

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.2592 OF 2017

O R D E R

O.S.No.564 of 2008 on the file of the learned III Additional District and Sessions Judge, Ranga Reddy District at L.B.Nagar, was filed for declaration of title of the plaintiff over the suit schedule properties, delivery of possession thereof and for costs. P.W.1, the plaintiff in the suit, was re-called for further chief-examination pursuant to the order dated 06.02.2017 passed by the trial Court in I.A.No.261 of 2016 in O.S.No.564 of 2008. During such further chief-examination on 06.02.2017, the trial Court permitted the plaintiff to mark the certified copy of the affidavit dated 01.04.2007 of the defendant as Ex.A.16. Aggrieved thereby, the defendant in the suit filed the present revision under Article 227 of the Constitution.

By order dated 16.06.2017, this Court opined that the question as to whether the trial Court ought to have marked the affidavit in question requires examination and granted interim stay of further proceedings in the suit. Notice having been served, the plaintiff entered appearance through learned counsel.

Heard Sri B.Vijaysen Reddy, learned counsel for the petitioner-defendant, and Sri Pramod Singh, learned counsel for the respondent-plaintiff.

Parties shall hereinafter be referred to as arrayed in the suit.

The issue is whether the trial Court ought to have marked the affidavit dated 01.04.2007 of the defendant in evidence.

According to the defendant, the same is barred by Section 33 of the Indian Evidence Act, 1872 (for brevity, 'the Act of 1872'), while the plaintiff would contend otherwise.

Section 33 of the Act of 1872 finds place in the Chapter titled 'Statements by persons who cannot be called as witnesses'. It reads to the effect that evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, would be relevant for the purpose of proving the truth of the facts which it states in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, when the witness is dead, or cannot be found or is incapable of giving evidence, or is kept out of the way by an adverse party, or if his presence cannot be obtained without delay or expense which the Court considers unreasonable. The proviso thereto reads to the effect that the proceeding in which such evidence was given must be between the same parties or their representatives in interest and the adverse party in such proceeding should have had the right and opportunity to cross-examine and the questions in issue should be substantially the same in the first and the second proceeding.

Perusal of the affidavit dated 01.04.2007 of the defendant reflects that it was not made in the context of or in the course of any judicial proceeding. It was thereafter marked in evidence as Ex.A.82 in another suit between the parties, viz., O.S.No.10 of 2008 on the file of the learned I Additional Chief Judge, City Civil Court, Secunderabad. Pertinent to note, the suit was of the year 2008, while the affidavit in question is dated 01.04.2007. It cannot therefore qualify as evidence given by a witness in a judicial proceeding. The provisions of Section 33 of the Act of 1872 therefore had no application whatsoever to the said affidavit.

Reliance placed by Sri B.Vijaysen Reddy, learned counsel, on **PALLA SAMPATH KUMARI V/s. KINTHALA VENKATA RAO¹**, is

¹ 2003 (3) ALD 115

therefore of no avail. Though a general observation was made therein that an affidavit of a living person cannot be received in evidence in view of Section 33 of the Act of 1872, the same must be construed in the light of the provisions of Section 33 of the Act of 1872. As already noted, Section 33 of the Act of 1872 has application only to evidence given by a witness in a judicial proceeding which is treated as relevant in a subsequent or the same judicial proceeding when he is not in a position to appear before the Court. It does not apply to every affidavit of a living person irrespective of whether it was made and tendered in the course of a judicial proceeding or otherwise.

On the other hand, the observations made by the Supreme Court in **BIPIN SHANTILAL PANCHAL V/s. STATE OF GUJARAT**², are of relevance. Therein, the Supreme Court observed in paras 13 and 14 as under:

‘13. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course

² (2001) 3 SCC 1

of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)'

It is by relying upon the aforestated observations of the Supreme Court that the trial Court permitted marking of the defendant's affidavit dated 01.04.2007, leaving it open to both parties to agitate about the objection raised as to its marking at the last stage if they so desire. As this Court is of the considered opinion that Section 33 of the Act of 1872 has no application whatsoever to the affidavit in question, the argument of Sri B.Vijaysen Reddy, learned counsel, founded thereon does not warrant acceptance.

The Civil Revision Petition is accordingly dismissed leaving it open to the parties to address arguments as to the admissibility and relevance of the defendant's affidavit dated 01.04.2007 at the appropriate stage. The interim order granted by this Court shall

stand vacated. Pending miscellaneous petitions, if any, shall also stand dismissed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

11th AUGUST, 2017

PGS

