in *B. Lakshamma v. B. Yadgir Reddy* unreported judgment in C. R. P. No. 1990 of 1975, D/- 2-11-1976, Madhava Rao, J., also held that the action of the trial Court in summoning the deponents for cross-examination in a proceeding under Order 39, Rule 1, C. P. C. is not illegal or beyond its powers.

12. Under the circumstances, therefore, the dismissal of the petitioner's application by the learned District Munsif on the ground that he has no jurisdiction at all to summon the deponents in a proceeding under Order 39, Rule 1, C. P. C. is erroneous and cannot be approved. The lower Court failed to exercise jurisdiction vested in it by not considering whether, under the circumstances of the case, it is necessary to summon the deponents as prayed for by the petitioner. The order of the lower Court is therefore set aside and this revision is allowed. The petitioner's application for summoning the deponents is remitted back to the lower Court for due consideration and proper disposal according to law. No costs.