

RAJASTHAN HIGH COURT

Doongar Singh

Vs.

Rameshwar Lal

C.R.P. No. 1153 of 2002

(Prakash Tatia, J.)

19.08.2003

ORDER

Prakash Tatia, J.

1. The controversy is short but of importance and far reaching consequence is involved in this revision petition. The controversy involved in this revision petition is that in cases where appeal is provided, can examination-in-chief be taken on record by affidavit despite the specific provision under Rule 5 of Order 18, C.P.C. which provides recording of the statement of all the witnesses in the Court.

2. Learned counsel for both the parties submit that the point in controversy has already been decided by this Court in *Laxman Das v. Dhanpat Mal and others*,¹ decided on the provisions of Order 18, Rules 4 and 5, C.P.C. held that in case where orders (decree) would be appealable, the evidence is required to be recorded strictly as provided under Order 18, Rule 5, C.P.C. Learned counsel for the parties also pointed out that in the judgment of the Hon'ble Supreme Court, delivered in case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, reported in² the only point for consideration before the Hon'ble Supreme Court was with respect to the provisions of Rule 4 of Order 18, C.P.C. and even in that case also, the Hon'ble Supreme Court held that even in cases falling under Rule 4 of Order 18, the Court has discretion to direct that evidence may be recorded in Court or through commission and also has power to order for recording of evidence of some of the witnesses in Court and direct to record the evidence of rest of the witnesses by appointing Commissioner and further held that evidence can be recorded with the help of electronic media audio or audio visual methods.

3. It appears that from the bare perusal of the Order 18, Rule 5 that Order 18, Rule 5 is

a specific provision providing provision for the specific set of cases in which appeal is allowed against the decree which may be passed by the trial Court whereas Rule 4 is rule of general nature. When there is a statutory provision dealing with a particular subject, then the general provision cannot be made applicable. It applies more effectually in the case where same statute provides specific provision for specific set of cases even after providing procedure for general application. In Rule 5 of Order 18, C.P.C. also, the word "shall" has been used providing that in cases in which an appeal is allowed, the evidence of each witness shall be taken down in the language in writing by or in the presence and under the personal direction and superintendence of the Judge or from the dictation of the Judge directly on the typewriter or if there exist reasons, which are to be recorded and if Court directs then the evidence can be recorded mechanically in the language of the Court in the presence of the Judge. The emphasis is of recording of the evidence of the witnesses in direct superintendence and presence of the Judge. The two rules, namely, Rules 4 and 5 of the C.P.C. can be read as provisions providing that in all cases, except the cases in which appeal is allowed, the examination-in-chief of the witness shall be on affidavit and in cases where appeal is allowed, the evidence of the witness shall be taken down by the Judge himself or in personal direction and superintendence of the Judge or from the dictation of the Judge only as a rule. The Rule 5 of the Order 18 has its own importance because of the reason that despite amendment of Civil Procedure Code in the year 1999 and in the year 2002 inserting Rule 4, the Rule 5 of the Order 18 has been retained. It will not be out of place to mention here that keeping the Rule 5 by itself is sufficient indication of importance of this rule to make it mandatory in addition to the fact that word "shall" has been used in Rule 5 of the Order 18, C.P.C.

4. The Rule 5 has been distinctly made for the cases in which appeal lies is further clear from Rule 19 of the Order 18 by which the Court is given power to issue direction for recording statement of the witnesses on commission under Order 4-A of the Order 26. If examination-in-chief in all the cases was to be by affidavit, then, there was no need to insert Rule 19 in Order 18 because sub-rule (2) to sub-rule (7) would have taken care of procedure of cross-examination and re-examination in the Court or on commission.

5. In the present controversy, the order dated 18-10-2002 is under challenge by which the trial Court rejected the application of the defendant submitted under Section 151, C.P.C. pointing out that in view of the decision of this Court delivered in the case of Laxman Das, referred above, the evidence may be recorded in Court as provided

under Order 18, Rule 5, Civil Procedure Code. That application was dismissed by the trial Court on the ground that the affidavits were already taken on record and, therefore, the stage has already reached beyond the stage of recording of the evidence in Court and this Court, in the above referred judgment, has not held that in all cases wherein the affidavit have been submitted as evidence in the appealable cases, they all will be reopened or the evidence will be taken on the record.

6. Both the counsel submit that in the present case, affidavit of the plaintiff was filed in the Court on 20-7-2002 and the judgment was delivered by this Court on 2-9-2002. Be that as it may, the judgment dated 2-9-2002 of this Court referred above declared the position of the law about recording of the evidence and not itself prescribe the procedure to be adopted by the Courts. Before amendment of Civil Procedure Code in the year 2002 and even after amendment of the Civil Procedure Code, the evidence is required to be recorded in Court only in the cases where appeal is allowed.

7. In view of the above reasons, the revision petition is allowed. The order of the trial Court dated 18-10-2002 is set aside. The trial Court may proceed to record evidence afresh as provided under Order 18, Rule 5, C.P.C.

Petition allowed.

Cases Referred.

1. S. B. Civil Revision Petition No. 750/2002
2. 2003 (1) WLC (SC) (Civil) 384: (AIR 2003 SC 189)