

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 13 of 2014

**Shree Shree Iswar Satyanarayanjee and Other deities,
represented by its shebait, Sri Lalit Kumar Bagla & Ors
Vs
Partha Brothers & ors.**

For the Appellants : Mr. Sakya Sen, Sr. Adv.
Mr. Animesh Pal
Mr. Ramij Munsu

For the Respondents : Mr. Srijib Chakraborty
Mr. Subhasis Chakraborty
Ms. Susmita Singh
Mr. Deeptangshu Kal

Heard on : 20.09.2023

Judgment on : 11.10.2023

Ajoy Kumar Mukherjee, J.

1. This second appeal has been assailed against judgment and decree dated 13th May 2013, passed by the learned. Additional District Judge, 2nd Court, Howrah in Title Appeal no. 10 of 2005. By the impugned judgment learned court below set aside the judgment and decree dated 31st august 2004 passed by learned Civil Judge (Jr. Division), 5th court at Howrah in Title Suit no 2 of 1989 and thereby allowed the first appeal.

2. Brief background of the instant case is that the appellant as plaintiff instituted aforesaid Title Suit no 2 of 1989 against

defendant/respondent herein, praying for a decree of eviction and recovery of 'khas' possession *interalia* on the ground of default and reasonable requirement. The opposite party herein appeared and filed application under Section 17(2) of the West Bengal Premises Tenancy Act 1956 and said application was disposed of by the Trial Judge directing the tenant/defendant to deposit R.s. 17,000/- in the court within 30th April 1994 and was further directed to deposit current rent month by month. The opposite party herein failed to comply with the said direction and for which an application for striking out the defence was taken out by the plaintiffs/Appellants and learned court below after hearing, was pleased to strike out the defence of the Respondent herein/defendant and thereafter suit was posted for *exparte* hearing. The Trial Court on 31st August, 2004 passed an *exparte* decree in favour of Appellant/plaintiff.

3. Being aggrieved by that order Respondent herein preferred aforesaid Title Appeal no. 10 of 2005 along with an application under Section 5 of the Limitation Act seeking condonation of delay in filing the appeal. However the first appellate court dismissed the said application for condonation of delay and thereby dismissed aforesaid Title Appeal no. 10 of 2005 by an order dated 25th August, 2010. A second appeal being S.A.T. no. 450 of 2010 was preferred against the said order dated 25th August, 2010 along with connected application and a Division Bench of this court was pleased to set aside the order dated 25th August, 2010 and thereby restored the Title Appeal no. 10 of 2005 to its original file by an order dated 14th July 2011. Thereafter first appellate court heard

aforesaid Title Appeal no. 10 of 2005 in presence of the parties and the First Appellate Court by the impugned order, set aside the aforesaid eviction decree passed in Title Suit no. 2 of 1989, for fresh hearing on the ground that the trial court did not admit the documents filed along with the examination in chief in evidence by putting exhibit mark and as such Trial Court ought not to have passed *ex parte* decree relying upon the documents which are not marked as exhibit. Referring Order XVIII Rule 4(1) of the Code of Civil Procedure (hereinafter called as code) Court below observed that only because plaintiff has filed some documents, so it cannot be said that the document had been admitted in evidence, unless specific order is passed by the court, marking the said document as exhibit in compliance with Rule 4 (1) of Order XVIII. The court below further held, since Trial Court did not comply the proviso to Order XVIII Rule 4(1) of the code by making any order admitting the documents in evidence, the Trial Court cannot pass *ex parte* order relying upon the documents which were only filed along with the affidavit-in-chief but were not marked exhibit by any written order of the court.

4. Mr. Sakya Sen, learned counsel appearing on behalf of Appellant contended that the learned court below while making the aforesaid observation completely failed to consider that the documents relied by the plaintiff/petitioner in support of their evidence were already marked as exhibit in the affidavit-in-chief on oath. Learned court below failed to consider the position of law as to marking of document as exhibit in a suit being tried *ex parte*, where defence of the tenant against delivery of possession was struck off and defendant's right to cross-examine has

been closed as the suit was posted for exparte hearing. The Trial Court after considering the probative value of the documentary evidence, passed the decree of eviction. Court below did not consider probative value of the evidence-in-chief filed by Sri Lalit Kumar Bagla on 23.04.2004 on oath, where the mode, manner of service of statutory notice to quit was clearly averred and proved. In fact the observation of the court below that Trial Court did not comply the proviso to Order XVIII Rule 4 (1) of the code by not making any order admitting the document in evidence is perverse. The court below actually misinterpreted Order XVIII Rule 4 of the code by observing that the affidavit-in-chief from the side of the plaintiff were not tendered or admitted in evidence by overlooking the Trial Courts observation. Plaintiff has successfully proved their case by cogent document and evidence.

5. Mr. Sen further submitted even if there is any procedural irregularity/omission in admitting the plaintiff's documents in evidence, the same cannot be agitated before the First Appellate court for the first time. Appellant strenuously argued that the evidence adduced in Title Suit no 2 of 1989 by PW-1 remained unchallenged and uncontroverted and as such the court below cannot come to any other observation by making out a third case save and except what are borne from the case record. The order impugned clearly depicts non application of judicial mind and court below should have observed that technicalities cannot override the provision of substantive law. The First Appellate court failed to consider the nature and scope of the appeal which has been preferred

against an exparte decree and accordingly prayed for setting aside the impugned judgment.

6. Mr. Srijib Chakraborty learned counsel appearing on behalf of the respondent submits that mere production of documents is not sufficient for the purpose of admission of those documents in evidence, unless plaintiff properly proved those documents and exhibited at the trial, except where opposite party admits the execution and/or contents of the document. Order XVIII Rule 4(1) makes it clear that the documents which are filed and relied by the parties, the proof and admissibility of such documents, shall be subject to the orders of the court. Here in the present context no order was passed by the Trial Court marking the said documents as exhibit, relying on which the exparte decree was passed.

7. Relying upon paragraph 12 of the judgment in ***Raman Lal Deo Chand Shah Vs. State of Maharashtra and another*** reported in ***(2013) 14 SCC 50***, Mr. Chakraborty contended that even if the documents had been produced by the plaintiff, the same were neither admitted documents nor properly proved or exhibited at the trial and as such the same cannot by themselves constitute evidence, except where such documents were public documents admissible by themselves under any provision of law. In this context Mr. Chakraborty further relied upon judgment in ***Life Insurance Corporation of India and another vs. Rampal Singh Bisen***, reported in ***(2010) 4 SCC 491*** and contended that the documents if not produced and marked as exhibit under the Evidence Act, court cannot rely upon such documents because contents of documents cannot be proved by merely filing the same before the

court. In this context learned counsel for the respondent further relied upon judgment of the Apex Court in ***Gyanti Devi and others vs. Shanti Devi*** reported in **(2012) SCC online Calcutta 13198** and referred paragraph 22 of the judgment, contending that it is obligatory and imperative on the part of plaintiff to produce all documentary evidence in original, where the copies of the documents are filed along with the plaint. The court at any stage may reject any document which is considered irrelevant or otherwise inadmissible under Order XIII Rule 3 of the code. The endorsement on the document admitted in evidence shall be made on each of the document, under the seal and initial of the judge and the document which are not admitted in evidence, shall be returned to the person producing the same and under Order XVIII Rule 4, it is imperative that the documents which are filed and relied upon by the parties along with the affidavit shall be subject to the orders of the court relating to the proof and admissibility thereof. In this context he on behalf of respondent also relied upon another judgment of Bombay High Court reported in **(2014) SCC online Bombay 1242 (K.M. Enterprises Vs. Garware Synthetics Ltd. and others.)** and relying upon paragraph 21 of the judgment, contended, if the document is not proved or exhibited by the Trial Court then normally it cannot be read in the evidence at the appellate stage. Mr. Chakraborty on behalf of Respondent accordingly contended that the impugned judgment is perfect and was passed in accordance with law and as such does not call for interference.

8. The instant appeal is heard on the following substantial questions of law as framed by the Division Bench of this court, while admitting the appeal on 10.12.2013

- (i) *Whether the learned Judge in the first Appellate court overlooked the position of law as to mode of disposal of a suit in which the defence of the tenant/defendant against delivery of possession stood struck off for non-compliance of order as well as the suit being set for ex parte hearing and erred in coming to a conclusion that the learned Trial Court did not admit the documents filed with the examination in chief by putting exhibit mark upon mis-construing Order 18 Rule 4 of the Code of Civil Procedure.*
- (ii) *Whether the learned Judge in the First Appellate Court is correct in coming to the conclusion that the Trial Court did not comply the proviso in Order 18 Rule 4(1) of the Code of Civil Procedure by making any order admitting the documents in evidence.*

DECISION

9. Before going to further details let me reproduce Order XVIII Rule 4 (1) of the Code of Civil Produce.

“4. Recording of evidence:-

(i) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.”

10. It is not in dispute in the present context that plaintiff filed examination-in-chief along with documents in the form of an affidavit sworn before one Debararata Chakraborty, Notary at Howrah, Government of West Bengal and in the affidavit-in-chief, plaintiff stated exhibit number of the documents.

11. In ***Ameer Trading Corporation Ltd vs. Shapoorji Data Processing Ltd***, reported in ***(2004) 1 SCC 702***, while dealing with the similar question raised therein, the Apex Court agreed with the view of Bombay High Court that 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 treated as part of the evidence, unless the deponent thereof enters the witness box and confirms that the contents of affidavit are as per his say and the affidavit is under his signature and where statement being made on oath is to be recorded by following the procedure prescribed under Rule 5. However in the said judgment it was also held that the presence of a party during examination in chief is not imperative. 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.

12. The object of introducing Order XVIII Rule 4 is to save time of the court and to avoid inconvenience and hardship of the witness by prescribing that only mode of giving evidence-in-chief is by filing affidavit. The statement of object and reason reads as follows :

As the maximum time is consuming in recording oral evidence by the courts which causes delay in disposal of cases, it is proposed to reduce such delay by making provisions for filing of examination-in-chief of every witness in form of an affidavit. For the cross examination and re-examination of witness it is proposed that it shall be recorded by a commissioner to be appointed by the court and the evidence recorded by the commissioner shall become part of the record of the suit.

13. In the instant case for noncompliance of Section 17 (2) of West Bengal Premises Tenancy Act 1997 the defendant's defence against delivery of possession was struck off and such decision has been virtually affirmed by the High Court. The case was posted for exparte hearing. Substituted plaintiff no.1, Lalit Kumar Bagla filed affidavit-in-chief supported by affidavit sworn before Notary Public on 23.04.2004. On 31st August 2004, Learned Trial Court on the basis of said affidavit-

in-chief and also the documents relied and marked by plaintiff in the affidavit-in-chief, decreed the suit *exparte*. Accordingly it is clear from the order of the court below that since the suit was posted for *exparte* hearing, the court below may not have felt it necessary to call the witness in the witness box for confirming the contents of the affidavit as per his say or that the affidavit is under his signature. Needless to say since the suit was posted for *exparte* hearing there was no challenge that the signature appearing in affidavit-in-chief was not his signature, nor there was any objection that any statement made in the affidavit or any document filed along with the affidavit, is beyond pleading.

14. Mr. Chakraborty learned counsel appearing on behalf of the respondent heavily stressed upon the words used by the legislature in proviso to Rule 4(1) of Order XVIII of the code which says that “the proof and admissibility of such documents which are filed along with affidavit, shall be subject to the orders of the court,” which means a written order is required to be passed by the court for marking the documents as exhibit, as filed by the plaintiff along with the affidavit-in-chief. In the present case no formal written order was passed by the Trial Court indicating that the documents filed by the plaintiff along with affidavit-in-chief were at all tendered, admitted and/or marked as exhibit by the court by an appropriate order.

15. The aforesaid observation of the Apex Court in **Ameer Trading Corporation Ltd (Supra)** subsequently came up for consideration before the same Apex Court in **Rasik Lal Manik chand Dhariwal and another Vs. MSS food product**, reported in **(2012) 2 SCC 196** where

their Lordship was pleased to observe in paragraph 77 and 78 as follows:-

77. *For all this, it cannot be said that in Ameer Trading Corpn. Ltd. [(2004) 1 SCC 702], it has been laid down as an absolute rule that 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 treated as part of the evidence unless the deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the notary or judicial officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already.*

78. *In our view, there is no requirement in Order 18 Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available for cross-examination in the witness box, unless the defendant's right to cross-examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence.*

16. Previously in ***Sudir Engineering Company vs. Nitco Roadways Ltd. (1995 SCC Online Del 251)***. R.C.Lahoti, J, as his lordship then was, made the position clear as to why the documents are marked as exhibit, while such marking has got no relation with the probative value of the document. It was held in paragraph 15 as follows:-

“15.The marking of a document as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers, is only for the purpose of identification. While reading the record the parties and the Court should be able to know which the document before the witness was when it was deposing. Absence or putting an endorsement for the purpose of identification no sooner a document is placed before a witness would cause serious confusion as one would be left simply guessing or wondering while was the document to which the witness was referring to which it proof. Neither the marking of an exhibit number can be postponed till the document has been held proved; nor the document can be held to have been proved merely because it has been marked as an exhibit.”

17. In such view of the matter, in the present context where defendant has chosen not to contest and plaintiff had produced affidavit-in-chief along with documents in the form of an affidavit, sworn

before the Notary who is competent to administer oath and Trial Court in order to save valuable time of the court, instead of calling witness in the witness box for the purpose of conforming of its content or deponent's signature, had adjudicated probative value of the evidence including documents and ultimately decreed the suit, I find nothing wrong to interfere with such exparte decree. The court below was not justified in observing that as Trial Court did not comply Order XVIII, Rule 4 (1), so case is required to be remanded for marking those documents formally by the court. It is not understandable what fruitful purpose will be served by remanding the case before the Trial Court only for calling the witness to enter in the witness box to say that the contents of the affidavit are as per his say or that the signature appearing in affidavit-in-chief is his signature or that the documents filed by him are genuine and in accordance with the pleading, when the suit is posted for exparte hearing and defendant's right to cross examine plaintiffs witness has been closed and when the Trial Court satisfied with the probative value of the documents.

18. The court below ought to have kept in mind that the judiciary is respected not on account of its power to legalise injustice but because it is capable of doing justice and it is expected to do so. In fact the order of the court below for remand has frustrated the very object of framing Order XVIII Rule 4 in the code as stated above where probative value of evidence (either oral or documentary) were never under challenge. There is no justification to pass order of remand merely on technical grounds.

19. In this context the relevant portion of order of remand passed by the court below may be quoted which runs as follows:-

“That the appeal be and the same is allowed on contest without any cost. The exparte order dated 31.08.2004 passed in Title Suit no. 02 of 1989 is hereby set aside. Consequently the suit be restored to it's original file and number”.

20. Needless to say, such order of remand after setting aside decree, passed by Trial Court, does not carry any sense. Before passing order of remand, the appellate court has to satisfy itself that remand is called for proper adjudication of the case and retrial must be considered necessary. Here from the order impugned I find no observation that retrial in the present case is must for proper adjudication of the dispute. The remand was ordered only because court below was of the view that without admitting the documents in evidence the suit was decreed exparte. Even if there are some irregularity in admitting the documents in evidence, while deciding the suit, it would be an empty formality to remand the suit, and the same would unnecessarily result in starting another round of litigation. Since the order of remand passed without recording the finding that retrial is necessary as evidence in record is insufficient to dispose of the matter, in my opinion, remand of suit is not necessary.

21. The case law cited by the petitioner reported in **(2013) 14 SCC 50** is not applicable in the present fact and circumstance of the case as the probative value of the documents relied by the plaintiff was not under challenge since defendant/tenant has chosen not to contest the suit. Similarly the case law reported by the appellant reported in **(2014) SCC Online Bom 1242** is also not applicable which state that mere

exhibition of document may not prove of the contents of the document. There is no dispute above the said proposition. In the present context the documents which were proved by the plaintiff along with affidavit-in-chief filed on oath were relied by the Trial Court and as such the question of proving document by mere exhibition does not arise. The same view also retreated by the Apex Court in ***Maya Mathew Vs. State of Kerala and others*** reported in **(2010) 4 SCC 498** which says mere admission by a document in evidence does not amount to prove and mere marking of exhibit on a document does not dispense with its prove which is required to be done in accordance with law. This is neither the issue of law nor the issue of fact in the present context. The judgment referred by Respondent reported in **(2012) SCC Online Cal 13198** also speaks about the proof and admissibility of the document as envisages in Order XVIII Rule 4(1) of the code which was never an issue taken in the instant appeal.

22. In view of aforesaid discussion **S.A. 13 of 2014** is allowed. The order impugned passed by the court below in Title Appeal no 10 of 2005 dated 13th may 2013 by the Additional District Judge, 2nd Court, Howrah is here by set aside. The order passed by the trial court on 31.08.2004 passed in Title Suit no 2 of 1989 by the Civil Judge (Jr. Division) 5th Court Howrah is here by affirmed.

23. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Ajoy Kumar Mukherjee, J.)