IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO.778 OF 2023

Anand Kumar Agarwal and another .... ***Petitioners***

Mr. Kalinga Keshari Mohapatra, Advocate

-versus-

Rajabala Agarwal .... ***Opp. Party***

Mr. A.K. Tripathy, Advocate

AFR

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
17.08.2023

1. 1. This matter is taken up through hybrid mode.

2. Order dated 8th February, 2023 (Annexure-1) passed by learned 2nd Additional Senior Civil Judge, Cuttack in C.S. No. 418 of 2011 is under challenge in this CMP, whereby the evidence in affidavit filed by the Defendant-Petitioner No.1, namely, Anand Kumar Agarwal, has been expunged.

3. Mr. Mohapatra, learned counsel submits that the Defendant-Petitioner No.1 filed his evidence in affidavit in terms of Order XVIII Rule 4 C.P.C. Due to his ill health, he could not make himself available for cross-examination. There is no provision under the Code of Civil Procedure to expunge the evidence of a party. In the event the witness does not make itself available for cross-examination because of its death, ill health or for any other cause, then the evidentiary value of its deposition shall be considered at the time of argument of the suit. Without considering this material aspect, learned trial Court expunged the evidence in affidavit of Defendant-Petitioner No.1. Hence, this CMP has been filed.

4. In support of his case, Mr. Mohapatra, learned counsel for the Petitioners relied upon the decision in the case of ***Somagutta Sivasankara Reddy and others –v- Palapandla Chinna Gangappa and others***, reported in 2001 SCC Online AP 1322, wherein it is held at paragraph-9 as under:

> *"9. ……..The evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. [Food Inspector v. James N.T., 1998 Cri.L.J. 3494, 3497 (Ker)]. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected [Diwan v. R, A, 1933 L 561]. Deposition of a witness whose cross-examination became impossible can be treated as evidence and the court should carefully see whether there are indications that by a completed cross-examination the testimony was likely to be seriously shaken or his good faith to be successfully impeached [Horil v. Rajab, A1936 P 34] ……."*

4.1 He also relied upon the decision of Calcutta High Court in the case of ***Bhaswati Ray –v- Smt. Tapasee Chowdhury and another***, reported in 2017 SCC Online Cal 20416, wherein it is held at paragraph-23 as under:

> *"23. As such the well-settled principle, that the evidence of a witness will not be expunged but its evidentiary value considered at the time of hearing, despite cross-examination of such witness having not been completed, holds good ground even in the context of non-party witnesses. Therefore, the interpretation of Order XVII Rule 2, coupled with Rule3, as sought to be argued by the Opposite Party No.1, is not tenable in the eye of law."*

4.2 He also relied upon another decision of Calcutta High Court in the case of ***Srikumar Mukherjee –v- Abhijit***

Mukherjee and others, reported in 2015 SCC Online Cal 6445, which lays down as under:

> ***"13.*** *The Division Bench of this Court in case of Ashis Bose (supra) held:*
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> *"In support of his contention relating to value of evidence who was not cross-examined Mr. Banerjee, the learned Advocate for the appellants cited two decisions. In Chatoo Kurmi v. Rajaram Tewari, reported in 11 CLJ 124, it was held by a Full Bench of this Court that it is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examining witnesses whose testimony is to be used against him. In MT. Horil Kuer v. Rajab Ali, reported in AIR 1936 Patna 34, it was held that, the deposition of a witness who has been examined-in-chief but has not been cross-examined on account of certain circumstances which made the cross-examination impossible, need not be ignored and can be treated as evidence on the record. The weigh to be attached to such evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. These two decisions in our opinion do not help the appellants. It is clear from the Lower Court Record that in spite of having opportunity, the then defendants waived their right of cross-examination of P.W. 7 to P.W. 9 and accordingly evidence of those witnesses cannot be totally discarded and Court has to consider such evidence along with other evidence and materials on record to come to a conclusive decision."*

He, therefore, submits that the evidence in affidavit filed by Defendant-Petitioner No.1 could not have been expunged by learned trial Court.

5. Mr. Tripathy, learned counsel for Opposite Party submits that previously the evidence of Defendant was closed as he could not make himself available to adduce evidence. Ultimately, pursuant to the direction of this Court in CMP No.1028 of 2022 disposed of on 29th November, 2022, prayer of

Defendant to be examined through a pleader commissioner was allowed with the following direction.

> *"5. In the result, the impugned order is set aside. This Court directs the Petitioner to take steps for issuance of Pleader Commission before learned trial Court forthwith. This Court also reiterates that since the suit is of the year, 2011 endeavour should be made for early disposal of the same giving opportunity of hearing to the parties concerned".*

6. When the Pleader Commissioner went to the residence of the Petitioner No.1 to administer oath and confirm the statement made in his evidence in affidavit, he could not even utter a single word or respond to the query of the Pleader Commissioner. Accordingly, the Pleader Commissioner submitted a report to the learned trial Court.

7. In view of the aforesaid facts and circumstances, the Opposite Party filed an application to expunge the evidence in affidavit of the Petitioner. Learned trial Court taking into consideration the facts and circumstances of the case and that the statement made in the evidence affidavit filed by the Defendant-Petitioner No.1 has not been confirmed, directed to expunge his evidence. It is his submission that unless the witness enters the witness box and confirms the statement made in the evidence-in-affidavit and admits his signature on the same, it cannot be treated as evidence. He further submits that the said principle is also applicable to a person who is being examined by a pleader commissioner under Order XXVI Rule 4-A C.P.C. In the instant case, the Defendant-Petitioner No.1 is not in a position to confirm the statement made in the evidence affidavit. As such, learned trial Court has committed no error in

expunging the evidence-in-affidavit filed by the Defendant-Petitioner No.1. In support of his submission, Mr. Tripathy, learned counsel for the Opposite Party relied upon the decision in the case of ***Ameer Trading Corporation Ltd. –v- Shapoorji Data Processing Ltd***., reported in AIR 2004 SC 355, in which it is held that in all 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 the statement being made on oath is to be recorded by following the procedure prescribed under Rule 5. He also relied upon the decision of this Court in ***M/s. Tarachand Sawarmal Modi –v- Sheo Prakash Muraka***, reported in 2005 (1) OLR 589, wherein this Court relying upon the ratio in ***Ameer Trading Corporation Ltd.*** (supra) reiterates the principles as above. He also relied upon the decision in ***Shyam Sundar Rout –v- Braja Kishore Pradhan,*** reported in AIR 2004 Orissa 171, wherein this Court reiterates the principles of ***Ameer Trading Corporation Ltd.*** (supra). He, therefore, submits that when the Defendant-Petitioner No.1 is not in a position to confirm the statement made in the affidavit and affirm that the affidavit has been prepared as per his instruction and he has signed the same, the evidence in affidavit cannot form part of the record. Hence, learned trial Court has committed no error in expunging the evidence in affidavit filed by the Defendant-Petitioner No.1.

8. Considering the rival contentions of learned counsel for the parties and in view of the clear law laid down in the case of ***Ameer Trading Corporation Ltd.*** (supra), there cannot be any iota of doubt that in all appealable cases, the examination-in-chief of a witness in the form of the affidavit cannot form part of the evidence unless the deponent himself enters the witness box and confirms that the contents of the affidavit are as per his instruction and he has signed the same. The said principle is also applicable to a case where the deponent is being examined on Commission under Order XXVI Rule 4-A C.P.C.

9. In the instant case, the Defendant-Petitioner No.1 is not in a position to confirm that the evidence-in-affidavit has been prepared as per his instruction and he has put his signature on it. Thus, it cannot form part of the evidence. The case law cited by Mr. Mohapatra, learned counsel for the Petitioner will only be applicable when the evidence in affidavit forms part of the evidence in conformity with Order XVIII Rule 4 C.P.C. following the procedure laid down in the case of *Ameer* ***Trading Corporation Ltd.*** (supra). In the instant case, when the evidence-in-affidavit cannot form part of the evidence, as stated above, the case law relied upon by Mr. Mohapatra is of no assistance to him. Accordingly, I find no infirmity in the impugned order.

10. Hence, the CMP being devoid of any merit stands dismissed.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

DKS