ANDHRA PRADESH HIGH COURT

Sri Guthula Bulliswamy

Vs.

Chakradhara Annampuranamma

C.R.P. No. 2206 of 1974

(Venkatarama Sastry, J.)

21.10.1975

JUDGMENT

Venkatarama Sastry, J.

1. This is a revision petition preferred by the plaintiff against the order of the learned First Additional District Munsif, Visakhapatnam holding that the deposition recorded in HRC No. 77 of 1969 on the file of the Principal District Munsif, Visakhapatnam was a deposition recorded by a competent Court in a judicial proceeding and that it can be admitted in evidence under Section 33 of the Indian Evidence Act, thereby overruling the objection raised by the petitioner to its admissibility. The plaintiff challenges that order in this revision.

2. The petitioner herein filed the suit O.S. No. 143 of 1970 for specific performance of a contract of sale dated 3rd March, 1966 executed by the respondent herein in his favour. The respondent leased out the very same house to the plaintiff on a monthly rental of Rs. 35/- and as the plaintiff committed default in payment of rent, the respondent filed cased in H.R.C. No. 77 of 1969 on the file of the Principal District Munsif, Visakhapatnam, sitting as Rent Controller under the provisions of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act. In the said proceedings the present petitioner contended that on 19th May, 1967 he paid Rs. 2,000/- to the respondent in part payment of the sale consideration under the suit agreement of sale executed by the defendant in his favour. The contention of the respondent, however, in those proceedings was that the said payment dated 19th May, 1967 is not true and that the endorsement to that effect on the suit agreement is a forged one. In those proceedings the suit agreement was sent to a hand-writing expert for his opinion. He gave an opinion and the expert was examined as PW-1 in those proceedings. He was also cross-examined. No doubt he opined that the endorsement marked as Exhibit A-2 is a forged one.

3. In the present suit, after the evidence was over, the Counsel for the defendant got summoned the original deposition of the hand-writing expert which was recorded by the Rent Controller in HRC No. 77 of 1969. He wanted to make use of that deposition as evidence on his behalf. Thereupon the plaintiff raised an objection that the deposition cannot be admitted in evidence under the provisions of Section 33 of the Indian Evidence Act because the Rent Controller is not

a Court, nor is it a judicial proceeding within the meaning of Section 3 of the Evidence Act. On the other hand, the respondent contended that the Rent Controller is a Court within the meaning of Section 3 of the Evidence Act and that the deposition was admissible under Section 33 of the Evidence Act as otherwise unnecessary delay and expense would ensue.

4. The lower Court considered the respective contentions of both the parties and passed the impugned order. The lower Court held that the Rent Controller is a Court within the meaning of Section 3 of the Evidence Act and therefore the proceeding before him is a Judicial proceeding within the meaning of Section 33 of the Evidence Act.

5. On the ground whether it is admissible or not, the lower Court was of the opinion that if it is not admitted, it would result in unnecessary delay and expense and therefore it should be admitted in evidence. The petitioner herein is challenging the findings on both the points.

6. Taking up the first point as to whether the Rent Controller is a Court, we have to see the provisions of the Andhra Pradesh Buildings (Lease, Rent and Eviction) control Act. Under sub-section (2) of Rule 8 of the Rules framed under this Act which provides the procedure governing the applications under this Act, the Controller shall give to the parties reasonable opportunity to state their case. He shall also record a brief note of the evidence of the parties and witnesses, if any, examined on either side and upon the evidence so recorded and after consideration of any documentary evidence which may be produced by the parties, pass orders on the application. The Rent Controller, therefore, has to record evidence of the parties or witnesses in such proceeding. Under Section 3 of the Indian Evidence Act, a 'Court' is defined as follows :

> "'Court' includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence."

The Rent Controller could therefore come within the purview of a person legally authorized to take evidence within the meaning of this definition.

7. Section 33 of the Indian Evidence Act in so far as it is relevant for this purpose may be extracted below :

> "Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable."

This section therefore makes admissible the evidence given by a witness in a proceeding and which was recorded by a person authorized by law, in a later stage of the same proceeding or in a subsequent judicial proceeding. There is no dispute that the present suit is a subsequent judicial

proceeding. If the other terms of this section are satisfied, the evidence given before and recorded by the Rent Controller would be admissible in the suit under this section.

8. In *S. Mohd. Ali and sons v. Madhavarao*[1], it was held that the court of a Rent Controller is not a Court within the meaning of Section 24 of the Code of Civil Procedure , as a Rent Controller is not subordinate to the District Court or the High Court. This decision would not touch the point now under consideration, viz., whether the Rent Controller's Court is a Court within the meaning of Section 33 of the Indian Evidence Act. It may be that the Rent Controller is not a court for the purpose of Section 24 of the Code of Civil Procedure .

9. In *G.D. Malleswara Rao v. Ranga Panaih*[2], it was held by my learned brother Ramchandra Rao, J., that the Rent Controller's Court is a Court within the meaning of Section 5 of the Limitation Act. I entirely agree with the reasoning in the said decision. For the purpose of the present case it is enough if the Officer, viz. the Rent Controller is legally authorised to take evidence. I have already held, under the Rules framed under the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act the Rent Controller is authorised to take evidence. He therefore, comes within the meaning of a 'Court' as contemplated by Sections 3 and 33 of the Indian Evidence Act.

10. The next question is whether the provisions of Section 33 of the Indian Evidence Act have been satisfied in this case. The lower Court has put it on the ground that if the deposition is not admitted it would result in unnecessary delay and expense. The lower Court has not given any grounds or reasoning as to why it has arrived at that conclusion. No data has been placed before the lower Court as to how defendant would incur any expense and as to how the trial of the suit would unnecessarily be delayed. It may be noted that the expert, who, it is admitted, is residing at Nagpur has already been summoned to give evidence at Visakhapatnam in the proceeding before the Rent Controller and the defendant has taken steps in that direction. It cannot, therefore, be said that the expert is living at a very far off place beyond the reach of the parties. As regards the further expense to be incurred by the defendant, no data or evidence has been placed before the Court. It is true that if a witness is summoned from a place beyond 200 miles he may have to be paid, *batta*, and travelling allowance. But that does not mean that it would be an unnecessary expense as contemplated by this section. As regards the delay, I do not think that the summoning of an expert would cause any delay. Moreover, the evidence of the expert, if it is given before the Court, the Court will have an opportunity not only to observe the demeanour of the witness but also to put some relevant questions to ascertain the truth of his statements. If the deposition which has already been recorded is merely admitted in evidence, the lower Court will be deprived of such an opportunity. There is nothing to show that the same Presiding Officer is not trying the present suit. In any event, as the party is bound to prove his case by examining an expert, if he thinks that it is necessary for his defense, it cannot be stated that summoning of such an expert would be an unnecessary expense.

11. Mr. Raghavarao, the learned counsel for the respondent relied upon a decision in *J.G.G. Fernandez v. Emperor*[3], It was held by the learned Judge

[1] AIR 1964 And Pra 132
[2] AIR 1975 And Pra 13 : 1974(2) An.W.R. 189
[3] AIR 1935 Ran 484

in that case that there was difficulty and expense involved in calling the witness in that case. The learned Judge distinguished the earlier decision reported in *Queen Empress v. T. Burke*[4], stating

that the conditions in that case were quite different from those in the case considered by him. Each case would depend upon its own facts and it cannot be said that one case is an authority on the question of admitting or not admitting the deposition recorded in an earlier proceeding.

12. The learned counsel for the respondent relied very strongly upon the decision of their Lordships of the Supreme Court reported in *Pandurang v. Maruti*[5], wherein their Lordships defined the scope of Section 115 of the Code of Civil Procedure . Their Lordships held as follows :

> "The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate Court which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favor of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under Section 115.."

The same proposition has been laid down by their Lordships of the Supreme Court in *D.L.F. Housing and Construction Co. Ltd. v. Sarup Singh*[6],

13. I have, therefore, to see whether this is a case for interference by this Court under Section 115 of the Code of Civil Procedure . The lower Court has got no doubt jurisdiction to admit the deposition recorded in an earlier proceeding before the Rent Controller, provided that the provisions of Section 33 of the Evidence Act are satisfied. In order to invoke Section 33, the lower Court should be satisfied that the presence of such expert cannot be obtained without an amount of delay or expense which under the circumstances of the cases, the Court considers unreasonable. The lower Court has given a finding in paragraph 3 of the order that it would result unnecessary delay and expense if the deposition is not admitted. As stated by me already, there was no data or evidence placed by the defendant before the lower Court about the delay and expense. This finding, therefore, that it would cause unnecessary delay and expense is not based on any

[4]1884 ILR 6 All 224 [6]1970(2) SCR 368 : AIR SC 2324

[5] AIR 1966 SC 153 : 1966(1) SCJ 1

evidence. Moreover, the lower Court has not found that it is unreasonable to summon the

presence of the witness as it would result in delay and expense. I have already observed that the expert, who has been examined before the Rent Controller, is available at Nagpur even now in the same manner as he was available at the time when he gave evidence before the Rent Controller. It is also to be seen that there would be no delay in summoning such a witness to give evidence. Moreover, it is pre-eminently necessary that the evidence of such an expert should be recorded in open Court so that the Court may have an opportunity of assessing the value of such evidence. The contention of the learned Counsel that the finding of the lower Court is a finding of fact cannot therefore be accepted. It is a finding which effects the jurisdiction of the Court. As a matter of fact the Court has acted illegally and with material irregularity in exercise of its powers in ordering the deposition to be received in evidence. In these circumstances of the case I am, therefore, of the opinion that this is a case for interference under Section 115 of the Code of Civil Procedure .

14. In the result, the Civil Revision Petition is allowed and the order of the lower Court is set aside. The petitioner will have his costs in this revision from the respondents.
Revision allowed.