
(1972) 12 MAD CK 0014

In the Madras High Court

Case No : Second Appeal No. 1053 of 1970

Sivasankara Pillai and Others

APPELLANT

Vs

Ponnuswami Nadar and Others

RESPONDENT

Date of Decision : 07-12-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, Order 18 Rule 5, Order 18 Rule 6, Order 26 Rule 10, Order 26 Rule 11
Evidence Act, 1872 — Section 138, 80, 91
Madras City Tenants Protection Act, 1922 — Section 9
Penal Code, 1860 (IPC) — Section 120B, 162

Citation : AIR 1973 Mad 450 : (1973) 86 LW 337 : (1973) 2 MLJ 122

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Judgement

1. Plaintiffs 1, 3 and 4 are the appellants. The suit was filed by the appellants along with the second plaintiff for an injunction restraining the defendants from interfering with their possession and for recovery of a sum of Rs. 300 as damages. The defense was that though the second plaintiff, whose children are plaintiffs 1, 3 and 4, is the owner, first defendant has been in possession and enjoyment of the land under an oral lease granted by the second plaintiff. The trial Court found that the plaintiffs are not in possession of the suit property, that the defendants are in possession and that the oral lease set up by them was true. In regard to the oral lease in addition to the evidence of the first defendant the trial Court relied on the admission of the second plaintiff who was examined as P.W. 4 on commission. In appeal the lower appellate court confirmed the finding that the first defendant was in possession and the plaintiffs were not in possession on the date of suit. The lower appellate Court also

confirmed the finding on the question of oral lease.

2. In this second appeal the learned counsel for the appellants contended that both the trial Court and the lower appellate Court relied on the

evidence of the second plaintiff who was examined on commission as P.W. 4 but that the recording of the evidence of P.W. 4 by the

Commissioner was not in accordance with Order XXVI, Rule 17 read with Order XVIII. Rules 5 and 6, C.P.C. on the ground that the evidence

was not read over to the witness and explained in a language known to her and therefore the evidence is inadmissible. The evidence recorded by

the Commissioner admittedly does not contain the endorsement as required under Order XVIII. Rule 5, C.P.C. The Commissioner was examined

at the stage of the appeal and he admitted that he did not read the evidence to the witness after the evidence was recorded. The evidence was

recorded. The evidence was recorded in English and P.W. 4 does not know English language. The Commissioner has also stated in his evidence

that he had not explained the evidence in Malayalam to the second plaintiff after it was recorded. In these circumstances the question for

consideration is whether the evidence is admissible at all.

3. Order XXVI, Rule 17(1) reads as follows:--

17(1). The provisions of this Code relating to the summoning attendance and examination of witnesses and to the remuneration of and penalties to

be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission

in execution of which they are so required has been issued by a court situate within or by a court situate beyond the limits of India, and for the

purposes of this rule the Commissioner shall be deemed to be a civil court.

As per the provisions of this rule, to a person required to give evidence before a Commissioner the provisions of the Code relating to examination

of witnesses shall apply. The question for consideration is whether the requirements of Rules 5 and 6 of Order XVIII relating to reading over of the

evidence, interpreting the same in the language of the witness and signing it ""by the Judge who recorded"" is applicable to the evidence recorded by

a Commissioner and if it is not recorded what is the legal effect of the same.

4. Order XVIII deals with hearing of suit and examination of witnesses. Rule 4 requires that the evidence shall be taken orally in open court in the

presence of the Judge. Rule 5 requires the evidence to be recorded in a narrative and where an appeal lies it shall be read over in the presence of

the Judge and the witness and shall be signed by the Judge. Rule 6 requires that where the witness gave the evidence in a language different from

that in which it was recorded It shall be interpreted to him in the language in which it was given.

5. Rule 7 requires the evidence to be taken in compliance with Section 138 of the Evidence Act. Rules 10 and 11 deal with cases where the actual

question and answer have to be recorded and how objections to any answer will have to be noted. Rule 12 enables the court to record any

remarks as to demeanor of witnesses while under examination. Rule 17 deals with recalling of witnesses. It is seen from the rules that some rules

speak of court and some rules speak what the Judge in whose presence the evidence is recorded shall have to do. Order XXVI, Rule 17 does not

generally attract the entire provisions of Order XVIII relating to examination of witnesses to the proceedings before a Commissioner. It only makes

the provisions applicable "to the person required to give evidence" and for purposes of the rule the Commissioner shall be deemed to be a civil

court. I am of opinion that the Commissioner has not been made a Judge for the purposes of examining the witnesses and the duties of the Judge

under Rules 5 and 6 of Order XVIII are not attracted under Order XXVI, Rule 17.

6. The necessity for a certificate as required under Rules 5 and 6 of Order XVIII in the case of evidence recorded by a Judge is based on the fact

that a Judge who recorded the evidence in court could not be called in evidence in any other proceedings where that evidence is sought to be

relied on. It was also put on the ground that the public policy requires that where the evidence of a witness is put against him in a different

proceedings he should have had an opportunity of knowing that the evidence given by him has been correctly recorded. But if the evidence

recorded is to be used in the same proceedings in cases where it was recorded by the Commissioner, the party against whom that evidence is

sought to be relied on could call the Commissioner who recorded the evidence as a witness and question him on the correctness of the record.

Further, as already stated Ruled 17 of Order XXVI attracts the provisions of Order XVIII only to the witnesses. A witness may be a party or may

not be a party. If he is not a party to the proceedings the evidence of that witness could not be relied on in any criminal proceedings against that

witness for perjury or other offences in the absence of a certificate appended as required under Rules 5 and 6 of Order XVIII. That is purely on

the basis of public policy that a prior statement of an accused could not be put against him without proof of the knowledge of the contents and that

it was a statement by the accused. So the requirements in a criminal prosecution about the need for a certificate is not based on the fact that Rules

5 and 6 had to be complied with by the Commissioner but on a different principle of public policy.

7. The learned counsel for the appellants relied on a decision of this court in Eithiraj Vs. K. Gopalaswamy Chetty, . That was a case where a Small

Cause Court in recording evidence in an application u/s 9 of the Madras City Tenants Protection Act did not append the certificate as required

under Rules 5 and 6. The question related directly with reference to the evidence recorded in a court and not the evidence recorded by a

Commissioner. Even where the court had relied on the decisions which dealt with criminal prosecutions, when the evidence given by the particular

witness was sought to be relied on against him as an accused, the need for guaranteeing the accuracy of the deposition was relied on and the

deposition without such certificate was held not admissible in the criminal prosecution. In fact in some of the decisions cited therein it is seen that

the recording of the evidence in the presence of the Judge and his listening to the reading during the time when the deposition is interpreted and

read over to the witnesses though this requirement also is under the same Rule 5 was held not mandatory and any contravention of the same would

only amount to an irregularity. Ultimately the learned Judge also was of the opinion that the Small Cause Court has not recorded the evidence as a

narrative but has recorded as usually done in Small Cause Courts as memo of evidence. Recording of evidence in an application u/s 9 of the

Madras City Tenants Protection Act should be in the narrative as while hearing that application the court is hearing the matter as a Civil Court and

not as a Small Cause Court. The decision will therefore, have to be restricted to the facts of that case.

8. The learned counsel also relied on the decision in Kashiram Budhia Vs. Chajuram Budhia, . Though in one part of the judgment the learned

Single Judge of the Calcutta High Court held that Order XVIII, Rules 5 and 6 applied to proceedings conducted by the Commissioner of partition appointed by the Original Side of the High Court, on the facts of that case it could be seen that a direction was given to the Commissioner to record the evidence in a particular way on an application by the plaintiff. The order appointing the Commissioner gave directions to examine witnesses upon oath or solemn affirmation and to take depositions in writing and return the same with the commission. The Commissioner examined one Surajmal as a witness. While he was examining other witnesses. Surajmal was prosecuted in a criminal court u/s 162 read with Section 120-B, I.P.C. and the statement given by him before the Commissioner was sought to be relied on against the accused. In a criminal revision case in that proceedings, the High Court held that inasmuch as the depositions had not been read over and explained to the witness they were not admissible u/s 80 of the Evidence Act and no secondary evidence of its contents also was possible u/s 91 of the Evidence Act. The plaintiff in that case therefore filed an application to the court to direct the Commissioner to record evidence and read over and explain the same to the witnesses. In that application the learned single Judge gave a direction that "with regard to all witnesses who have been called and whose examination had not been concluded and with regard to all witnesses who may hereafter be called at the reference. Mr. J. M. Ghouse (Commissioner) should see that the provisions of Rules 5 and 6 of Order XVIII are carried out that is to say that the depositions should be read over and explained to the respective witnesses when each witness's evidence is completed and that when necessary they should be translated into a language which the witness understands. I do not think it necessary to give any directions with regard to the depositions which have already been completed". Certainly, it is open to the court to direct the Commissioner to append the certificate as required under Rules 5 and 6 after reading over the evidence and interpreting the same to the witness. The observation of the Judge that Rules 5 and 6 of Order XVIII is applicable to the evidence recorded by a Commissioner was an obiter and not the ratio of that judgment. If really Rules 5 and 6 are applicable, no directions need have been given. Further, the court could not have stated that there was no direction necessary with regard to the depositions which have already

been completed. This decision was relied on by single Judge of the Bombay High Court in Biharilal Ramcharan Cotton Mills Ltd. Vs. China

Cotton Exporters, where the question was whether the Commissioner appointed for the purpose of taking accounts of a partnership is a court

within the meaning of the CPC so that on his death a successor could continue the proceedings from the stage at which his predecessor had left

under Rule 15 of Order XVIII. The court relied on the fact that under Rule 17, Order XXVI, the Commissioner shall be deemed to be a civil

court. The learned Judge held that the "Commissioner was also a Judge for the purpose of the "Code". It is not necessary for me to consider the

correctness of the judgment except to say that that was not one which considered the question of the necessity or the mandatory nature of Rules 5

and 6 of Order XVIII in their application to the recording of evidence by a Commissioner. One other decision relied on by the learned counsel for

the appellants is in Nand Kishore Vs. Lala Shiam Sundar Lal, . That was a case where the Assistant Collector who constituted the Revenue Court

under the Agra Tenancy Act appointed the Commissioner who examined the witnesses behind the back of the parties and in a confidential way.

The court relied on Rule 16 of Order XXVI and Section 138 of the Evidence Act for holding that the recording of the evidence behind the back

was illegal.

9. As already noted in this case the Commissioner was examined as a witness though at the appellate stage. There was no question as to the

correctness of the statement recorded and the Commissioner was cross-examined only regarding the reading over and explaining the evidence in

the language known to the witness. The evidence is also not sought to be relied on in a criminal proceeding against the witness. In the foregoing

circumstances there was nothing illegal in the courts below relying on the evidence of P.W. 4. The findings of the courts below on the question of

possession and oral lease cannot therefore be interfered with. The second appeal fails and it is dismissed. No order as to costs. No leave.

10. Appeal dismissed.