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CRP.PD.No.331 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2022

CORAM:

THE HONOURABLE Ms. JUSTICE P.T.ASHA

C.R.P.PD.No.331 of 2022

G.Ravi

... Petitioner

vs.

1.Mrs.G.Saroja
2.G.Kumar
3.Mrs.K.Kala
4.R.Subramanian

5.The Sub-Registrar (Joint-I),
The Sub-Registrar's Office,
Chidambaram-608 001,
Cuddalore District.

6.M/s.Equitas Small Finance Bank Limited,
Represented by its Manager,
Phase-II, 4th Floor, Spencer Plaza,
No.769, Anna Salai, Chennai-600 002.

Respondents

...

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the Docket Order dated 15.11.2021 passed in the Proof Affidavit of PW1 by the II Additional District and Sessions Court, Chidambaram in O.S.No.50 of 2020 praying to set aside the same.

For Petitioner : Mr.P.Kamarasu



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ORDER

Aggrieved by the return of his proof affidavit as PW1 filed in lieu

of the chief examination, the plaintiff is before this Court.

2. A perusal of the original proof affidavit of PW1 Mr.G.Ravi would show that the same has been returned with the following endorsement.

"Chief examination by affidavit of PW1 to be in Tamil. Hence returned."

However, the learned Judge has not specified under what provision of law the proof affidavit had been returned for the above compliance.

3. The learned counsel for the petitioner would submit that there is no rule which contemplates that the chief examination should be in the vernacular language. He would submit that the only criteria that is contemplated while preparing the affidavit is prescribed in Rule 40 of the Civil Rules of Practice where any person who is unacquainted with the



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language in which the affidavit is written, it shall be certified that the affidavit was read over and explained by the person in whose presence the deponent had affixed his signature or mark was so done after the contents was read over and explained to him and after the deponent had understood the contents thereof. He would submit that the affidavit in question has complied with this procedure as a perusal of the jurat would indicate that the contents of the proof affidavit has been explained in Tamil to the deponent who understood the same and has affixed his signature. In fact, the deponent has signed in the English language.

4. The argument advanced by the learned counsel for the petitioner has considerable force.

5. The provisions of Order XVIII of the CPC deals with the hearing of suit and the examination of witnesses. Rule 4 therein deals with the recording of evidence. Rule 5 deals with how evidence has to be recorded in appealable cases. A cursory glance of these two rules would indicate that they are overlapping. Rule 4 takes in to consideration the recording of evidences in all cases. Rule 4 has been substituted by Act 46 of



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1999 and Act 22 of 2002 which provides the recording of the examination in chief is by way of an affidavit. This is in contradistinction to the provision of Rule 5 which provides that in all the cases where an appeal is allowed the evidence of witnesses shall be taken down in the language of the Court by or in the presence / under the control of the Presiding Officer.

6. This issue regarding the recording of evidence as contemplated under Rule 4 and 5 has been set at rest in the order of the Hon'ble Supreme Court reported as *Ameer Trading Corporation vs. Shapoorji Data Processing Ltd.*, in *AIR 2004 SC 355*.

7. The question that fell for the consideration of the Supreme Court was the interruption of Order XVIII Rules 4 and 5 of CPC. Tracing the amendment to Rule 4 with effect from 01.07.2002 the Hon'ble Apex Court held that Rule 4 does not draw a distinction between an appealable case and a non-appealable case. However, Rule 5 deals with appealable cases. The Hon'ble Supreme Court referred with approval, the Judgment of the Bombay High Court reported in *FDC Ltd., vs. Federation of Medical Representatives Association of India* in *AIR 2003 Bom 371*, and extracted



appealable cases.

In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit 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 prescribed under R.5. In non-appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to R.13 of O.XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of R.5, where as in case of non-appealable cases the Court would be empowered to exercise its power under R.13."

8. The learned Judges, while agreeing with the finding of the Bombay High Court also observed that the matter could be considered from another angle and held as follows:

"Presence of party during examination-in-chief is



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not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the Court in writing and in any event, the attention of the witness can always be drawn while cross-examination him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an affidavit and in the event, he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court."

9. Therefore, taking into consideration the provisions of O.XVIII Rules 4 and 5 CPC r/w. Rule 40 of the Civil Rules of Practice, an examination-in-chief is permissible by way of an affidavit. Once the same is by way of an affidavit, the same should conform to the provision of Rule 40 the Civil Rules of Practice with reference to the deponent being aware of the contents of the affidavit.



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10. In the judgment relied supra namely, Ameer Trading, the Hon'ble Supreme Court has held that the examination-in-chief can be by way of a proof affidavit. However, the party signing such an affidavit has to enter the witness box and confirm the contents of the affidavit under oath. The learned Judge has not taken into consideration the Rule 40 of the Civil Rules of Practice and has not considered the amendment to Order XVIII Rule 4 of CPC., whereby the evidence-in-chief has been permitted by way of an affidavit. The caution to be exercised by the Presiding Officer who receives the evidence in chief is to ensure if the deponent has affixed his signature after fully understanding the contents therein more particularly when it is signed in a language other than which it is transmitted. Further the deponent has to get into the box to confirm not only the contents of the affidavit but also his signature/mark affixed thereto.

11. In the result, this Civil Revision Petition is allowed and the learned II Additional District and Sessions Judge, Chidambaram is directed to take on file the said proof affidavit as examination in chief of PW1 in the suit in O.S.No.50 of 2020.



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Index : Yes/No

Speaking / Non-speaking order

To

1. The II Additional District and Sessions Judge,
Chidambaram.
2. The Sub-Registrar (Joint-I),
The Sub-Registrar's Office,
Chidambaram-608 001,
Cuddalore District.



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P.T.ASHA, J.,
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